

## **Standing Committee on Copyright and Related Rights**

**Twentieth Session**

**Geneva, June 21–24, 2010**

Draft WIPO Treaty on Exceptions and Limitations for the Disabled,  
Educational and Research Institutions, Libraries and Archive Centers

*Proposal by the African Group*

## **Preamble**

The Contracting Parties,

*Recalling* the principles of non-discrimination, equal opportunity and access, proclaimed in the United Nations Convention on the Rights of Persons with Disabilities;

*Acknowledging* the right of everyone to education, as recognized in the International Covenant on Economic, Social and Cultural Rights;

*Noting* that the International Covenant on Civil and Political Rights guarantees the right to freedom of expression, including freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice;

*Considering* that equal access to education, culture, information and communication is a fundamental right that comes under public policy;

*Recognizing* the important role played by the authorities in guaranteeing equal opportunity for all in terms of access to education, culture and information;

*Mindful* of the role played by educational and research institutions, libraries and public archives in popularizing, disseminating, promoting and preserving the cultural and scientific heritage;

*Prompted* by a desire to contribute to the implementation of the relevant recommendations of the Development Agenda of the World Intellectual Property Organization;

*Mindful* of the obstacles that are prejudicial to human development and the fulfillment of disabled persons with regard to education, research, access to information and communication;

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

*Aware* that national copyright legislation is territorial in nature, and where activity is undertaken across jurisdictions, uncertainty regarding the legality of that activity undermines the development and use of new technologies and services that can potentially improve the lives of persons with disabilities and all those who do not have the means to access education, culture and information;

*Mindful* of the need to safeguard public interests by introducing imperative exceptions and limitations from which no exemption can be provided by any national or international legal provision;

*Recognizing* the urgent need to broaden the scope of copyright exceptions and limitations for disabled persons, libraries, archives, education and research;

*Recognizing* the need to introduce new international rules in order to provide adequate solutions to the needs of vulnerable persons and the challenges and opportunities presented by economic, social, cultural and technological developments;

*Recognizing* the need to maintain a balance between the rights of authors and the larger public interest, particularly in education, research and access to information;

*Underscoring* the importance of guaranteeing that developing countries enjoy and continue to enjoy access to flexibilities and exceptions without any legal or technical hindrances;

*Acknowledging* the urgent need to take up a major challenge in terms of international law, namely the development of a global approach to exceptions and limitations;

*Hereby agree* on the following:

### **Article 1: Definitions**

For the purposes of this Treaty:

**“Work”** means any original or derived production of an artistic, literary, dramatic, musical or scientific type, regardless of the mode, format or form of expression, which could be protected by copyright, even if such protection has expired.

**“Owner of copyright”** includes any physical person or legal entity, who is the author of the work, who enjoys exclusive rights in the exploitation of his work when protection still applies or when copyright does not subsist or no longer subsists.

**“Exclusive rights”** mean any rights provided in accordance with the agreements identified in Article 4, and include the rights of reproduction, adaptation, distribution and communication by wire or wireless means to the public.

**“Accessible format”** means an alternative manner or form which gives a person suffering from a disability listed in Article 18 of this Treaty access to the work, as flexibly and comfortably as a person without a disability.

**“Accessible formats”** shall include, but not be limited to, large print, with different typefaces and sizes all being permitted according to need, Braille, audio recordings, digital copies compatible with screen readers or refreshable Braille and audiovisual works with audio description.

**“Copyright”** means all economic and moral rights that an author has in his works.

**“Database”** means a collection of independent works, data or other materials, which are arranged in a systematic or methodical way, and are individually accessible by electronic or other means.

**“Archives”** mean non-profit establishments with a public vocation, which serve as depositories for works dealing with all types of knowledge of nations and peoples, including cultural heritage, with a view to the furtherance of knowledge useful for education, teaching, research and the public interest.

