

WORKING TEXT October 19, 2012

REVISED WORKING DOCUMENT ON AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS FOR VISUALLY IMPAIRED PERSONS/PERSONS WITH PRINT DISABILITIES

PREAMBLE

(Proposed in SCCR/23/7)

(First)

Recalling the principles of non-discrimination, equal opportunity, accessibility, and full and effective participation and inclusion in society, proclaimed in the United Nations Convention on the Rights of Persons with Disabilities,

(Second)

Mindful of the challenges that are prejudicial to the complete development of persons who have limited vision and those with print disabilities, which limits their right of access to information and communication, and also education and research,

(Third)

Emphasizing the importance of copyright protection as an incentive for literary and artistic creation and enhancing opportunities for everyone to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits,

(Fourth)

Emphasizing the importance and flexibility of copyright protection as an incentive for literary and artistic creation, and for increasing the opportunities for all persons with limited vision and those that have reading disabilities to participate in the cultural life of the community, enjoy the arts and share scientific progress and its benefits.

(Fifth)

Recognizing the importance of both accessibility to the achievement of equal opportunities in all spheres of society and of the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible,

(Sixth)

Aware of the many barriers to access to information and communication experienced by persons who have limited vision and those who have print disabilities, or have other disabilities regarding access to published works,

(Seventh)

Aware also that the majority of visually impaired persons/persons with print disabilities live in developing countries,

(Eighth)

Desiring to provide full and equal access to information, culture and communication for the visually impaired persons/persons with print disabilities and, towards that end, considering the need both to expand the number of works in accessible formats and to improve access to those works,

(Ninth)

Recognizing the opportunities and challenges for the visually impaired/persons with a print disability presented by the development of new information and communication technologies, including technological publishing and communication platforms that are transnational in nature,

(Tenth)

Recognizing also the need to seek, receive and impart information and ideas through any media and regardless of frontiers,

(Eleventh)

Aware that national copyright legislation is territorial in nature, and where activity is undertaken across jurisdictions, uncertainty regarding the legality of activity undermines the development and use of new technologies and services that can potentially improve the lives of the visually impaired/persons with print disabilities,

(Twelfth)

Recognizing the large number of Members who, to that end, have established exceptions and limitations in their national copyright laws for visually impaired persons/persons with a print disability, and yet there is a continuing shortage of available works in acceptable formats for such persons,

(Thirteenth)

Recognizing that the preference is for works to be made accessible by rights holders to people with disabilities at publication and that, to the extent that the market is unable to provide appropriate access to works for visually impaired persons/persons with a print disability, it is recognized that appropriate copyright exceptions and limitations are needed to improve such access,

(Fourteenth)

Recognizing also the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, and that such a balance must facilitate effective and timely access to works for the benefit of visually impaired persons/persons with a print disability,

(Fifteenth)

Emphasizing the importance and flexibility of the three-step test for limitations and exceptions established in Article 9(2) of the Berne Convention and other international instruments,

(Sixteenth)

Needing to contribute to the implementation of the relevant recommendations of the Development Agenda of the World Intellectual Property Organization,

(Seventeenth)

Taking into account the importance of Member States agreeing to make commitments both to increase the number and range of accessible format works available to visually impaired persons/persons with print disabilities in the world, and to provide the necessary minimum flexibilities in copyright laws that are needed to ensure full and equal access to information and communication for persons who are visually impaired or have a print disability in order to support their full and effective participation in society on an equal basis with others, and to ensure the opportunity to develop and utilize their creative, artistic and intellectual potential, for their own benefit and for the enrichment of society,

Alternative text

(First) Proposed by Brazil

Recalling the principles of non-discrimination, equal opportunity, accessibility, and full and effective participation and inclusion in society, proclaimed in the Universal Declaration of Human Rights and the United Nations Convention on the Rights of Persons with Disabilities,

(Second) Proposed by United States of America

Mindful of the challenges that are prejudicial to the complete development of persons with visual impairments/print disabilities, which limits their freedom of expression including the freedom to seek, receive and impart information and ideas of all kinds on an equal basis with others,

including through all forms of communication of their choice, and their enjoyment of the right to education,

India and Peru suggested to add at the end: "and research"

African Group and Pakistan suggested to add at the end: "and the opportunity to conduct research"

(Third) Proposed by Mexico

Emphasizing the importance of copyright protection as an incentive and reward for literary and artistic creations and enhancing opportunities for everyone including persons with visual impairments/print disabilities to participate in the cultural life of the community, to enjoy the arts and to share scientific progress and its benefits,

(Fourth) (merged Fifth, Sixth and Eighth from SCCR/23/7) Proposed by Australia

Aware of the barriers of persons with visual impairments/print disabilities to access published works and the need to both expand the number of works in accessible formats and to improve the circulation of such works,

Iran suggested to add after "published works":

"...to achieve equal opportunities in the spheres of society, and the need..."

