



## **Summary of the International Publishers Association Position on a WIPO Legal Instrument for the Benefit of persons with print disabilities.**

### **Principles:**

The position of the International Publishers Association (IPA) on a legal instrument for the benefit of print disabled persons, as consistently presented throughout the WIPO SCCR process, can be summarised as follows:

1. The global publishing industry is committed to working towards full equality in access to literary works for persons of all abilities. Publishers want person with print disabilities to read works at the same time, at the same price, whether purchased from a retailer or lent from any type of library.
2. Today, improvements in technology and publishing production ensure that the overwhelming majority of persons with print disabilities with access to digital technology can or will be able to access commercially available works. This irreversible process is already for many a key source of accessible works. This success must be reflected, and encouraged, in the instrument.
3. Because this progress will not reach all persons with disabilities with equal speed, in particular in developing countries, and because it may not cover a number of works that have only been made available in paper format, IPA recognises the importance of national copyright exceptions for the benefit of persons with print disabilities and their charities. IPA requests that such copyright exceptions be implemented, and/or that other policy measures be put in place that empower charities to produce accessible formats.
4. For the international exchange of digital accessible files, publishers encourage a legal instrument that supports the exchange of such files between charities supporting persons with print disabilities. Because the modern accessible file formats are universally accessible, they can compete with publishers' e-books. Publishers therefore require that international exchange be managed through collaboration. Such mechanism must be comprehensive, swift and easily manageable for charities. They must be transparent, safe and accountable for publishers. In practice only collaborative initiatives achieve the full potential for cost savings, scale and speed.
5. The instrument must not weaken the consensus achieved in WIPO's international legal instruments.

### **Changes to the Wording of the Legal Instrument:**

Taking the aforementioned principles into account, IPA requires that the current instrument be improved in the following ways:

1. Explicit reaffirmation of the Berne Convention three-step-test.
2. Use of Trusted Intermediaries as the exclusive vehicles/mechanisms through which international digital file exchanges may occur.
3. Trusted Intermediaries must provide for a mechanism to establish stakeholder trust that empowers all stakeholders.
4. Policy space/Flexibility for Member States to comply with instrument.
5. Priority for commercially available works in accessible formats

6. Inclusion of appropriate rules for transparency, accountability and security when importing or exporting digital files.

The following draft contains suggested textual edits to the proposed instrument. IPA is flexible on the wording of these amendments, provided the above concerns, that IPA has consistently raised, are fully addressed. Alternative wording and commentary are added in footnotes.

Geneva, March 2012

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Secretary General  
International Publishers Association

## PREAMBLE

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,

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,

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,

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.

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,

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,

Aware also that the majority of visually impaired persons and persons with a print disability live in developing countries,

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

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,

Recognizing also 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 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,

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,

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 may~~ improve such access,

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,

~~Emphasizing-Reaffirming 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,

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

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 and persons with a print disability in the world, and to provide ~~the necessary minimum~~ flexibilities in copyright laws that ~~improve 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,

~~Aware that currently the high substantial investment in producing accessible format copies is a barrier for their creation in particular in developing countries, and interim measures must be taken until ebooks and digital commercial formats that can develop their full potential,<sup>1</sup>~~

Have agreed as follows:

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 print format~~<sup>2</sup> 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~~ format<sup>3</sup> 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.

"authorized entity"

means a governmental agency, a non-profit entity or non-profit organization that has as one of its ~~primary~~<sup>4</sup> activities to assist persons with print disabilities by providing them with

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<sup>1</sup> Preamble wording is added to correct factual errors and to strengthen the three-step-test. These are non essential improvements and are therefore put forward as cosmetic improvements, not in application of our principles.

<sup>2</sup> In line with "print disabilities" that are being addressed in this instrument.

<sup>3</sup> "manner" adds only ambiguity and should therefore be deleted for clarity. A non-essential improvement.

<sup>4</sup> This addition ensures that organisations meeting a minimum threshold of credibility and track-record to qualify

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 authorised entity maintains compliance policies and procedures regarding access and IT security that follow internationally recognized standards<sup>5</sup>. It records appropriate usage information and provides this to rightsholders in a transparent and timely manner.**

An authorized entity has the trust<sup>6</sup> 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.

"reasonable price for developed countries"

means that the accessible format copy of the work is available **at a price reasonably related to that normally charged in the country for comparable works<sup>7</sup>** ~~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 work is available in an accessible format **at a price reasonably related to that normally charged in the country for comparable works** ~~at prices that are affordable in that market,~~ **and** 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.

**"commercially available"<sup>8</sup>**

**A work is commercially available, when the appropriate accessible format copy can be acquired through any distribution channel, including those customary to beneficiaries."**

**References to 'copy' or 'copies' do not include any unlawfully made copy or copies<sup>9</sup>.**

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<sup>5</sup> This clause is designed to enable the smooth circulation of digital files in a trusted environment, by taking due account of charity's clients' privacy interests, but maintaining an appropriate standard of security and accountability. It is intended to ensure that publishers know how their works are being lawfully used, so that they can identify when there is a compliance issue. There is no interest in personal or private data. Publishers have always respected the interest of all libraries in holding personal data of their clients confidential. Furthermore, as the digital files are commercially valuable, charities must not have lower security standards than the entire rest of the distribution environment (no "weakest link"). Alternative wording that has been suggested is: "An authorised entity maintains adequate and effective compliance policies and procedures regarding access and IT security. It documents and maintains records of transactions conducted pursuant to this instrument, while respecting the privacy of beneficiary persons. It is subject to appropriate and effective remedial mechanisms where it grossly and repeatedly fails to comply with this instrument."

