BACKGROUND PAPER AND
FREQUENTLY ASKED QUESTIONS (FAQS)

ON THE CONSENSUS INSTRUMENT PROPOSED BY THE UNITED STATES
FOR IMPORTATION AND EXPORTATION OF SPECIAL FORMAT COPIES
FOR PERSONS WITH PRINT DISABILITIES

SUBMITTED AS AN INFORMATION DOCUMENT

STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS

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Background and Frequently Asked Questions
on the consensus instrument proposed by the United States

On June 10, 2010, the United States formally submitted a proposed "Draft Consensus Instrument" (document SCCR/20/10), to the Standing Committee on Copyright and Related Rights for its consideration. We have prepared the following **Background** and **Responses to Frequently Asked Questions** to explain the scope and content of the proposed Consensus Instrument, which establishes principles for the importation and exportation of special format copies for the benefit of persons with print disabilities.

Background

The United States firmly believes that the Member States of the World Intellectual Property Organization must work toward an international consensus on basic, necessary limitations and exceptions in copyright law for persons with print disabilities. An effective copyright system fosters creativity, free expression, and economic engagement, by developing a body of works that are accessible to the public.

As our Delegation explained at the Nineteenth Meeting of the Standing Committee, the United States believes that there are two kinds of international legal norms that must be established to facilitate access to special format copies of published materials. One kind of international norm would establish the ***nature*** and ***scope*** of exceptions for the visually impaired in national laws; this is the substantive content of the national exceptions for the reproduction and distribution of special format copies to persons with print disabilities. The other kind of international norm would recognize the validity of (and need for) ***cross-border transfer*** of these special format copies, establishing principles for the importation and exportation of special format copies.

The proposed Consensus Instrument represents the <u>first</u> part of the commitment by the United States to address the needs of persons with print disabilities for proper exceptions in international copyright law. The United States offers this proposal to help establish clear, definite legal norms for ***the cross-border sharing*** of special format copies of published works.

The Consensus Instrument consists of two articles: one on importation and one on exportation. As to physical Braille copies, the instrument provides that if a country has a national exception for the reproduction and distribution of such copies, the country should allow them to be imported and exported freely. As to all other special format copies for the visually impaired, including audiobooks and other electronic formats, the instrument provides that, if a country has a national exception for the reproduction and distribution of such copies, the country should allow these copies to be imported from and exported to trusted intermediaries in other countries -- institutions dedicated to serving the needs of the visually-impaired. The consensus

instrument also provides a set of definitions to guide interpretation of the importation and exportation rules.

We have used the vehicle of a consensus instrument to enable the Standing Committee to promptly address the **content** of the needed international legal rule, without regard to its ultimate form. We observe that the language in the proposed consensus instrument can become a Joint Recommendation of the WIPO General Assemblies that can quickly and expeditiously establish the new legal norm. Joint Recommendations of the WIPO General Assemblies and the WIPO treaty-making process are not exclusive of one another; indeed, they have historically been complementary. Our goal in proposing the Consensus Instrument is to provide timely, meaningful, and definitive guidance to countries on the cross-border transfer of special format copies that can be ***both*** promptly implemented through a Joint Recommendation and incorporated into our continuing work of developing international norms.

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1. HOW DOES THE CONSENSUS INSTRUMENT COMPARE TO THE TREATY PROPOSAL SUBMITTED BY BRAZIL, ECUADOR, PARAGUAY, AND MEXICO?

The two instruments have similarities, but differ in scope, effect, and timing. It is important to understand all three areas of difference and similarity. We think it is also important to recognize the willingness of Brazil, Ecuador, and Paraguay in their statements at SCCR 19 and the May consultations to accept alternative language for many of the provisions in their treaty proposal

SCOPE. The treaty draft submitted by Brazil, Ecuador, and Paraguay – and now joined by Mexico -- [the "treaty draft"] covers both the substantive content of national exceptions and importation/exportation exceptions for the visually-impaired. The treaty draft also addresses a range of other issues – particularly articles on copyright law and contract law and on technological protection measures.

The consensus instrument only addresses importation/exportation exceptions for the visually-impaired. The consensus instrument proposes that Braille copies should be freely exported and imported, while other special format copies – copies that can also be used by sighted persons – should flow freely among "trusted intermediaries" – that is institutions, organizations, and government agencies that serve people with print disabilities. The consensus instrument does not propose an open-ended exception to copyright, but an exception that addresses how persons with print disabilities are actually provided with materials.

