



ASSOCIATION OF  
RESEARCH LIBRARIES



## COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE ON THE WORKING DOCUMENT IN AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS FOR PERSONS WITH PRINT DISABILITIES – SCCR/23/7

We welcome the opportunity to comment on SCCR/23/7. Our comments focus on the provision that most directly affects libraries: the definition of an authorized entity. In addition to commenting on the Chair’s proposal and the comments thereon, we will also respond to proposed amendments by the International Publishers Association (IPA).

### I. Comments on Definition of “Authorized Entity”

Because the instrument works through the activities of authorized entities, getting this definition right is critical to the effectiveness of the instrument. If the definition is too restrictive, the instrument will be of little benefit to the print disabled. Fortunately, the Chair’s proposal in general strikes the appropriate balance and is consistent with the Chafee amendment.

**Paragraph 1.** The reasoning of Pakistan in A. 10*bis* is sound; the “one of its activities” formulation allows necessary flexibility for the variety of institutions that assist the print disabled in countries with differing levels of development. The need for flexibility echoes the concern of Kenya on behalf of the Africa group, which suggests that the definition be deleted altogether. “One of its primary missions,” proposed by the U.S. and the EU in A. 09, also would be acceptable, using wording similar to the Chafee Amendment. (However, as discussed below, the IPA’s “one of its primary activities” would be problematic.) We agree with the U.S. and the EU in A. 10 that “in accordance with national law” should be deleted; it implies that the authorized entities must receive governmental recognition.

**Paragraph 2.** The U.S. proposal in footnote 19 helpfully clarifies the purpose of the rules and procedures maintained by the authorized entity. The U.S. proposal on this issue is simpler than the EU’s proposal in A. 12. At the same time, India’s suggestion in footnote 18 that the paragraph be omitted is worthy of consideration. The requirement that authorized entities maintain rules and procedures for determining the eligibility of beneficiary persons could be misconstrued to suggest that the authorized entities may need to do their own testing rather than accept the certification of a qualified healthcare professional or a government agency. Comment A. 13, by Morocco and Senegal, reflects this understanding that the authorized entities may have to make their own certification of eligibility.

**Paragraph 3.** The third paragraph referring to the trust of both beneficiary persons and copyright holders is unnecessary and may lead to confusion. The paragraph states clearly that in order to obtain this trust, the authorized entities do not need the prior permission

of the rights holders or the beneficiaries. But then, as Japan asks in A. 08, how is the trust obtained? India in A. 17 fears the possibility that the paragraph “might lead to a licensing system.” Pakistan in A. 17*bis* believes that the paragraph would lead to “cumbersome and complex” authorization, security, and reporting standards that would “defeat the purpose of flexibility.” Indeed, Jamaica in A. 20 appears to request precisely such reporting standards. The Chafee amendment, however, says nothing about trust or security and reporting standards. Accordingly, the third paragraph should be removed.

If the paragraph stays in, Ecuador’s suggestion in A. 15 to remove the word “prior” would be helpful to eliminate the implication that an authorized entity may be required to obtain permission or pay license fees after the fact. We object to the EU’s proposal in A. 16 to add the sentence that “Member States/Contracting parties should encourage rightsholders and beneficiary persons to cooperate and participate in authorized entities.” This could be read to suggest that rightsholders should participate in the management of authorized entities. Authorized entities must be completely independent of the rightsholders; their objective is to serve the print disabled, not the rightsholders.

**Paragraph 4.** The meaning of this paragraph is unclear. It could be intended to state that if an authorized entity is part of a nationwide network, then the limitations addressed by the instrument should be available to other entities within the network only if they too are authorized entities. Such a provision would be acceptable, although the language should be amended to make this meaning clear.

Alternatively, it could be intended to state that if an authorized entity is part of a network, the authorized entity cannot enjoy the limitations in the instrument unless all the other entities in the network also are authorized entities. This would be completely unacceptable to LCA because it would unduly restrict the ability of authorized entities to provide services to the print disabled.

Yet another possibility is the formulation proposed by the EU in A. 19. This language in essence states the obvious point that entities that have the characteristics of authorized entities are, in fact, authorized entities.

