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Copyright Exceptions and Limitations for the Benefit of Persons with Disabilities

- Access to Cultural Life and Information

Master thesis

20 points (30 ECTS)

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Human Rights and Intellectual Property

Autumn Semester 2007

Contents

Sammanfattning

Funktionshindrade är intresserade av att delta i samhället. I Internationella konventionen om ekonomiska, sociala och kulturella rättigheter (ICESCR) artikel 15(1)(a) har medlemsstaterna erkänt varje individs mänskliga rättighet att delta i kulturlivet. Alla individer har också rätt till friheten att ”söka, ta emot och sprida uppgifter och idéer av alla slag” enligt artikel 19(2) i Internationella konventionen om medborgerliga och politiska rättigheter (ICCPR). FN-konventionen om funktionshindrade personers rättigheter, som öppnades för undertecknande i mars 2007, kommer när den trätt i kraft förtydliga både funktionshindrade personers rättigheter att delta i kulturlivet och till information.

Material skyddat av upphovsrätt erbjuds ofta bara i format som inte är tillgängliga för funktionshindrade. För att ändra formatet behövs i de flesta fallen rättighetsinnehavarens tillstånd. Alternativt kan individen eller en assisterande organisation stödja sig på ett undantag från upphovsrätt eller närstående rättigheter, dvs. en nationell bestämmelse som möjliggör användning utan vederlag, eller en tvångslicens, en bestämmelse som tillåter användning utan tillstånd men med betalning av ersättning. Eftersom det är en tidskrävande process utan garanterat resultat att söka tillstånd av rättighetsinnehavaren, så behöver personer med funktionshinder undantag eller tvångslicenser från upphovsrätt och närstående rättigheter.

Det internationella regelverket för upphovsrätt och närstående rättigheter grundas på Bernkonventionen för skydd av litterära och konstnärliga verk och Internationell konvention om skydd för utövande konstnärer, framställare av fonogram samt radioföretag (Romkonventionen). Bestämmelserna i dessa två konventioner och i Avtalet om handelsrelaterade aspekter av immaterialrätter (TRIPS-avtalet), WIPO-fördraget om upphovsrätt (WCT) och WIPO-fördraget om framföranden och fonogram (WPPT) kommer bedömas från aspekten funktionshindrades rättigheter. Alla dessa internationella överenskommelser är grundade i en vilja att skydda kreativitet och att avväga rättigheterna mot allmänhetens intressen. Ändå kommer inte regimerna av intellektuell äganderätt och mänskliga rättigheter alltid till samma slutresultat, trots att de båda vill finna en balans mellan dessa intressen.

Danmarks och Sveriges upphovsrätt och närstående rättigheter har analyserats vad gäller digital rights management (kopieringsskydd och andra skyddsåtgärder i verket), import av kopior tillgängliga för funktionshindrade, definition av slutanvändaren av undantaget eller tvångslicensen, och det nationella systemet för produktion och distribution av tillgängliga kopior.

Slutsatsen är, att kultur och information fortfarande är otillgängligt på många områden, eller är tillgängligt endast till ett mycket högt pris. Upphovsrättslig lagstiftning måste öka möjligheterna för funktionshindrade och organisationer som hjälper dem, samtidigt som den måste förbli tydlig och skydda rättighetsinnehavarnas legitima intressen.

Summary

Persons with disabilities have an interest in participation in society. In Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights, the States Parties have recognized the human right of everyone to take part in cultural life. It is also a right of everyone to have the freedom to "seek, receive and impart information and ideas of all kinds", according to Article 19(2) of the International Covenant on Civil and Political Rights. The Convention on the Rights of Persons with Disabilities, which was opened for signature in March 2007, will when in force clarify both the rights of access to cultural life and to information belonging to persons with disabilities.

Copyright is a bundle of rights, guaranteed by law and international agreements, giving the creator of a work exclusive rights to control different aspects of use of the work. Related rights pertain to the rights of performers, producers of phonograms and broadcasting organizations.

The international regime of copyright and related rights is based on the Berne Convention for the Protection of Literary and Artistic Work (the Berne Convention) and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention). In this Thesis the provisions of those two conventions and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty are assessed from a disability rights point of view. All those international agreements are based on a will to protect creativity, and to balance the rights with public interests. However, even though the regimes of intellectual property rights and of human rights both aim at the balance of interests, they do not always concur.

The Danish and Swedish copyright and related rights legislation has been analysed, with a view to the issues of digital rights management, importation of accessible copies, definition of the end beneficiary of a copyright exception or compulsory license, and the national system of production and distribution of accessible copies.

The conclusion is that many areas of cultural life and much information still is inaccessible, or can only be made accessible at a very high cost of the person with disability. Copyright and related rights legislation must be broadened in its scope, while a safe and clear wording still must protect the legitimate interests of the right-holders.

Preface

The writing has been difficult but very exciting, as this topic is not discussed much.

I would like to extend a big thank you to the persons at WIPO who have inspired me and assisted me: among others, my supervisor Gao Hang, Mpazi Sinjela, my former teacher Tschimanga Kongolo, Geidy Lung, Jörgen Blomqvist and Gabriela Treso. They also welcomed me to Geneva for a six week study visit, where I could benefit from the wonderful WIPO facilities including the library. The trip was made possible by a scholarship from Awapatent, a Swedish firm to which I am most grateful.

I would not have endured in this work without the priceless strength from God, my family and my friends, whom I also want to thank.

Abbreviations

Berne Convention	Berne Convention for the Protection of Literary and Artistic Works
CESCR	International Committee on Economic, Social and Cultural Rights
DRM	Digital Rights Management
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICF	International Classification of Functioning, Disability and Health
Rome Convention	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations
Standard Rules	United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
WIPO	World Intellectual Property Organization

1 Introduction

Access to cultural life can make a remarkable difference to a person, as it is a door opener and door shutter. It has gained the symbolic meaning of access to society, current entertainment, debate, etc. When including also the right to access to information for persons with disabilities a big immaterial part of society is encompassed. Therefore the topic has been chosen. The legal problem is, that if no copyright exception or limitation allows direct use of the work by persons with disabilities or organizations/libraries helping them, they will have to seek and negotiate permission from the right-holder, which takes time and money, and does not guarantee any positive result. This has been a rather forgotten issue, although now highlighted a bit in the WIPO. Copyright exceptions for material in a form accessible by persons with disabilities are one important way of providing access to culture and information.

Some introductory remarks should be made: copyright is not always a problem, as material might be created primarily for the use by persons with disabilities, already accessible at least by persons with one type of disability. Furthermore, there already exist copyright exceptions for the use in education, quotation etc, and this also benefits persons with disabilities, as will be further explored below. In many ways the question of exceptions for the benefit of persons with disabilities is more complex than other types of exceptions, because it could be in regard of any type of use and material. Seen in a bigger perspective, the right to access to cultural life by persons with disabilities is also complex because the obstacles may be legal, technical, practical, or economic. Finally, one has to keep in mind that this is not about providing private copies of popular works for free for persons with disabilities, or anything like that. The wish of persons with disabilities is instead that the rights accorded in copyright law to restrict acts in respect of works, would be balanced against their interest and right in being able to take part of the *same material* as their fellow citizens, at the *same time* and without any *additional cost* to the individual.[1]

1.1 Purpose and Delimitations

The research theme is: how can copyright and the right to access to culture and information for persons with disabilities be combined? The legal question is twofold: do States have any obligation in public international law to provide access to copyright or related rights material for persons with disabilities? And which methods do the international agreements allow in order to make material accessible, as it involves several different technologies and uses?

[1] World Blind Union (WBU), David Mann, as cited in Nic Garnett, Automated Rights Management Systems and Copyright Limitations and Exceptions, WIPO Doc. SCCR/14/5, p. 27, para. 1 *et seq.*

The point of departure in the Thesis is an overarching goal to fulfill the human rights obligations towards both interest groups. As I will show, one must safeguard both the author's rights and the rights of persons with disabilities at a reasonable level.

Since the obstacles to access to cultural life for persons with disabilities may be legal, economic or technical/practical, the solutions may be outside of the actual legal framework of copyright. However, they are often connected to the legal sphere, and some of these issues will be assessed in connection to some regional and national examples of copyright exceptions, in the quest of different public policies and practical legal solutions.

I will focus on the visually impaired, hearing impaired, and persons with intellectual disabilities, because the practical needs of those groups are quite well-known.

This Thesis will not elaborate on the differences between developed and developing countries, even though concerns have been forwarded that developing countries are less likely to provide an appropriate range of exceptions to rights when introducing copyright laws that developed countries.[2] The Appendix of the Berne Convention for Developing Countries will also not be assessed.

In the quest of exceptions and limitations in international law, I will assess the Berne Convention for the Protection of Literary and Artistic Works (hereinafter: Berne Convention), the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (hereinafter: Rome Convention), the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter: TRIPS), WIPO Copyright Treaty (hereinafter: WCT), the WIPO Performances and Phonograms Treaty (hereinafter: WPPT), and some European Union Directives. Because of limitations in time and volume, I will deal with neither the Phonograms Convention of 1971 nor the Satellites Convention of 1974. However it is not excluded that these instruments may provide interesting openings. On national level, I will focus on the exceptions for the benefit of persons with disabilities in Denmark and Sweden.

1.2 Method and Material

The method is literature study, and I have used a traditional legal dogmatic method. The discussion will be both on *de lege lata* and *de lege ferenda*, because the human rights obligations in my opinion push some countries further, towards a better balanced national copyright legislation.

The material is legal texts such as legislation, preparatory work and UN documents, and books, articles, and electronic sources. For the study of the Danish copyright act, I have had some trouble finding recent commentaries. Thus I have used a book updated in 2003, before the

[2] Sullivan, 'Study on Copyright Limitations and Exceptions for the Visually Impaired', (2006), WIPO Doc. SCCR/15/7, p. 109, <www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_7.doc>.

amendments of November 2004, but in combination with the preparatory work.

1.3 Outline

I will first present the international IP regime of exclusive rights of copyright and related rights, and thereafter apply it on the situations of production and use of accessible material by persons with disabilities. As a red thread through this Thesis, the responses from the human rights community will be taken into account. I will first assess the general exceptions and limitations, and then present the copyright and related rights regimes of the European Union and Sweden and Denmark. On specific themes which are often problematic in the realization of access for persons with disabilities, I will seek the Danish and Swedish solutions. These themes include for example importation and exportation regulations, digital rights management and its interaction with copyright exceptions, and the production of accessible material. The thesis will be concluded by analysis of the facts found, and with recommendations for different actors in this field.

1.4 Definitions

1.4.1 Disability and Impairment

A *disability* is, according to World Health Organization's International Classification of Functioning, Disability and Health (ICF) defined as "the outcome or result of a complex relationship between an individual's health condition and personal factors, and of the external factors that represent the circumstances in which the individual lives".[3] This is also the definition used in this Thesis. There are several different definitions of disability, with different degrees of emphasis on the conditions in the environment around the person. The Convention on the Rights of Persons with Disabilities, which is not yet in force (I will elaborate that below) says in article 1(2) that "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others." The ICF defines impairments as "problems in body function or structure such as significant deviation or loss".[4] Accordingly, the definition of disability provided in the Convention almost corresponds fully to the ICF definition, in that it includes both impairment and the surrounding social setting.

