

WORKING DOCUMENT ON AN INTERNATIONAL INSTRUMENT ON LIMITATIONS
AND EXCEPTIONS FOR PERSONS WITH PRINT DISABILITIES

Draft document prepared by the Secretariat on the basis of comments made by Member States delegations to the Chair's document SCCR/22/16, on November 25, 2011

Comments on the Preamble

0.01. Replace “visually impaired persons and persons with print disabilities” by “visually impaired persons/persons with print disabilities”. These are not two different groups, but two different ways to describe the same beneficiary group (European Union, Kenya, United States of America). *This change was included in the text.*

0.02 The second paragraph should read “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 freedom of information and communication, their right to education and their freedom of research,” (Switzerland).

0.03 In the second paragraph, “limited vision” should be replaced by “low vision” (India, Kenya).

0.04 The second and tenth paragraphs are largely duplicative and can be merged (United States of America).

0.05 The second and third paragraphs are duplicative and cover a matter dealt with by the fifth and sixth paragraphs (Senegal).

0.06. The fourth paragraph needs further consideration (United States of America) or should be deleted (European Union, Morocco, Senegal).

0.07 In the fifth paragraph, the word “uniform” should be deleted. There are differences in developing and developed countries and the current draft does not suggest uniformity (European Union).

0.08 The sixth paragraph should read “Aware of the many barriers to access to information and communication experienced by persons who are blind or have limited vision, or have other disabilities regarding access to published works,” (United States of America).

[Comments on the Preamble continue, page 4]

PREAMBLE

(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,

[Preamble continues, page 5]

0.09. The tenth and eleventh paragraphs should be merged and read as follows “Recognizing also the need to seek, receive and impart information and ideas through any media and regardless of frontiers, and that the use of new technologies and services that can potentially improve the lives of the visually impaired/persons with print disabilities,” (European Union).

0.10. The tenth paragraph should be deleted as it is duplicative of the eleventh paragraph (Senegal).

0.11 The twelfth paragraph is not clear and needs further consideration. The problem is not the shortage but the need of international norms on limitations and exceptions (Senegal). Many countries do have national exceptions and limitations for visually impaired persons. But even counting on these exceptions and limitations, the cross-border exception should help in reducing the shortage in certain countries (Brazil).

0.12 In the twelfth paragraph, the word “acceptable” should be replaced by “accessible” (United States of America).

0.13. In the thirteenth paragraph, “copyright exceptions and limitations” should be replaced by “appropriate measures” (European Union).

0.14 The thirteenth paragraph is not clear and needs further consideration. The objective is to have limitations and exceptions within a harmonized international environment (Senegal).

[Comments on the Preamble continue, page 6]

[Preamble, continued]

(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 and 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 and 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 and persons with a print disability, it is recognized that appropriate copyright exceptions and limitations are needed to improve such access,

[Preamble continues, page 7]

0.15 The fifteenth paragraph should read “Reaffirming the obligations of Member 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,” (European Union).

0.16 In the fifteenth paragraph, the sentence “emphasizing the importance and flexibility of the three step test” should be replaced by “reaffirming the importance and flexibility of the three step test”. The concept of three step test should be the base of this instrument (European Union, Japan).

0.17 In the sixteenth paragraph, the word “Needing” should be replaced by “Prompted by the desire” (European Union).

0.18 The seventeenth paragraph should read “Taking into account the importance of increasing the number and range of accessible format works available to visually impaired persons/persons with print disabilities in the world, and 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,” (European Union).

0.19 In the seventeenth paragraph, “to support” should be replaced by “to guarantee” (Spain).

0.20 The seventeenth paragraph should be simple and read “Taking into account the importance of increasing the number and range of accessible format works” (United States of America).

0.21 The final wording of the Preamble “having agreed as follows” may depend on the nature of the instrument (United States of America).

0.22 A new paragraph should be added and read “Desiring to harmonize and enhance national laws on such limitations and exceptions through an international framework consistent with the Berne Convention in order to facilitate access to knowledge in copyrighted works by persons with disabilities,” (Kenya).

0.23 Member States have agreed to craft a clause recognizing the Development Agenda for the Audiovisual Performers Treaty (AVP) and that, eventually, there probably should some consistency between the AVP provision and the provision in this instrument (United States of America).

0.24 The number of paragraphs of the Preamble can be reduced from 17 to no more than 10 paragraphs (Egypt, Kenya, United States of America).

[End of comments on the Preamble]

[Preamble, continued]

(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 and 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,

Have agreed as follows:

[End of Preamble]

Comments on Article A

A.01 The definition of “work” should also refer to scientific works as provided by the Berne Convention (Egypt). Other construction could be made to include the scientific works (United States of America).

