EXEMPTIONS UNDER THE CANADIAN COPYRIGHT ACT

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by

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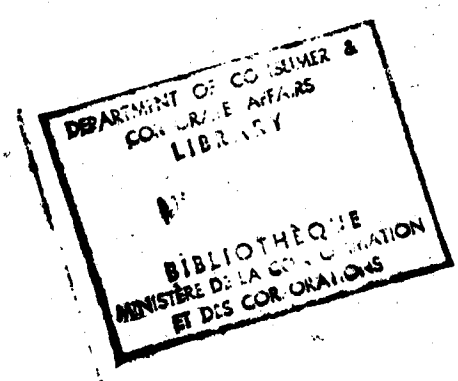

CHAPTER V

EXEMPTION FOR THE HANDICAPPED

Introduction

Claims have been put forward on behalf of those unable to use conventional literary and artistic materials that some special provisions have to be introduced into the copyright law to assist in making information and literary or artistic creations available to such persons. In order to help give the handicapped access to literary and artistic works special forms of material have been created. The most common forms of each special material in use in Canada are: braille, large type literature, talking books (tape recordings of literary material), radio reading services (special radio broadcasts of literary material) and captioned television or motion pictures (subtitled audio-visual material for the hearing impaired).[1] The production of this material will constitute an infringement of the exclusive rights of copyright owners to reproduce, to publicly perform and to communicate by radio communication their protected works. Under present Canadian law there is no effective exemption from the exclusive rights of the copyright owners for the production of any of the above types of special materials.[2]

Those providing these special types of materials have argued that the application of copyright law in the usual way to the production of such material can severely restrict the availability of literary and artistic material produced in

these forms. First, the producers of such material note that very limited resources are available for the production of such material, it often being produced by voluntary and charitable agencies which discover that they have far from enough resources to meet the need for the material.[3] In such circumstances it is argued that those agencies have no money which is available to pay copyright owners for the use of their works as any such payments necessarily result in a further reduction of the amount of already scarce special material able to be made available.

Further, the producers of these special materials have suggested that even if some money was available to pay copyright owners reasonable compensation for the use of their works, experience with the copyright system indicates that it would still pose serious problems in gaining access to the needed material. In order to produce such materials the permission of the copyright owner is needed. Such permission in some cases is refused and in others may be subject to what the producers of special materials see as unreasonable restrictions.[4] In some other cases the fees demanded by copyright owners for permissions are seen as unreasonably high.[5] In addition the producers of special materials have argued that the process of having to secure permission from copyright owners has in itself caused serious difficulties. It has been found to be difficult in many cases to locate the appropriate owner of copyright in particular works. In some cases no reply is ever

received to requests for permission and in many cases the time needed to secure permission is seen as excessive, delaying access to timely material.[6] Further, the costs inherent in having the clerical and other facilities necessary to secure permissions are seen as an unreasonable burden on agencies which have inadequate resources to carry out their work.

Analysis

The argument and evidence presented to the government by the producers of special material for the handicapped does indicate that the present copyright law is playing some role in limiting the access of handicapped people to literary and artistic material. In relation to existing services for producing such material the present law has prevented access to some material and has made access to much other material difficult and costly. The difficulties with copyright may be playing some role in discouraging the expansion of the availability of such special services and material for the handicapped. In these circumstances, given the high value that should be placed on assisting all persons in the community in having access to information and to artistic material[7], we believe that there is a strong case for the provision of exemptions or some other effective device to ensure that copyright is not an unreasonable obstacle to making information and creative work available to handicapped persons.

On the other hand the owners of copyright have argued that it would be unfair to copyright owners to provide for an exemption for the production of material for the handicapped. It is argued that given the acceptance of copyright as a recognition of the right of authors to control the use of their works and to claim compensation for that use, that it is irrational and unfair to exclude entirely copyright owners from receiving compensation for the use of one group of users however deserving their claims to access to material may appear to be. It is argued that the inequity to the handicapped in their not having access to copyright protected material shoud not be dealt with by imposing an inequity upon copyright owners. In this regard it is suggested that providing for an exemption for the handicapped would amount to compelling copyright owners to make a charitable contribution to the organizations providing services for the handicapped, something that is not asked of the providers of other goods and services to such agencies, e.g., the vendors of paper to the makers of books in braille.[8] In sum, the copyright owners do not see the problem as one of access by the handicapped to copyright protected material (in fact the owners generally are sympathetic to and supportive of the claims of the handicapped to reasonable access to such material), but rather as one of who is to pay for the access - the copyright owners through an enforced contribution or society as a whole through taxes or other contributions.

