

Standing Committee on Copyright and Related Rights

Twenty-Second Session
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Draft WIPO Treaty on Exceptions and Limitations for the Persons with
Disabilities, Educational and Research Institutions, Libraries and Archives

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 all persons 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;

Determined to contribute to the implementation of the relevant recommendations of the Development Agenda of the World Intellectual Property Organization;

Mindful of the challenges to human development and the fulfillment of persons with disabilities with regard to education, research, access to information and communication;

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;

Recognizing the urgent need to broaden the scope of copyright exceptions and limitations for persons with disabilities, libraries, archives, education, teaching 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, teaching and access to information;

Aware that the territorial nature of copyright and related laws can be an obstacle to cross-border exploitation of works, performances, or production and therefore inhibit the normal access, particularly through new technologies, by persons with disabilities, to education, culture, information and knowledge

Recognizing that copyright laws must strike a balance between the interests of the public and the interests of authors and other right-holders to fulfill the fundamental purpose of encouraging learning and the dissemination of knowledge;

Recognizing the need for a global approach to copyright exceptions and limitations and a minimum level of international harmonization of limitations and exceptions to secure the effective and unhindered flow of information essential for global equality of access to research, ideas and innovation;

Noting that access to knowledge in copyright works is integral to the goals of copyright system;

Recalling that the Berne Convention provides for the conclusion of special agreements governing such access that do not contravene its provisions;

Noting that consistent with the Berne Convention, States have in their national legislation provided for limitations of or exceptions to the rights of authors of literary and artistic works in special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the work;

Recognizing that inadequate utilization of or lacks of harmonization of the exceptions and limitations adopted in domestic laws have created undesired obstacles to access to knowledge;

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, educational and research institutions, libraries, and archives centers.

Article 1: Definitions

For the purposes of this Treaty:

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

“**Archives**” means 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.

“**Database**” means a collection of independent works, data or other materials, arranged in a systematic or methodical way and individually accessible by electronic or other means, which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation, without prejudice to any rights subsisting in those contents themselves.

“**Disability**” means visual impairment, or other physical, mental, sensory, or cognitive incapacity, that requires an accessible format of a work.

“**Exclusive rights**” mean the exclusive rights of authorization granted to the author in terms of the Berne Convention and the WCT.

“**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.

“**Work**” means any literary and artistic protected by copyright, and includes any literary and artistic work in which copyright protection has expired.

Article 2: Relations with other international instruments

1. Nothing in this Treaty shall derogate from the obligations that contracting parties have to each other over the following:
 - (a) the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention).
 - (b) the WIPO Copyright Treaty, 1996 (WCT);
 - (c) the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, done at Rome, October 26, 1961 (Rome Convention);
 - (d) the WIPO Performances and Phonograms Treaty, 1996 (WPPT); and
 - (e) the Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994 (TRIPS Agreement);
2. Contracting Parties agree that, to the extent that this Treaty applies in part to literary and artistic works as defined in the Berne Convention, this treaty 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 3: Beneficiaries

1. Contracting Parties shall provide the exceptions and limitations guaranteed in this Treaty for the benefit of persons with disabilities, educational and research institutions as well as libraries and archives, in this Article referred to as Beneficiaries.
2. 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 4: Nature and scope of obligations

1. Contracting parties shall adopt appropriate measures to implement the provisions of the Treaty.
2. Contracting Parties shall 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.
3. Contracting Parties shall ensure that implementation of this Treaty allows for the timely and effective exercise of actions covered, including expeditious procedures that are fair and equitable.

Limitations and exceptions for persons with disabilities

Article 5: Limitations and exceptions to exclusive rights

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 persons with disabilities 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:

- (a) the person or organization wishing to undertake any activity under this provision has lawful access to that work or a copy of that work;
- (b) 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 persons with disabilities;
- (c) copies of the work are supplied exclusively to be used by persons with disabilities;
- (d) the activity is undertaken on a non-profit basis; and
- (e) the owner of the right is recognized as such.

Article 6: Personal use by persons with disabilities

A person with a disability to whom a work is communicated by wire or wireless means as a result of activity under Article 5 of this Treaty 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.

Article 7: Application to profit entities

The rights under Article 5 of this Treaty 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:

- (a) 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;
- (b) the activity is undertaken by a for-profit entity on a non-profit basis, only to extend access to works to persons with disabilities; or
- (c) 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 persons with disabilities, 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.

