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Delegations will find attached the partially declassified version of the above-mentioned document.

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EUROPEAN COMMISSION

Brussels, 8.6.2012
COM(2012) 283 final

Recommendation for a

COUNCIL DECISION

**authorising the Commission to negotiate an international agreement within the World
Intellectual Property Organisation on improved access to books for print impaired
persons**

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on 28 OCT 2015

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EXPLANATORY MEMORANDUM

1. Introduction

Full and equal access to printed material is of crucial importance for persons who are blind, have low vision, or have other disabilities affecting their capability to read text, in order to ensure their effective participation in society on an equal basis with others. It is necessary for their education, their integration into the labour market and their participation in cultural life. The development of the creative, artistic and intellectual potential of visually impaired persons is an important goal which must be pursued in the interest of the enrichment of society as a whole.

According to the World Health Organisation (WHO), 285 million people worldwide are visually impaired: 39 million are blind and 246 million have low vision. About 90% of the world's visually impaired live in developing countries. According to the World Blind Union (WBU) only 5% of published books are currently available in accessible formats for visually impaired and print-disabled persons in Europe. Moreover, according to the WBU, in the rest of the world, and most notably in the developing countries, only 1% of reading material is available to visually disabled persons.

Nowadays most books accessible to persons with print disabilities are made by specialist agencies, often libraries for the blind, at a national level. Their financial resources are constrained, even in developed countries. The lack of an international legal framework allowing for the exchange of accessible formats means that there is often duplication of work in producing such formats, even among countries which share the same language. This is why action at international level is needed to establish a legal framework to enable books protected by copyright in accessible formats to be shared worldwide, while ensuring a balanced approach that takes the interests of rightholders into account.

Improved access should not have a negative impact on the level of protection granted to rightholders: the importance of copyright protection as an incentive for literary and artistic creation must be maintained for the benefit of all and limitations to such a protection must be confined to special cases and circumscribed to what is required to attain their purpose. The current situation as regards access to books in special formats – a situation that could be seen as market failure – is one such case.

Action at an international level should lead to an improvement in the cross-border access to physical copies of books in accessible formats, such as large print, audio or braille, for the benefit of print impaired persons all over the world, and more particularly in developing countries. At the same time, it is widely recognised that access to books in physical format will become less important in light of developments in technology. It is therefore equally important to allow for the cross-border circulation of digital copies, when this is necessary for print impaired people to have access to accessible formats, while ensuring that this is done in a secure environment to avoid prejudice to the interests of rightholders including the development and viability of new electronic formats.

Action at international level could take the form of a non-binding (e.g. a recommendation) or a binding instrument (e.g. a treaty). Consensus on a non-binding instrument would be easier to achieve but there is a legitimate concern that, in a number of countries, it would not result in the changes necessary to facilitate access by the print impaired persons to books in special

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formats. A binding instrument would be more effective provided it achieves the appropriate balance to ensure that it is acceptable to all stakeholders and is ratified by a wide number of countries across the world. Even if it is acknowledged that the EU would be a net exporter of special format copies, its Member States could nevertheless benefit from wider availability of books in accessible formats, notably in English (exchanges with the United States of America, Canada, Australia), Spanish (exchanges with Latin America) and French (Africa, Canada). It would also improve access to books in accessible formats for language minorities in all Member States.

The EU is bound by the UN Convention on the Right of Persons with Disabilities (UNCRPD), which entered into force for the EU in January 2011. This UN Convention, as an international agreement concluded by the EU forms an integral part of the EU legal order. The Convention sets out a right of access to information (Article 21) and recognises the right of persons with disabilities to participate in the cultural life on an equal basis with others (Article 30). Article 30 provides that State Parties shall take appropriate measures to ensure, inter alia, that persons with disabilities enjoy access to cultural materials in accessible formats. The obligations under the UN Convention on the Right of Persons with Disabilities shall be also taken into account when negotiating an international agreement.

In the context of the Digital Agenda for Europe, the EU facilitated signature of a Memorandum of Understanding on access to works by people with print disabilities and sponsors the follow up process which aims to establish the European Trusted Intermediaries Network (ETIN).