Clearly the copyright owners argue that the provision of access to copyright material to the handicapped is a responsibility of society as a whole.[9]

We accept that there is merit in above position put forward by copyright owners. However, we are not hopeful that any substantial change in the problem of the inadequacy of public or other funding of the provision of special materials to the handicapped is likely to occur in the near future. We believe that our recommending a reaffirmation of the present copyright law coupled with a plea for adequate funding for the agencies would be an abdication of responsibility toward those who are dependant on such material for access to information and our cultural life.[10] It may be true that at least for the foreseeable future we are forced to choose between inequity to the copyright owners and inequity to the handicapped. If that is so, it is our view that the inequity is far greater for the handicapped than for copyright owners. Therefore we recommend that special provisions be introduced into the copyright legislation to faciitate access by the handicapped to material protected by copyright.

However, we believe that there is merit in the objections of copyright owners that it is unfair in principle to deny them any compensation for this use of their material. Consequently we do not recommend the introduction of an exemption for these purposes which would deny an chance of compensation as long as the exemption existed. Rather we propose a system

of compulsory licensing which would be sufficiently flexible to permit some compensation now to copyright owners where it could be paid without seriously restricting the supply of special material for the handicapped. The system would permit the increase of compensation to copyright owners toward reasonable levels as and when increased funding became available, and it might also provide a forum in which the financial needs of the suppliers of such services could be highlighted as well as the entitlement of copyright owners to reasonable compensation for the use of their works. A further factor in our recommendation is the problems that that have arisen under the present copyright legislation in securing access to material in copyright. It appears that it will always be the case that those who need such special materials will have a much more limited range of works produced in such forms than is available to those who do not need such special forms. Therefore we see any copyright provisions which have the effect of further restricting or delaying the making of works available in such forms as objectionable.11

Recommendation

In drafting the proposed compulsory licence provision there are two approaches which can be taken. Individual provisions could be inserted in the statute designed to apply to each of the known forms of special material for the handicapped.12 The advantage of this approach is that it would

permit limitation of each such section only to the specific needs of each type of material, e.g., in reference to types of works or to type of use made of the works. Such an approach would be most likely to ensure that the compulsory licensing provisions were not unintentionally overinclusive in extending to uses that were not restricted to the handicapped but that interfered with the copyright owners' exploitation of the usual markets for their works. However such an approach also has the disadvantage of inflexibility in that if new forms of providing special material to the handicapped are developed, the statute may haye to be amended to include those new forms.

Consequently, we are recommending a general compulsory licensing provision intended to apply to all existing and later developed special modes of providing material to those who are unable to use conventional literary or artistic material. It is our intention to include within that general provision such criteria as will preclude any significant abuse of the section by extending access under it to copyright protected material for purposes other than providing for the needs of the handicapped.

We propose that the copyright statute provide that it is not infringement for any person to do, or to authorize the doing of, anything which it is the exclusive right of the copyright owner to do in relation to any work made public provided that certain conditions are met. The first condition is that the things done which would otherwise be infringement must be

done for the purpose of providing a reproduction, performance or transmission[13] of the work specifically designed for and primarily directed to blind or other handicapped persons who are unable to read normal printed material or to enjoy normal graphic or other artistic material as a result of their handicap, or to deaf or other handicapped people who are unable to hear usual aural signals because of their handicap.[14]

The second condition is that all persons undertaking such activity must be doing so without any purpose of direct or indirect commercial advantage.[15] Clearly it would be unreasonable to limit or exclude the copyright owners from securing remuneration from such use of their works, but to permit the operators of agencies providing such materials to the handicapped to make a profit from such activities.

A further requirement for such agencies to acquire the right to use copyright protected material under the proposed statutory amendment would be that the agencies pay or be committed to pay copyright royalty fees as determined by the copyright tribunal.

Considerable care will have to be taken in setting up the procedure under which the proposed system functions in order to assure that it achieves the objective of ensuring access for the handicapped to copyright protected material which has been made public, but under a system without excessive administrative costs and complexity. A critical feature of the proposed system is that it provide access to copyrighted

materials for the suppliers of special materials for the handicapped without the problems that have been encountered in securing permission from copyright owners under the present law.[16] Consequently, the system should provide for an automatic right to use the needed material provided that the above conditions have been met.