An estimated ten per cent of the world's population or 650 million persons experience some form of disability or impairment and the number is

[3] Disability and Rehabilitation WHO Action Plan 2006-2011, p. 1, <www.who.int/disabilities/publications/dar_action_plan_2006to2011.pdf>.
[4] *Ibid*., p. 1 footnote 1.

at this moment increasing.[5] The most common causes of disability include injuries and chronic diseases.[6]

In this thesis I will use the expressions visually impaired, hearing impaired and intellectual disability. The *visually impaired* is the main group for which specific copyright exceptions have been made, even though both hearing impairment, intellectual disability and for example learning and mobility impairments also affect the accessibility. Visual impairment means low vision that cannot be corrected or blindness; the WHO has established certain standards on the measurement of vision.[7] Visually impaired persons belong to the group of persons with print disabilities, to which belong all who cannot access print. The print disability may be visual, physical (cannot hold or manipulate a book), perceptual (for example dyslexia) or learning disabilities.[8] In 2002, the WHO stated that over 161 million people are visually impaired, out of which 37 million are blind.[9] *Hearing impairment*, or aural impairment, can mean either a person hearing vaguely, for whatever reason, or a deaf person. The WHO in 2005 estimated that 278 million have moderate to profound hearing loss in both ears.[10] WHO also estimates that 80 per cent of the deaf or hearing-impaired live in low or middle-income countries.[11] *Intellectual disability* is a phrase used in lack of any better, meaning persons who have a deficit brain function from birth or later events in life, which in combination with surrounding environment makes it a hinder in everyday life. The WHO lacks this concept and therefore it is hard to find statistics on intellectual disability.[12]

1.4.2 Access to Cultural Life

This concept is mainly used in a human rights discourse. Unfortunately, it has never been decided in any international body or instrument what cultural life means. The word *culture* origins from cultivation and one could say that cultural life is the sphere of society that cultivates a sense of participation, may it be as political comment, entertainment, in the area of education or other area. The word *access* is in my opinion about having a *de facto* possibility to enjoy cultural life and be a part of it. In the case of cultural life linked to copyright, it is not so much about physical access to

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[5] Disability and Rehabilitation WHO Action Plan, *supra* note 3, p. 1. One reason is for example that the world's population is living longer, and therefore suffer from impaired body functions because of age.
[6] *Ibid*., p. 1.
[7] WHO Fact Sheet no. 282, November 2004, Magnitude and causes of visual impairment, *in fine*.
[8] DAISY Consortium, 'Frequently asked questions', question 6, <www.daisy.org/about_us/faq.shtml?faq=gen#a_24>.
[9] *Ibid*., para. 1 of section 1.
[10] WHO 'Facts about Hearing Impairment and Deafness', para. 1 *et seq*. Fact Sheet no. 300, <www.who.int/mediacentre/factsheets/fs300/en/>.
[11] *Ibid*.
[12] WHO Fact Sheet: Mental and Neurological Disorders, The World Health Report, 2001, p. 3. The WHO concept of mental retardation is probably the nearest of what I would define as an intellectual disability, even though it does not include disability that has arrived after birth. <www.who.int/whr/2001/media_centre/en/whr01_fact_sheet1_en.pdf>.

events or concerts etc., or about the creativity of persons with disabilities, but about making possible the production, distribution and use of copyright material in accessible form.

This Thesis will circle around the rights of access to culture and information, and those two human rights are a perfect example of the interrelatedness and indivisibility of human rights. They are instrumental rights which when realized will be catalysts for other rights, such as the right to health (health information) and the civil and political rights connected to citizenship, which require some access to information.

1.4.3 Digital Rights Management

Digital Rights Management (DRM) refers to the "technologies and/or processes that are applied to digital content to describe and identify it and/or to define, apply and enforce usage rules in a secure manner", according to Cunard *et al*.[13] They state that DRM can be divided into two functional areas; firstly, the identification and description of intellectual property and of rights pertaining to works and to the parties involved in their creation and administration.[14] Secondly, DRM has the function of technical enforcement of usage restrictions. It can be access control, such as a password to an Internet site, or copy control for example of a DVD or CD.[15]

In this Thesis the second, enforcing function will be discussed; it has in recent years gained protection within the copyright regime and has been disputed in terms of access to works and the balancing of interests.

[13] J.P. Cunard, K. Hill, C. Barlas, 'Current Developments In The Field Of Digital Rights Management', (WIPO Doc. SCCR/10/2/Rev.), p. 4, <www.wipo.int/edocs/mdocs/copyright/en/sccr_10/sccr_10_2_rev.doc>.
[14] *Ibid*.
[15] *Ibid*.

2 The Law of Rights of Persons with Disabilities

As I will show in this Chapter, it is the human right of everyone to have a possibility to enjoy cultural life and have access to information. This applies to everyone under the jurisdiction of a State party of the two Covenants on human rights.

Furthermore, the realization of rights of persons with disabilities has been increasingly highlighted in UN bodies. However, two problems appear: first, the economic, social and cultural rights are sometimes down-prioritized by the States parties in favour of civil and political rights; second, the right not to be discriminated against in the realization of those rights is sometimes unclear, leaving a rather broad margin of appreciation to the State party.

The Chapter will be concluded with an analysis of the interaction between intellectual property, and copyright in particular, and human rights.

2.1 The Human Rights of Intellectual Property and Access to Information and Cultural Life

Already in 1948 the Universal Declaration of Human Rights (UDHR), by the United Nations General Assembly, guaranteed a right to "freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits" (Article 27(1)). The UDHR is a landmark document that sets up non-binding but still politically highly important provisions on fundamental rights and freedoms. Paragraph 2 of the same Article provides: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author". The international community was thus already in 1948 was aware of the interaction and possible conflict between copyright and access, and the need to find a proper balance between them.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees in Article 15(1)(c) the right of authors to "benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. Subparagraph (a), on the other hand, guarantees the right of everyone to take part in cultural life, and in (b) everyone is guaranteed the right to enjoy the benefits of scientific progress and its applications. One could say that all subparagraphs (a-c) of Article 15(1) are complementary: the right balance between them helps creating a society where both users and creators are guaranteed protection of their interests, to a reasonable extent. Furthermore, Article 15(2) of ICESCR provides that "the steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right

shall include those necessary for the conservation, the development and the diffusion of science and culture".

The right to freedom of information is guaranteed in the International Covenant on Civil and Political Rights (ICCPR), Article 19(2) which provides that "Everyone shall have the right to freedom of expression; this right shall include 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".

2.2 The Inclusion of Disabilities in the General Human Rights Discourse

Needless to say, the whole UDHR and the ICESCR applies also to persons with disabilities. However, those human rights have not always been prioritized in the national implementation, one the reasons being the cost of guaranteeing human rights for the benefit of persons with disabilities, and many States have not realized the democratic, economic and other values in making the society accessible to this group.

The Committee on Economic, Social and Cultural Rights (CESCR) has the power to give general comments, statements, on the interpretation of the ICESCR and its thematic issues.[16] These are not binding to States parties, but are usually considered as correct and followed. In the General Comment *Persons with Disabilities* the Committee affirmed that the Covenant, in accordance with article 2(2), applies without discrimination to all persons on the territory or under the jurisdiction of a State party.[17] "Other status" clearly applies to disability as one of the prohibited grounds of discrimination[18], provided that the distinction is not reasonable and objective, which would make it allowed under the ICESCR. The Committee went further, saying that the obligations of the State party include a duty to respect, protect and ensure. It shall protect the beneficiary from interference from private parties in conflict with the rights. It shall also ensure an actual realization, to the extent of its resources, of the right. This may in many cases imply that persons with disabilities have a right to affirmative action, in order to overcome disadvantages in the actual enjoyment of the rights.[19]

States parties to the ICESCR are to realize the rights guaranteed therein by "taking steps […] to the maximum of its available resources, with a view to achieving progressively the full rights recognized"[20]. This has led to a rather common tendency to down-prioritize those rights in favor of civil and political rights. Not only are the human rights of economic, social and cultural nature as such often neglected in the international community; persons with disabilities are often also prioritized low and discriminated

[16] ICESCR Article 21 provides for "reports with recommendations of a general nature".
[17] CESCR General Comment 5 'Persons with Disabilities', para. 5.
[18] *Ibid*. *in fine.*
[19] *Ibid*., para. 5.
[20] Article 2(1) of ICESCR.

against in the national realization of the rights. Historically, international treaties did not mention persons with disabilities.

In 1971, the United Nations General Assembly adopted the *Declaration on the Rights of Mentally Retarded Persons* and in 1975 the *Declaration on the Rights of Disabled Persons*, which focused on certain especially crucial rights. For long, those were the only explicit international statements saying that at least the fundamental rights and freedoms apply equally to persons with disabilities. Furthermore, much happened in the UN in the 1980's, such as the proclamation of an *International Year of Disabled Persons* (1981) and the *UN Decade for Disabled Persons* (1983-1992) and its corollary *World Programme of Action Concerning Disabled Persons*, adopted by the UN General Assembly in 1982.

2.2.1 The Standard Rules and a Special Rapporteur Mandate

In 1993 came a mere breakthrough with the *United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, proclaimed by the UN General Assembly.[21]

The Standard Rules consisted of 22 rules guiding the national promotion of the rights of persons with disabilities in a practical way. They summarized the message of the World Programme of Action which had ended just before, and combined it with the development in human rights norms during the UN Decade for Disabled Persons.

The definition of disability was different in the Standard Rules than in the Convention on the Rights of Persons with Disabilities: it comprises only impairment, while the definition of the Convention adopted 2006 includes also contextual factors.[22] However, the Standard Rules also used the term 'handicap', in the sense of loss or limitation of opportunities to take part in the life of the community on an equal level with others.[23] So the term 'handicap' of those days corresponds to the term 'disability' in the new Convention.[24] The Standard Rule 5 is on accessibility, and provides *inter alia* that persons with disabilities shall have access to full information on diagnosis, rights and available services and programmes.[25] States should also develop strategies to make information services and documentation accessible, and encourage the media to make their services accessible.[26]

The Standard Rules provided for the establishment of a mandate for a Special Rapporteur on Disability for the Commission for Social

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[21] UN General Assembly Resolution 48/96 of 20 December 1993 (A/RES/48/96), with the Standard Rules on the Equalization of Opportunities for Persons with Disabilities in the Annex to the Resolution.
[22] Standard Rules, Introduction, para. 17.
[23] *Ibid*., para. 18.
[24] For the definition of disability in the Convention on the Rights of Persons with Disabilities *see* Article 1(2).
[25] *Supra* note 21, Rule 5, para. 1.
[26] *Ibid*., para. 2 *et seq.*

Development, "if necessary".[27] The Commission for Social Development reports, via several bodies, to the UN General Assembly. In March 1994, the UN Secretary-General appointed as Special Rapporteur on Disability the Swede Bengt Lindqvist.[28] A Special Rapporteur is a special procedure, meaning that it is a mandate established under the former Commission on Human Rights or the new Human Rights Council. Special procedures can also be called independent experts or working groups - persons with much insight in an issue, with a mandate to (unpaid) do research and develop the knowledge on a certain issue. Depending on the mandate, the special procedure may also monitor national implementation of human rights obligations. One of the duties of the Special Rapporteur on Disability is to report annually to the Commission on Social Development on his/her monitoring of the implementation of the Standard Rules.[29]

From 2003, Ms. Sheikha Hessa Al Thani from Qatar holds the mandate. In 2005, the Economic and Social Council extended her mandate to December 31, 2008.[30] In the ongoing reform of the UN human rights system, the Human Rights Council has in 2006 replaced the Commission on Human Rights. The Council has decided to assume all special procedures which the Commission established, and to extend all mandates, including the Special Rapporteur on Disability, until they are next considered and reviewed by the Council.[31]

The international community has in recent years given the rights pf persons with disabilities more attention, including introducing special provisions in for example the *Convention on the Rights of the Child* (Article 23), the *African Charter on Human and Peoples' Rights* (Article 18(4)), and the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (Article 18). In parallel with the strong development of a "Disability Convention", the ICESCR is in a strengthening process. The Human Rights Council has begun drafting an optional protocol to the ICESCR, which would mandate the CESCR to

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[27] Standard Rules, *supra* note 21, IV. Monitoring Mechanism, para. 2.

[28] Monitoring on the Implementation of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, Note by the Secretary-General, <www.un.org/esa/socdev/enable/srreport-ecn520064.htm>.

[29] Standard Rules, *supra* note 21, IV Monitoring Mechanism.

[30] ECOSOC Resolution Further promotion of equalization of opportunities by, for and with persons with disabilities and protection of their human rights 2005/9 of 21 July, 2005, para. 4. The Resolution also requested, in para. 7, the Special Rapporteur to submit to the Commission for Social Development annual reports on the monitoring of the implementation of the Standard Rules.

[31] Human Rights Council Resolution 5/1 E "Institution-building of the United Nations Human Rights Council", II Special Procedures, B(61). The resolution was adopted on June 18, 2007, at the conclusion of its 5th session. Appendix I of the Resolution includes an enumeration of mandates which will be, "where applicable", automatically renewed until they have been reviewed by the Council. A troublesome fact is that the mandate of Special Rapporteur on Disability is not to be found in the list of Appendix I, <www.ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_5_1.doc>. *Cf.* <www.ohchr.org/english/bodies/hrcouncil/docs/FACTSHEET_OUTCOMES_FINAL.pdf> .

consider individual and group communications on violations of the Covenant.[32]

2.2.2 The International Convention on the Rights of Persons with Disabilities

On December 13, 2006, the United Nations General Assembly adopted, without a vote, the *International Convention on the Rights of Persons with Disabilities* and its *Optional Protocol*.[33] It includes both economic, social and cultural rights on the one hand and civil and political rights on the other. It focuses especially on the fundamental principles of non-discrimination, equality and the autonomy of the person. The Convention opened for signature the 30 March, 2007 at the United Nations Headquarters.[34] The Convention on the Rights of Persons with Disabilities has been called a great success, because of its short drafting history comprising only 4 years (2002 to 2006) and its all-time record in the number of signatures on the opening day of a human rights treaty, 81 States and the European Union.[35] It also has a rather clear social development agenda and explicit language on responsibilities of States parties.