**“Libraries”** mean non-profit establishments with a public vocation, which make available free of charge works dealing with all types of knowledge of nations and peoples, including cultural heritage, with a view to the furtherance of knowledge useful for education, teaching, research and the public interest.

**“Bodies”** refer to those identified in Article 2 of this Treaty.

### **Article 2: Purpose**

This Treaty sets out the minimum elements of flexibility to be included in national copyright legislation, with a view to allowing the following beneficiaries to access protected works:

- Persons suffering from disabilities listed in Article 21;
- Educational and research institutions;
- Libraries;
- Archive centers.

### **Article 3: Nature and scope of obligations**

- (a) Contracting Parties shall agree to undertake appropriate measures to ensure full and equal access to information and communication for the persons and bodies covered in Article 2.
- (b) Contracting Parties shall give effect to the provisions of this Treaty;
- (c) Contracting Parties shall be free to determine the appropriate method of implementing the provisions of this Treaty;
- (d) Contracting Parties shall agree to apply the Treaty transparently, taking into account the priorities and special needs of developing countries as well as the different levels of development of the Contracting Parties.
- (e) Contracting Parties shall ensure that the implementation allows for timely and effective exercise of authorized actions covered by this Treaty, including expeditious procedures that do not in themselves create barriers to legitimate uses, are fair and equitable, and are not unnecessarily complicated or costly, or entail unreasonable time, time-limits or unwarranted delays.

### **Article 4: Relations with other international instruments**

- (a) Contracting Parties shall agree that the provisions of this Treaty are consistent with obligations set out under those of the following treaties and conventions to which they are a party:
  1. the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention);
  2. the WIPO Copyright Treaty, 1996 (WCT);
  3. the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, done at Rome, October 26, 1961 (Rome Convention);
  4. the WIPO Performances and Phonograms Treaty, 1996 (WPPT);
  5. the Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994 (TRIPS Agreement);

6. the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions; and
  7. the United Nations Convention on the Rights of Persons with Disabilities;
- (b) Contracting Parties agree that, to the extent that this Treaty applies to literary and artistic works as defined in the Berne Convention, it is a special agreement within the meaning of Article 20 of that Convention, as regards Contracting Parties that are member countries of the Union established by that Convention.

**Article 5: Limitations and exceptions to copyright**

For persons with disabilities

- (a) It shall be permitted without the authorization of the owner of copyright to make an accessible format of a work, supply that accessible format, or copies of that format, to disabled persons by any means, including by non-commercial lending or electronic communication by wire or wireless means, without the authorization of the owner of copyright, and undertake any other intermediate steps to achieve these objectives, when all of the following conditions are met:
1. the person or organization wishing to undertake any activity under this provision has lawful access to that work or a copy of that work;
  2. the work is converted to an accessible format, 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 disabled persons;
  3. copies of the work are supplied exclusively to be used by disabled persons;
  4. the activity is undertaken on a non-profit basis;
  5. the owner of the right is recognized as such.
- (b) A disabled person to whom a work is communicated by wire or wireless means as a result of activity under paragraph (a) shall be permitted without the authorization of the owner of copyright to copy the work exclusively for his or her own personal use. This provision shall be without prejudice to any other limitations and exceptions that the person in question is able to enjoy.
- (c) The rights under paragraph (a) shall also be available to for profit-entities and shall be extended to permit commercial rental of copies in an accessible format, if any of the following conditions are met:
1. the activity is undertaken on a for-profit basis, but only to the extent that those uses fall within the normal exceptions and limitations to exclusive rights that are permitted without remuneration to the owners of copyright;
  2. the activity is undertaken by a for-profit entity on a non-profit basis, only to extend access to works to disabled persons; or

3. the work or copy of the work that is to be made into an accessible format is not reasonably available in an identical or largely equivalent format enabling access for disabled persons, and the entity providing this accessible format gives notice to the owner of copyright of such use and adequate remuneration for copyright owners is available.
- (d) In determining whether a work is reasonably available according to (c)(3), the following criteria shall be considered:
1. for developed economies, the work must be accessible and available at a similar or lower price than the price of the work available to persons who are not disabled; and
  2. for developing countries, the work must be accessible and available at prices that are affordable, taking into account disparities in income levels for disabled persons.