A procedure by which this might be accomplished would be to provide that each agency should apply annually to the copyright tribunal for a certification of the fees that would be payable in the following year for the use of copyright protected material.[17] The statute, in empowering the copyright tribunal to set the fee payable by each agency, should expressly indicate that the tribunal shall consider the charitable or non-profit nature of any such agency. In addition the tribunal should be directed not to establish a fee that will have the effect of significantly reducing the ability of the particular agency in meeting the need for its services. Further, the tribunal should be directed to consider the fact, where relevant, that without the efforts of the particular agency there would be no such market for copyright protected material, as the provision of services provided by the particularly agency on a commerical basis would not be feasible.[18]

A further aspect of the proposal that must be considered is that of distribution of any fees collected to copyright owners.[19] To facilitate this process the agencies which have used copyright protected material under the proposed provision

should be required to file annually statements of material used in the previous year.[20] One approach to the actual distribution of funds would be to provide that claims could be submitted for payment only by collectives of copyright owners as approved by the tribunal. This would shift a substantial portion of the problem of sorting out how the funds collected were to be divided among copyright owners to the owners themselves though their collectives. This approach would be feasible if the new copyright statute contained other provisions, e.g., dealing with the problem of reprography, that resulted in the formation of new collectives, the owners in which owned a significant portion of the works being used under the proposal made here.[21]

If distributing the funds collected under the proposal by means of collectives proved impossible, the statute could provide that copyright owners could submit claims for compensation to the copyright tribunal within a specific period (e.g. twelve months) after the submission of the reports of use of material by each agency referred to above.[22] The statute would further provide that the failure to submit a claim within the specified period would end any right of a copyright owner to claim compensation for such use of his works. The copyright tribunal would be given broad discretionary power in distributing the available funds among the claimants on an equitable basis.[23]

A further problem to be considered in the process of the copyright tribunal certifying the fees payable by the agencies providing materials for the handicapped is whether in that process the copyright tribunal should be given powers to stipulate conditions and restrictions on the types of material that may be used and the uses to which such material can be put. The reason for considering giving such a power to the tribunal is to cope with the potential problem of the use of copyright protected material by such agencies spilling over into other markets for copyrighted material, particularly markets involving the non-handicapped or even markets involving the handicapped that can be adequately served by the normal commerical mechanisms. It is the purpose of the first condition of our recommended statutory provision noted above[24] to limit the effect of the proposed statutory amendment to the supplying of materials to the handicapped so that it will not interfere with such markets.

It should be noted that the language of the proposed statutory condition, "...specifically designed for and primarily directed to (the handicapped),"[25] is deliberately not limited to circumstances in which the special materials are received exclusively by the handicapped. In order to permit flexibility in using the present modes of supplying such material and in developing new modes, the proposed language does not disqualify a particular mode of supplying material to the handicapped from qualifying for the compulsory licence because the material can

be, or is, received by some non-handicapped persons. As a result there can be a legitimate concern that the normal markets for copyrighted materials among the non-handicapped may be adversely affected to an unreasonable extent.

One method of coping with the above phenomenon would be to draft the statutory conditions for qualifying for the compulsory licence in a way which precluded entirely the possibility of the special material being accessible to the non-handicapped. We reject this approach because the inflexibility it would introduce could seriously hamper the efforts to get information and creative material to the handicapped in an effective manner. In addition we do not believe that such a limitation is necessary to protect the legitimate interests of copyright owners in exploiting the markets for their works among the non-handicapped.

A better understanding of present or potential problems with spillover of materials designed for the handicapped into markets for materials for the non-handicapped can be gained by making brief reference to the present methods of supplying such material to the handicapped.