(Fifth) Proposed by the African Group

Taking into account that the majority of persons with visual impairments/print disabilities live in developing and least-developed countries,

(Sixth) (merged Ninth, Tenth and Eleventh from SCCR/23/7) Proposed by United States of America

Recognizing that despite the differences in national copyright laws, the positive impact of new information and communication technologies on the lives of persons with visual impairments/print disabilities may be reinforced by an enhanced legal framework at the international level.

(Seventh) Proposed by European Union

Recognizing that many Member States have established exceptions and limitations in their national copyright laws for persons with visual impairments/print disabilities, and yet there is a continuing shortage of available works in accessible formats for such persons,

Switzerland proposed to add at the end:

"that considerable resources are required for their effort of making works accessible to these persons, and that the lack of possibilities of cross-border exchange of accessible formats necessitates avoidable duplication of these efforts,"

(Eighth) Proposed by Brazil

Alternative A

Recognizing that the preference is for the rightholders to make their works accessible to persons with visual impairments/print disabilities and that, to the extent that the market is unable to provide such access, appropriate copyright exceptions and limitations are needed,

(Eighth) (Thirteenth from SCCR/23/7) Proposed by Chile

Alternative B

Recognizing that together with the important role of right holders in making their works accessible to persons with visual impairments/print disabilities, appropriate copyright exceptions and limitations are needed, including when the market is unable to provide such access,

(Eighth) (Thirteenth from SCCR/23/7) Proposed by Colombia

Alternative C

Recognizing that it would be ideal that rights holders make works accessible to people with disabilities at publication but that, to the extent that the market is unable to provide appropriate access to works for visually impaired persons/persons with a print disability, it is recognized that appropriate copyright exceptions and limitations are needed to improve such access,

(Ninth) Proposed by the European Union and its Member States

Recognizing also the need to maintain a balance between the effective protection of the rights of authors and the larger public interest, particularly education, research and access to information, and that such a balance must facilitate effective and timely access to works for the benefit of persons with visual impairments/print disabilities,

(Tenth) Proposed by Mexico

Reaffirming the obligations of Members States under the existing international treaties on the protection of copyright and the importance and flexibility of the three-step test for limitations and exceptions established in Article 9(2) of the Berne Convention and other international instruments,

(Eleventh) Proposed by Brazil

Alternative A

Seeking to contribute to the implementation of the relevant recommendations of the Development Agenda of the World Intellectual Property Organization,

(Eleventh) (Sixteenth from SCCR/23/7) Proposed by Peru and India

Alternative B

Recalling the importance of the Development Agenda recommendations, adopted in 2007 by the General Assembly of the Convention Establishing the World Intellectual Property Organization (WIPO), which aim to ensure that development considerations form an integral part of the Organization's work,

(Twelfth) Proposed by the African Group

Desiring to harmonize and enhance national laws on such limitations and exceptions through a flexible international framework, consistent with the Berne Convention, in order to facilitate access to works protected by copyright by persons with visual impairments/print disabilities.

The European Union and its Member States suggested to add a reference to "and other international conventions" after "the Berne Convention".

ARTICLE A DEFINITIONS

For the purposes of these provisions

"work"

means literary and artistic works within the meaning of Article 2.1 of the Berne Convention, [in the form of text, notation and/or related illustrations], whether published or otherwise made publicly available [in any media].

"accessible format copy"

means a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment/print disabilities. The accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons.

"reasonable price for developed countries" (Proposed in SCCR/23/7)

means that the accessible format copy of the work is available at a similar or lower price than the price of the work available to persons without print disabilities in that market.

"reasonable price for developing countries" (Proposed in SCCR/23/7)

means that the accessible format copy of the work is available at prices that are affordable in that market, taking into account the needs and income disparities of persons who have limited vision and those with print disabilities.

Alternative A

Delete both definitions.

Alternative B

Keep both definitions

Alternative B.1

"Reasonable price for developing countries" is a price at which the accessible format copy of the work is available at prices that reflect national economic realities,

Alternative B.2

"Reasonable price for developing countries" is a price at which the accessible format copy of the work is available at prices that reflect national economic realities, taking into account the needs and income disparities of persons who have limited vision and those with print disabilities.

"authorized entity":

[Authorized entity means an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations.]

