



Canadian Association of
Research Libraries

Association des bibliothèques
de recherche du Canada

June 5, 2013

Shelley Rowe
Senior Project Leader
Industry Canada
Strategy and Planning Directorate
235 Queen Street
Ottawa, Ontario K1A 0H5

Eugene Filipovich
Senior Policy Analyst
Canadian Heritage
International Negotiations
25 Eddy Street
Gatineau, Quebec K1A 0M5

By E-mail: shelley.rowe@ic.gc.ca, eugene.filipovich@pch.gc.ca

Dear Ms. Rowe and Mr. Filipovich:

Subject: CARL comments on the draft text of a Treaty to facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities

On behalf of the Canadian Association of Research Libraries (CARL), which includes as members the 29 larger Canadian university libraries, I would like to thank the Government of Canada for inviting comments from stakeholders on the *Draft Text of an International Instrument/Treaty on Limitations and Exceptions for Visually Impaired Persons/Persons with Print Disabilities*.

CARL urges the Government of Canada to be explicit in its support for this international agreement, the adoption of which would not require amendments to Canada's *Copyright Act* and would result in a vast improvement in access by persons with disabilities both in Canada and in other countries to accessible format copies of works under copyright reasonably without harm to the interests of copyright rights holders.

CARL further urges the Government of Canada to explicitly favour and promote the use of the more imperative "shall" rather than the simply advisory "should" in the numerous places where the choice between these words is still open for discussion. The purpose of the treaty is not just to set out a standard for national laws, but rather to constrain signatory countries to improve the lives of citizens with disabilities by ensuring them greater access to works through changes, when necessary, to their copyright laws. Given the difficulty in changing copyright law in most countries, especially in ways that favour the users of works under copyright, realistically little change will occur if such change is optional. Having stated our strong preference for an imperative ("shall") agreement, CARL would also assert that an advisory ("should") agreement is better than no agreement at all inasmuch as at least this can stand as a statement of international principle.

In the notes below, we offer comments on many of the clauses in the draft text; clauses about which we have made no comment are ones that cause us no particular concern at this time. In the comments that we have provided, the term “persons with disabilities” (or similar) is used as shorthand for the definition of beneficiary persons as defined in the draft treaty text (although we have suggested one small change to that definition).

I should note that this is the first time that CARL has commented in detail on the draft text of the treaty. We understand that some of our comments may be offered too late in the process to affect it. Where the Government of Canada might be influenced by our comments and might be able in turn to influence the treaty negotiations, we will be pleased; where our comments cannot influence outcomes, we submit them anyway “for the record.” In all cases, we thank the Government of Canada for its consideration of our comments.

Yours truly,



Brent Roe
Executive Director, CARL
613-482-9344 x101; brent.roe@carl-abrc.ca

CARL Comments on the *Draft Text of an International Instrument/Treaty on Limitations and Exceptions for Visually Impaired Persons/Persons with Print Disabilities*:

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**(Third)
Emphasizing the importance of copyright protection...**

We would note that, while it is true that creators (appropriately) benefit from copyright protection and that there are creators with disabilities who also benefit, it should be observed that it is much more frequently the case that persons with disabilities find that copyright protections severely limit their access to works that those without disabilities can easily read. In the present context, we offer the observation that it seems unbecoming that the text state that copyright protections are also for the benefit for persons with disabilities.

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“reasonable price for developing countries”

The definition implies that the pricing of accessible format copies can be controlled. If, then, the cost of a copy can be set to a level that is “affordable,” it can surely also, in theory, be set to a level that is at a “similar or lower price” than the price that persons without disabilities would have to paid to obtain the same work in that country, as in the definition of “reasonable price for developed countries.”

Since the point of the treaty is to ensure that persons with disabilities have similar access to works as do persons without disabilities, both logic and justice suggest that the “reasonable price” be stated as a price that is “similar or lower” than the price paid for the regular format of the work purchasable by persons without disabilities in the same country. We recommend, then, that while the “reasonable price” in developing countries (as in all countries) should be “affordable,” the *maximum* “reasonable price” should be one that is similar to the price paid in the country for the regular format of a work.

Alternative B.2

If it is necessary to use the alternative definitions of “reasonable price for developing countries,” we prefer Alternative B.2, which makes reference to the income disparities of persons with disabilities, which will be an especially regular phenomenon in developing countries that lack the social safety net that provides support for persons with disabilities in developed countries.

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“authorized entity”

We recommend that libraries, whether public, academic, school or, as appropriate, special libraries, be considered included in any list of “authorized entities” as libraries around the world have a natural role in the provision of access to works of all kinds and formats and often already maintain collections and services that serve persons with disabilities.

iii) to discourage the reproduction...

We recommend that the discouraging measures to be taken be required only to a *reasonable* degree. For example, recourse to technological protection measures, which may be difficult to deal with by persons or “authorized entities” especially in developing countries, should not be required.

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(b) has a visual impairment...

It should be recognized that reading disabilities do not necessarily include a problem with “visual function,” as seems to be implied as necessary to this definition. A person with a dyslexia may have perfectly fine visual function, but not be able to read a text without the aid of software and equipment that reads out in sound and image (e.g., the highlighting of words on a screen as they are being read) a text in a digital file format that can be read by the appropriate software and equipment. We recommend that the word “visual” be removed from the phrase “visual function” in this definition.