Two methods of supplying material to those with impaired vision are braille and large type print. Experience indicates that there is no problem with these materials interfering with the markets for material among normally sighted people.[27] Another type of material for such people is the talking book or tape recording of literary material. Under present methods of

making and distributing such material there would appear to have been no significant problems with the material interfering with other markets for copyright material, although unlike braille and large type material talking books may be attractive to some non-handicapped people. One method of making talking books involves the use of special tape and tape machines that are not compatible with equipment in common use. Procedures involving control over access to such machines and tape appears to have ensured that there is no significant abuse. The other method of making talking books involves the use of tape and machines which are compatible with those in ordinary use. However procedures developed to control the distribution of the material does appear to restrict its use to those who truly need it.[27]

The development of recorded literary material for general sale, however, indicates the kind of problem of market interference which can develop. Copyright owners may argue that the blind or those with impaired vision are naturally a part of the market for such recorded material. The copyright owners may then claim that the distribution of talking books of the same works as appear on commercially recorded materials unreasonably interferes with their markets for recorded literary material. While there has been some recorded literary material available for a considerable time it appears that it is only fairly recently that a serious effort to develop a significant market for these materials has developed.[28] Consequently, it

may be too early to determine whether there will be any serious conflict between that commercial market and talking books. However, where no agency for the handicapped has yet recorded a particular literary work it may be that talking book suppliers will turn to commercially available recordings to meet their needs.[29] To the extent that this occurs, of course, there will be no market interference. Where there is no commercial recording of a particular work available, it cannot be argued that the making of a talking book of that work interferes with any commercial market given the steps which are taken to ensure that talking books are not generally available to non-handicapped persons. Where a talking book was earlier made of a particular work and a commercial recording of that work later becomes available there may occur some problems of market interference. If the agencies supplying talking books continue to supply new copies of talking books from their original recording rather than turning to the commercial supplier it might be argued that market interference is occuring.

A further method of supplying material to those who cannot use ordinary literary material is the radio reading service. At present there is only one such service in Canada although there are a considerably larger number in the U.S.[30] The present Canadian radio reading service (and most of the U.S. services) is distributed via FM subcarrier which requires a special receiver. While it is not impossible for any person to acquire such a receiver, given the limited utility of the

receivers and their relatively high cost it is likely that few persons have acquired such receivers. The present radio reading service distributes special receivers to handicapped persons on a carefully controlled basis. Under these circumstances there appears to be little likelihood that there is any significant interference with the markets for ordinary literary material by the radio reading service.

However, there have been proposals that radio reading services operate where necessary on ordinary broadcast facilities which would make them available to anyone with an ordinary broadcast receiver (as is the case with some U.S. radio reading services). More importantly, perhaps, it has been suggested that radio reading services make use of vacant channels on cable television and radio distribution systems. In such circumstances the radio reading service would be available to any subscriber to the service. The potential advantages of such a distribution method over the present FM subcarrier approach in reaching for larger numbers of the handicapped at reduced cost are clear. However, will the use of such a distribution system unreasonably interfere with the copyright owner's markets?

The answer to the above question, in relation to possible interference with the present markets for literary material, depends on whether non-handicapped people would regard the radio reading service so supplied as an acceptable substitute for acquiring the material in the forms in which it is now marketed. We should note that the literary material

used by radio reading services is often local and timely. This means that such services are drawing largely (although not exclusively) from newspapers and other periodicals. It is far from clear that sighted people who would otherwise purchase such materials would find a radio reading service an adequate substitute even though such people would regard the reading service as a "free" good[31] as compared with the printed material for which they would have to pay. First such people would lose access to any photographic or illustrative material in such publications. Second they would have to tolerate absorbing considerably less material within the same time period, as the great majority of people can read faster than the radio readers can speak the material. Third the sighted listener would have to accept the rigid scheduling necessary on the radio reading service, i.e., he would have to listen when the broadcast is made[32] as opposed to his being able to read the material whenever he pleased. Further he would have to accept the selection of material from the particular periodicals made by the reading service - time constraints are such that much material is omitted from many periodicals. In addition, given the nature of the material as literary material which is simply being read aloud, it is submitted that many users of literary material would find it an unsatifying substitute for reading on one's own. As well, the service is inflexible as one cannot stop temporarily to attend to some other matter nor reread material for better understanding or because one missed

the impact of material through some distraction. For these reasons we believe that even a widely available reading service would not significantly effect present markets for literary material.[33]

A further problem of possible market interference is whether non-handicapped people would turn to the reading service, not as a substitute for the purchase in other forms of the broadcast literary material, but rather as a substitute for other copyrighted material, e.g., ordinary radio or television broadcasts. To the extent that such a phenomenon occurred, it can be argued that the owners of the copyrighted works broadcast over radio and television suffer a loss of market which is as a result of unfair competition as no, or reduced,[34] copyright royalties are being paid for the works used on the radio reading service. For the reasons suggested above we do not believe that sighted persons generally would find a radio reading service a satisfying alternative to other forms of entertainment or information. We do not think there would be any significant market losses to copyright owners from this phenomenon.