**Article 6: *Reproduction for private use and research***

- (a) Contracting Parties shall agree to undertake appropriate measures without the authorization of the right holder to reproduce a work for private use and for research purposes.
- (b) Permissible use shall include the reproduction of all or a substantial part of a work without adequate compensation for the right holder.
- (c) The source and author of the work shall be sufficiently known.

**Article 7: *Educational and research institutions***

- (a) It shall be permitted, without the authorization of the right holder, to make limited copies of published and unpublished works, regardless of their format, for purposes of education and scientific research.
- (b) Copies of the work referred to in paragraph (a) shall be for non-profit use or in the public interest, and shall not unreasonably prejudice the legitimate interests of the right holder.
- (c) This authorization shall cover distance learning.
- (d) It shall be permitted for educational and research institutions to make copies of works acquired legally, without the authorization of the right holder.
- (e) It shall be permitted for educational and research institutions to make copies of orphaned works, where the right holder cannot be identified or located, for the purposes and on the conditions referred to under paragraph (b).
- (f) It shall be possible for the educational and research institutions covered by this Treaty to circumvent measures for the technical protection of works.
- (g) The beneficiaries of this Treaty and persons acting on their behalf shall not bear responsibility if they have acted in good faith, believing or having reasonable grounds to believe that they have acted in accordance with copyright.

**Article 8: *Libraries and archives***

- (a) It shall be permitted to make limited copies of published and unpublished works, regardless of their format, to meet the needs of libraries and archives, without the authorization of the owner of copyright;

- (b) The copies of the work referred to in paragraph (a) shall be used solely to meet the needs of teaching, scientific research, and preservation of cultural heritage;
- (c) The copies referred to in paragraph (a) shall be made for non-profit uses, in the general interest of the public and for human development, without conflicting with the normal exploitation of the work or unreasonably prejudicing the legitimate interests of the author; this activity may be exercised *in situ* or remotely;
- (d) It shall be permitted for libraries and archives services to make copies of works acquired legally, without the authorization of the right holder;
- (e) It shall be permitted for libraries and archive services to make copies of orphaned works, where the right holder cannot be identified or located, for the purposes and on the conditions referred to in paragraph (b);
- (f) It shall be permitted for the libraries and archive services covered by this Treaty to circumvent measures for the technical protection of works;
- (g) The beneficiaries of this Treaty and persons acting on their behalf shall not bear responsibility if they have acted in good faith, believing or having reasonable grounds to believe that they have acted in accordance with copyright.

**Article 9: Computer programs**

Contracting Parties shall agree to provide for exceptions and limitations relating to computer programs to allow interoperability, replacement or support.

**Article 10: Limitations and exceptions to neighboring rights**

Rights recognized for the performer, the producer of phonograms or videograms and sound or audiovisual broadcasting bodies shall be subject to the same exceptions and limitations to exclusive copyright provided for in Articles 5, 6, 7 and 8.

**Article 11: Quotation**

- (a) Contracting Parties shall agree to undertake appropriate measures to allow the use of works protected by copyright that have already been made public for purposes of quotation.
- (b) Quotations shall supply the source and name of the author of the work.

**Article 12: Recognition and moral right**

- (a) When a work or copy of a work is supplied to the beneficiaries referred to in Article 2 above, mention shall be made of the source, and of the name of the author as it appears on the work or copy of the work to which the person or organization acting under Articles 5, 6, 7 and 8 has lawful access.
- (b) Use as permitted by Articles 5, 6, 7 and 8 shall be without prejudice to the exercise of moral rights.

