

April 20, 2013 8:30 pm

**DRAFT TEXT OF AN INTERNATIONAL INSTRUMENT/TREATY ON LIMITATIONS AND
EXCEPTIONS FOR VISUALLY IMPAIRED PERSONS/PERSONS WITH PRINT DISABILITIES**

PREAMBLE

(First)

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)

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, their enjoyment of the right to education, and the opportunity to conduct research,

(Third)

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)

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

(Fifth)

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

(Sixth)

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)

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

(Eighth)

Recognizing both the [preference for the rightholders to make] [importance of rightholders' role in making] their works accessible to persons with visual impairments/print disabilities and [the importance of] [the need for] appropriate exceptions and limitations to make works accessible to persons with visual impairments/print disabilities, [including] [particularly] when the market is unable to provide such access.

(Ninth)

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)

[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)

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)

Recognizing the importance of the international copyright system and desiring to harmonize exceptions and limitations with a view to facilitating access to and use of works by persons with visual impairments/print disabilities.

GENERAL CLAUSE¹²

Nothing in this treaty shall derogate from any obligations that Contracting Parties have to each other under any other treaties, nor shall it prejudice any rights that a Contracting Party has under any other treaties.

¹ *Ad referendum*: these elements of the treaty are the result of the SCCR session that met from February 18 to 22, 2013. This language was tentatively agreed by the delegations attending that session and remains *ad referendum*.

² See Annex.

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 media³.

"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.

³ An Interpretative Understanding/Agreed Statement will be drafted to clarify that audiobooks are included in the definition of "work".

"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.

[References to "copyright" include copyright and any rights related to copyright recognized by Member States/Contracting Parties in accordance with national law.]

"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 primary⁴ activities or institutional obligations.

establishes and follows its own practices

- 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; and
- iv) to maintain due care in, and records of, its handling of copies of works, while respecting the privacy of beneficiary persons in accordance with Article H.

⁴ An Interpretative Understanding/Agreed Statement will be drafted concerning the scope of "primary".

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; or⁵
 - (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.

⁵ [Interpretative Understanding: Nothing in this language implies that "cannot be improved" requires the use of all possible medical diagnostic procedures and treatments.]

ARTICLE C

NATIONAL LAW LIMITATIONS AND EXCEPTIONS ON ACCESSIBLE FORMAT COPIES

1. (A) 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, and the right of making available to the public as defined in the WIPO Copyright Treaty⁶, 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.

(B) Member States/Contracting Parties may also provide an exception for the right of public performance [and the right of translation⁷] to facilitate access to the work for beneficiary persons as defined herein.

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. A Member State/Contracting Party may fulfill Article C(1) by providing any other limitation or exception in its national copyright law pursuant to [cross-reference to be determined.]

4. A Member State/Contracting Party may confine limitations or exceptions under this Article to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market. Any Contracting Party availing itself of

⁶ The wording of this reference should be technically improved.

⁷ Proposed Agreed Statement: [It is understood that this Article/paragraph neither reduces nor extends the scope of applicability of the limitations and exceptions permitted under the Berne Convention.]

this possibility shall so declare in a notification deposited with the Director General of WIPO at the time of ratification of, acceptance or accession to this Treaty or at any time thereafter.⁸

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

⁸ [Agreed Statement on Article C(4): It is understood that this is without prejudice to the operation of Article D [and E].]

Agreed Statement on Article C(4): It is understood that a commercial availability requirement does not prejudice whether an exception or limitation under this Article is consistent with the three-step test.

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.

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 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.]⁹

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].]¹⁰

Alternative C: [A Member State/Contracting Party [should/shall/may] limit distribution and making available under this Article in cases where the exporting authorized entity, prior to the distribution or making available, [knew/knew or should have known/knew or had reason to believe] that the work, in the particular accessible format, could be obtained commercially under reasonable terms for beneficiary persons in the receiving country.]¹¹

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

⁹ See Annex.

¹⁰ See Annex.

¹¹ Proposed Agreed Statement to Alternative C: [It is understood that reasonable terms also take in to account the needs and incomes of beneficiary persons in the receiving country. Furthermore, it is understood that this Article does not imply any duty on the exporting authorized entity to investigate whether the work in the particular accessible format can be obtained commercially in the receiving country or any action that will delay the distribution or making available of the accessible format copy to beneficiary persons.]

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 [cross reference to be determined].

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 beneficiary persons, without the authorization of the rightholder.^{12 13}

¹² See Annex.

¹³ See Annex.

ARTICLE F
OBLIGATIONS CONCERNING TECHNOLOGICAL MEASURES¹⁴

Alternative A

1. Member States/Contracting Parties should/shall ensure that beneficiaries of the exception provided by Article C are not prevented from enjoying¹⁵ the exception in the exception where technological protection measures have been applied to a work.
2. 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. Member States/Contracting Parties may encourage rightholders to take adequate, effective and readily accessible voluntary measures to ensure the exercise of limitations and exceptions by beneficiaries.