The final problem of potential market interference would be not with presently established markets but with potential markets for literary material in the light of new and developing technology. For example, experiments have already been conducted with providing the text of newspapers via television screens with the access to material provided by computer

linked to subscribers via cable.[35] It might be argued that a radio reading service which was readily accessible to non-handicapped persons might be used by such persons as a substitute for such services. However, since the technologies for the provision of such new services are still under development and the specific nature of the services that are likely to be made commercially available is unclear, it is not yet possible to predict what the interactive effect of radio reading services and new services for non-handicapped that may be provided. It should be noted, of course, that with new technology the nature of the special material and services provided to the handicapped may change and therefore different potential problems of market interference may arise.

Another form of special service for the handicapped currently in use is the provision of "captioned" television broadcasts for the deaf.[36] The typical such broadcast is one of material that was originally made for ordinary television to which the captions have been added. Given the very limited resources available to make such material, and given the desire to make the same material that is available to others available to the deaf, new productions of works specifically for the purpose of captioning seems a very unlikely occurrence. Given that material which is captioned has then usually been broadcast earlier in a non-captioned form, the potential non-handicapped audience for captioned material may be greatly reduced. Further, we believe that most people with normal

hearing find it very distracting to view material with captions and therefore would not find such material an attractive substitute for non-captioned material. It can be noted that captioned material could be made even less attractive to hearing audiences by deleting the sound portion of such material.[37] When the material captioned is a commercial television broadcast containing advertising and the advertising remains in the captioned material when disseminated, it could be argued that the advertisers might pay larger fees, which in turn could result in larger fees for the copyright owners, in view of the larger audience being reached through the captioned material.[38]

In general, we believe that part of the statutory condition we propose to qualify for the compulsory licence, i.e., that the special material produced be "primarily directed to (the handicapped)" should deal adequately with possible problems of market interference such as those noted. The intended meaning of those words is not merely that the intent of the producers of the material be that the material reach primarily the handicapped[39], but also that the material actually reaches primarily the handicapped and not others. However, to allay the fears of copyright owners about possible unreasonable market interference and to provide greater certainty in cases in which doubt may arise, we propose that the new copyright legislation provide for a power of the copyright tribunal to impose conditions on the granting of licences to agencies pro-

viding special material to the handicapped. The statutory power for the tribunal to impose such conditions should indicate that conditions may be imposed to give effect to the general statutory limitation we propose[40] and to prevent unreasonable interference with the normal commercial markets for copyright protected material.

Section 19 Copyright Act

Concern has been expressed by copyright owners that granting permission to agencies to produce talking books of literary or dramatic works will trigger the compulsory licensing provisions of s.19. If this is so, the result would be that anyone could obtain a licence to produce recordings of such works in Canada by paying the royalty provided for in s.19(5), i.e., two cents per playing surface of a record or two cents for each "mechanical contrivance" (e.g., tape cassette). An amendment has been introduced into Parliament which would alter s. 19 so that it was clear that a licence granted for talking book production intended primarily for the handicapped would not cause the compulsory licence provisions of s. 19 to operate.[40a]

International Convention Considerations

The Universal Copyright Convention requires member states to grant "adequate and effective protection" for copyright proprietors.[41] The 1952 version of the Convention to which Canada has adhered has no provision expressly dealing

with exemptions for the handicapped, or with exemptions in general.[42] However, each country must reach its own conclusions about what constitutes "adequate and effective protection" within the spirit of the Convention. The proposal made above which makes a limited qualification on the rights that copyright owners might otherwise have under Canadian law would not reduce the level of protection below that which is adequate and effective.[43]

The Rome level of the Berne Convention to which Canada has adhered has no provision which requires that the copyright law of the member countries recognize the right of copyright owners to control the reproduction to their works. Such a requirement was not agreed upon until 1967.[44] The failure to include such a requirement until that date has been attributed to failure of member states to agree upon "a formula wide enough to cover all reasonable exceptions but not so wide as to make that right illusory".[45] It is clear that member countries in Convention revisions before 1967, by failing to bind themselves expressly to grant a right of reproduction, were reserving to themselves a right to make exemptions to, or to otherwise qualify, a right of reproduction. The qualification to the right of reproduction inherent in the compulsory licensing proposal made here is within this doctrine and is consistent with Canada's Berne Convention commitments.