According to Article 1 of the Convention, its purpose is "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity". This clearly shows that the purpose of this Convention is not to establish new legal norms, but rather to "pick up" and promote and clarify the human rights and fundamental freedoms that persons with disabilities already enjoy, especially by the two Covenants but also the other human rights instruments in the international bill of human rights. The Convention on the Rights of Persons with Disabilities specifies especially the obligations of non-discrimination and reasonable accommodation. Among the main principles we find dignity, autonomy, equal participation, non-discrimination and respect for differences.[36]

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[32] Resolution of the Human Rights Council (UN Doc. A/HRC/1/L.4/Rev.1) 'Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', adopted by consensus June 29, 2006. The Human Rights Council decided to extend the mandate of the Working Group with two years. *See also* the report of the Open-ended Working Group with a view to considering options regarding the elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (UN Doc. E/CN.4/2006/47).

[33] UN document A/RES/61/105 (official record A/61/PV.76 of the General Assembly 13 Dec. 2006, and press release of the meeting GA/10554), adopted without a vote.

[34] Final report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities,
<www.ohchr.org/english/issues/disability/docs/conventiontextfinaleng.doc>.

[35] UN Enable, <www.un.org/disabilities>.

[36] Article 3 of the Convention on the Rights of Persons with Disabilities.

According to article 45(1) it will enter into force on the 30th day after the deposit of the 20th instrument of ratification or accession. As of 23 January, 2008, the Convention has 123 signatures and 14 ratifications.[37]

2.2.2.1 The Committee on the Rights of Persons with Disabilities

When the Convention on the Rights of Persons with Disabilities has entered into force, a Committee on the Rights of Persons with Disabilities will be established (Article 34(1)), with the mandate to consider reports from States parties, on the progress in implementation of the treaty obligations, according to a certain schedule of reporting (arts. 35 *et seq*.). The Committee will have the power to request further information from the State, and to give suggestions and general recommendations on the report (Article 36(1)).

The Optional Protocol (OP) to the Convention will provide the Committee with further mandate. It has yet 69 signatories and eight ratifications.[38] According to Article 13(1) of the OP, it will enter into force after the Convention has entered into force, and on the thirtieth day after the deposit of the tenth instrument of ratification or accession to the OP. The main functions from the OP are, firstly, the consideration of individual communications (complaints) from individuals or groups of individuals who are under the jurisdiction of a State party and claim to be victims of a violation of the Convention (Articles 1-5). Secondly, where the Committee receives liable information indicating grave or systematic violations by a State party, it will have the mandate to examine and make an inquiry of the situation (Article 6 *et seq*.). The second procedure reminds a bit of the '1503 procedure' which enabled the Commission on Human Rights to consider situations of gross and systematic violations of human rights, and which also was a confidential procedure. The new complaints procedure in the Human Rights Council, which will replace the 1503 procedure,[39] will probably complement the complaints procedure under the Convention on the Rights of Persons with Disabilities, in that the procedure of the Council will deal only with more systematic and gross violations, while the Committee can consider individual violations as well.

2.2.2.2 Non-Discrimination

The Human Rights Committee, commenting on ICCPR and Article 2(1) of the same, has stated that not every differentiation is discriminative.[40] If it is

[37] UN Enable, 'Countries', website w updated list of States parties, <www.un.org/disabilities/countries.asp?navid=12&pid=166>.
[38] *Ibid*.
[39] 'Human Rights Complaints Procedure', <www2.ohchr.org/english/bodies/chr/complaints.htm>, para 3.
[40] General Comment 18 'Non-discrimination' of the UN Human Rights Committee, para. 13, may be found in UN Doc. HRI/GEN/1/Rev.7.

based on reasonable and objective criteria, and if the aim is to achieve a purpose which is legitimate under the Covenant, it is acceptable.[41]

In Article 4(1)(a) of the Convention on the Rights of Persons with Disabilities, States Parties undertake to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the Convention. Article 4(1)(b) also provides that the States Parties shall take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities. Therefore, if for example the international copyright law regime would hinder the realization of member States' human rights obligations in any field, it will be the human rights obligation of the State to work for a change in international copyright law in the long run, or for a reservation on that point.

To be understood correctly, differentiation can be coupled with the requirement on the State to take 'appropriate steps' in the realization of the rights. National libraries may support a differentiation if they let the visually impaired wait a month or more from a book release until they provide it in accessible format, but this would probably be reasonable and objective, considering its reasons (cost, resources and other reasonable and objective criteria). The State would probably be considered to have taken appropriate steps by such a procedure. It may also be reasonable and objective to provide a narrower spectrum of literature in school libraries for the visually impaired, because of financial implications which would not be reasonable for the use by a single student. On the other hand, a public school library could maybe not refuse affiliation with a national library or an organization, if that would at a reasonable cost provide accessible material to students with disabilities.

2.2.2.3 The Right to Access to Information

One of the fundamental principles of the Convention on the Rights of Persons with Disabilities is autonomy (Article 3). Therefore, access should as much as possible be achieved by self-help, with the aid of assistive devices. The State Parties also undertake in Article 4(1)(h) to "provide accessible information about … devices and assistive technologies, including new technologies…", which must include for example new computer programs which can present works in a clear way.

Communication is relevant in the access to both information and cultural life. Article 2 of the Convention defines communication very broadly, including for example Braille text, tactile communication, multimedia and audio.

Article 9 establishes general obligations of taking appropriate measures regarding access, to different areas of society. These measures, including the identification and elimination of obstacles and barriers to accessibility, apply also to information, communications and other services (Article 9(1)(b)). According to Paragraph (2)(g) the States Parties shall

[41] UN Human Rights Committee, *supra* note 40.

promote access to new information and communication technologies and systems, including specifically the Internet. Furthermore, Article 9(2)(h) provides that the Parties shall take appropriate measures to "promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost". These obligations of accessibility touch upon both the information and culture, and many more areas of life.

According to Article 21, States Parties shall take all appropriate measures to ensure the right of access to information, as an element of the right to freedom of opinion and expression. This freedom to seek, receive and impart information shall be possible to exercise on equal basis with others and through all forms of communication of the choice of the persons with disability. Here follow some examples of Article 21: States Parties shall *provide information* intended for the general public to persons with disabilities in accessible formats and technologies appropriate in a timely manner and without additional cost (paragraph (a)); accept and *facilitate* the use of sign language, Braille, etc. in official interactions (b); *urge private entities* that provide services to the general public "including the Internet", to provide information and services in accessible and usable formats (c); and *encourage the mass media* to make their services accessible to persons with disabilities (d). Paragraph (c) on urging private parties is interesting, because it stipulates not an obligation to make the private actors provide the information and services in accessible formats; it is sufficient to urge them to do so.

2.2.2.4 The Right to Access to Cultural Life

Article 30 of the Convention is on "Participation in cultural life, recreation, leisure and sport". According to Paragraph (1), States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life. They shall also take appropriate measures to ensure that they enjoy access to cultural materials in accessible formats (Subpara. (a)), and access to television programmes, films, theatre and other cultural activities in accessible formats (b). In Article 30(1)(c) is also provided the obligation to take appropriate measures to enable the persons to enjoy access to places for cultural performances or services, which is an action which should be taken alongside with measures within copyright legislation. Paragraph 3 of Article 30 reads:

> "States Parties shall take *all appropriate steps*, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an *unreasonable or discriminatory barrier* to access by persons with disabilities to cultural materials."

Hence, the intellectual property rights obligations set forth in for example the Berne and Rome Conventions may not be overridden because of the right to access to culture; States have to continue upholding the protection of works provided in international intellectual property treaties,

at least to the minimum level. Furthermore, the Contracting Parties must make sure that exceptions and limitations always comply with the restrictions put in those treaties, such as the three-step test. A press release from the discussions in the Committee drafting the Convention shows that there was a widespread consensus on Article 30 among the negotiating States parties[42], although it might seem rough to categorize intellectual property as a potential barrier, when it could also be seen as a guarantee for a solid access to material. A further requirement is the right to recognition and support of the specific cultural and linguistic identity of persons with disabilities, according to Article 30(4). This should have an effect on the modes of making works accessible, for example by promotion of sign language in audiovisual works, instead of subtitled comment, for the support of deaf culture.

The provisions on access to cultural life and information in the Convention on the Rights of Persons with Disabilities could be regarded as merely an echo of UDHR Article 27, ICESCR Article 15, and ICCPR Article 19(2), because as Audrey Chapman writes, already the wording of article 15 of the ICESCR places an obligation on States Parties to, when protecting the intellectual property of creators, also weigh in considerations of the other elements of art. 15.[43] The insertion of protection of intellectual property in the very Article 15 means that to be consistent with that Article, the intellectual property law of a State party must assure that intellectual property protections complement, fully respect, and even promote other components of Article 15.[44] So it must for example facilitate cultural participation.

However, the new Convention brings the obligations of UDHR and ICESCR one step further in that it defines the rights of disabled persons in more detail in different areas of daily life. The State should work result oriented, aiming at actual access to and enjoyment of copyright works and objects of related rights. In practice it is however difficult to promote the production and distribution of accessible material, and in order to reach accessibility to a broad spectrum of material, the process cannot involve only the State and public libraries but has to include also publishers, right-holders and other private actors.

The Standard Rules on the Equalization of Opportunities for Persons with Disabilities are one of many bases for interpretation of the new convention, as the current Special Rapporteur on Disability has stated. While the Convention delineates the legal obligations, the Standard Rules are more precise in describing the specific target areas, procedures and mechanisms necessary to achieve equalization of opportunities.[45]

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[42] Press release of the meeting on 30/01/2006 (SOCS/4691) of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, para. 14.

[43] A. Chapman, *Approaching Intellectual Property as a Human Right,* p. 13 para. 3.

[44] *Ibid*.

[45] Al Thani, 'Report of the Special Rapporteur on Disability of the Commission for Social Development on Monitoring of the implementation of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities', p. 5, para. 13.

Now the first research question can be answered: the international human rights law can be interpreted as posing an obligation on signatory States to, where possible according to finances, make culture and information accessible, by providing accessible material or encouraging private actors to do so. The strongest support is found in the UDHR and the two Covenants.

Under the Convention on the Rights of Persons with Disabilities, according to Article 4(1)(a), States Parties undertake to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the Convention.

2.3 Human Rights and Copyright

2.3.1 The Legal Relationship

As shown above, protection of the interests in one's creation is a human right. Still, copyright existed in national and international legislation almost a century before the human rights were guaranteed in international agreements. The two regimes are also different in nature; while copyright law is embodied in national, territorial legislation, human rights stand for themselves in international treaties, and they are the same in all member States. The human rights as embodied in the UDHR are generally held to exist independently of implementation or even recognition in individual countries.[46] Paul C. Torremans writes that copyright has a relatively weak claim of human rights status, as its inclusion in the international human rights instruments was highly controversial.[47] Copyright and other intellectual property components were only included because they were seen as tools to give effect to and protect other human rights.[48] Furthermore, the various elements of those human rights articles are inter-related, and intellectual property rights should *make sure* that the other components of the relevant articles are respected and promoted.[49] So, while international human rights law leaves the determination of the substance of copyright to the legislature,[50] it nevertheless concerns itself with the basics of protection of one's creation, and with the application of copyright.

A distinction is sometimes made between the 'right of intellectual property', as a human right guaranteed in *inter alia* Article 15 of ICESCR, and 'intellectual property rights', as recognized in international and national intellectual property regimes. The CESCR agrees that it is important not to

[46] Torremans, 'Copyright As A Human Right", p. 5, para. 2.
[47] *Ibid*., p. 9, para. 3.
[48] *Ibid*.
[49] *Ibid*., p 9 *in fine, et seq.*
[50] *Ibid*., p. 10, para. 1.

equate intellectual property rights with the human rights recognized in Article 15(1)(c) of ICESCR[51]:

> "The fact that the human person is the central subject and primary beneficiary of human rights distinguishes human rights, including the right of authors to the moral and material interests in their works, from legal rights recognized in intellectual property systems. […] While intellectual property rights may be allocated, limited in time and scope, traded, amended and even forfeited, human rights are timeless expressions of fundamental entitlements of the human person. Whereas human rights are dedicated to assuring satisfactory standards of human welfare and well-being, intellectual property regimes, although they traditionally provide protection to individual authors and creators, are increasingly focused on protecting business and corporate interests and investments. Moreover, the scope of protection of the moral and material interests of the author provided for under article 15 of the Covenant does not necessarily coincide with what is termed intellectual property rights under national legislation or international agreements."[52]

The CESCR is right in this Statement that the content of the right of intellectual property is different from intellectual property rights. For instance, human rights are guaranteed only to individuals and in some cases groups of individuals, while intellectual property rights can be held by legal entities such as corporations. Furthermore, intellectual property rights have limitated duration, while copyright as a human right is more or less timeless.