As to the substantive content of national exceptions, *we believe that the substantive content of national law exceptions and limitations for persons with print disabilities <u>needs</u> to be addressed, but we believe that project will take a little longer and should be the subject of a separate Joint Recommendation,* without foreclosing the possibility that both joint recommendations could be part of a longer term project to establish a treaty.

Both projects share the goal of establishing ***new legal norms in international copyright law on exceptions and limitations for the visually impaired.***

As explained below, we see neither the need to address the relationship between contract law and copyright nor the need to address technological protection measures in these new international norms.

EFFECT. There has been much commentary from proponents of a treaty that the US proposal would be "non-binding" and "voluntary" while the treaty would be binding and, somehow, ***involuntary.*** Just the opposite is true.

As the text of a Joint Recommendation, under international law the consensus instrument would constitute an authoritative interpretation of the Berne Convention, which is already <u>binding</u> on over 160 countries. It would constitute the proper interpretation of exceptions and limitations for the visually-impaired within the structure of the Berne Convention ***immediately.***

While the United States remains open to the idea of a treaty, a treaty is actually a completely ***voluntary*** instrument. Countries have no obligation to comply with a treaty until they sign and ratify it. Almost 15 years after its completion, the WIPO Copyright Treaty only has half the signatories of the Berne Convention. For half the members of the Berne Convention, the WCT is completely non-binding.

TIMING. There is a lot of commentary about how long a treaty takes to become effective – with some commentators in this discussion skewing the history of intellectual property treaties to make it seem that the process is much quicker than it actually is. We will discuss that more below. The bottom line, however, is simple: ***However quick or slow you think the process of writing, promulgating, and ratifying a treaty will be, passage of a WIPO Joint Recommendation – with immediate effect – is much quicker.*** That fact was widely accepted by the Standing Committee on Trademarks, which promulgated a number of Joint Recommendations in the 1990s, some in anticipation of the Singapore Treaty on the Law of Trademarks (2006).

ALTERNATIVE LANGUAGE. Remaining open-minded to the possibility of a treaty or protocol, the United States is appreciative of the comments made by Brazil, Ecuador, and Paraguay that they are completely open to alternative language. We see the process of crafting Joint Recommendations on the export/import issue, then the national exceptions, as a method of raising confidence about the proper scope of an eventual treaty.

2. HOW DOES THE CONSENSUS INSTRUMENT COMPARE TO THE PROPOSALS MADE IN THE 1980S FOR COPYRIGHT EXCEPTIONS FOR THE VISUALLY IMPAIRED?

In the 1980s, WIPO and UNESCO studied the problem of copyright exceptions for persons with disabilities. Even then, the WIPO and UNESCO experts understood that there was a difference between Braille copies and other special format copies – that can also be used by sighted persons.

The WIPO/UNESCO model provisions that were drafted in 1982 provided a general exception "to reproduce in Braille any published work or authorized translation there for the purpose of rendering the work accessible to visually-handicapped persons, provided there is no motive for commercial gain."

In contrast, for "reproduc[tion] in large print or by sound recording or by broadcast by means of a radio-reading service" the WIPO/UNESCO provisions required a "competent authority" to permit the "person or organization" to make the reproduction, all this conditional on there being "appropriate guarantees that the work will be used only for the needs of visually-handicapped persons."[1]

[1] Working Group on Access by the Visually and Auditory Handicapped to Material Reproducing Works Protected by Copyright [Paris, October 25 to 27, 1982], Annex 1, at 1. This working group was convened jointly by the Director-General of UNESCO and the Director-General of WIPO.

As technology changes, the same problem exists that was recognized in 1982: how to provide special format copies to persons with print disabilities while protecting the author's right to sell copies to the rest of the market. Our experience in the United States confirms the wisdom of the 1982 proposals; our authorized entities or "trusted intermediaries" *distribute hundreds of thousands of special format copies to persons with print disabilities,* and we are convinced this is the best way to meet the needs of the visually-impaired while protecting the integrity of the rest of the market for the copyrighted work.

As soon as mention is made of the work done in the 1980s, someone will say that the lack of action on the recommendations from the 1980s is proof that nothing but a treaty is adequate, but the 1982 proposal was for a model law while the consensus instrument would first be a Joint Recommendation, that is, *an authoritative interpretation of the Berne Convention (that already applies to 164 countries) as well as the WCT.*

3. WHY DOES THE CONSENSUS INSTRUMENT NOT ADDRESS THE CONTENT OF THE NATIONAL LAW EXCEPTIONS FOR PERSONS WITH PRINT DISABILITIES?