The Rome level of the Berne Convention does provide for two specific rights of reproduction in Articles 13 and 14. In

Article 13(1) the right to adapt musical works, only, to "instruments which can reproduce them mechanically" is provided for. However, in Art. 13(2) member countries are permitted to make "reservations and conditions" to the application of that Article which would include the kind of exemption proposed here. In Article 14 the exclusive right of adapting literary, scientific or artistic works to cinematography[46] is established. However, it is recognized that member countries are entitled to make "minor reservations" to the rights required to be provided for by Article 14.[47] This doctrine of minor reservations is, of course, consistent with the inability of member countries to agree on a formulation of a provision for a general right of reproduction referred to above. It is our view that this right to make minor reservations would extend to the making of a provision such as that proposed here for the handicapped.

Article 11 of the Berne Convention, Rome level, provides that member countries must provide copyright protection in respect of the public representation of dramatic and dramatico-musical works as well as the public performance of musical works. It can be noted that since many of the works dealt with under the proposed exemption will be non-dramatic literary works, Article 11 would not apply to such works. To the extent that dramatic and musical works were performed under the proposed exemption, we believe that Canada has the right to provide for such an exemption through the doctrine of minor

reservations referred to above.[48] More importantly, Article 11(1) states that the "stipulations of the present Convention" shall apply to the right of public performance which would include Article 4(2). That latter article indicates that the extent of protection is to be governed exlusively by the laws of each member country in which protection is claimed. Consequently, Canada has the right under the Berne Convention (Rome level) to enact the limited qualification in the exclusive right of public performance that is inherent in the proposals made above regarding access to copyright material for the handicapped.[49]

Article 11 bis requires member countries to provide copyright protection in respect of communication of works to the public by means of radiobroadcasting. Article 11 bis(2) specifically provides that the national legislation of member states may regulate the conditions under which the radio broadcasting right may be exercised, which entitles Canada to make the kind of minor exemption from the broadcasting right proposed here.[50]

In summary, the proposed licensing provision is consistent with Canada's Berne Convention commitments.

RECOMMENDATIONS

1. We recommend that a general compulsory licensing scheme be adopted applicable to all works which have been made public for use in special modes of providing material to the handicapped (p. 7), upon the following conditions:

(i) The material must be specifically designed for and primarily directed to the blind or others unable to read normal printed material or to enjoy ordinary graphic or artistic material or to the deaf or others unable to hear normal aural signals (p. 8),

(ii) the use of the copyright protected works must be without direct or indirect profit to the user (p. 8),

(iii) a royalty as determined by the Copyright Tribunal must be paid for the use of the copyright material (pp. 8-9).

2. The statute should direct the Tribunal to take several factors specifically into account in setting the level of the royalties: (i) the non-profit nature of the use, (ii) that no fee is to be imposed that would have the effect of significantly reducing the services rendered to the handicapped, (iii) that there might be no market for copyright protected works among the handicapped without the provision of such special services (pp. 9-10).

3. We urge that collectives of copyright owners be formed to facilitate the distribution of any royalties collected, but if that does not occur the Tribunal shall have a broad discretion to distribute the royalties collected on an equitable basis to those copyright owners who submit claims for compensation within 12 months of a mandatory report of use by the users. (p. 11).

4. The Tribunal shall have the power to impose conditions on the compulsory licence to prevent unreasonable interference with normal commercial markets for copyright material (p. 20).

Footnotes

1. Lucyk, J.R., "Radio Reading Service for the Blind and Otherwise Print Handicapped", March, 1980, Dept. of Communications, Ottawa. Brief of Canadian National Institute for the Blind, Ja. 25, 1980, to Minister of Consumer and Corporate Affairs.

2. There is a possibility that a very limited amount of such activity might be exempted as "fair dealing for the purposes of private study, research", Act, s. 19(1)(a).

3. See sources in footnote 1, above. Also see Thiele, P., "Copyright and the Right to Read", March 1980. Brief, B.C. Advisory Committee on Library Service to the Handicapped, to Minister, Jan. 23, 1978.