2.3.2 Interaction – What Is a Human Rights-Based Approach to Copyright

The CESCR states that a human rights-based approach must be taken in the adoption of intellectual property regimes.[53] It defines this as primary focus on the needs of the most disadvantaged and marginalized individuals and communities.[54] One might wonder how a human rights-based approach to copyright would change the end result, i.e., the national implementation.

The recognition of copyright as a human right places it in a legal system of interrelated rights, where one human right cannot be used for the destruction or hindrance of another.[55] In the Vienna Declaration on Human Rights and Programme of Action, the UN General Assembly recognized

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[51] General Comment of the CESCR 17 'The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (art. 15 (1) (c))', para. 3.
[52] Statement by the Committee on Economic, Social and Cultural Rights (E/C.12/2001/15), 'Follow-up to the day of general discussion on Article 15.1 (c)', Monday, 26 November 2001 p. 3 para. 6. The day of general discussion was held as a preparation of General Comment 17 on Article 15(1)(c).
[53] *Ibid*., p. 4, para. 8.
[54] *Ibid*.
[55] One of many grounds for this is Article 5(1) of ICESCR. It provides that "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein […]".

that all human rights are universal, indivisible, interdependent and interrelated.[56]

Paul L.C. Torremans states that there exist two different approaches to the interaction between human rights and copyright and intellectual property rights. The first is probably the most common and is based on a conflict model: copyright is in fundamental conflict with human rights.[57] In the conflict model it is argued that strong intellectual property rights are bound to undermine human rights and in particular economic, social and cultural aspects of human rights. The result is incompatibility, which can only be resolved by recognition of the primacy of human rights, as those are in normative terms fundamental. This approach has been criticized for not addressing the broader picture and only focusing on specific situations where the result of intellectual property protection may seem unfair.[58]

The second approach is more balanced and has greater expectations on the intellectual property rights systems. It means that intellectual property rights and human rights deal with the same fundamental equilibrium.[59] Intellectual property rights is about defining the scope of the private exclusive right broadly enough to enable it to play its incentive and recognition (of the creative contribution to society) function in an appropriate and effective way, whilst on the other hand there is the broader interest of society that the public must be able to have adequate access to the fruits of the authors' efforts.[60] This model means that both intellectual property rights law and human rights law try to get the public-private rights balance right and as such there is no conflict.[61] The areas of law do however not define the balance in exactly the same way in all cases, and this leads to the conclusion that there is compatibility between them but not consensus.[62] As will be explained below, the public-private rights balancing act is recognized explicitly in the WCT and the WPPT, and those instruments refer to the Berne Convention in that matter.

Peter Drahos suggests that the rights enacted by intellectual property legislation belong to the human rights regime too, but are a different kind of human rights norm than for instance the rights to food and health. He argues that intellectual property rights cannot be regarded as "real" human rights simply on the basis of their universal recognition, and also that unless one adopts a moral objectivism view it is impossible to claim that they be universal.[63] Drahos argues that intellectual property rights are instead instrumental rights, meaning that they should serve those needs and interests which the human rights discourse identifies as

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[56] 'Vienna Declaration and Programme of Action', adopted by the World Conference on Human Rights in Vienna on 25 June 1993, Chapter I, Article 5.
[57] Torremans, *supra* note 46, p. 2, para. 2.
[58] *Ibid*.
[59] *Ibid*.
[60] *Ibid*.
[61] *Ibid*., p. 2 *in fine, et seq.*
[62] *Ibid*. p. 3, para. 1.
[63] Drahos, 'Intellectual Property and Human Rights', p. 365ff.

fundamental.[64] It is accepted in rights theory that the existence and exercise of some rights presupposes the existence of other rights. Rights come in clusters, and complementary elements obtain between rights.[65] Support for the view of intellectual property rights as instrumental rights may be found *inter alia* in the Vienna Declaration of 1993 (interdependence and interrelatedness of all human rights)[66]. Drahos proposes that "linking intellectual property to human rights discourse is a crucial step in the project of articulating theories and policies that will provide guidance in the adjustment of existing intellectual properties rights and the creation of new ones".[67] What he seeks is a change in the intellectual property rights community where "technocrats" could provide to the aspiration of human rights discourse a regulatory specificity in the practical cases.[68] This view on the relationship between intellectual property and other human rights is very useful, because it takes the discussion from a theoretical to a practical level, which sees forward to new intellectual property legislation more in harmony with other human rights. This is precisely the case in many instances of copyright exceptions for the benefit of persons with disabilities. In that situation it also becomes very clear that the "technocrats" and "human rights persons" need to cooperate in order to develop appropriate solutions.

2.3.2.1 Balancing Intellectual Property Rights and Human Rights Practically on Country Level

Human rights are first and foremost obligations of the State, i.e., the Government and its branches. However, their realization depends also on private actors and can be impeded by their actions. Article 5(1) of ICESCR provides, as stated above, that nothing in the Covenant may be interpreted as implying for […] group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized in the same Covenant. So the author, in possession of the human right of intellectual property, must at least respect the other human rights guaranteed in Article 15 of the ICESCR.

The Human Rights Committee has opened up for State responsibility for the acts of private actors as well, in the application of the International Covenant on Civil and Political Rights.[69] However, it concerns grave criminal acts and as regards copyright, State responsibility for actions of private actors is unthinkable. However, as shown above, the State must where possible *work for* non-discriminative access also as regards works from private parties, for example against unfair use of DRMs.

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[64] *Ibid*., p. 349 and 367 *et seq*.
[65] *Ibid*., p. 367.
[66] 'Vienna Declaration and Programme of Action', *supra* note 56, part I Article 5.
[67] Drahos, *supra* note 63, p. 368 *et seq*.
[68] *Ibid*., p. 370.
[69] Human Rights Committee, General Comment 31'The Nature of the General Legal Obligation Imposed on States Parties' , para. 8. The Committee states that in some cases a State's inactivity in prosecuting, correcting etc. private actors' non-respect for human rights constitutes a violation of the same rights, and refers to Article 2(1) of the ICCPR.

Several different areas of law can restrict the use of intellectual property rights. Many scholars have discussed the combination of competition law and intellectual property rights. The *Magill* case in the United Kingdom showed that freedom of information can sometimes partially ease copyright exclusive rights which have been abused, even though normally a right-holder can refuse to license.[70] The abuse consisted of refusal of two broadcasting companies to grant a license regarding the basic program listing information which another company needed in order to introduce a weekly listing, and which the broadcasting companies did not offer and for which there was a consumer demand.[71] Competition law was used to make sure that copyright was used according to its proper intention, i.e., in the public interest, and for the reward and encouragement of the author.[72] The third party was allowed to use the information by payment of equitable remuneration.[73]

One may wonder whether any specific type of copyright system and legislation in order to provide non-discriminative legislation is suggested. Some principles from the new Convention on the Rights of Persons with Disabilities can be applied and give a direction to the copyright legislation. The principle of equal participation means access on equal conditions as other users and should affect for example waiting time and price, where applicable and possible for the State Party. The principle of autonomy, as stated above, points towards self-help rather than dependence of assistants, where possible. On the other hand, this principle should not be interpreted as saying that it is sufficient to provide access to copyright material for those persons who can use it on their own.

[70] Joined cases C-241/91 P and C-242/91 P *Radio Telefis Eireann and Independent Television Publications Ltd* v. *EC Commission* [1995] ECR I-743, [1995] All ER (EC) 4161.
[71] Torremans, *supra* note 46, p. 15, para. 1.
[72] *Ibid*., p. 15, para. 2.
[73] *Ibid*.

3 Key Concepts of Copyright and Related Rights

The international treaties establish obligations between the States parties regarding authors' rights in their own and other countries. This serves a purpose of protecting national interests of the member States in their creative industries. Under copyright only expressions are protected and not the underlying ideas.

First, the main international agreements on copyright and related rights will be presented, followed by a selection of exclusive rights of copyright or related rights. I will also present an evaluation of the needs of persons with different disabilities, and which exclusive rights will need to be put aside by authorization or legal exception in order to achieve access. This shows that the most affected rights regarding accessibility are probably the rights of reproduction and adaptation, but also distribution, including rental and lending, broadcasting by wireless means, other communication to the public, and public performance. The general exceptions and limitations to those exclusive rights will in the next Chapter be assessed as regards the importance for persons with disabilities.

3.1 International Treaties on Copyright and Related Rights

3.1.1 The Berne Convention for the Protection of Literary and Artistic Works

Copyright is a concept of protection for works enumerated in Article 2 of the Berne Convention. The Convention established the Berne Union and the member States form the Assembly of the Union, competent to "deal with all matters concerning the implementation of [the] Convention".[74] The Convention, and Union, has now 164 Member States.[75]

The categories of works protected and scope of protection have been enlarged by several revisions since the adoption in 1886, by Acts such as the Stockholm Act of 1967 and the Paris Act of 1971 which is the latest. 'Literary and artistic works' include for example choreographic works, works of applied art, folklore, architecture and audiovisual works. The system is basically about protecting the rights of authors of literary and artistic works from infringement in their economic and moral rights in the work. The Berne Convention is a key treaty because of its status as

[74] Berne Convention, Article 22(2)(a)(i).
[75] 'Berne Convention for the Protection of Literary and Artistic Works', <www.wipo.int/treaties/en/documents/pdf/berne.pdf> as of 15 January, 2008.

foundation and starting point of the international copyright system, and as model for national copyright legislation almost worldwide.

Later copyright treaties can generally be classified as 1) attempts to increase the number of States in the international copyright system, even if it entails a lower level of protection than that offered by the Berne Convention, or 2) attempts to provide protection for subject matter and/or rights falling outside the traditional ambit of the Berne Convention.[76] The Universal Copyright Convention (UCC) belongs to the first group, serving as a bridge between non-Berne members, and to Berne members. It was created in 1952, but with a later version from 1971 too. The UCC will not be mentioned in the discussion, because it has few active members as most of them have subsequently accessed to the Berne Convention.

The purpose of the Berne Convention is to "protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works" (Article 1 of the Preamble). The Articles on exceptions and limitations for different public policy purposes show, however, that the parties also saw a purpose in the introduction of certain modifications to the exclusive rights.

The Convention is governed by two fundamental principles of application: minimum protection and national treatment. *"Minimum protection"* means that the Convention is a minimum standard, and as provided in Articles 7(6) and 19 it does not preclude greater or longer copyright protection to be granted in a country of the Union. According to Article 20, members may conclude other agreements on copyright, provided that the rights under Berne are either strengthened or unaffected. The TRIPS Agreement and the WIPO Copyright Treaty (WCT) are such special agreements.

The second agreed principle of application is *"national treatment"* (Article 5(1)) – in the sense that in a country other than the country of origin of a work (origin defined in Article 5(4)) the authors of works eligible to protection are to enjoy the same rights as the nationals of those countries.[77] The Berne Convention provides full national treatment (equality between nationals and other from Union countries) except for certain special cases such as for example the comparison of terms of protection in Article 7(8).[78] However, paragraph (1) leaves to the member State the decision whether to guarantee the same rights as the nationals receive or the minimum level of protection from the Convention, because the State might have an interest in not granting wider protection to foreigners than their home countries would offer foreigners.[79] National treatment is a basic principle of the international norms of copyright and related rights.[80]

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[76] S. Ricketson, J.C. Ginsburg, *International Copyright and Neighbouring Rights The Berne Convention and Beyond*, Vols. I and II, Oxford University Press, 2 ed., 2006, Vol. II, p. 1170, para. 18.01.

[77] M. Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (hereinafter: WIPO guide or WIPO Dictionary), p. 40 para. BC-5.1.

[78] WIPO Guide, p. 40, para. BC-5.2.

[79] *Ibid*., p. 40, under BC-5.1 et seq. *See also* WIPO Dictionary, *supra* note 77, p. 297.

[80] WIPO Dictionary, *supra* note 77, p. 297, "National treatment (principle of)" para. 1.