<sup>6</sup> This is the only place where a safeguard is in the text that ensures that international file exchange requires collaboration. It is therefore absolutely essential that this principle is maintained. The word "trust" could be replaced by another term, such as "consensus", "support", "Trusted Intermediary", "jointly managed". A notary like role for WIPO could be envisaged "trust, as registered with the WIPO Secretary General"

<sup>7</sup> Wording reflecting the Berne Convention Acquis from the Berne Convention Annex

<sup>8</sup> The definition of „commercially available" is intended to ensure that the term did not add cumbersome obligations regarding the checking of distribution channels. Furthermore there is no intention to restrict library lending in any way.

## 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~~<sup>40</sup> 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.

## ARTICLE C

### NATIONAL LAW EXCEPTIONS ON ACCESSIBLE FORMAT COPIES

1. A Member State 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 **accessible format copies**<sup>11</sup> ~~works in accessible formats~~ for beneficiary persons as defined herein, **unless such accessible format copies can be obtained through commercial offerings or licences**<sup>12</sup>.

2. A Member State 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 in accessible format, and supply those copies to a beneficiary person by any means, including by non-commercial lending or by **secure** 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 not available as a commercial product or licence in an accessible format**<sup>13</sup>.

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 **and securely** to be used by beneficiary persons; and

4. the activity is undertaken on a non-profit basis.

(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.

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<sup>9</sup> New paragraph to clarify the instrument should not serve as a pretext for piracy or other infringement.

<sup>10</sup> This take-out is a clarification: print disability is the most generic term and requires no specification. “reading disability” is not a technical term that describes a recognised disability, but a symptom.

<sup>11</sup> Editorial change only

<sup>12</sup> This is an essential addition for the „model exception clause“. WBU did not object, but had asked for clarification of the term, which we were happy to provide. Because the US does not have such a clause, the instrument must have an alternative wording, that would allow the US to comply with the instrument without changing their law. This issue is resolved in our Article 3 bis).

<sup>13</sup> We insist that commercial format works must be purchased in order to incentivise their production. Other wording that achieves the same effect, without creating an unnecessary burden on persons with print disability, is equally welcome.

3. A Member State 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<sup>14</sup>.

**3.bis) Member States may choose other means for increasing the availability of accessible format copies, provided these means afford Beneficiaries with equally effective access to Works.**<sup>15</sup>

4. The Member State may should/shall 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.

#### ARTICLE D

##### CROSS-BORDER EXCHANGE OF ACCESSIBLE FORMAT COPIES

1. Member States 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 the~~ authorized entity, **that has created the accessible format copy**<sup>16</sup>, where that other Member State would permit that beneficiary person to make or import that accessible copy.

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

(A) Authorized entities, **that have created accessible format copies of a work**, shall be permitted without the authorization of the rights holder to distribute or make available accessible format copies to authorized entities in other Member States 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 rights holder to distribute or make available accessible format copies to persons with print disabilities in other Member States where the authorized entity has verified the individual is properly entitled to receive such accessible format copies under that other Member State's national law.

The Member State ~~may~~**should/shall**<sup>17</sup> 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.

3. A Member State may fulfil 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.

#### ARTICLE E

##### IMPORTATION OF ACCESSIBLE FORMAT COPIES

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<sup>14</sup> The clear expression of the three step test is important to us. We welcome the alternative proposed by the EU to introduce a special article to that effect.

<sup>15</sup> This clause allows Member States to use other methods than copyright exceptions as worded before. Alternative wording could copy the wording of Article 30 of the Disability Convention: Member States should/shall take any other “appropriate steps [to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities] to literary works.

<sup>16</sup> Even under copyright exceptions, charities plan to charge in some cases when they provide each other with accessible formats. This is supported by IPA, as it ensures that exporting charities can recoupe costs and remain incentivised to produce more works. This clause ensures that only the producing charity can distribute to other charities and receive appropriate compensation.

<sup>17</sup> If commercial availability is included in the principal clause, this clause becomes obsolete.

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 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, **from the authorised entity that has produced the accessible format<sup>18</sup> copy, if it cannot be obtained through a commercial offering or licence.**

#### ARTICLE F

##### TECHNOLOGICAL PROTECTION MEASURES<sup>19</sup>

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

In the absence of voluntary measures by rights holders and to the extent that copies of the work in the accessible format are not available commercially at a reasonable price or via authorized entities, Member States 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.

#### ARTICLE G

##### RELATIONSHIP WITH CONTRACTS

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

#### ARTICLE H

##### RESPECT FOR PRIVACY

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

#### **ARTICLE I:**

##### **RELATIONSHIP WITH OTHER INSTRUMENTS**

**The provisions of this instrument are complementary to the provisions of treaties previously agreed by the Member States and shall be construed and applied in harmony with them.<sup>20</sup>**

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<sup>18</sup> See previous footnote. IPA also asks for the limitation of the exportation/importation to the producer, to make compliance management possible.

<sup>19</sup> The international acquis on TPM protection should not be weakened.

<sup>20</sup> This is another clause seeking to guarantee the preservation of the international acquis, including the three step test. IPA supports the alternative suggested by the EU and its Members States of a separate clause that expressly includes the three-step-test.