[establishes and follows] [may maintain] its own rules and procedures

- i) to establish that the persons it serves are beneficiary persons;
 - ii) to limit to beneficiary persons and/or authorized entities its distribution and making available of accessible format copies;
 - iii) to discourage the reproduction, distribution and making available of unauthorized copies [including by informing authorized entities and beneficiary persons that any abuse will lead to stopping the supply of accessible format copies]; and
 - iv) to maintain reasonable care in, and records of, its handling of copies of works, while respecting the privacy of beneficiary persons in accordance with Article H; in the case of an authorized entity that serves a rural or small population and does not distribute accessible format copies in electronic form for whom record keeping would constitute an undue burden such record keeping may be appropriately adjusted.
- [v) An authorized entity carrying out cross-border exchanges of accessible format copies establishes and follows rules and procedures which enable the provision of anonymous and aggregated data relating to such exchanges for the evaluation, when appropriate, of their volume and periodicity.] [This provision shall not apply to developing and least developed countries, nor to governmental authorized entities, libraries or educational institutions.]]

In the case of an authorized entity that engages only in activities under Article[s] [C] [C and E], [as regards physical copies] items iii to v? iv to v? shall be discretionary

ARTICLE B

BENEFICIARY PERSONS

A beneficiary person is a person who

- (a) is blind
- (b) has a visual impairment or a perceptual or reading disability which cannot be improved 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; or¹
- (c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading,

regardless of any other disabilities.

¹ [Interpretive Understanding: Nothing in this language implies that "cannot be improved" requires the use of all possible medical diagnostic procedures and treatments.]

Article Bbis

NATURE AND SCOPE OF OBLIGATIONS

- [1. Member States/Contracting Parties should/shall adopt appropriate measures to implement the provisions of this international legal instrument/joint recommendation/treaty.
2. Member States/Contracting Parties should/shall apply the international legal instrument/joint recommendation/treaty transparently, taking into account the priorities and special needs of developing countries as well as the different levels of development of the Member States/Contracting Parties.
3. Member States/Contracting Parties should/shall ensure the implementation of this international legal instrument/joint recommendation/treaty allows for timely and effective exercise of actions covered, including expeditious procedures that are fair and equitable.]

[Language to be proposed prior to SCCR by Brazil, EU, India, Nigeria and US.]

ARTICLE C

NATIONAL LAW LIMITATIONS AND EXCEPTIONS ON ACCESSIBLE FORMAT COPIES

1. A Member State/Contracting Party should/shall provide in its national copyright law for an exception or limitation to the right of reproduction, the right of distribution, the [right of public performance], [the right of translation], and the right of making available to the public as defined in the WIPO Copyright Treaty, to facilitate the availability of works in accessible format copies for beneficiary persons as defined herein. The limitation or exception provided in national law should permit changes needed to make the work accessible in the alternative format.

2. A Member State/Contracting Party may fulfill Article C (1) for all rights provided therein by providing an exception or limitation in its national copyright law such that:

(A) Authorized entities shall be permitted without the authorization of the copyright rights holder to make an accessible format copy of a work, obtain from another authorized entity a work in accessible format, and supply those copies to a beneficiary person by any means, including by non-commercial lending or by electronic communication by wire or wireless means, and undertake any intermediate steps to achieve those objectives, when all of the following conditions are met:

1. the authorized entity wishing to undertake said activity has lawful access to that work or a copy of that work;
2. the work is converted to an accessible format copy, which may include any means needed to navigate information in the accessible format, but does not introduce changes other than those needed to make the work accessible to the beneficiary person;
3. copies of the work in the accessible format are supplied exclusively to be used by beneficiary persons; and
4. the activity is undertaken on a non-profit basis; and

(B) A beneficiary person, or someone acting on his or her behalf including a primary caretaker or caregiver, may make an accessible format copy of a work for the personal use of the beneficiary person or otherwise may assist the beneficiary person to make and use accessible format copies where the beneficiary person has lawful access to that work or a copy of that work.

3. Alternative A: A Member State/Contracting Party may fulfill Article C(1) by providing any other exception or limitation in its national copyright law that is limited to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

Alternative B: [A Member State/Contracting Party may fulfill Article C(1) by providing any other limitation or exception in its national copyright law pursuant to Article Ebis.]

4. The Member State/Contracting Party may limit said exceptions or limitations to published works which, in the applicable special format, cannot be obtained within a reasonable time and at a reasonable price.

[A Member State/Contracting Party may confine limitations or exceptions under this Article to published works which, in the particular accessible format, cannot be obtained commercially under reasonable terms, including at prices that take account of the needs and incomes of beneficiary persons in that market.]

5. It shall be a matter for national law to determine whether exceptions or limitations referred to in this Article are subject to remuneration.

ARTICLE D

CROSS-BORDER EXCHANGE OF ACCESSIBLE FORMAT COPIES

1. A Member State/Contracting Party should/shall provide that if an accessible format copy of a work is made under an exception or limitation or pursuant to operation of law, that accessible format copy may be distributed or made available to a beneficiary person or an authorized entity in another Member State/Contracting Party by an authorized entity [where that other Member State/Contracting Party would permit that beneficiary person or authorized entity to make or import that accessible copy.]