Again, we believe that this work should be done *next*, after promulgating a new international legal norm of copyright law on the export and import of special format copies.

Just as the 1980s WIPO/UNESCO working group recognized a distinction between Braille and other special format copies, they also recognized that some countries might want to address the needs of the visually-impaired with straightforward exceptions to copyright law and other countries might want to establish equitable remuneration or compulsory licensing systems. For this reason, the WIPO/UNESCCO group proposed **TWO sets** of exceptions: one set were "straight" exceptions and the other set were exceptions against "payment of remuneration."

Since that WIPO/UNESCO work, a number of countries have implemented complex exceptions for persons with print disabilities; others are just now developing such laws (India, Chile). As our colleagues from Canada have pointed out repeatedly, crafting international norms on what national exceptions should say will require language that recognizes different ways of addressing the problem.

This is a significant problem with the treaty draft. Its proponents argue that a treaty is needed because many countries lack the expertise or political willpower to draft their own exceptions for the visually-impaired. On this basis, they suggest that the treaty is needed because self-executing treaty provisions can give these countries domestic laws immediately.

The United States does not want to enter the discussion about whether other Member States lack the expertise or political willpower to write their own domestic laws, but *if the purpose of a treaty text is to provide self-executing provisions for domestic law,* then the

treaty text must be sufficiently detailed to work at the national law level. Article 4 of the treaty draft does not do this; much additional work will be needed. And, again, no worldwide implementation of these domestic national exceptions would take place until the treaty was ratified worldwide.

4. STILL, WHY THE EXPORT/IMPORT PROBLEM FIRST?

Because this is the part of the problem that can be fixed most quickly.

If the SCCR and the General Assemblies pass the consensus instrument as a Joint Recommendation, then the Member States can also direct the WIPO Secretariat to start immediately with seminars and symposia to promote the new legal norms. Countries and institutions with significant capacity to provide special format copies – such as ONCE in Spain – can be enlisted to adhere to the new international legal norm. All this can start years before any treaty could become effective, let alone be implemented throughout the world.

5. DOES THE CONSENSUS INSTRUMENT PROVIDE EXPORT AND IMPORT OF SPECIAL FORMAT COPIES ONLY WHEN BOTH COUNTRIES HAVE AN EXCEPTION IN THEIR NATIONAL LAW FOR THE VISUALLY IMPAIRED?

No, this is a key point. The consensus instrument provides that when country A has an exception for persons with print disabilities, the trusted intermediaries in country A can send special format copies to a trusted intermediary in country B *without regard to or need to analyze* country B's copyright law.

Consider the following example. Nigerian copyright law provides an exception for:

> reproduction of published works in Braille for exclusive use of the blind, and sound recordings made by institutions or other establishments approved by the Government for the promotion of the welfare of other disabled persons for the exclusive use of such blind or disabled persons.[2]

In contrast, South Africa does not have a copyright exception for the visually-impaired. Nonetheless, South Africa has an Institute for the Blind with a history going back to 1880. The institute runs its own pioneer school for the blind. Under the principle in the consensus instrument, Nigerian institutions approved by the government to serve persons with print disabilities should be able to send special format copies to the South African Institute for the Blind.[3]

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[2] Laws of the Federation of Nigeria, Chapter 68, Copyright Act, Second Schedule, provision "(s)."

[3] Of course, this raises the question whether the South African Institute can legally *receive* and *use* the special format copies. And we acknowledge that this is a legitimate issue. Even without an exception directed toward persons with print disabilities, the South African institute – once it has the special format copy – will likely be able to use the copy under any number of other exceptions. For example, South African copyright law provides a general

6. WHO DECIDES WHO ARE ELIGIBLE "PERSONS WITH PRINT DISABILITIES" UNDER THE CONSENSUS INSTRUMENT?

Under the consensus instrument, that remains a matter of national law and different countries will use different definitions, the consensus instrument provides only a rigorous set of criteria that should inform national laws. Differences in definitions will not stop the importation and exportation of the special format copies.

The development and further refinement of international standards on persons who should benefit from exceptions for the visually-impaired is desirable, but we can act *immediately* on the export/import problem, while leaving that task to the future.

7. WHO DECIDES WHO WILL BE "TRUSTED INTERMEDIARIES" UNDER THE CONSENSUS INSTRUMENT?

Under the consensus instrument, that remains a matter of national law and different countries will use different definitions. Again, the consensus instrument provides a set of criteria that should inform national laws, but differences in definitions will not stop the importation and exportation of the special format copies.