A.02 The definition of “work” should read “means a protected work within the meaning of the Berne Convention, whether published or otherwise made publicly available in any media.” Works refer to printed material (Brazil, European Union, United States of America). Variations to the current definition are also acceptable (United States of America).

A.03 The definition of “work” should be further elaborated (Senegal).

A.04 In the definition of “work”, “literary” should be replaced by “written literary” (Switzerland). Some other construction could be made to include the print format (United States of America)

A.05 The definition of “accessible format copy” should refer to all works, not just those that are printed but also those that are in digital form (Algeria). Other construction could be made to recognize works that exist principally or originally in a digital format, even though what they are is print or writing (United States of America).

A.06 In the definition of “accessible format copy,” the phrase “as a person without a print disability” should be replaced by “as a person without visual impairment and print disabilities” (India).

A.07 The definition of “accessible format copy” should refer to actually any type of copy (Senegal).

[Comments on Article A continue, page 10]

ARTICLE A DEFINITIONS

For the purposes of these provisions

"work"

means a literary or artistic work protected by copyright and includes any literary and artistic work in which the copyright remains valid, 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 a print disability. The accessible format copy must respect the integrity of the original work and be used exclusively by beneficiary persons.

[Article A continues, page 12]

A.08 As to the definition of “authorized entity”, it is asked who authorizes the authorized entity and how trust is got (Japan).

A.09 As to the definition of “authorized entity”, first paragraph, the phrase “activities” should be replaced by “primary missions” (European Union, United States of America).

A.10 As to the definition of “authorized entity”, first paragraph, the phrase “in accordance with national law” should be further clarified (Brazil, European Union) or deleted (United States of America). The outcome of discussions between the World Blind Union and the International Publishers Association is very relevant regarding this definition (United States of America).

A.11 In the definition of “authorized entity”, the phrase “to assist persons with print disabilities” should be replaced by “to assist persons with visual impairment and persons with print disabilities” (India).

A.12 As to the definition of “authorized entity”, the second paragraph should read “an authorized entity maintains rules and procedures to establish the bona fide nature of persons with print disabilities that they serve.” (European Union).

A.13 As to the definition of “authorized entity”, the second paragraph should start with the sentence “The national competent authorities authorize the authorized entities.” (Morocco, Senegal).

A.14 As to the definition of “authorized entity”, the second paragraph should read “an authorized entity maintains rules and procedures to determine the eligibility of the beneficiary persons that they serve” (United States of America).

A.15 In the definition of “authorized entity”, third paragraph, delete “prior” and add at the end accordance at the end “, in accordance with national law” (Ecuador).

A.16 As to the definition of “authorized entity”, the third paragraph should have an additional sentence that reads “Member States/Contracting parties should encourage rightholders and beneficiary persons to cooperate and participate in authorized entities.” (European Union).

A.17 As to the definition of “authorized entity”, third paragraph, the meaning of “trust” should be further discussed. There is a concern that the current wording might lead to a licensing system (India).

A.18 In the definition of “authorized entity”, reservations are kept regarding the fourth paragraph (Kenya).

A.19 In the definition of “authorized entity”, the fourth paragraph should be replaced by “Organizations, institutions, and entities which are part of a nationwide network and adhere to all these characteristics are authorized entities.” (European Union).

A.20 The definition of “authorized entity” should include a reference to the need to keep statistical tracking of what is being used and how many copies are produced and distributed (Jamaica).

[Comments on Article A continue, page 12]

[Article A, continued]

"authorized entity"

means a governmental agency, a non-profit entity or non-profit organization that has as one of its activities to assist persons with print disabilities by providing them with services relating to education, training, adaptive reading, or information access needs, in accordance with national law.

An authorized entity maintains rules and procedures to determine the beneficiary persons that they serve.

An authorized entity has the trust of both beneficiary persons and copyright rights holders. It is understood that to obtain the trust of such rights holders and beneficiary persons, it is not necessary to require the prior permission of said rights holders or persons.

If an authorized entity is part of a nationwide network of organizations, then all organizations, institutions, and entities must adhere to these characteristics, in accordance with national law.

[Article A continues, page 13]

A.21 The definition of “reasonable price for developing countries” should be replaced by “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, taking into account the needs and income disparities of persons who have limited vision and those with print disabilities in that market.” (European Union).

A.22 Further discussions and debates are essential on the complex issue of “reasonable price” as it is not mature (European Union).

A.23 The definition of “copyright” should be further discussed (European Union).

A.24 According to the nature of the instrument, there will be a need to agree on a definition of “Member State” or “Contracting Party” (European Union).