A third fundamental principle of the Berne Convention is found in Article 5(2): the copyright protection shall be *formality-free*, meaning that a work shall be automatically protected after creation, even though fixation may be required for some types of works. Union members are for example not allowed to require registration for this purpose.[81]

3.1.2 The International Convention for the Protection of Performers, Producers and Broadcasting Organizations (Rome Convention)

In 1961 *related rights*, also called 'neighbouring rights', were guaranteed explicitly, under the Rome Convention. The "works" protected under related rights are called "objects of related rights" and are, respectively: the performances of performers, phonograms of their producers, and the broadcasts of broadcasting organizations.[82] Those rights were in some States already protected in the copyright regime.

The Rome Convention was the first international treaty on related rights, meaning the rights of performers in their performances, of producers in their phonograms and of broadcasting organizations in their broadcasts.[83] Related rights are also called neighbouring rights. The Rome Convention was concluded in 1961 and has 86 Contracting Parties to this day.[84] Its rather low adherence is mainly due to the fact that countries with a common law tradition already considered phonograms and broadcasts eligible to copyright protection.[85]

The Convention has been complemented by the Phonograms Convention of 1971 and the Satellites Convention of 1974, which are excluded from this research, and the WPPT which in 1996 among other things gave specific provision on related rights and new technology.

3.1.3 The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

TRIPS was concluded in 1994 in the Uruguay Round of the World Trade Organization. It has 151 members as of 27 July 2007.[86] The purpose of the protection and enforcement of intellectual property rights under TRIPS is, to "contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations" (Article 7).

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[81] WIPO Guide, *supra* note 77, p. 41, para. BC-5.7.
[82] WIPO Dictionary, *supra* note 77, "Related rights" p. 307.
[83] *Ibid*., "Related rights", p. 307, para. 1.
[84] WIPO, 'Contracting Parties – Rome Convention', <www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=17>.
[85] WIPO Guide, *supra* note 77, Introduction, Historical Background, p. 8, para. 17.
[86] WTO, 'Members and Observers', <www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>.

TRIPS did in general not alter the said balance, or the substantial provisions of international intellectual property law, but it was the first international legal instrument to set up an enforcement regime to these rights.

Article 2(2) of TRIPS provides: "Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under […] the Berne Convention, the Rome Convention […]. This means that TRIPS is a Special Agreement under the Berne and Rome Conventions.

The relationship between TRIPS and the Berne Convention is rather complex. Article 9(1), specifies that "Members shall comply with Articles 1 through 21 of the Berne Convention and its Appendix, but shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom". Article 9(1) of TRIPS is to be regarded as *lex specialis* over the more general Article 2(2), and the conclusion is therefore that protection of moral rights is not obligatory under the TRIPS. However, most WTO members are parties also to the Berne Convention, which makes them obliged to provide all the Berne rights; some important exceptions exist though, *e.g.*, the USA.[87]

TRIPS is often called Berne-plus and Paris-plus (referring to the Paris Convention on Industrial Property), because TRIPS adds some elements to the protection. For example, TRIPS added the exclusive right of rental, and provisions on the enforcement of intellectual property rights.

3.1.4 WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT)

As a response to the developments in information technology with Internet and other technological advances, the WIPO arranged in the 1990's negotiations of the so-called 'Internet treaties': the WCT and the WPPT. They were concluded in 1996 and both entered into force in 2002. The WCT has 64 Contracting Parties,[88] and the WPPT has 62 Contracting Parties.[89]

Apart from including the substantive norms of the Berne Convention by reference, and reproducing the Rome Convention (in the WPPT) and TRIPS norms with minor changes, the two treaties also provided new norms developed under the 'digital agenda' of the 1996 Diplomatic Conference of WIPO.[90] For example, computer programs and compilations of data are explicitly protected under the WCT (Articles 4 and 5).

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[87] 'Berne Convention for the Protection of Literary and Artistic Works', WIPO list of States parties, *supra* note 75.
[88] 'Contracting Parties – WIPO Copyright Treaty', <www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16>.
[89] 'Contracting Parties – WIPO Performances and Phonograms Treaty', <www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=20>.
[90] WIPO Guide, *supra* note 77, p. 11 para. 32 *et seq.*

Paragraphs 5 of the Preambles of both treaties provide "The Contracting Parties […] recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention". This is a recognition of an intentional balance between those rights and interests in the Berne Convention, and that there is a need for maintaining that balance.[91] An agreed statement to Article 10(2) of the WCT confirms the principle of "unchanged balance" as regards exceptions: "It is understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention".

The term of protection under the WPPT is for performers 50 years after their death, and for producers of phonograms 50 years from the publication (at the latest 50 years after its recording), according to Article 17.

3.2 Moral and Economic Rights under Copyright and Related Rights

Below, the different types of exclusive rights of authors and right-holders will be introduced; some appear in all the conventions assessed while some are specific for newer conventions.

The economic rights are exclusive rights of the right-holder to authorize certain acts in respect of their works or objects of related rights, or at least their rights of remuneration for such acts.[92] Some of those exclusive rights pertain to physical copies, such as the right of distribution and rental, while the majority are only attached to the content of the work.

3.2.1 Moral Rights

The Berne Convention provides in Article 6bis the so-called moral right, that "independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or any derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation". This moral right consists of several elements, of which the main are the right of paternity, meaning the right to claim authorship, and the right to integrity which means objection to actions which would be prejudicial to the author's honour or reputation.

The corresponding provision in the field of related rights is Article 5 of the WPPT, guaranteeing similar rights only to performers.

The effect of copyright exceptions on the moral rights of authors will not be individually assessed in this Thesis; however, this is often governed by the three-step test, and as a general rule, the just as other

[91] WIPO Guide, *supra* note 77, p. 187 para. CT-Pr.7.
[92] *Ibid*., p. 284 *et seq*.

exclusive rights, moral rights which are subject to an exception or limitation have to be specified or clearly implied in such a national provision.

Acknowledgement of the author is only required in less than half of the countries of Sullivan's study,[93] although this paternity right seems to be precious to many authors. Sullivan writes that on the other hand, the provision of accessible material to the *print disabled* is always extending only to uses not inflicting the moral rights of the authors, because the needs of neither visually impaired nor persons with print or perceptual disabilities do require any modification of the words in a work, and therefore the right of integrity is not affected.[94] This is probably true, but does not apply to all types of works, for example artwork for the visually impaired or dramatic works for persons with intellectual disabilities. Sullivan also acknowledges this fact, at least as regards persons with intellectual disabilities or hearing impairments.[95]

3.2.2 The Right of Reproduction

Reproduction is the core exclusive right, even though it was first provided in conventional text in the Berne Convention as late as in the 1967 Stockholm Act.[96] Article 9(1) of the Berne Convention provides that "authors of literary and artistic works shall have the exclusive right of authorizing the reproduction of these works, in any manner or form. The wording is intently made indistinct, in order to not exclude any new technologies which may allow new techniques of reproduction. The WIPO dictionary provides a reasonable minimum requirement: that the fixation be sufficiently stable in a way that the work may be perceived, further reproduced and communicated on the basis thereof..[97] Some examples of reproduction are the photo of a work of fine art, the temporary storing of a computer file, the printing of a book in Braille, and probably also "performance" in sign language of a literary work.

Today this right is also guaranteed, by reference to the Berne Convention, in TRIPS Article 9.1 and WCT Article 1(4). The WIPO Guide states correctly that the right will have the same scope in all three conventions, because the Berne *acquis* is part of TRIPS and WCT.[98]

As regards related rights, the Rome Convention provides an explicit definition in Article 3(e): "reproduction means the making of a copy or its fixation", which still leaves the matter rather unsettled. The WPPT applies in Articles 7 and 11 (rights of reproduction of performers and producers of phonograms) the language of the Berne Convention, in a *mutatis mutandis* manner. This means that the Berne meaning of the expression applies, including the Berne *acquis* which includes the sources

[93] Sullivan, *supra* note 2, p. 116, para. 6.5.5.8. Acknowledgement required.
[94] *Ibid*., 6.13 Print disabled people in general, p. 132, para. 1.
[95] *Ibid*., 6.13 Print disabled people in general, p. 132, para. 2 *et seq*.
[96] WIPO Guide, *supra* note 77, p. 54, BC-9.1.
[97] WIPO Dictionary, *supra* note 77, p. 307 para. 1.
[98] *Ibid*., p. 307 *et seq*. "Reproduction, right of", para. 3.

of interpretation such as agreed statements of the parties, however with respective differences of the conventions taken into consideration.

One of the exceptions to the right of reproduction is the three-step test of Article 9(2) of Berne, which has now reached the status of international intellectual property rights standard provision. The test and other exceptions will be assessed in the Chapter General Exceptions and Limitations.

3.2.3 The Right of Adaptation

According to the Berne Convention Article 12, every author of a work the object of copyright protection must have an exclusive right of authorizing adaptations, arrangements and alterations of the said work. Furthermore, the right of adaptation of a work to cinematographic form is guaranteed in Article 14(1)(i) of the Berne Convention. A WIPO dictionary says that the expression 'cinematographic work' in the context of the Berne Convention means also work created by a process analogous to cinematography.[99] Therefore audiovisual works, original fixations of images and sounds, are also covered by the Berne provisions on cinematographic works.[100]

The act of adaptation is altering a pre-existing work (either protected or in the public domain) or an expression of folklore, for a purpose other than for which it originally served, in a way that a new work comes into being in which the elements of the pre-existing work and the new elements – added as a result of the alteration – merge together.[101]

So, the work is made in another form. Article 12 mentions "adaptations, arrangements and other alterations" and the concept includes short versions for example suitable in another context, the making of a movie out of a book, a modernized or parody version of an opera. Translations are typical alterations but are guaranteed in Article 8. The concept of adaptation in Article 12 also covers some versions customized for use by persons with disabilities, since they are also made for another type of use, as long as they add some new elements to it and are not mere fixation of the work (reproduction). The WIPO dictionary provides that alterations which are normally needed for authorized uses of a work, and are not of an original nature, do not require separate authorization of the right-holder.[102] The only limit in such a case would be the right of integrity of the author by virtue of Article 6bis. The question arises then, which alterations are 'normally needed'; unfortunately, it seems like the average user is the model and while some actions to present a work in accessible format must be allowed, such as using a magnifying tool when reading electronic texts, some methods are not permissible on this ground.

The exclusive right to adaptation entails that anyone seeking to make such an adaptation is under a duty to inform the right-holder and seek

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[99] WIPO Dictionary, *supra* note 77, "Cinematographic work", p. 273, para. 2, citing part of the list of protected works in Article 2(1) of the Berne Convention.
[100] *Ibid*., "Audiovisual fixation", p. 267, para. 1 *et seq*.
[101] *Ibid*., "Adaptation; right of", p. 264, para. 1.
[102] *Ibid*., "Alteration of a work, other", p. 265, para. 4.

permission, enter an agreement on the terms such as payment of remuneration.

The result of an adaptation shall be protected by copyright or related rights as a derivative work (Berne Convention 2(3)) without prejudice to the copyright in the original work. However, some Berne members combine this with classifying the act of adaptation legally as a form of reproduction.[103] Ricketson discusses the proper allocation of rights between the adapter and the author of the underlying work.[104] He states that the most logical and practical interpretation of the Berne Convention is that the general right of reproduction is widely framed and capable of including reproductions of non-original kind, which historically were covered by Article 12 (adaptations). These "colourable imitations", fake adaptations, are therefore not covered by Article 12 of today, but by Article 9(1). Article 12 of today confers only a right to make derivative works, of the kind referred to in Article 2(3).[105] This interpretation leads to the conclusion that Article 12 only requires members to protect adaptation rights, and not necessarily any rights of exploitation in those adaptations.[106] Ricketson states that accordingly, it is a matter for national legislation to determine what rights are to be conferred to the first author in this regard; the original author may have rights to control the exploitation of the adaptation.[107] Normally this is settled beforehand, in the agreement giving the adapter a right to make an adaptation.[108]

As will be explored below, the right of adaptation has sometimes been claimed to be subject to the minor exceptions doctrine which allows certain exceptions of *de minimis* nature.

3.2.3.1 The Right of Translation

The exclusive right of right-holders to authorize the translation of their works is founded in the Article 8 of the Berne Convention, but is actually a form of adaptation. It targets the ordinary meaning of the word, translations from one language to another, but as curiosa one can mention that the right of translation sometimes also is extended to the transformation of a computer program from one programming language to another one.[109] No exception to the right of translation is provided in the Berne Convention, but as will be described below, within the concept of minor exceptions some member States claim that there is an implied exception to this right.
This right is of course just as important to persons with disabilities as to other users. However, when two countries use the same languages, the right of translation may be important because libraries and organizations in the

[103] Ricketson and Ginsburg, *supra* note 76, p. 645, *see* footnote 130 referring to French law.
[104] *Ibid*., p. 653.
[105] *Ibid*., p. 655, para. 2.
[106] *Ibid*., p. 655 para. 3.
[107] *Ibid*., p. 655 para. 3.
[108] *Ibid*., p. 656 para. 1.
[109] WIPO Dictionary, *supra* note 77, p. 314, para. 2 under "Translation, right of".

two countries might want to transfer accessible copies of works without having to translate them again, depending on the two national import and export, and copyright, regulations. This situation will be discussed as a thematic issue below.