Despite claims to the contrary, the US consensus instrument does **not** rely on or require the criteria of trusted intermediaries from the WIPO Stakeholders' Platform. The development of a WIPO-based international registry of trusted intermediaries may be a desirable next step, but it is not embedded in the consensus instrument.

The development and further refinement of international standards on "trusted intermediaries" is desirable, but we can act *immediately* on the export/import problem, while leaving that task to the future.

8. WHY DOES THE CONSENSUS INSTRUMENT NOT ADDRESS THE RELATIONSHIP BETWEEN COPYRIGHT AND CONTRACT LAW AS THE TREATY DRAFT DOES?

There are several reasons.

First, the treaty draft itself only addresses the relationship between contract law and national law exceptions (treaty draft, Article 4), not the relationship between contract law and export/import principles (the subject of the consensus instrument).

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regulatory exception against the right of reproduction as long as it is "in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright." (Section13). South Africa Copyright Act, Act No. 98 of 1978, as amended by Copyright Amendment Act, No. 9 of 2002.

Second, in the United States, contract provisions are important and helpful for authorized entities who are serving persons with print disabilities.

Most importantly, there is no established record that contract law has created problems of access for the visually-impaired community. The Sullivan Report notes some problems with respect to licensing arrangements, but recognizes that "other case studies do show licensing arrangements with right holders which are, or look likely to be, more effective and which do or will complement exceptions in useful ways." SCCR/15/7, Executive Summary, at 10.

Of course, overreaching and unfair contract terms should be addressed, but most countries already have general legal doctrines under contract law to make unconscionable contracts unenforceable.

9. WHY DOES THE CONSENSUS INSTRUMENT NOT ADDRESS THE RELATIONSHIP BETWEEN DIGITAL RIGHTS MANAGEMENT (DRM) AND COPYRIGHT EXCEPTIONS AS THE TREATY DRAFT DOES?

As with contract provisions, in the United States, digital rights management (DRM) has proved important and helpful as our authorized entities distribute hundreds of thousands of special format copies to persons with print disabilities.[4]

Most importantly, there is no established record that DRM have created problems of access for the visually-impaired community in *any* countries. The Sullivan report expressly does not study the issue, acknowledges that DRM may be useful in meeting the needs of the visually-impaired, and even recognizes that, under appropriate circumstances, DRM may reasonably limit the access of visually impaired persons.[5]

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[4] The recent compendium prepared by the Secretariat, Examples of Practices and Other Measures for the Benefit of Persons with Print Disabilities, SCCR/20/5, May 17, 2010, confirms that many countries use digital rights management, including technological protection measures, to provide special format copies to persons with print disabilities.

[5] SCCR/15/7, Section 6.9, at pages 126-127:

> Of course some countries do provide legislative solutions to deal with the relationship between DRMs and exceptions such as those for the benefit of visually impaired people, but it is probably too early to tell how effective these might be. Designing a DRM to permit use under an exception for the benefit of visually impaired people might in some ways be easier than for some other exceptions as it must permit use of the whole work rather than just a certain proportion as under a fair use or fair dealing exception. There would still be a problem knowing whether the use is by or for a visually impaired person rather than someone else though. It may be that it is more realistic for a DRM to be made, however, that permits text to be read out by speech recognition software or converted to a refreshable Braille display, but not anything else. Whether this would provide sufficient accessibility for a visually impaired person is something that all stakeholders, including those developing technology, need to discuss. Where a work is only published in a digital form protected by DRM it may be reasonable to limit what a visually impaired person can do with that work just as DRM will limit what a person without any impairment can do. For example, perhaps there is no reason to permit a visually impaired person to have access to a paper Braille or large print copy any more than a sighted person has a paper copy of the text that has only been published electronically protected by DRMs.

Since the only WIPO-commissioned study on the relationship of copyright and the needs of persons with print disabilities concludes that "WIPO could certainly facilitate further study of and collaboration" on the topic, there is no basis to consider a treaty provision on this issue.

10. WOULD ADOPTING THIS CONSENSUS INSTRUMENT PREVENT WIPO FROM WORKING ON A TREATY FOR THE VISUALLY-IMPAIRED?

No. In fact, if the consensus instrument is passed as a Joint Recommendation of the WIPO Assemblies it will establish agreement within the international copyright community on one set of norms that would be a central component of a future treaty.