Article 8: Criteria for determining reasonable availability

In determining whether a work is reasonably available under Article 7 (c) of this Treaty, the following criteria shall be considered:

- (a) 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
- (b) for developing countries, the work must be accessible and available at prices that are affordable, taking into account disparities in income levels for persons with disabilities.

Article 9: Remuneration for commercial exploitation of works

1. When implementing Article 7(c) of this Treaty, 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 7(c) of this Treaty, the following principles shall be observed;
2. 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;
3. 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;
4. It shall be a matter of national law to determine if remuneration under (a) is waived for the works covered by the exception;
5. 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.

Exceptions and limitations for libraries and archives

Article 10: Purchase of works

It shall be permissible for libraries and archives to purchase and import legally published works to be incorporated into their collections in cases where a Contracting Party does not provide for international exhaustion of the importation right after the first sale, or other transfer of ownership of a work.

Article 11: Supply of works

It shall be permissible for a library or archive to supply a copy of any work, or of material protected by related rights, lawfully acquired or accessed by the library or archive, to another library or archive for subsequent supply to any of its users, by any means, including digital transmission, provided that such use is compatible with fair practice as determined in national law.

Article 12: Cross-border uses of works and materials reproduced under an exception or limitation

It shall be permissible for libraries and archives located in the territory of a Contracting Party to send, receive or to exchange a copy of work, or material protected by related rights, legally made in the territory of another Contracting Party including copies of works and materials protected by related rights made in accordance with this Treaty.

Article 13: Use of works for personal or private purposes

1. It shall be permissible for libraries and archives to reproduce, and to communicate to the public and make available by any means, including digital transmission, a work, and material protected by related rights, lawfully acquired or accessed by the library or archive, for the personal or private use of the user, provided that such use is compatible with fair practice as determined in national law.
2. It shall be permissible for library and archive users to reproduce a work, and material protected by related rights, lawfully acquired or accessed by the library or archive, for personal or private use, and to retain the copies, provided that such use is compatible with fair practice as determined in national law.

Article 14: Preservation of library and archival materials

1. 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;
2. The copies of the work referred to in paragraph (a) shall be used solely to meet the needs of teaching, research, and preservation of cultural heritage;
3. 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.

Article 15: Educational and research institutions

1. Educational and research institutions shall be permitted, without the authorization of the right holder and without financial compensation, to make copies of published and unpublished works made legally accessible to the public, regardless of their format, for purposes of education and research.
2. Copies of the work referred to in paragraph (a) shall be for non-profit use or justified by purpose, and shall not unreasonably prejudice the legitimate interests of the right holder.

3. This authorization permitted in paragraph (a) shall include teaching, research and distance learning.

Common Provisions

Article 16: Computer programs

Contracting Parties shall provide for exceptions and limitations relating to computer programs to allow interoperability and backup.

Article 17: Limitations and Exceptions to Related Rights

Limitations and Exceptions covered by the provisions of this Treaty shall apply mutatis mutandis to related rights.

Article 18: 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 19: Relationship with contracts

Any contractual provisions which provide exemptions from the application of the limitations and exceptions listed in Article 2 shall be null and void.

Article 20: Imports and exports of works

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

- (a) 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 the provisions of this Treaty and
- (b) 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 this Treaty into another country.

Article 21: Orphaned works

1. It shall be permitted for the beneficiaries provided for in Article 2 of this Treaty to reproduce and use a work, and materials protected by related rights, for which the author or rights holder cannot be identified or located after reasonable inquiry.
2. It shall be a matter for national law to determine whether certain commercial use of a work, and materials protected by related rights, for which the author or rights holder cannot be identified or located after reasonable inquiry would require payment of remuneration.

Article 22: Conference of the Parties

1. 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.
2. 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.
3. The Conference of Parties shall adopt its own rules of procedure.
4. The functions of the Conference of Parties shall be, inter alia:
 - (a) to consider possible measures to enhance the implementation or modify the provisions of this Treaty, including the development of optional protocols; and
 - (b) 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:

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

Final provisions

Article 24: Becoming Party to the Treaty

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

Article 25: 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 26: 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 27: 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 28: 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 29: Notifications

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

- (a) signatures under Article 29;
- (b) deposits of instruments of ratification or accession under Article 25;
- (c) the date of entry into force of this Treaty;
- (d) any denunciations received under Article 28.

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