3.2.4 The Right of Distribution, Including Rental and Lending

The right of distribution pertains to physical copies of the work and is crucial for an understanding of the practical copyright system. It is in fact rather extraordinary that the copyright regime includes such rights, considering the immaterial nature of rights.[110] In a narrow sense, the right of distribution is the right to make available the original or copies of a work, or an object of related rights, to the public by sale or other transfer of ownership (such as gift).[111] In a wider sense, the right of distribution also includes the right of rental, lending or other transfer of possession.[112] Rental is made for indirect or direct economic or commercial advantage, and lending is not.[113] The right of lending is however not required in the international copyright or related rights legislation.[114] The *droit de suite* also belongs to rights of distribution in a broader sense, because it gives the author of a work of fine art, or original manuscripts, the right to a share in the proceeds in further sales of the work.[115] The droit de suite or the right of subsequent disposal is optional in the Berne Convention (Article 14ter) but mandatory within the European Union.[116]

The narrow right of distribution, i.e., the right of making available to the public by sale or other transfer of ownership, is guaranteed in the Berne Convention as regards cinematographic adaptations or reproductions (of literary and artistic works, in Art. 14(1)(i)); owners of copyright in cinematographic works enjoy the same right (Art. 14bis(1)). In this narrow sense distribution means only the "putting into circulation" of copies, and can thus only be made once for a work.[117] The Berne Convention does not guarantee any general "right of circulation" which would include a right to control sales and other transfers of ownership after the first distribution; this is confirmed by a view on Article 14(1) in French version (French is official language together with English, see Article 37(1)), which provides "la mise en circulation" showing clearer than the English text that only the putting into circulation is guaranteed.[118] It has been argued, at least from WIPO, that the provision in Article 14(1) of the Berne Convention is abundant

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[110] Ricketson and Ginsburg, *supra* note 76, p. 660, para. 1.
[111] WIPO Dictionary, *supra* note 77, p. 283 under "Distribution", para. 2.
[112] *Ibid*., p. 283, para. 1.
[113] *Ibid*., p. 307 under "Rental; right of", para. 1.
[114] Ibid., p. 294 under "Lending".
[115] Ricketson and Ginsburg, *supra* note 76, p. 659, para. 2.
[116] *See* Directive 2001/84/EC of the European Parliament and of the Council of 27 Sept 2001 on the resale right for the benefit of the author of an original work of art, (Official Journal L 272, 13/10/2001 P. 0032-0036).
[117] WIPO Dictionary, *supra* note 77, p. 283, para. 3 in fine.
[118] Ricketson and Ginsburg, *supra* note 76, p. 665 para. 2, and WIPO Guide, *supra* note 77, p. 87 para. BC-14.18.

because one can deduct from Article 9(1) an implicit right of first distribution, as an inseparable corollary of the right of reproduction.[119] Such a theory would mean a guarantee of the right of distribution as regards all Berne Convention works. However, it is certain that the Berne Convention leaves a lot of room for national consideration on the content of the right of distribution and on which works to protect in that respect. Article 16 of the Berne Convention provides for seizure of infringing copies of works under certain conditions, which also is a form of control of physical copies.[120]

The TRIPS includes by reference the Berne Convention but does otherwise not provide for the rights of distribution in the narrow sense. The TRIPS does however guarantee an exclusive right of rental of certain works: computer programs, cinematographic works and phonograms (Arts. 11 and 14(4)).

The principle of 'exhaustion of rights', applied both in copyright and related rights, puts an end to the right of distribution so that transfers of ownership cannot be controlled by the author forever. It seems like most Berne Union members limit the right of control of a copy to the first distribution or publication,[121] and it can be done with national, regional or global effect. For instance, if the right of distribution is exhausted only nationally, it means that the right of distribution is only exhausted if a sale is made in that country, and that the right-holder still can object to any publication of the work abroad. For example, the European Union requires regional exhaustion of the right of distribution of physical copies of works.[122] Some exceptions: online services do not lead to consumption of the right of distribution and the copy of the work must on that account stay with the downloader.[123] Furthermore, rental rights are of course not exhausted by the first rental.[124] More about these provisions and their application regarding importation of copies in the Chapter on thematic issues.

The Rome Convention does not specifically guarantee any rights of distribution.[125] The WPPT, on the other hand, provides for the same narrow right of distribution as the Berne Convention as regards phonograms and copies of works or performances (Arts. 7 and 12, respectively).[126] The right of authorizing commercial rental is guaranteed for producers of phonograms (Article 13(1)) and same right of performers as regards their performances fixed in phonograms (Article 9(1)). In both cases, this rental

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[119] WIPO Guide, *supra* note 77, p. 87 para. BC-14.18.
[120] For a good overview of the right of seizure under the Berne Convention *see* Ricketson and Ginsburg, *supra* note 76, pp. 660-663.
[121] *Ibid*., p. 658, para. 3.
[122] Directive 2001/29/EC of the European Parliament and the Council (the "Infosoc" Directive), Article 4(2), *see also* preambular paragraph 28. Previously, the Nordic countries applied global exhaustion of the right of distribution. Not only the EU Member States are parties to the Directive but also the members of the European Economic Area (EEA), *i.e.*, Norway, Iceland and Liechtenstein.
[123] *Ibid*., Recital (preambular paragraph) 29.
[124] *Ibid*., third sentence of Recital 29.
[125] WIPO Dictionary, *supra* note 77, p. 283 para. 4.
[126] WIPO Dictionary, *supra* note 77, p. 283 para. 7.

right persists even after the authorized distribution (paras. (2) of the provisions).

The WCT guarantees in Article 6 the right of distribution for all protected types of works, and in Article 7(1)(i-iii) the right of authorizing commercial rental of computer programs, cinematographic works and works embodied in phonograms. However, the rental right in cinematographic works applies only when "such commercial rental has led to widespread copying of such works materially impairing the exclusive right of reproduction".

Another right pertaining to physical copies is the right of exhibition, i.e., the right of showing, disclosing or exposing the original or a copy of a work to the public in a static form, either directly or on screen.[127] This right is guaranteed in some national laws but neither in international copyright law nor in related rights law.[128]

3.2.5 The Right of Public Performance

There are two elements to this right: first, the *authors* of dramatic, dramatico-musical or musical works have, according to Berne Article 11(1), the exclusive right of authorizing their public performance. The provision covers public performance by "any means or process", including the playing of such works that are fixed in audiovisual fixations or phonograms.[129] In Article 14(1)(ii) the authors of audiovisual adaptations or reproductions have the exclusive right of authorizing public performance. Article 14*bis*(1) guarantees the owner of copyright in such a work the same rights under the latter provision as the author of an original work. The right of public performance is also provided in Article 14*ter*(1)(ii) as regards recitation.

The second side of the right of public performance is as a related right. In this sense, public performance means "the act of a *performer* concerning a work, as a result of which the work becomes audible and/or visible for those who are present at the place of the performance".[130] If the work is made audible or visible to persons not present, the act is instead 'communication to the public'.[131] The right of protection of one's public performance is guaranteed in the Rome Convention (Article 7) OSV

The WPPT defines performers as "actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore" (Article 2(a)). The WPPT (Art. 6) provides a stronger right of public performance for broadcasts than the Rome Convention, in the sense that it is not a right of possibility of preventing, but an exclusive right of authorization. However, performers are under the WPPT only guaranteed the right of authorizing the sound recording of their performance, and not the audiovisual recording (Art. 7(1)). Audiovisual performances are only

[127] *Ibid*., p. 282 under "Displaying/display; right of public display", para. 1.
[128] *Ibid*, para. 2.
[129] *Ibid*., p. 301 under "Performing a work; right of public performance", para. 2.
[130] *Ibid*., para. 1.
[131] *Ibid*., para. 5.

protected when fixed in phonograms, because the contractual relationship of performer and producer, of whom the latter already enjoys the exclusive rights in audiovisual productions, was disputed in the drafting process.[132] For example, this means that actors and performing musicians do for now not enjoy protection in relation to audiovisual fixations of their performances.

The right of public performance is guaranteed in TRIPS Article 14(1) *in fine* as a right of performers to prevent the broadcasting by wireless means or communication to the public of their live performances.

3.2.6 The Right of Communication to the Public and Broadcasting by Wireless Means

There is no common definition of this right in the treaties, but in the meaning of the Berne Convention, the WIPO Dictionary presents this definition of communication to the public:

> "The transmission, by wire or by wireless means, of the images or sounds, or both, of a work or of an object of related rights, making it possible for the images and/or sounds to be perceived by persons outside the normal circle of a family and the closest social acquaintances of the family, at a place or places the distance of which from the place where the transmission is started is such that, without the transmission, the images or sounds, or both, would not be perceivable at the said place or places, irrespective of whether the said persons can perceive the images and/or sounds at the same place and at the same time, or at different places and at different times (emphasis added)."[133]

The typical modes of communication to the public are thus radio and TV broadcasting, cable TV and now also "streaming" from the Internet.

The concept of communication to the public formally includes broadcasting, even though this right is guaranteed in a separate Article of the Berne Convention (11bis). That convention provides for protection of the communication to the public of public performances of dramatic, dramatico-musical and musical works (Article 11(1)(ii)), and public recitations of literary works (11ter(1)(ii)), and cinematographic works (14(1)(ii) and 14bis(1)).

In the field of related rights, the Rome Convention also provides rights of broadcasting and of communication to the public separately. The Rome Convention broadened the concept of communication to the public to include communication of a performance at a place where the public was, or a place open to the public (Article 7(1)(a)).[134]

As noted above, TRIPS refers to the Rome Convention in Article 2(2), but it does otherwise not provide for this right.

The WCT has moved this concept of communication to the public into the digital environment, and also extended it to "making available to

[132] H. Olsson, *Copyright* (2006), p. 445 , para. 2.
[133] WIPO Dictionary, *supra* note 77, p. 275 *et seq*.
[134] WIPO Dictionary, *supra* note 77, p. 276, para. 3.

the public" (Article 8). This includes interactive making available,[135] for example 'on demand' services for downloading from the Internet.

The WPPT defines communication to the public as transmissions to the public by any medium, other than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram (Article 2(g)). In Article 15(1) of the WPPT, performers and producers of phonograms are guaranteed the right to a single equitable remuneration for the direct and indirect use of phonograms published for commercial purposes, for broadcasting or for any communication to the public. To conclude, it does not provide any exclusive right of authorizing the communication to the public, because the delegations were unable to reach consensus on that issue. Article 15 of the WPPT presents the same concept of communication to the public as the Rome Convention, but leaves out the interactive making available which WCT provides for.[136] However, WPPT guarantees in Article 10 an exclusive right of "interactive digital transmissions" of performances fixed in phonograms,[137] similar to the "making available to the public" in WCT. This is called the "umbrella solution" because it mandates the Contracting Parties to decide to characterize this as a separate right of making available, or as part of the right of distribution, communication to the public or a combination of these rights.[138]

Explicit convention exceptions to the right of communication to the public are often reserved to rare cases, such as the ones of the Berne Convention. The minor reservations doctrine, which will be assessed in the Chapter on general exceptions, applies to some cases of communication to the public.

3.3 Accessibility of Material and its Implications for Copyright

Now that the different economic and moral rights have been introduced, this summary of the possible ways of making copyright material accessible for persons with different disabilities will also show which adjustments of exclusive rights are needed.

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[135] *Ibid*., p. 276 para. 2.
[136] *Ibid*., p. 276, para. 4.
[137] Article 10 of the WPPT reads: "Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them".
[138] WIPO Guide, *supra* note 77, p. 248, para. PPT-10.3.

3.3.1 The Hearing Impaired

For the hearing impaired, works in written form are accessible, although an interesting detail is that the mother tongue of persons born deaf is sign language, and the written language therefore comes second. Therefore the work is better accessible in sign language.

Sign language is not a fixation of a work ("in any manner or form") and thus does not interfere with the exclusive right of reproduction. However, it may be interfering with the right of public performance of a dramatic or dramatico-musical work, as guaranteed in Article 11(1) of the Berne Convention. As regards literary works, Article 14ter(1)(ii) provides for a separate right of public recitation, even though recitation according to the WIPO Guide should be regarded as part of the concept of 'public performance'.[139] This right of recitation probably also covers recitation in sign language.