In short, paragraph 4 at a minimum must be clarified, and perhaps deleted.

## **II. Comments on Proposed IPA Amendments**

These amendments depart in many respects from the provisions of the Chafee amendment, and thus would require changes to U.S. law in order to be implemented.

Because the U.S. is unlikely to amend the Chafee amendment, the IPA amendments, if adopted, would provide the U.S. with two bad choices. First, the U.S. would not sign the instrument, thereby abandoning international leadership on this issue and signaling to the world that the anxieties of the publishers about potential infringement are more important than addressing the realities of the serious problems caused to people with print disabilities by not being able to obtain access to the information necessary to participate

fully in economic and cultural life in the 21st century. Second, the U.S. would sign the instrument, but then would not comply with its provisions. This would undermine the credibility of the U.S. in this area, as well as the credibility of the instrument.

Putting aside the issue of consistency with Chafee, the IPA amendments place serious constraints on "authorized entities." Because the instrument works through the activities of authorized entities, the constraints on authorized entities would have the effect undermining the effectiveness of the instrument in bringing about meaningful change in the lives of people with print disabilities.

Turning to the specific IPA amendments, we offer the following comments:

**1. "One of its primary activities."** This phrase is more restrictive than the Chafee amendment's wording, "has a primary mission." "Primary activities" implies a specific, current, high level of ongoing service to the print disabled, while "a primary mission" implies a more general objective of providing service.

**2. "An authorised entity maintains compliance policies and procedures regarding access and IT security that follow internationally recognized standards."** This language has no parallel in the Chafee amendment. Moreover, it is unclear what standards are contemplated. And it is unclear if authorised entities can provide service in the absence of such standards.

U.S. libraries have developed and currently comply with appropriate policies and practices regarding access and IT security. Having to meet new undefined international standards while libraries are trying to provide needed information to users could lead to an inability to serve as many patrons due to new costs and burdens stemming from these new requirements. Reductions of service obviously are not in the best interests of U.S. users and not the intent of U.S. law.

**3. "It records appropriate usage information and provides this to rightsholders in a transparent and timely manner."** This language has no parallel in Chafee. It also is completely unacceptable to the U.S. library community. U.S. libraries, by professional ethics and by state law, must zealously protect the privacy of users. For this reason, libraries retain little information concerning "appropriate usage information." And they certainly do not provide the information they do retain to any third parties in the absence of appropriate legal process.

U.S. libraries are also deeply committed to equal treatment of all users, again by ethics and by law. Users with print disabilities should not be discriminated against by having their privacy compromised through a requirement that libraries maintain a separate system for tracking their usage.

Additionally, the record-keeping required by this provision would impose additional costs on libraries, which in turn would require a reduction of service to users.

**4. “It is understood that such trust can be assumed in the following cases:**

- 1. a designated government approved public service agency that is subject to public audit.**
- 2. an entity subject to a certification and oversight mechanism that involves representatives of all stakeholders, or**
- 3. an entity whose operations are based on agreements between national rightsholders and stakeholder organisations.”**

These conditions of trust have no parallel in the Chafee amendment. It is unclear what is the consequence of the conditions not being met – that the entity is no longer able to make available copies in accessible formats? Furthermore, with government-approved agencies, the contemplated “public audit” could lead to costly and disruptive rights holder intrusion into the internal workings of public service agencies. For other entities, rights holders would have veto power through the “certification and oversight mechanism.” Rights holders currently have no say in library oversight and certification. A change of this sort is completely unacceptable to LCA.

**5. “Unless such accessible format copies can be obtained through commercial offerings or licences.”** This language has no parallel in the Chafee amendment. This condition would completely eviscerate the utility of the instrument. An authorized entity would have to request a license before making available an accessible format copy, and this could lead to a protected negotiation. If acceptable terms could not be reached, the authorized entity would not have any certainty concerning whether it could make available accessible format copies without facing copyright infringement liability. Moreover, the delay caused by seeking permission would be particularly burdensome in the educational context. If a student is required to read a chapter of a book in the first week of class, she can’t wait several weeks for her authorized entity to obtain permission to make an accessible copy.

February 8, 2012