A.25 The definition of “Member State” should read “means a State member of the World Intellectual Property Organization or a country of the Union established by the Berne Convention for the Protection of Literary and Artistic Works and/or a Contracting Party of the WCT” (Argentina).

A.26 The instrument should refer to “copyright and related rights to copyright” as using the single term of “copyright” to cover both categories of rights is confusing (Senegal). This is a cross-cutting issue, particularly in relation to the inclusion of neighboring or related rights and the reference to members of WCT in the definition of “Member State” (European Union).

A.27 An additional definition on “limitations” and “exceptions” should be included (Algeria). It is not wise to introduce such a definition (Brazil). That exercise could be very hard and time consuming (United States of America).

[End of comments on Article A]

[Article A, continued]

"reasonable price for developed countries"

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"

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.

"Member State"

means a State member of the World Intellectual Property Organization or of the Berne Convention for the Protection of Literary and Artistic Works and/or a Contracting Party of the WCT.

References to "copyright" include copyright and any rights related to copyright recognized by Member States in accordance with national law.

[End of Article A]

Comments on Article B

B.01 There is no need to refer to persons with print disabilities, persons with reading disabilities, persons with visual impairment, etc. in the instrument. Since there is a definition of “beneficiary persons”, the term “beneficiaries” suffice and can replace the above terms in the text (Brazil, United States of America).

B.02 The definition of “beneficiary persons” should be included in Article A with the other definitions (Algeria, India). The separate treatment of this definition is the approach taken in the draft treaty submitted by Brazil, Ecuador, Mexico, Paraguay, later joined by Argentina. This construction stresses the importance that this is for the benefit of those people (Brazil, Egypt, Morocco, Nigeria, United States of America). Definitions in Article A and B could also be grouped under one single chapter called “Chapter on definitions” (Algeria).

B.03 The first line of the definition should read “A beneficiary person is:” Then each paragraph (a), (b) and (c) should start with the words “a person”, so that it is clear that there are three categories of beneficiaries (Morocco).

B.04 Paragraph b) should only refer to the person who “has a visual impairment or a perceptual or reading disability.” (United States of America)

B.05 Paragraph c) should read “is 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 in the manner of a person without such a disability” (United States of America).

[End of comments on Article B]

NEW ARTICLE

X.01 It is proposed to reinsert Article X which reads:

ARTICLE X

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 (Kenya).

[End of Article X]

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 or any other print disability, which cannot be improved by the use of corrective lenses to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or
- (c) is 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.

[End of Article B]

Comments on Article C

C.01 Replace Member States by Member States/Contracting Parties. Also, replace shall by should/shall. This applies to the other articles as well (Brazil, Egypt, United States of America, European Union, Senegal). *This change was included in the text.*

C.02 Article C should include the right of translation, after the right of reproduction (Egypt). The right of translation is implicit in the right of reproduction, but it can be included explicitly (Ecuador). The inclusion of the right of translation is a matter of concern, particularly regarding its justification and the moral rights ramifications (United States of America).

C.03 Article C should refer not only to “exceptions” but to “limitations and exceptions” (Algeria, United States of America).

C.04 The phrase in Paragraph (1) “to facilitate the availability of works in accessible formats” significantly broadens the aim of the instrument and has broad implications. It should be preceded by the phrase “or any other equally effective measure” (European Union).

C.05 In Paragraph (1), the reference to the WCT should be reinserted so that it reads “the right of making available to the public, as defined in article 8 of the WCT” (Brazil). The issue of rights “such as the reproduction right and the making available right while referring to copyright as defined under national law” needs further clarification (United States of America).

C.06 Paragraph (2)(a) should read “Authorized entities shall be permitted to make an accessible format copy of a work, obtain from another authorized entity a work in accessible format, and supply such a copy 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:” (European Union).

C.07 The footnote of Paragraph (2)(a) which reads “It is understood that cooperation or partnerships with other organizations, including for profit organizations, shall be permitted.” should be reinserted (Brazil).

[Comments on Article C continue, page 18]

ARTICLE C

NATIONAL LAW 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 and the right of making available to the public, to facilitate the availability of works in accessible formats for beneficiary persons as defined herein.

2. A Member State/Contracting Party may fulfill Article C (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 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.

[Article C continues, page 19]

C.08 In Paragraph (3), delete reference to three-step test “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.” A separate Article E*b*’s is proposed in this connection (European Union).

C.09 In Paragraph (3), the word “likewise” should be inserted before “limited” (Brazil, United States of America). Paragraph (3) is intended to be an observation both to state the freedom of Contracting Parties of the Berne Convention and the other copyright treaties to carry out exceptions and limitations that meet the three-step test (United States of America).