11. HOW LONG WOULD IT TAKE TO PASS THIS CONSENSUS INSTRUMENT COMPARED TO A TREATY?

Whatever your views on how long it would take for a treaty to become effective, there is no question that a Joint Recommendation can become effective – again, on all 164 members of the Berne Convention – in half the time needed for a treaty or ***much less***.

If you believe that a treaty would be "binding" immediately, consider that there are 184 Contracting Parties of the WIPO Convention, 173 Contracting Parties to the Paris Convention, and 164 Contracting Parties to the Berne Convention. In comparison, here are the Member States of several other treaties at WIPO (with the year the treaty was completed):

Lisbon Agreement (1958)	26 Contracting Parties
Rome Convention (1961)	88 Contracting Parties
Phonogram Convention (1971)	77 Contracting Parties
Trademark Law Treaty (1994)	47 Contracting Parties
WCT (1996)	88 Contracting Parties
WPPT (1996)	86 Contracting Parties
Singapore Treaty of the Law of Trademarks (2006)	19 Contracting Parties

It is possible that a treaty establishing copyright exceptions for the blind would have more political support than many of these, but we should all keep in mind that only 57 countries out of 164 members of the Berne Convention have national law exceptions for the visually-impaired. Passage of the consensus instrument as a Joint Recommendation would itself provide a clear and *immediate* signal to 107 countries that copyright exceptions for persons with print disabilities are needed, reasonable, and compatible with the Berne system.

12. WOULD THE CONSENSUS INSTRUMENT HAVE "THE EFFECT OF NARROWING THE POSSIBILITIES FOR IMPORTS AND EXPORTS"?

The criticism is wrong, indeed obviously so.

If the effect of the consensus instrument were to "narrow the possibilities for imports and exports" then visually-impaired people would not be facing the "book famine" we are talking about. They are facing that problem – proving this criticism is not only wrong, it is non-sense.

Today, there are no international legal norms for the importation or exportation of special format copies without the authorization of the copyright owner. Many national laws forbid such activities; other national laws may be ambiguous. No one knows whether such importation or exportation would be acceptable under the Berne three-step test and under what conditions.

The consensus instrument clarifies all this in favor of nations permitting the importation and exportation of special format copies without the authorization of the copyright holder. For special format copies that can also be used by sighted persons, the consensus instrument recognizes that the trade should occur among "trusted intermediaries" and provides a new, international legal norm for these entities (such as Spain's ONCE) to provide special format copies to one another.

13. HOW IS THE CONSENSUS INSTRUMENT DIFFERENT FROM THE MODEL LAWS OF THE 1980S THAT HAD NO IMPACT?

If the consensus instrument is adopted by the General Assemblies as a "Joint Recommendation" it becomes a definitive interpretation of the Berne Convention, *immediately applicable to 164 countries.* If the language of the consensus instrument were later integrated into a treaty, it would become a new binding obligation on those countries that ratify the treaty – but it would *still apply to the 164 countries in Berne.*

14. DOES THE CONSENSUS INSTRUMENT LIMIT "TRUSTED INTERMEDIARIES" TO THOSE IN THE WIPO TRUSTED INTERMEDIARY GUIDELINES?

No, there is nothing in the consensus instrument that prevents a country from choosing the Trusted Intermediaries (TIs) it recognizes in other countries or, alternatively, for WIPO to establish a global list of trusted intermediaries. That may be a desirable project, but the legal norm in the consensus instrument – *sharing of special format copies among TIs in different countries* – can take effect *immediately* as nations recognize each other's bona fide institutions for the visually-impaired.

The consensus instrument only draws the reasonable principle that a Trusted Intermediary should have "the trust of both persons with print disabilities and copyright rights holders" from the WIPO Trusted Intermediary Guidelines developed in the Stakeholders' Platform. The consensus instrument similarly draws ideas and definitions from the treaty draft and many national laws.

15. ISN'T A TREATY BETTER BECAUSE A TREATY IS "BINDING" BUT A JOINT RECOMMENDATION IS JUST "VOLUNTARY"?

We have to repeat, while the United States remains open to the idea of a treaty, a treaty is actually a completely ***voluntary*** instrument. Almost 15 years after its completion, the WIPO Copyright Treaty only has half the signatories of the Berne Convention. For half the members of the Berne Convention – including one of the treaty sponsors here -- the WCT is ***completely non-binding***.

As the text of a Joint Recommendation, under international law the consensus instrument would constitute an authoritative interpretation of the Berne Convention, which is already binding on over 160 countries. It would constitute the proper interpretation of exceptions and limitations for the visually-impaired within the structure of the Berne Convention ***immediately.***

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