Cinematographic works are accessible when special subtitling describing the dialogue and other sounds is added, so-called caption. Alternatively, sign language commentary can be added in a side of the screen. Both those techniques qualify as adaptations of the work in the meaning of Article 12 of the Berne Convention.

3.3.2 The Visually Impaired

In non-electronic format, a work can be made accessible by recording of reading, or by printing in Braille. Braille is a writing system based on a series of raised dots embossed in paper, or on a refreshable, computer-connected display. Composed of 63 possible combinations of one to six dots arranged in a six position cell, Braille characters can represent letters, words, numbers, punctuation, composition signs and graphic symbols. There are special Braille codes for music and mathematics, and different grades of Braille, each one increasing in complexity.[140] Refreshable Braille displays are also popular, where a literary work in electronic format can be shown after commando by the user, from the computer screen. Such displays depend on a special so-called screen-reader program, i.e., software that takes the text from the screen and "communicates" it in an accessible form. Successful use also depends on the text of the electronic document; it has to be text and not for example pdf images, and be "tagged" in the right order, so that the software reads it from the beginning to the end. Screen-reader programs can also provide magnifying functions (on the computer screen) for visually impaired.

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[139] WIPO Dictionary, *supra* note 77, "Performing a work; right of public performance", p. 301, para. 3.

[140] F. Hébert, and W. Noel, *Copyright and Library Materials for the Handicapped / A Study prepared for the International Federation of Library Associations and Institutions*, p. 13, para. 3.1.

Screen-readers can also have a text-to-speech (TTS) function, which means that a synthetic voice reads the material. It is quite difficult to hear what it says.[141] Because the format of the work is changed, such a use of the document may be classified as alteration, although this often allowed under the minor exceptions doctrine as will be described below. The synthetic speech can of course be sound recorded, which is classified as a reproduction, because it is a fixation of the work. In Sweden, TTS is not classified as a specific sound recording, because the digital voice is not real sound.[142] Ordinary talking books, i.e., recordings of a person reading a literary work, are more common and constitute products of the act of reproduction. Many formats of talking books are in use on the market, and one of the most successful in the latest years is the DAISY format which is digital and capable of presentation both in sound, text or Braille.[143] It is possible to tag the document in order to be able to start at that place at the next use; this and many other functions make DAISY books popular not only to persons with disabilities but also other persons. Therefore, that format cannot be used with support in an exception allowing the making of "special copies" which persons with disabilities need in order to access the work.[144]

Artwork can be accessed by touch, of both sculptural and paint work, if it is allowed in the particular cases. It depends on the conditions of the exhibition, but it would of course be preferable if the State (or the private actors, on their own initiative) could prepare copies of sculptures and relief versions of paint work, accompanied by Braille signs with details about the work.

Audiovisual works are accessible if audio-description is added, where a speaker voice tells what happens and how it looks. As regards performances such as dance, it is more difficult.

3.3.3 Persons with Intellectual Disabilities

A common mistake is to offer those persons children's material. They are not children of mind; their interests change through life. To access material in written form, adaptation into a simpler and clearer version is usually needed. This adaptation is sometimes already available because of needs in schools etc. Cinematographic works are equal to written ones, in that they are sometimes accessible, whilst they sometimes need to be adapted into another version. Performances such as dance and theatre are in most cases already accessible to persons with intellectual disabilities. An interesting side question here is whether it is possible to adapt for example theatre pieces to make them accessible to persons with intellectual disabilities, while still keeping the spirit of the original piece. It may be that the

[141] For a listening sample of TTS and natural person recordings, click the links from the paper by Kerscher and Fruchtermann, 'The Soundproof Book: Exploration of Rights Conflict and Access to Commercial eBooks by Persons with Disabilities'.
[142] Olsson, *supra* note 132, p. 221, para. 3.
[143] Sullivan, *supra* note 2, p. 115, 6.5.5.6, para. 2.
[144] Sullivan, *ibid*., p. 115, para. 3.

adaptation does not resemble the old piece, which in rare cases may lead to the conclusion that the adaptation is in fact a new creation. An adaptor has to be cautious not to conflict with the author's moral right not to have the work deteriorated, i.e., the right of integrity which is guaranteed in *inter alia* Article 6bis(1) of the Berne Convention.

3.3.4 Table of Uses by Persons with Disabilities

This is a table showing the main elements of the meeting between copyright and the needs of persons with disabilities, and how the uses should be classified. Acts of distribution or communication to the public are often made in the process of provision of accessible materials. However, this will not be included in the table in those cases where they are not the main acts involved. The table should be read from top to bottom, and it displays the type of work or object of related rights in the left column and the disability or impairment on the top row.

	Hearing	**Visual**	**Intellectual**
Literary works	Accessible. However, the work may often be more accessible in sign language (P)	Reading (P), or recording of reading (R). Braille printing (R). Magnifying screen reader program may also help.	Sometimes simpler text is needed (A). If the person cannot read, the text will have to be adapted into another format, such as spoken or acted in theatre.
Text in electronic form	Accessible	TSS directly (may constitute A) or recorded (R). Refreshable Braille display (R)	Often needs clearer layout (A if extensive changes). TTS may also benefit (A)
Visual/fine art	Accessible	Touching it can mean some access. Braille signs (R)	Accessible
Cinemato-graphic (audiovisual) works	Subtitles (R), preferably including added comments (A)	Audio-description added in personal devices or in the film soundtrack (A). Alternatively description in Braille (A)	(A)
Musical works	Some accessibility,	Accessible in general, opera in	Accessible

	the body feels the sound. Other forms: "played" in sign language after sheet music (P)	foreign language can be translated in Braille form (R, T) or in personal audio devices (R, T)	
Dramatic works (performances)	Spoken commentary added where needed (A) or performed in sign language (P)	Translation if needed (T), and Braille program (R) or audio-description (A)	Other version may be needed (A)

R = Reproduction (including recording)
A = Adaptation
P = Public performance
D = Distribution
C = Communication to the public
T = Translation

3.4 Summary: Exclusive Rights and the Needs of Persons with Disabilities

As the table above shows, the most common rights to be affected are the rights of reproduction and adaptation. However, the material normally also needs to be distributed or communicated to the users.

The table above has the general starting point of the existent culture in society, without any particular assessment of the *interests* of persons with disabilities. Deaf culture is a well-known example of how a group can develop its own interests and ways of entertainment and culture. Therefore, not only the right of access but also of identity is protected as a human right, and in the provision of copyright exceptions it is of course important to assess the needs and interests beforehand.

Now the possibility of different national copyright exceptions and limitations will be assessed, and their applicability for persons with disabilities, before looking at some examples of the different national solutions.

4 The Benefit of Different Exceptions and Limitations

It may of course often be possible for those persons to use the material as it is, using exceptions for the purposes of education, private use etc.[145] For example, the visually impaired can enjoy music, and the persons with hearing impairment can enjoy dance performances. In this chapter I will therefore explore the comprehensiveness and usefulness of exceptions and limitations (including non-voluntary licenses) which could indirectly or directly benefit persons with disabilities.

One must always remember that decisions to introduce exceptions or non-voluntary licenses belong to the State, which has to provide national legislation using the opportunities given in international intellectual property law. Even though proposals have been made for international mandatory exceptions and compulsory licenses,[146] it is not the State of the law today.

4.1 Defining Exceptions, Limitations and Non-Voluntary Licenses

Copyright can be adjusted and restricted in many ways to fit the public policy better, but such exceptions and limitations need to fit into the frames of the international agreements. The Berne Convention provides four legal-technical solutions to this: copyright exceptions, limitations, and compulsory and statutory licenses respectively. The two main components are release from the obligation of obtaining prior consent by the right-holder, or from paying remuneration for the use.

To begin with, there are copyright *limitations*, which permit or demand certain types of material or works to be excluded from copyright protection. The terminology varies between the different conventions, and 'limitations' is sometimes used in the generic meaning embracing all "limitations to copyright protection", and sometimes in the more specific meaning explained in this section.

The State can also provide in legislation for an *exception*, which permits activity without permission by the right-holder and without payment of remuneration.[147] In the text of the Berne Convention the verb "to permit" or adjective "permissible" is used to describe exceptions, or for example that the State may "determine the conditions under which" an act "may" be carried out, but the provision cannot include a proviso that equitable

[145] Sullivan, *supra* note 2, p. 29.
[146] Permanent Representation of Chile in Geneva, 'Proposal by Chile on the Subject Exceptions and limitations to copyright and related rights, note verbal to WIPO on October 28, 2004', (WIPO doc. SCCR 12/3). *See also* the *Report* of the Standing Committee on Copyright and Related Rights (WIPO doc. SCCR/12/4).
[147] WIPO Dictionary, *supra* note 77, p. 287, "Exceptions and Limitations", para. 4.

remuneration should be paid. Copyright exceptions are often in international copyright law referred to as "free uses".[148]

Finally, the Berne Convention provides that compulsory or statutory licenses under certain conditions can be created in national legislation. A *compulsory license* is issued by the State upon the request of users and requires the right-holder to grant licenses.[149] The *statutory license* gives the users, by legislation, a direct permission of use without prior consent. With both types of licenses is attached a requirement of payment of equitable remuneration.[150] The Berne Convention speaks of "non-voluntary licenses" which covers both types of licenses.[151] The limitations spoken of in Article 15 of the Rome Convention seem to cover exceptions and compulsory licenses, and the term 'compulsory licenses' seems to mean both compulsory and statutory licenses.[152] The Phonograms Convention uses the same terminology, while the Satellites Convention because of its special legal nature instead talks of certain program signals in respect of which there are no obligations under the Convention.[153]

It is rather common that what is spoken of as copyright exceptions for the benefit of persons with disabilities are actually statutory or compulsory licenses. In order for the provision not to interfere with the third step of the three-step test, prejudicing the legitimate interests of the author, a requirement of payment of remuneration is often added.[154]

International copyright law does not hinder the countries from letting copyright exceptions be overridable by contract. However, some would argue that human rights law hinders this in some cases. The Swedish Copyright Act only provides obligatory exceptions in this sense for certain acts of reproduction of computer programs; all other exceptions of Chapter 2 of the Act can be abandoned by contract, for example by sale with certain conditions which are clear to both parties.[155]

4.2 The Usefulness of General Openings in Intellectual Property Law to Persons with Disabilities

Below is a selection of copyright exceptions and limitations which may benefit persons with disabilities. The crucial question here is whether de facto access can be made possible. Sullivan writes that the exceptions most likely to provide access for the visually impaired are for the purposes of education and/or private copying.[156] This is also true for persons with other disabilities, because these exceptions are the widest in scope. Sullivan also

[148] WIPO Dictionary, *supra* note 77, p. 287, para. 4
[149] *Ibid*.
[150] *Ibid*. *See also* Sullivan, *supra* note 2, p. 16.
[151] WIPO Dictionary, *supra* note 77, p. 287.
[152] *Ibid*., para. 2.
[153] *Ibid*.
[154] Sullivan, *supra* note 2, p. 40, para. 3.
[155] Olsson, *supra* note 132, p. 179, para. 2.
[156] Sullivan, *supra* note 2, p. 29

mentions the copyright legislation of Macau, where any legal right to *use* a work without the author's consent also is said to imply the right to transform it, to the extent necessary for the authorized use.[157] This type of legislation is very beneficial and seemingly allows the making of accessible formats. I will start by assessing limitations, then the general doctrine of minor exceptions, and then more specific exceptions to the economic rights will be explained.

4.2.1 Copyright and Related Right Limitations

The international agreements provide some instances of mandatory exclusion from protection of certain types of materials. For example, the Berne Convention has one mandatory limitation: Article 2(8) on news of the day and miscellaneous facts having the character of mere items of press information. Articles which qualify as literary works are on the other hand protected.[158] Therefore, persons with disabilities, or organizations assisting, are free to adapt "mere items of press information" and simpler articles for their needs. The Berne Convention also leaves in Article 2(4) optional the protection of "official texts of a legislative, administrative and legal nature, and to official translations of such texts".

The agreements always exclude some material or uses. The right of adaptation is also not provided in the WPPT. As stated above, the WPPT does not require protection of the audiovisual recordings of performances. However, the producers of the phonograms still enjoy copyright.

Another limitation is that the right of communication to the public generally does not include the right of private communication, so online distribution of accessible works via e-mail is not hindered by the international agreements.[159] Finally, non-commercial lending is neither required to be protected in TRIPS, the WCT nor the WPPT.

4.2.2 The Minor Exceptions Doctrine

The *de minimis non curat lex* principle of interpretation is Latin and means "the law does not concern itself with trifles". This indicates that even if a technical violation of a law appears to exist according to the letter of the law, if the effect is too small to be of consequence, the violation of the law will not be considered as a sufficient cause of action, whether in civil or criminal proceedings.

