



COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE AND THE CHIEF OFFICERS OF STATE LIBRARY AGENCIES ON THE NOVEMBER 23, 2012, DRAFT TEXT OF AN INTERNATIONAL INSTRUMENT/TREATY ON LIMITATIONS AND EXCEPTIONS FOR VISUALLY IMPAIRED PERSONS/PERSONS WITH PRINT DISABILITIES

The Library Copyright Alliance (LCA) and the Chief Officers of State Library Agencies (COSLA) are pleased that the Extraordinary General Assembly at its meeting in December 2012 authorized an international diplomatic conference in 2013 for the purpose of adopting a treaty on limitations and exceptions for visually impaired persons. LCA and COSLA are grateful for the leadership the United States has shown throughout the discussions at the World Intellectual Property Organization concerning this instrument. As we enter what hopefully is the home stretch for this treaty, we hope that compromises are not made that will undermine its utility or that will have the effect of limiting the services provided to the print disabled in the United States. In particular, the U.S. delegation should seek to prevent the placement of burdens on “authorized entities” that would deter or delay the delivery of services.

Authorized entities are essential to achieving the purposes of the treaty. The treaty would require countries to adopt exceptions that allow authorized entities first to make copies of works in formats accessible to the print disabled, and then to distribute those accessible format copies to the print disabled – referred to in the treaty as “beneficiary persons.” If the definition of authorized entity is too narrow, and the administrative requirements placed on authorized entities are too burdensome, beneficiary persons will not receive accessible format copies and the treaty will fail to meet its objective.

Below we offer comments on the most recent draft text.

Definition of Authorized Entity/Article J

As we have previously stated, we are troubled by the record-keeping requirements in the definition of authorized entity in Article A, as well as the reference to the collection and distribution of anonymous and aggregated data in Article J. These provisions invite the adoption in national legislation of burdensome and intrusive record-keeping obligations, which could discourage or prevent entities that serve the print disabled from qualifying as authorized entities and thereby benefiting from the exceptions the treaty envisions. There is no evidence that authorized entities in jurisdictions where exceptions exist have abused those exceptions. Thus, there is no justification for imposing this additional administrative burden on entities that serve the print disabled—a burden that U.S. copyright law currently does not place on any other entity that relies upon an exception. Moreover, these provisions establish an unfortunate precedent that a person using an exception must maintain documentation of the use.

This issue is of particular concern to U.S. libraries, many of which meet the definition of “authorized entity” under the Chafee Amendment and all of which must comply with the Americans With Disabilities Act. It would be a cruel irony if a treaty intended to benefit the print disabled would have the effect of encouraging a legislative debate which could lead to a reduction of services for the print disabled in the United States.

Accordingly, we recommend the striking of the words “and records of” in subsection (iv) of the definition of authorized entity in Article A, and the striking of the second sentence of Article J.

With respect to the first sentence of Article J, we have previously expressed concern that a provision regarding registries could be misapplied so as to restrict the number of authorized entities that could provide services under this instrument. While the language in the November 23 draft is an improvement over that in the October 19 draft, we do not believe that creating access points to registries is an appropriate role for the International Bureau.

Additionally, we strongly support the inclusion of a reference to libraries in an agreed statement to eliminate any possible argument that libraries are not authorized entities.

Commercial Availability

We are concerned by the knowledge standard imposed by Alternative B of Article D.3. on authorized entities before they can engage in a cross-border transaction. This language would prohibit the cross-border distribution of accessible format copies when the exporting authorized entity “should have known” that accessible format copies could have been obtained in the importing country through customary distribution channels at reasonable prices. This constructive knowledge standard as a practical matter would require exporting authorized entities to determine the commercial availability of an accessible format copy in the importing country. The clearance process would be so costly in the aggregate that many authorized entities would elect not to engage in cross-border distributions, to the detriment of the print disabled.

The Chafee Amendment does not require authorized entities to determine the commercial availability of accessible format copies prior to making such copies. Inclusion of this commercial availability language in the treaty would invite a legislative debate on this issue in the United States. Inserting a commercial availability requirement in the Chafee Amendment would deter or delay the delivery of services to the print disabled by authorized entities.

Three-Step Test

We oppose inclusion of Article *Ebis*. An exception consistent with this instrument should not have to pass through the filter of the three-step test. Article *Ebis* could result in the adoption of exceptions narrower than those permitted under the instrument, to the detriment of beneficiary persons. The reference to the three-step test in the “respect for

copyright” provision of the cluster package is less objectionable than Article *Ebis* in that the “respect for copyright” provision appears more interpretative than prescriptive. If Article *Ebis* is included, it should be clear that the three-step test applies to national legislation, as in the WCT and the WPPT. Additionally, the interpretation of the three-step test in Article I should be included.

Relationship With Contracts

We are very disappointed that Article G has been deleted from the treaty. We fear that some rights holders may argue that this deletion indicates that Member States do not have the freedom to decide to nullify contractual provisions that override exceptions for beneficiary persons. At a minimum, an agreed statement should be inserted that provides that nothing in the treaty shall prevent Member States from addressing the relationship of contract law and statutory exceptions and limitations for beneficiary persons.

Technological Measures

Technological protection measures should not be allowed to undermine the effectiveness of this treaty. Either alternative in Article F is an appropriate solution to this problem, to the extent that the provision is mandatory rather than permissive. What would not be acceptable is language that permits Member States only to adopt temporary exemptions as in Section 1201(a)(1)(B) of the Digital Millennium Copyright Act, rather than permanent exceptions. LCA has participated in every DMCA rulemaking, seeking exemptions for libraries, educators, and the print disabled. These rulemakings are needlessly burdensome, particularly with respect to the renewal of an existing exemption. At the very least, the treaty should include language similar to that in footnote 10 to the Beijing Treaty on Audiovisual Performances, although it should be part of the treaty text rather than an agreed statement.

Cluster Package

The brackets around the references to fair use and fair dealing in the third sentence of the cluster package and in the cluster package’s “respect for copyright” provision should be removed. Some rights holders persist to argue in various fora that fair use is not compatible with the three-step test. An explicit reference to fair use in this treaty would refute that fallacious argument.

If you have any questions, please contact Jonathan Band, jband@policybandwidth.com or 202-296-5675.

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