2. Preparatory work in WIPO

Discussions on a possible international instrument improving access to books for the benefit of persons with print disabilities have been ongoing in the World Intellectual Property Organisation (WIPO) for several years. A series of proposals ranging from non-binding instruments to proposals for an international treaty have been tabled by several delegations in the framework of WIPO Standing Committee on Copyright and Related Rights (SCCR) since 2009.¹ The European Union tabled a Draft Joint Recommendation concerning improved access to works in June 2010.² At the November 2010 SCCR, it was agreed that WIPO would work towards an appropriate international legal instrument or instruments (whether model law, joint recommendation, treaty and/or other forms), taking into account the proposals already tabled and any additional submissions.

In 2011, work continued at the 22nd and 23rd SCCR meetings. Following informal consultations to explore points of commonality and possible convergence among the different proposals, the Chair of the SCCR tabled a text for an international instrument on limitations and exceptions for persons with print disabilities at the 22nd session of the SCCR.³ On the

¹ See document SCCR/18/5 in May 2009 by Brazil, Ecuador and Paraguay (http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=133353); document SCCR/20/10 of June 2010 by the United States of America (http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=133815); document SCCR/20/11 of the African Group (www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_11.doc)

² Draft Joint Recommendation concerning the improved access to works protected by copyright for persons with a print disability (document SCCR/20/12: www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_12.doc).

³ Document SCCR/22/16

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basis of this proposal, taking into account the various comments made and text-based options presented, the SCCR at its 23rd session adopted a “*Working document on an international instrument on limitations and exceptions [to copyright] for visually impaired persons/persons with print disabilities*” (the “working document”).⁴ The European Union participated in the elaboration of this document, alongside Brazil, Mexico and the United States of America.

The working document will constitute the basis for the future text-based work to be undertaken by the Committee in its 24th session to be held on 16 to 25 July 2012, with the aim of agreeing and finalising a proposal on an international instrument on limitations and exceptions for visually impaired persons/persons with print disabilities.

While the working document represents a degree of progress, it still needs substantial improvement. The legal character of the document is still to be determined and will be decided during the course of negotiations. If sufficient progress is made at the 24th session of the SCCR, the 2012 WIPO General Assemblies will discuss in September this year the possibility to convene a Diplomatic Conference in 2013.

3. Participation by the European Union in the negotiations and in a possible future international agreement

The Commission considers that the time has come to seek a Council authorisation to negotiate, on behalf of the European Union, an international agreement ensuring improved access to books for print impaired persons. Active and formal involvement of the European Union in the negotiations is important to finding a solution that establishes the right balance between all stakeholders and which constitutes an effective instrument in practice.

In light of the discussions to date, the main issues likely to be covered by future negotiations are the introduction of an exception to copyright to be incorporated into the national laws of WIPO Member States to facilitate the creation of books in accessible formats and the subsequent cross-border exchange of the format copies made under the exception (via specific provisions dealing with the export and import of special formats). Specific rules on the legal protection of technological measures used to protect the works and on the relationship with contracts may also be included.

The limitation to copyright will normally affect right of reproduction, right of distribution and right of communication to the public including the right of making available of authors.

These rights have been harmonised, at EU level, by Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society⁵ (see in particular: right of reproduction in Article 2, distribution right in Article 4 and right of communication to the public including the right of making available to the public in Article 3). The only limitations to those rights are set out in Article 5 (2) and (3). As stated in recital 32 these limitations are exhaustive and Member States cannot introduce different or further exceptions to the exclusive rights in their national law. In addition, the exceptions should be exercised in accordance with Article 5(5) (“three step test”) as confirmed by recital 44. Article 5(3) b) of the Directive has introduced an exception or limitation to the reproduction and communication to the public, including the making available rights in case of uses, for the benefit of people with a disability, which are

⁴ Document SCCR/23/7
⁵ OJ L 167, 22.06.2001, p. 10-19.