4. Lucyk, op. cit., pp. 23-24. Thiele, op. cit., pp. 5-6, UNESCO/WIPO, "Application of the Berne Convention and the UCC to Material Intended Specifically For the Blind", 9 Jan., 1979, B/EC/XIV/4, pp. 24-25.

5. See note 4, especially UNESCO/WIPO document referred to there.

6. See note 4.

7. Canada is a signatory country to The Universal Declaration of Human Rights which provides in Article 27:

> "1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the outs in scientific advancement and its benefits."

But note also the second part of Article 27

> "2. 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."

8. It should be noted what is in fact asked of the copyright owner in financial terms if there is an exemption. Given the nature of copyright, the use of the protected work by the handicapped has no out-of-pocket cost to the copyright owner, but rather is at best a foregone opportunity to earn a further return. If the vendor of paper were asked to donate paper there would be an out-of-pocket cost in the marginal cost of producing that paper. Perhaps the

paper makers' position would parallel the copyright owners' if the former were asked to sell at the price of his marginal cost only.

9. See Copyright in Canada, p. 171.

10. Consumer and Corporate Affairs, which administers the copyright legislation, would appear to have no authority to embark on programs for the handicapped per se. In addition, it is far from clear that in times of budgetry constraints and government deficits that even highly deserving pleas for additional spending will receive favourable responses. Finally, it is not clear what jurisdiction the federal, as opposed to provincial, authorities would have in relation to programs for the handicapped.

11. Evidence indicates that any requirement that the providers of special material must secure permission from the copyright owners of the works used individually will inevitably lead to such restrictions and delays. See above at note 4.

12. The U.S. copyright legislation adopts this approach in part, see 17 USC s. 110(8), (9), 112(d).

13. It is intended that the powers of services providing material for the handicapped be limited. For example, converting a work to braille might constitute a translation. These agencies should have the power to do what is necessary to carry out their work, subject to the conditions recommended below.

The US legislation distinguishes between performing non-dramatic works and performing dramatic works. See 17 USC s. 110(8) and (9). There may be a good reason to distinguish between the dramatized performance of a work and a non-dramatized performance in some cases, e.g., when done by a radio reading service. The dramatized performance of, e.g., a new play by such a service, particularly where the play has not yet been performed otherwise in a broadcast, may appeal to non-handicapped listeners and may unfairly affect the market for the work. The problem may be dealt with by excluding "dramatizatized" performances as opposed to mere readings (a definitional problem of some difficulty). It may also be dealt with by the proposed condition restricting access to protected material to cases where the material is directed primarily to the handicapped and by the proposed power to impose conditions on the use of material. See below, pp. 10, 18-19.

14. The language is adopted from 17 USC s. 110(8).

15. The language "direct or indirect" again comes from 17 USC s. 110(f). It is not intended to exclude services which may make charges to recover costs provided that no profit is made.

16. See above at note 4.

17. Given the non-profit mature of such agencies and their frequent lack of resources the process should not be an elaborate one. A further reason for avoiding an elaborate process is that relatively little money will be at stake, at least in the initial years of using this process. It is assumed that most agencies would wish to apply for approval prior to using material in order to ascertain what their financial liability might be before using the material. Given that some agencies may, because of lack of knowledge of the system, use material before seeking the approval of the tribunal, the tribunal should have the power to grant approvals retroactively.

18. It appears that no commercial agency has been prepared to provide the services needed by the handicapped. The size of the market is relatively small, the costs of producing the material is relatively high and the handicapped who are the market often have relatively litle disposable income with which to purchase these services. See Thiele, op. cit., see note 4, above.

19. The total fees may be quite small. It is contemplated that in some, perhaps many, cases the fees charged an agency would be purely nominal.

20. A relatively simple log of information about material that would be readily available to the agencies is all that is contemplated. The agencies would have no responsibility to uncover the name of the copyright owner.

21. Such collectives may arise out of recommendations for revised copyright legislation in relation to the problem of reprography and copyrighted material. See "Problems Relating to Reprography", pp. 53-55. See also Whitford Committee Report, U.K., 1977, Cmnd. 6732, pp. 70-74

22. It would be the responsibility of each copyright owner to discover that his material had been used from the reports filed with the tribunal.