C.10 Paragraph (4) should read “the Member State/Contracting Party shall limit the exceptions or limitations provided for in this article to published works which, in an applicable special format, cannot be otherwise obtained within a reasonable time and at a reasonable price” (European Union). The word “otherwise” should be retained in this paragraph (Brazil, United States of America). Exceptions should not depend on the existence of commercially available works, as in this case the question is defending a fundamental human right (Ecuador).

C.11 Paragraph (4) should read “The Member State/Contracting Party should/shall limit the exceptions or limitations provided for in this article to published works which, in the applicable special format, cannot be otherwise obtained within a reasonable time and at a reasonable price.” The term “otherwise” shows that there is a leeway for market-based solutions to get copies as an alternative to the exception (European Union).

C.12 As to Paragraph (4), it is asked what “reasonable time” means (India).

C.13 Paragraph (4) should use the word “shall” so that exceptions are applied when there are no reasonable alternatives, and incentives to produce accessible materials remain (Jamaica).

C.14 In Paragraph (4), the word “said exceptions or limitations” should change to “exceptions or limitations under this Article”. This will clarify the scope of the provision (European Union, United States of America).

C.15 Paragraph (4) should be moved as part, and at the end, of Paragraph (2) (Japan, Switzerland). This paragraph provides flexibility for alternative solutions but should not limit the flexibility in paragraph (3) beyond the limitations of the three-step test (Switzerland). This scope and proper ordering of this paragraph needs further consideration (United States of America).

C.16 In Paragraph (5), the expression of exceptions or limitations is used, but it does not mean that this refers to the licensing system (India).

C.17 The order of paragraphs could be a matter of further consideration for the sake of clarity. Paragraph 2(b) can change with 2(a), paragraph (3) can change to (1), paragraph (4) can change to (2), and paragraph (5) can change to (3) (Senegal). This sequence seems acceptable for the sake of coherence. This same logic should also possibly apply to Article D (European Union).

[End of comments on Article C]

[Article C, continued]

(B) A beneficiary person or someone acting on his or her behalf may make an accessible format copy of a work for the personal use of the beneficiary person 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 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.

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.

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

[End of Article C]

Comments on Article D

D.01 In paragraph (1), add “or otherwise” after “export license” (Ecuador).

D.02 It is asked whether the reference in the first paragraph to “authorized entity” is an authorized entity of an exporting country. Under Japanese copyright law, the accessible format copy which is made in accordance with the provision of limitation on reproduction right can be exported as long as it is treated within the purpose of the provision of limitation. Therefore, it is possible for Japan to enable accessible format copies to be exported without an authorized entity which is precisely defined in Article A although an authorized entity may be one of good measures to ensure accessible format copies are treated within the purpose of the limitation. This kind of flexibility can contribute to cross-border exchange of accessible format copies (Japan).

D.03 It is also asked what paragraph (1) of Article D asks Member States to do exactly. According to the first paragraph, a Member State is required to achieve its legal condition under which its own authorized entity is allowed to distribute or make available accessible format copies in case the member state has an authorized entity and the authorized entity wants to do so. In other words, a member state is not necessarily required to establish an authorized entity or to implement the exportation of accessible format copies through an authorized entity. On the basis of this understanding on the first paragraph and thanks to the third paragraph, Article D is interpreted as it allows a Member State to adopt any other measure which satisfies the criteria of three step test and does not require an authorized entity (Japan).

D.04 The word “importation” and “exportation” usually means the exchange of tangible goods or products, and usually does not mean, exchanging intangible goods such as the digital format. If the word importation and exportation in this instrument include exchanging the digital format, it is better to explicitly write this point somewhere in this instrument in order to prevent ambiguity (Japan).

D.05 In Paragraph (2)(a), delete “without the authorization of the rightholder” (European Union).

D.06 In Paragraph (2)(b), delete “without the authorization of the rightholder” (European Union).

D.07 In Paragraph (2), after subparagraph (b), delete the last paragraph that reads “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” (Brazil, European Union). A separate paragraph (3)*bis* is proposed in this connection (European Union).

D.08 In Paragraph (2), after subparagraph (b), include the phrase “under this article” after “making available,” to clarify that it does not refer to other things the Member State or Contracting Party may do. Also, delete the word “published” before “works,” to address the concern about capturing published and making available in media in the digital era. The paragraph will read “the Member State/Contracting Party may limit distribution or making available under this article of works” (United States of America).

D.09 In Paragraph (3), delete reference to three-step test “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.” A separate Article E*bis* is proposed in this connection (European Union).