Alternative B

Where the national law of a Member State/Contracting Party provides adequate legal protection and effective legal remedies against the circumvention of technological measures, a Member State/Contracting Party should/shall/may adopt effective and necessary measures to ensure that a beneficiary person may enjoy limitations and exceptions provided in that Member State's/Contracting Party's national law, in accordance with this instrument/Treaty, 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.¹⁶

¹⁴ See Annex.

¹⁵ See Annex.

¹⁶ See Annex.

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 J
COOPERATION TO FACILITATE CROSS-BORDER EXCHANGE¹⁷

[To foster the cross-border exchange of accessible format copies, Member States/Contracting Parties shall endeavor to facilitate the voluntary sharing of information to assist authorized entities in identifying one another. The International Bureau shall establish an information access point for this purpose.]

[The International Bureau shall collect, where available, anonymous and aggregated data relating to the cross-border exchange of accessible format copies for the evaluation of the functioning of this instrument/Treaty.]

¹⁷ See Annex.

ARTICLE/S¹⁸

Implementation provisions

Member States/Contracting Parties undertake to adopt the measures necessary to ensure the application of this Treaty.

Nothing shall prevent parties from determining the appropriate method of implementing the provisions of this instrument/treaty within their own legal system and practice.

Contracting parties may fulfill their rights and obligations under this Treaty through, exceptions or limitations specifically for the benefit of beneficiary persons, other exceptions or limitations, or a combination thereof within their national legal traditions/systems. These may include judicial, administrative or regulatory determinations for the benefit of beneficiary persons as to fair practices, dealings or uses to meet their needs.

This instrument/Treaty is without prejudice to other exceptions and limitations for persons with disabilities provided by national law.

Respect for copyright provision

In adopting measures necessary to ensure the application of this Treaty, a Contracting Party may exercise the rights and shall comply with the obligations that that Contracting Party has under the Berne Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related Aspects of Intellectual Property and/or the WIPO Copyright Treaty, so that:

1. in accordance with Article 9.2 of the Berne Convention for the Protection of Literary and Artistic Works, a Contracting Party may permit the reproduction of works in certain special cases provided that such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author;
2. in accordance with Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property, Contracting Party shall confine limitation or exceptions to exclusive rights to certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author;
3. in accordance with Article 10.1 of the WIPO Copyright Treaty, a Contracting Party may provide for limitations of or exceptions to the rights granted to authors under the WCT in certain special cases, that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author;
4. in accordance with Article 10.2 of the WIPO Copyright Treaty, a Contracting Party shall confine, when applying the Berne Convention, any limitations of or exceptions to rights to certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

¹⁸ *Ad referendum*: these elements of the treaty are the result of the SCCR session that met from February 18 to 22, 2013. This language was tentatively agreed by the delegations attending that session and remains *ad referendum*.

Development provision

Member States/Contracting Parties recognize that a Member State/Contracting Party may implement in its national law other copyright exceptions and limitations for the benefit of beneficiary persons than are provided by this instrument/Treaty having regard to that Member State/Contracting Party's economic situation, and its social and cultural needs, and in the case of a least-developed country taking into account its special needs, in conformity with that Member State's/Contracting Party's international rights and obligations.

[Annex follows]

ANNEX

Note on General Clause: Suggested Revisions:

GENERAL CLAUSE [/Relationship with other [Relevant] Conventions and Treaties]

Nothing in this treaty shall derogate from any [existing] obligations that Contracting Parties have to each other under any other [relevant] treaties, nor shall it prejudice any rights [and obligations] that a Contracting Party has under any other [/such] /treaties.

[Proposed Footnote: It is understood that Contracting Parties who are members of the World Trade Organization (WTO) acknowledge all the principles and objectives of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and understand that nothing in this Treaty affects the provisions of the TRIPS Agreement, including, but not limited to, the provisions relating to anti-competitive practices.]

Note on Article D: Proposed Text for Discussion:

A (Additional Paragraph)

[A Contracting Party may [/shall] [by statute, regulation, or administrative order] limit the distribution or making available of accessible format copies under Article D to other Contracting Parties that ensure, either through [implementation of/] their membership to the Berne Convention, [TRIPS,] WCT, or otherwise, that the use of an accessible format copy received under this article is limited to certain special cases that do not conflict with the normal exploitation of the work[/accessible format copies] and do not unreasonably prejudice the legitimate interest of the author. [In doing so, a Contracting Party shall take due account of the TRIPS waiver granted to LDCs].]