2. A Member State/Contracting Party may fulfill Article D(1) by providing an exception or limitation in its national copyright law such that:

(A) Authorized entities shall be permitted without the authorization of the rightholder to distribute or make available for the exclusive use of beneficiary persons accessible format copies to an entity or organization in another Member State/Contracting Party that [qualifies as/is] an authorized entity.

[(B) Authorized entities shall be permitted, pursuant to Article A, to distribute or make available accessible format copies to a beneficiary person in another Member State/Contracting Party without the authorization of the rightholder.]

[Provided that prior to the making available or distribution the originating authorized entity did not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons.]

3.

Alternative A: [The Member State/Contracting Party may limit said distribution or making available of published works which, in the applicable accessible format, cannot be otherwise obtained within a reasonable time and at a reasonable price, in the country of importation.]

Alternative B: [A Member State/Contracting Party should/shall[/may] prohibit said distribution or making available to published works where the exporting authorized entity, prior to making available or distribution, knew or should have known that a copy in the particular accessible format could have been obtained through the distribution channels customary to the beneficiary persons, [under reasonable terms, including] at prices that take account of the needs and incomes of beneficiary persons in the country of importation[, as well as the cost of producing and distributing the work].]

4.

Alternative A: A Member State/Contracting Party may fulfill Article D(1) by providing any other exception or limitation in its national copyright law that is limited to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

Alternative B: A Member State/Contracting Party may fulfill Article D(1) by providing any other limitation or exception in its national copyright law pursuant to Article Ebis.

ARTICLE E

IMPORTATION OF ACCESSIBLE FORMAT COPIES

To the extent that national law of a Member State/Contracting Party would permit a beneficiary person, someone acting on his or her behalf, or an authorized entity, to make an accessible format copy of a work, the national law of that Member State/Contracting Party should/shall also permit [them/authorized entities] to import an accessible format copy for the benefit of a beneficiary person, without the authorization of the rightholder.

ARTICLE Ebis

Alternative A

[All [national implementation of] exceptions and limitations provided for in this instrument shall be limited to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.]

Alternative B

[Contracting Parties/Member States, in their national [law/legislation], shall/should provide [additional/any] limitations or exceptions [in conformity with/as per Article Bbis of] this treaty/instrument [only] in certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.]

ARTICLE F

OBLIGATIONS CONCERNING TECHNOLOGICAL MEASURES

1. Member States/Contracting Party should/shall ensure that beneficiaries of the exception provided by Article C are not prevented from enjoying the exception in the exception where technological protection measures have been applied to a work.

2. Alternative A

[In particular] [In the absence of voluntary measures by rights holders and to the extent that copies of the work in the accessible format are not available commercially at a reasonable price or via authorized entities,] Member States/Contracting Parties should/shall take appropriate measures to ensure that beneficiaries of the exception provided by Article C have the means of benefiting from that exception when technological protection measures have been applied to a work, to the extent necessary to benefit from that exception.

2. Alternative B

[A Member State/Contracting Party may fulfill Article F(1) by permitting, under its national copyright law, circumvention of technological protection measures for the purposes of, and to the extent necessary for benefiting from an Article C exception.]

[A Member State/Contracting Party should/shall adopt effective and necessary measures to ensure that a beneficiary person may enjoy limitations and exceptions provided in that Contracting Party's national law, in accordance with Article C, where technological measures have been applied to a work and the beneficiary person has legal access to that work, in circumstances such as where appropriate and effective measures have not been taken by rights holders in relation to that work to enable the beneficiary person to enjoy the limitations and exceptions under that Member State/Contracting Party's national law.]

ARTICLE G
RELATIONSHIP WITH CONTRACTS

[Nothing herein shall prevent Member States/Contracting Parties from addressing the relationship of contract law and statutory exceptions and limitations for beneficiary persons.]

Alternative A

[Contracts that override the exercise of the provisions herein specified shall be null and void.]

Alternative B

[Nothing here shall prevent the Member States/Contracting Parties from treating the limitations or exceptions provided to beneficiary persons under this treaty as immune from private contracts and such contracts entered into in violation of provisions of this treaty are null and void.]

ARTICLE H
RESPECT FOR PRIVACY

In the implementation of these exceptions and limitations, Member States/Contracting Parties should/shall endeavor to protect the privacy of beneficiary persons on an equal basis with others.

ARTICLE I

INTERPRETATION OF THE THREE-STEP TEST

[The three-step test should be interpreted in a manner that respects the legitimate interests of third parties, including:

- a) interests deriving from human rights and fundamental freedoms;
- b) interests in competition, notably on secondary markets; and
- c) other public interests, notably in scientific progress and cultural, educational, social, or economic development.]

ARTICLE J

REGISTRY OF AUTHORIZED ENTITIES

[Member States/Contracting Parties shall/should set up a voluntary registry of authorized entities which may be used by authorized entities to identify one another for the purposes of Article D.]

[End of document]