**Article 13: Circumvention of technical measures**

Contracting parties shall ensure that beneficiaries of the exceptions and limitations listed in Article 2 have the means to enjoy the exception where technical protection measures have been applied to a work, including when necessary the right to circumvent the technical protection measure so as to make the work accessible.

**Article 14: Relationship with contracts**

- (a) Any contractual provisions which provide exemptions from the application of the limitations and exceptions listed in Article 2 shall be null and void.
- (b) This Treaty shall not apply retroactively to contractual relationships entered into prior to the entry into force of the said Treaty.
- (c) The effects of the principle referred to in paragraph (a) shall apply as of the date of entry into force of this Treaty.

**Article 15: Imports and exports of works**

Contracting Parties shall ensure that imports and exports of works meet the conditions listed in Articles 5, 6, 7 and 8, and shall take the necessary steps for this to be permitted without the authorization of the owner of copyright;

1. the export to another country of any version of a work or copies of the work that any person or organization in one country is entitled to possess or make under Articles 5, 6, 7 and 8; and
2. the import of that version of a work or copies of the work by a person or organization able to act under the provisions of Articles 5, 6, 7 and 8 into another country.

**Article 16: Notice to right holders for reproduction and distribution of works**

Contracting Parties shall ensure that in cases involving the reproduction and distribution of works for the beneficiaries of the limitations and exceptions under Articles 5, 6, 7 and 8, reasonable efforts shall be made to provide notice of this fact to the owner of the right. Such notice shall include the following:

1. the name, postal address and relevant contact information of the party exercising its right to reproduce and distribute works;
2. the nature of the use of the work, including the countries where the work is distributed and the terms under which the works are distributed.

**Article 17: Database on availability of works**

- (a) WIPO shall create a database that is accessible through the Internet and other means that will allow copyright owners to identify works voluntarily for purposes of facilitating compliance with the notices obligations in Article 16 of this Treaty, and to provide information regarding the availability of a work in forms enabling its perception by disabled persons.



- (b) After consultation with publishers and stakeholders, WIPO should ensure that the database includes a standard machine readable code to identify uniquely works registered in the database. This code shall be suitable for use for published works in a variety of formats.

**Article 18: Remuneration for commercial exploitation of works**

- (a) When implementing Article 5(c)(3), Contracting Parties shall ensure that there is a mechanism for determining the level of adequate remuneration to be paid to the owner of copyright in the absence of voluntary agreement. In determining adequate remuneration under Article 5(c)(3), the following principles shall be observed:
  - (b) Right owners shall be entitled to remuneration that is reasonable for normal commercial licensing of works, regarding the terms normally associated with the country, population and purposes for which the work is used, subject to the requirements of paragraph (c) below;
  - (c) In developing countries, remuneration should also take into consideration the need to ensure that works are accessible and available at prices that are affordable, taking into account disparities in income levels for the beneficiaries of the exceptions and limitations;
  - (d) It shall be a matter of national law to determine if remuneration under (a) is waived for the works covered by the exception;
  - (e) Persons who distribute works across borders shall have the option of registration for remuneration payments in a single country, if the mechanisms for remuneration meet the requirements of this Treaty and address the legitimate concerns of the copyright owners in terms of transparency, and remuneration is considered reasonable either for a global license for works that are distributed globally, or for a license to use works in specific countries, calibrated for the countries, users and purposes of such use.

**Article 19: Orphaned works**

- (a) It shall be a matter for national law to determine whether certain commercial uses of works for which the author or copyright owner cannot be identified or who do not respond to notices require payment of remuneration.
- (b) In cases where right owners cannot be identified or do not respond to notices, liability for uses of works shall not exceed 24 months from the date of use.

**Article 20: Respect for privacy**

In implementing this Treaty, Contracting Parties shall protect the privacy of the beneficiaries, in particular that of persons who are visually impaired, on an equal basis with all others.