ARTICLE D

CROSS-BORDER EXCHANGE OF ACCESSIBLE FORMAT COPIES

1. Member State/Contracting Party should/shall provide that if an accessible format copy of a work is made under an exception or limitation or export license in accordance with the national law, that accessible format copy may be distributed or made available to a person with print disabilities in another Member State by an authorized entity where that other Member State would permit that beneficiary person 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 accessible format copies to authorized entities in other Member States/Contracting Parties for the exclusive use of beneficiary persons, where such activity is undertaken on a non-profit basis.

(B) Authorized entities shall be permitted without the authorization of the rightholder to distribute or make available accessible format copies to beneficiary persons in other Member States/Contracting Parties where the authorized entity has verified the individual is properly entitled to receive such accessible format copies under that other Member State/Contracting Party 's national law.

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.

[Article D continues, page 23]

D.10 In Paragraph (3), the word “likewise” should be inserted before “limited” (Brazil, United States of America). More clarification is needed regarding the insertion of this term (Ecuador). Paragraph (3) is intended to be an observation both to state the freedom of Contracting Parties of the Berne Convention and the other copyright treaties to carry out exceptions and limitations that meet the three-step test (United States of America).

D.11 It is proposed to add a new paragraph *3bis* that reads “The Member State/Contracting Party should/shall limit the exceptions or limitations provided for in this article to published works which, in an applicable special format, cannot be otherwise obtained within a reasonable time and at a reasonable price in the country of importation.” (European Union).

D.12 A change in the sequence of paragraphs, as proposed for Article C, seems acceptable for the sake of coherence (European Union).

[End of comments on Article D]

[Article D, continued]

3. 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.

[End of Article D]

Comments on Article E

E.01 The word “importation” and “exportation” usually means the exchange of tangible goods or products, and usually does not mean, exchanging intangible goods such as the digital format. If the word importation and exportation in this instrument include exchanging the digital format, it is better to explicitly write this point somewhere in this instrument in order to prevent ambiguity (Japan).

E.02 Delete the phrase “without the copyright rights holder’s authorization.” (European Union, United States of America). Article E should allow Member States to mirror the flexibility of their exception in relation to imports. That phrase could mean, for example, that in other articles where it is not specified, there is no need the right holders’ authorization. This article requires further discussion, in particular regarding the notion of importation in relation to copyright (European Union).

E.03 The word “likewise” should be included in this provision after the word “shall” (United States of America).

[End of comments on Article E]

NEW ARTICLE

E.01 It is proposed to add a new Article *Ebis* which reads:

“All 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.”

The text here should read “shall” as it refers to existing international obligations. Using the alternative “should/shall” would contravene existing international obligations of Member States (European Union).

E.02 All references to the three-step test in Articles C(3) and D(3) should be deleted. (European Union).

ARTICLE E

IMPORTATION OF ACCESSIBLE FORMAT COPIES

To the extent that national law would permit a beneficiary person or an authorized entity acting on the beneficiary person's behalf to make an accessible format copy of a work, the national law should/shall permit a beneficiary person or an authorized entity acting on that person's behalf to import an accessible format copy without the copyright rights holder's authorization.

[End of Article E]

Comments on Article F

F.01 The wording of the article should change as follows:

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

A Member State 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" (Australia, Japan).

F.02 In the second paragraph, "At least" should be replaced by "in particular." This article should be seen in connection with the WCT and should a matter of further discussion as it could be construed as giving technical protection measures precedence over other exceptions and limitations, which is not the case under WCT (Switzerland).

F.03 Change "the work" to "a work," and change "Member States" to "a Member State/Contracting Party" because the intent of this article is to express the capacity of a single Member State or a single Contracting Party, not member states working together (United States of America).

[End of comments on Article F]

ARTICLE F

OBLIGATIONS CONCERNING TECHNOLOGICAL MEASURES

Member States/Contracting Parties should/shall ensure that beneficiaries of the exception provided by Article C have the means to enjoy the exception where technological protection measures have been applied to a work.

At least, in the absence of voluntary measures by rightholders 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.

[End of Article F]

Comments on Article G

No comments were made on this Article.

[End of comments on Article G]

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.

[End of Article G]

Comments on Article H

No comments were made on this Article.

[End of comments on Article H]

NEW ARTICLE

I.01 It is proposed to add a new Article I which reads:

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

- interests deriving from human rights and fundamental freedoms;
- interests in competition, notably on secondary markets; and
- other public interests, notably in scientific progress and cultural, educational, social, or economic development” (Venezuela)

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.

[End of Article H and of document]