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directly related to the disability and are of non-commercial nature, to the extent required by the specific disability. Where Member States provide an exception to the right of reproduction, Article 5 (4) also allows them to provide for a similar exception to the right of distribution. Article 6 provides comprehensive legal protection for technological measures where used by rightholders. Article 6 (4) also provides a mechanism whereby Member States must ensure that beneficiaries of certain exceptions benefit from those exceptions where technological protection measures are in place, in the absence of voluntary agreements.

It shall be then concluded that, by virtue of Directive 2001/29/EC, the scope of a possible future international agreement would come within the scope of application of EU law and in any event within an area which is already largely covered by EU rules.⁶ Therefore the Union shall have exclusive competence for the conclusion of this instrument, under Article 3(2) of the TFEU, according to which "the Union has exclusive competence for the conclusion of an international agreement (...) insofar as its conclusion may affect common rules or alter their scope".

It is therefore appropriate that the Union should be able to be a party to the instrument and that the Commission should conduct negotiations on this instrument in the framework of WIPO, in consultation with the special committee appointed by the Council to assist it.

⁶ See inter alia ECJ, Opinion 2/91, paragraph 25

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THE COMMISSION THEREFORE RECOMMENDS TO THE COUNCIL TO:

- adopt the attached Decision, including the Annex with the negotiating directives, authorising the Commission to open and conduct negotiations on behalf of the European Union on an international agreement in the context of the World Intellectual Property Organisation to improve access to books for print impaired persons; and
- designate the Working Party [...] as a special committee to assist it in this task;

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COUNCIL DECISION

authorising the Commission to negotiate an international agreement within the World Intellectual Property Organisation on improved access to books for print impaired persons

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 218(2), (3) and (4) thereof,

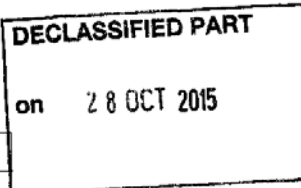
Having regard to the recommendation from the European Commission,

Whereas:

- (1) At present only a limited number of published books are available in accessible formats for visually impaired and print-disabled persons throughout the world.
- (2) There is therefore a need to ensure improved access to books for persons with print disabilities at an international level in order to allow for their full and equal participation in society.
- (3) It is equally important to keep a high level of copyright protection to maintain and foster substantial investment in creativity and innovation as well as literary and artistic creation.
- (4) The UN Convention on the Rights of Persons with Disabilities has entered into force for the EU on 22 January 2011 and it contains clear obligations related to the right of persons with disabilities to access information (Article 21 and 30).
- (5) Discussions on an international instrument ensuring improved access to books for visually impaired persons have been on-going in the World Intellectual Property Organisation (WIPO) for several years.
- (6) The twenty-third session of the WIPO Standing Committee on Copyright and Related Rights held on 21 November to 2 December 2011 decided that a "*working document on an international instrument on limitations and exceptions [to copyright] for visually impaired persons/persons with print disabilities*" would constitute the basis for the future text-based work on the matter to be undertaken by the Committee in its 24th session (16 to 25 July 2012), with an "aim to agree and finalise a proposal on a international instrument on limitations and exceptions for visually impaired persons/persons with print disabilities".
- (7) The Union should participate in the WIPO negotiations with a view to negotiating and agreeing an international agreement on limitations and exceptions to copyright to the extent required to ensure better access to books by print impaired persons and should become a party to this instrument.

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HAS ADOPTED THIS DECISION:

Article 1

The Commission is hereby authorised to negotiate, on behalf of the European Union an international agreement in the context of the World Intellectual Property Organisation on improved access to books for print impaired persons, in consultation with the Intellectual Property Working Party (Copyright) (hereinafter referred to as the "special committee").

Article 2

The negotiations shall be conducted on the basis of the negotiating directives set out in the Annex to this Decision.

Article 3

This Decision is addressed to the Commission.

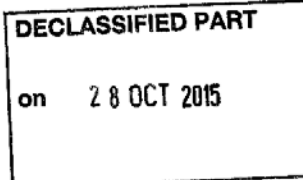
Done at Brussels,

*For the Council
The President*

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"ANNEX to COM(2012)283 final remains RESTREINT UE"
(not declassified)

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ANNEX

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