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1. (A) A Member State/Contracting Party should/shall provide...

We urge the Government of Canada to explicitly favour and promote the use of the more imperative “shall” rather than the simply advisory “should.”

1. (B) Member States/Contracting Parties may also provide and exception...

We recommend that this clause apply to the ability to provide for persons with perceptual disabilities, in this case deaf persons, sign language translation as well as subtitling and closed-captioning of live performances, film showings and broadcasts.

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5. It shall be a matter for national law to determine...

Whether or not the envisioned exceptions or limitations are subject to remuneration, we would prefer that it be made explicit that the eventual cost to a person with a disability for access to (and ownership of, if applicable) an accessible format copy of a work should not be greater than what a person without a disability would need to pay for a copy in the regular format in a given country.

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1. A Member State/Contracting Party should/shall provide that...

We urge the Government of Canada to explicitly favour and promote the use of the more imperative “shall” rather than the simply advisory “should.”

2. A Member State/Contracting Party may fulfill Article D(1)...

We would assert that option “(A)” must be in the treaty and we would strongly encourage the Government of Canada to favour and promote the inclusion also of option “(B).” We believe that it should be possible for a person with a disability to obtain for himself or herself (perhaps most often with the help of a family member or friend) an accessible format copy by requesting it directly from an organization in another country. We favour this as an option because while many persons with disabilities in the world may have access to the services of an “authorized entity” within their own country through which to arrange access to an accessible format copy, many others may not, but may have the ability, through the Internet, to locate and have sent directly to themselves an accessible format copy from a source in another country.

3. Alternative A: [The Member State/Contracting Party may limit...

The wording of this clause is obscure. If the meaning is that a Member State may limit the exportation of an accessible format copy if such is reasonably available in the country of importation, this seems an acceptable provision. That said, we greatly prefer Alternative (C), together, ideally, with the “Proposed Agreed Statement” text in footnote 11. This combination of texts appropriately recognizes both (a) the duty of a signatory state to limit exportation of accessible format works to countries where they are already available on reasonable terms to persons with disabilities and (b) the need for an “authorized entity” to work quickly and without having to perform difficult research (which would strain the resources of most such entities, which are often charities with very limited budgets and human resources) in order to provide an accessible format copy of a work to an “authorized entity” or a person with a disability in a country of importation.

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ARTICLE E IMPORTATION OF ACCESSIBLE FORMAT COPIES

We urge the Government of Canada to explicitly favour and promote the use of the more imperative “shall” rather than the simply advisory “should.”

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ARTICLE F OBLIGATIONS CONCERNING TECHNOLOGICAL MEASURES

We would recommend that the Government of Canada favour and promote Alternative B because this seems to be stronger language providing for the ability of persons with disabilities to benefit from the rights given under the other terms of the treaty in the presence of a technological protection measure that would otherwise be preventing access to work for the purpose of making an accessible format copy. We urge, moreover, the Government of Canada to explicitly favour and promote the use of the more imperative “shall” rather than the simply advisory “should” in this text.

If only Alternative A can be achieved as final treaty text, we urge the Government of Canada to explicitly favour and promote the use of the more imperative “shall” rather than the simply advisory “should” in clause 1 and to favour and promote the substitution of “should” for the “may” that is currently in the text of clause 2.

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**ARTICLE H
RESPECT FOR PRIVACY**

We urge the Government of Canada to explicitly favour and promote the use of the more imperative “shall” rather than the simply advisory “should.”

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**ARTICLE J
COOPERATION TO FACILITATE CROSS-BORDER EXCHANGE**

To the extent that the clauses of this Article may be especially tentative, we would recommend that the Government of Canada favour and promote their inclusion in the final treaty text.

ANNEX (*unmarked page 1 of the Annex; page 20 of the document*)

Note on Article D: Proposed Text for Discussion

We would urge the Government of Canada to consider very carefully the actual consequences for persons with disabilities, especially in developing countries, of the inclusion of any of the proposed texts referring to the “three-step test.” We suggest that the other provisions of the draft treaty sufficiently protect the rights and markets of the copyright rights holders, yet also provide for the needs of persons with disabilities without undue legal uncertainty for them or “authorized entities” working to assist them. If it proves diplomatically necessary to include such clauses, we recommend that the “Agreed Statement to B” be included.

Annex, page 2 (*page 21 of the document*)

C (Replacement for D (1))

We urge the Government of Canada to resist the inclusion of this clause in the final treaty text as it places too much of an onus of responsibility on the Member State (and likely its “authorized entity”) of exportation to ensure not only that an accessible format copy of a work is not already reasonably available on the market in the country of importation (should checking this be necessary), but also that more vague conditions are met around “legitimate interests of the author” and such. Again, given that the work of creating and providing accessible format copies is the work most often of budget- and staff-challenged charitable organizations, this would be a problematic clause.

Note on Article F: Proposed addition from the US...

We urge the Government of Canada to resist the inclusion in the final treaty text of this clause because it raises the threshold of acceptable circumvention of a technological protection measure too high to be effected by “authorized entities” without considerable risk of liability. Inclusion of this clause would likely result in very few organizations taking on the legal risk of circumventing a technological protection measure to create an accessible format copy of a work for a person with a disability, with the result that the original purpose of the treaty is partially thwarted. Again, very few organizations that serve persons with disabilities can afford the research and legal advice that inclusion of this clause would cause to require.

[End of comments]