23. The tribunal should have the power to distribute all funds received among those copyright owners who apply, if the tribunal finds this appropriate (even though some copyright owners have not applied for remuneration although their works were used). The tribunal should also have the power not to distribute all the funds, reflecting the fact

that the owners of some works used claimed no compensation and that the fees collected reflected all works used. A provision might be introduced permitting copyright owners to file a notice with the tribunal that they do not require fees to be collected in respect of their works. See the U.S. Act, s. 710.

24. See p. 7 at note 14.

25. See 17 USC s. 110(8)

26. CNIB, op. cit., see note 1.

27. CNIB, op. cit., pp. 3-4.

28. French, W. "Cassettes: Curl up, Plug in, and Listen to a Good Book", Globe and Mail, Aug. 26, 1980, p. 15.

29. Some of the commercially recorded material is of edited or abridged versions of literary works. Such material may be unsuitable for use by the handicapped if there is a need to provide unabridged versions of works.

30. Lucyk, R., op. cit.. See note 4.

31. It would be regarded as free by the substantial number of people who already subscribe to cable service for reasons other than gaining access to a radio reading service.

32. This rigidity could be alleviated by using a recording machine with a timing device that could record material for later playback.

33. The functioning of services operating at present in the U.S. and Canada does not appear to have caused serious difficulty. See Lucyk, op. cit.

34. The tribunal, under the proposal made here, would presumably order fees payable that in most cases would be uneconomically low and that would not reflect provision of material to persons other than the handicapped.

35. Godfrey and Parkhill, Gutenburg 2, 1979, Press Porcepic Ltd. Fortune, 6 Oct., 1980, p. 67.

36. For example, many stations of the U.S. Public Broadcasting Service carry such programming. There are two forms of such captioning: (1) "Closed caption" which cannot be received without a special receiver. Like the special receiver radio reading service broadcasts, this should present few, if any, problems of non-handicapped audience spillover. (2) "Open caption" in which the captions are visible on ordinary receivers. The latter type may

present non-handicapped audience spillover problems such as discussed in the text. Problems have recently arisen in Canada in relation to the practice of Rogers Cable of decoding U.S. originated closed caption programming and disseminating it as open captioned programming on a cable converter channel. The CRTC has ordered Rogers to cease the practice as they are not licensed to provide such a service. "CTRC Order an TV Captions Frustrates, Depresses Family", Globe and Mail, Feb. 3, 1981,p.4. It should be noted that open caption broadcasts are much more accessible to the hearing impaired as they do not require the use of costly decoders by viewers.

37. The provision of the sound portion could be important to persons of some but limited hearing who might use it in conjunction with the captions to get a fuller under standing and also for hearing members of a family who wished to watch programming with a hearing impaired member of that family.

38. The audience reached may not be one the advertisers are prepared to pay for, however.

39. See above, pp. 7, 10-11.

40. See above, p. 7.

40a. Miscellaneous Statute Law Amendment Act, 1981.

41. Article 1.

42. The 1971 revision of the UCC does have a specific clause concerning exemptions in Article IV bis (2). Exemptions may be enacted that do not conflict with "the spirit and provisions" of the Convention.

43. The proposal affects a very limited quantity of use, for a special purpose. Since it is very unlikely that the copyright owners would secure any revenue for such use given the limited market and relative poverty of many of the handicapped users, the real effect on copyright owners' markets and rights is negligible.

44. Stockholm revision. See Paris (1971) revision Article 9(1).

45. WIPO, Guide to the Berne Convention, 1978, p. 54.

46. Article 14(4) extends the application of the Article to "any other process analogous to cinematography". This may include media such as videotape and videodisc.

47. WIPO, Guide to the Berne Convention, 1978, p. 65. Note also the discussion of Article 14 in the section of this paper below on Exemption for Public Performances by Gramophones and Radio Receiving Sets, at p. 23. There it is noted that it is unlikely that the members of the Convention would agree to an absolute exclusive right to reproduce works in cinematographic form when they could not agree on the scope of a general right of reproduction. It would appear to have been the intent in adopting Article 14 merely to extend clearly the scheme of the Convention to cinematographic reproduction. The general scheme of the convention contemplated member countries qualifying the right of reproduction. As noted in the text it is this history which may, in part, explain the development of the "minor reservations" doctrine.
    Note that the latter doctrine also applies to Articles 11 bis, 11 ter and 13.

48. See text at note 47.

49. See Exemption for Public Performances by Gramophones and Radio Receiving Sets, below, text at note 54.

50. Ibid., note 66.