**Article 21: Disabilities covered by this Treaty**

- (a) For the purposes of this Treaty, a disabled person means any person suffering from visual impairment or a physical, mental, sensory or cognitive incapacity.
- (b) Contracting Parties shall extend the provisions of this Treaty to persons with any other disability who, due to that disability, need an accessible format of a type that could be made under Article 4 in order to access a copyright work to substantially the same degree as a person without a disability.

**Article 22: Conference of the Parties**

- (a) A Conference of Parties shall be established among the States Parties to this Treaty. The Conference of Parties shall be the plenary and supreme body of this Treaty.
- (b) The Conference of Parties shall meet in ordinary session once every five years. It may meet in extraordinary session if it so decides or upon request to that effect from at least one-quarter of the Parties.
- (c) The Conference of Parties shall adopt its own rules of procedure.
- (d) The functions of the Conference of Parties shall be, inter alia:
  - 1. to consider possible measures to enhance the implementation or modify the provisions of this Treaty, including the development of optional protocols; and
  - 2. to take whatever other measures it may consider necessary to further the objectives of this Treaty.

**Article 23: Optional protocols**

Contracting Parties shall have the right to propose optional protocols for this Treaty, to address measures such as:

- 1. harmonized obligations or offers to promote standards, interoperability requirements, or regulatory measures to enhance access to works and communications;
- 2. joint funding to support the digitalization and distribution of works; or
- 3. other measures that are necessary to achieve greater equality of access to knowledge and communications.

**Article 24: Monitoring and implementation**

Every three years WIPO shall solicit voluntary contributions from Contracting Parties and other possible donors in order to finance one or more studies of the implementation of this Treaty.

### ***Final provisions***

#### ***Article 25: Becoming Party to the Treaty***

- (1) Any State member of WIPO may become party to this Treaty by means of:
  - (i) signature followed by the deposit of an instrument of ratification;
  - (ii) deposit of an instrument of accession.
- (2) Instruments of ratification or accession shall be deposited with the Director General of WIPO.

#### ***Article 26: Entry into force of the Treaty***

- (1) This Treaty shall enter into force three months after 10 instruments of ratification or accession by States have been deposited.
- (2) Any State which does not become party to this Treaty upon entry into force under paragraph (1) shall become bound by this Treaty three months after the date on which such a State has deposited its instrument of ratification or accession.

#### ***Article 27: Reservations***

Any Contracting Party may declare that it will not apply the provisions of Article 5.c(3) of this Treaty.

#### ***Article 28: Denunciation***

- (1) Any Contracting State may denounce this Treaty by notification addressed to the Director General of WIPO.
- (2) Denunciation shall take effect six months after receipt of the said notification by the Director General.

#### ***Article 29: Signature and languages***

- (1) This Treaty shall be signed in a single original in the English, French and Spanish languages, and shall be official in the other official languages of the United Nations (Arabic, Chinese and Russian), all six texts being equally authentic.
- (2) This Treaty shall remain open for signature at Geneva until December 31, xxxx

**Article 30: Depositary functions**

- (1) The original of this Treaty, when no longer open for signature, shall be deposited with the Director General of WIPO.
- (2) The Director General of WIPO shall transmit a copy, certified by him, of this Treaty to the Governments of all Contracting States.
- (3) The Director General of WIPO shall register this Treaty with the Secretariat of the United Nations.
- (4) The Director General of WIPO shall transmit two copies, certified by him, of any amendment to this Treaty to the Governments of all Contracting States and, on request, to the Government of any other State.

**Article 31: Notifications**

The Director General of WIPO shall notify the Governments of all WIPO Member States of:

- (i) signatures under Article 29;
- (ii) deposits of instruments of ratification or accession under Article 25;
- (iii) the date of entry into force of this Treaty;
- (iv) any reservations made under Article 27;
- (v) any denunciations received under Article 28.

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