B (Additional Paragraph)

[Any Contracting Party/Member State which is not a member of the Berne Convention, [TRIPS,] or the WCT, upon becoming a member of this treaty shall seek [/may] benefit from Article D by ensuring that [exceptions to rights under those treaties for the enjoyment of] [the use of] accessible format copies [received under Article D/] are enjoyed [/apply] only in certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interest of the author [,without prejudice to the exceptions and limitations contained in the Berne Convention and the WCT, WPPT, and BTAP].]

[Nothing in this provision shall prejudice the exceptions and limitations available to Contracting Parties under the Berne Convention or any other international intellectual property treaties.]

[Agreed Statement to B: It is understood that [nothing in this agreement provides for a universally agreed interpretation or application of the three-step test] there is no universally agreed interpretation or application of the three-step-test standard. It is further understood that such Contracting Parties may implement any version of the three-step test, under the applicable WIPO treaties, and that such implementation shall be consistent with their own national legal traditions.]

C (Replacement for D(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 [under this treaty], or pursuant to operation of law [for the implementation of this treaty], 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, if that Member State/Contracting Party ensures [/provides] that the use of the accessible format copy received under this article is limited to certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interest of the author.]

Note on Article D(2)(B): Text for discussion: [(B) Authorized entities shall [may] 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 [if there is no authorized entity in the importing Member State/Contracting Party /if the beneficiary person is registered with an authorized entity in the importing Member State/Contracting Party].]

Note on Article D(3): Alternative B: Text for discussion: [In order to determine the availability of accessible format copies in the importing Member State/Contracting Party, the exporting authorized entity shall rely on information provided by an authorized entity in the importing Member State/Contracting Party and/or the rightholders and/or any other reliable source. The authorized entity in the importing Member State/Contracting Party and/or the rightholders shall provide the information requested by the exporting authorized entity, if available.]

Note on Article E: Text for discussion: [The Member State/Contracting Party may limit said importation to published works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in the Member State/Contracting Party of importation.] [Alternative to commercial availability clause in Article D].

Note on Article E: Text for discussion: Japan, EU and other interested delegations to work on this proposal: [A Contracting Party which does not have an appropriate and effective copyright system that is in line with the existing international copyright law (Berne Convention, TRIPs and WCT), shall provide in its national law a provision to prohibit making available or distribution of imported accessible format copies to persons who are not beneficiary persons.]

Note on Article F: Proposed addition from US: It is understood that a Contracting Party may adopt such effective and necessary measures [only where] [provided that] [on the condition that] the actual or likely adverse impact of the Contracting Party's law protecting technological measures on the beneficiary person's lawful use of the work is established by credible evidence in a transparent legislative or administrative proceeding.

Note on Article F: Alternative Proposal: [[It is understood that] a Contracting Party [that has a law protecting technological measures against circumvention] [may/should] adopt effective and necessary measures to ensure that beneficiary persons [with legal access to a work,] are not prevented from enjoying the exceptions provided under Article C where technological measures have been applied to a work [in circumstances such as where appropriate and effective measures have not been taken by rightsholders to enable the beneficiary person to enjoy the exceptions], [and may/should permit under its national law, circumvention of technological measures], taking due account of that contracting party's relevant [rights and] obligations under international law.]

Note on Article F: Other proposals raised during the discussion include deleting Article F and possibly drafting an agreed statement on technological measures.

Note on Article F: Egypt proposed the addition of the word "legally" so the phrase reads "enjoying legally the exception".

Note on Article J: Alternative Proposal:

[(1) To foster the cross-border exchange of accessible format copies, Member States/Contracting Parties shall [/may] endeavor to facilitate the voluntary sharing of

information to assist authorized entities in identifying [in cooperating with] one another. The International Bureau shall [may/can] establish an information access point for this purpose.]

[Agreed Statement to paragraph (1): It is understood that Article J does not imply any mandatory registration for authorized entities, nor does it constitute a precondition for the use of this Treaty by authorized entities [to benefit from the provisions of this Treaty]; but it provides for a possibility for sharing information to facilitate the cross-border exchange of accessible format copies.]

[(2) The International Bureau [Contracting Parties] undertake[s] to collect appropriate information, including statistical and research data, relating to the cross-border exchange of accessible format copies to enable Contracting Parties to formulate and implement policies to give effect to this Treaty. The process of collecting and maintaining this information shall: (a) comply with legally established safeguards, including legislation on data protection, to ensure confidentiality and respect for the privacy of beneficiary persons [in accordance with Article H]; and (b) comply with internationally accepted norms to protect human rights and fundamental freedoms and ethical principles in the collection and use of statistics.]

[(3) The information collected in accordance with this Article shall be disaggregated, as appropriate, and shall only be used to identify and address the barriers faced by beneficiary persons in exercising their rights.]

[End of Annex and of document]