This is the basis of the "minor reservations doctrine" or, as the WTO Panel more correctly called it in the *Homestyle* case, "minor

[157] Sullivan, *supra* note 2, p. 29.
[158] Statement in the Report of Main Committee I at the Stockholm Conference in 1967, as quoted in Ricketson, 'WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment', 2003 (WIPO Doc. SCCR/9/7), p. 11, para. 1.
[159] Olsson, *supra* note 132, p. 223, in fine.

exceptions doctrine".[160] In international copyright law the application of this principle leads to "*de minimis* exceptions": exceptions that are so insignificant in scope and value that they are allowed. The question of minor exceptions came into discussion on the Brussels revision conference in 1948. The Brussels revision conference asked the Rapporteur-General of the conference to give a statement on such exceptions, and in the General Report Mr. Plaisant referred to "limited exceptions… allowed for religious ceremonies, military bands and the needs of child and adult education" as such "minor exceptions".[161]

In their decision in the *Homestyle* case, the WTO Panel of Experts confirmed that the statement of 1948 is an agreement between the parties in connection with the conclusion of the treaty in the meaning of Article 31(2)(a) of the VCLT, i.e., part of the Berne *acquis*.[162] This case really concerned the application of the TRIPS Agreement, and the Panel found that by virtue of the incorporation of Berne Convention provisions into TRIPS, the Berne *acquis*, including the minor exceptions doctrine, also applies to TRIPS.[163] The WTO Panel reiterates that the Report of the Main Committee I of the 1967 Stockholm Conference also mentions 'popularization' of works, and that the examples mentioned in Brussels are only of illustrative character.[164] And while the Report of 1967 refers only to Article 11(1) (public performance of dramatic, dramatico-musical or musical works), the Panel clarifies that exceptions also to Articles 11bis (broadcasting and certain public communication), 11ter (recitation), 13 (recording of musical works) and 14 (cinematographic adaptation of a work) are possible.[165] However, Sullivan seems to see an opening to the minor exceptions doctrine also regarding Article 14bis(1) of the Berne Convention.[166]

The Panel also stated that otherwise the application of the minor exceptions doctrine is not limited to exclusively non-commercial uses or to exceptions in national legislation that existed prior to 1967.[167]

The benefit to persons with disabilities from the minor exceptions doctrine cannot be great, because if its *de minimis* nature. Therefore minor exceptions can probably never be acceptable in cases of making works in digital format available to those persons, for example. However, accompanying performances with sign language interpretation should be

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[160] *United States - Section 110(5) of US Copyright Act* (*European Communities* v. *United States of America*), Report of the Panel, Part I, 15 June 2000 (WTO Doc. WT/DS/160/R), para. 6.49.
[161] WIPO Dictionary, *supra* note 77, "Minor exceptions/reservations", p. 296.
[162] *United States - Section 110(5) of US Copyright Act*, *supra* note 160, para. 6.53. The WTO Panel supports this view with the fact that the exclusive rights concerned were introduced or amended at this revision conference, and that the conference entrusted the Rapporteur-General "expressly mention minor exceptions" and the General Report with that statement was formally adopted by the Berne members.
[163] *Ibid*., para. 6.91 *et seq*.
[164] *Ibid*., p. 22, para. 6.57.
[165] *Ibid*.
[166] Sullivan, *supra* note 2, p. 18.
[167] *United States - Section 110(5) of US Copyright Act*, *supra* note 160, para. 6.93.

permissible under the minor exceptions doctrine, in cases where only a few persons benefit from the sign language.

The European Union provides in the Infosoc Directive an exception similar to the minor exceptions doctrine, in Article 5(3)(o). It says that Members may allow uses in certain cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

In common law countries such as the UK and the USA a principle of fair use, or fair dealing, is provided in copyright law. For example the US Copyright Act of 1976, Section 107 provides this. This exception is based on an evaluation of transaction costs, meaning that when the requirement of payment of equitable remuneration would not be cost-effective because of administrative costs, the use will be allowed without payment. This applies for example in the case where a student copies a chapter from a book, because if this were not allowed, the user would not buy the book or pay remuneration for the short part anyway. The reasoning is similar to the minor exceptions doctrine.

4.2.3 Exceptions and Non-Voluntary Licenses for Educational Purposes

This exception is provided in the Berne Convention Article 10(2), and only allowed for the purpose of illustration, and in accordance with fair practice.

For example, a person with a disability who is receiving education may benefit from this provision, just as other students. However, there are two main problems with the use of the educational exception by persons with disabilities. Firstly, to take the example further, there may be a situation where reproduction is not enough and the student is in need of material in another form in order to be able to perceive it. Of course, school libraries and other actors lack often the incentive to alter material or produce it in a form suitable for students with disabilities, because the small group of beneficiaries. Even though copyright remuneration may be excluded because of the exception for reproduction for education, it costs to produce or alter material. Here, the fair practice condition may also constitute a problem; even though study material is often provided from publishers to persons with disabilities on voluntary basis, this cannot be called standard practice.

Secondly, persons with disabilities of course also want to use copyrighted material in situations outside the educational sphere, and maybe keep the copies. In that case, the following provision on exceptions for private use may be of help.

Sometimes these issues are solved voluntarily. In Sweden, the Government stated in preparatory work of 2004 that there existed to some extent agreements between a certain public library and right-holders, allowing the making of a few digital copies of literary works, and allowing their lending. They were then used by visually impaired students and other

students with disabilities who needed the book in digital format. This type of agreement especially for students probably still exists in Sweden, to complement the exception in Article 17.

4.2.4 The Three-Step Test and Exceptions to the Right of Reproduction

Exceptions and limitations to this fundamental right of reproduction exist on several different bases, and some of them are considered separately in this Chapter. However, the three-step test, introduced in international copyright law in 1967, is special among those exceptions, because it is open to any policy reason, as long as the requirements are met.

The generally worded three-step test is usually the basis of national exceptions of reproduction for *private use*, but also for material accessible by persons with *disabilities*. The previously existing exceptions in the Berne Convention continued to exist with unaffected scope.[168] Exceptions for the benefit of persons with disabilities were mentioned as one of the envisaged exceptions in the discussions surrounding the adoption of Article 9(2), in the Main Committee I on the Stockholm revision Conference of 1967.[169] Some States even replicate the conditions of the three-step test in exceptions for the visually impaired, while legislators in the majority of countries assess the ability of different uses to pass the test before allowing them in legislation.[170]

The steps are, in the wording of the Berne Convention:

1) The limitation or exception can only apply in certain special cases,
2) The limitation or exception must not conflict with a normal exploitation of the work, and
3) The limitation or exception must not unreasonably prejudice the legitimate interests of the author.

Article 9(1) of the Berne Convention guarantees a general exclusive right of reproduction, in whatever manner or form, and Article 9(2) provides that national laws may grant exceptions or compulsory licenses to this right, provided that the three conditions are fulfilled. The three-step test for exceptions is also required in Article 13 of the TRIPS Agreement, Article 10 of WCT, and Article 16(2) of WPPT. The Rome Convention instead provides in Article 15(2) that any Contracting State may provide for the same exceptions and limitations with regard to the protection of performers, producers of phonograms and broadcasting organizations, as it provides for in connection with the protection of copyright in literary and artistic works.

The Berne Convention and the TRIPS have two differences in the wording of the three-step test, and the first one is that while Berne only

[168] Ricketson, *supra* note 158, p. 21 para. 2.
[169] Ricketson and Ginsburg, *supra* note 76, p. 485 *et seq*.
[170] Sullivan, *supra* note 2, p. 41, para. 2.10 Other Conditions, section 1.

provides for the three-step test to limitations and exceptions to the right to reproduction, the TRIPS Agreement Article 13 says "Members shall confine any limitations or exceptions to exclusive rights to…" without specifying which exclusive rights. However, the TRIPS Agreement cannot derogate from earlier commitments of Berne Union members to protect intellectual property rights, because of its status as a "special agreement concluded between member States" as in the Berne Convention Article 20. Therefore the copyright exceptions within TRIPS cannot be more extensive than Article 9(2) of the Berne Convention, except that it includes the exclusive rights guaranteed in the Agreement itself. This means that the scope of Article 13 of TRIPS is efficiently framed by the obligations of the Berne Convention.[171] Even though this is somewhat debated, my conclusion is that Article 13 of TRIPS governs exceptions only from the right of reproduction and the exclusive right provided in the Agreement, i.e., the right of rental. Some scholars even argue that TRIPS is "Berne Plus" in the sense that it extends and reinforces the rights compared to the Berne Convention, and that by consequence the possibilities of exceptions and limitations would be even smaller under TRIPS.

The second difference in the wording of the three-step test is that Article 13 of TRIPS says 'author' and not 'right-holder'. The difference is that right-holders do not possess the moral rights in a work. However, TRIPS does not require protection of the moral rights guaranteed in the Berne Convention (Article 9(1) of TRIPS), so the difference is intended.

To summarize, the three-step test applies only to the exclusive right of reproduction. However, a copyright exception is often built on more uses than just reproduction. For example, the provision making an exception may allow "use" of a work, without specifying reproduction, communication etc. There are cases where an exception to the exclusive right to reproduction brings with it an acceptance of restriction of other exclusive rights as well. For example, the adaptation rights established in the Berne Convention Article 12, and for cinematographic works in Article 14, lack exception in the Convention but are subject to the minor exceptions doctrine. The same applies to the exclusive right of translation, as shown in the above Chapter. When developing an exception or compulsory license, the legislator assesses the impact on the exclusive rights and normally also lets the parties give their opinion. In reality there are no international disputes known about exceptions that interfere with rights that cannot be derogated from, except that sometimes industrialized countries have complained about the wide exceptions provided in some developing countries. The legislative process has to be efficient. When exceptions are introduced, they have to have some practical use, i.e., not involve only copying but also distribution and necessary alterations. There exist other bases for exceptions than the three-step test, and in all cases exceptions and licenses must strive for clarity and an adequate balance of interests.

[171] For a contrary view, *see* for example Ricketson, *supra* note 158, p. 47, para. 1, where he argues that Article 13(1) of TRIPS applies to all the exclusive rights of the Berne Convention, including that of reproduction, as well as the rental right in TRIPS.

WIPO has a Standing Committee on Copyright and Related Rights (SCCR), and it meets every year in order to discuss the development of international norms and practice, etc. In 2004 the SCCR included in its working agenda the issue of exceptions and limitations of copyright for the benefit of education, libraries, and persons with disabilities. SCCR decided to include this in order to help improve international understanding of the needs in these areas,[172] on the proposal of the Chilean delegation.[173] This shows, in my view, that the discussions in WIPO increasingly take into account a stakeholder view on copyright legislation.

In its consulting activities the WIPO uses a model copyright provisions in advising countries that are about to build up or strengthen a national copyright system. According to Nic Garnett, one of the suggested provisions states that it shall be permitted without authorization to reproduce a published work for visually impaired persons in an alternative manner or form which enables their perception of the work, and to distribute the copies exclusively to those persons.[174] The work must not be reasonably available in an identical or largely equivalent form enabling its perception by the visually impaired. Furthermore, the reproduction and distribution must be made on a non-profit basis.[175] There are no official statistics on how this model provision has been used.

4.2.4.1 The First Step

The first condition (certain special cases) refers to clarity of the exception or compulsory license, and to narrowness in the scope and reach. The WTO Panel stated that there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularized. [176]

Part of this step is the limitation of scope of end beneficiary, i.e., the user of an exception or compulsory license and in this case a person with disability. Ricketson writes that exceptions for the benefit of visually or hearing impaired in the digital environment, in order to satisfy the first step of the test, have to be clearly defined and limited, because the definition of the end beneficiary and the uses could otherwise become too large.[177] The definition of end beneficiary is explored as a thematic issue in the Chapter below.

Most countries seem to have chosen a more detailed type of exception which separates the needs and uses of groups with different disabilities. The reason for this may be that the model is secure for the right-holder who can calculate how the rule could be applied to their work. In that way the State has probably also assessed the problems in each specific type of needs, and done the three-step test beforehand. That method may be

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[172] Standing Committee on Copyright and Related Rights, *supra* note 146, p. 49 para. B.
[173] Permanent Representation of Chile in Geneva, *supra* note 146.
[174] Garnett, *supra* note 1, p. 97.
[175] *Ibid*.
[176] *United States - Section 110(5) of US Copyright Act*, *supra* note 160, para. 6.108.
[177] Ricketson, *supra* note 158, p. 76.

appreciated by the beneficiaries and organizations as well, as long as it does not exclude for example important disabilities or future technologies.

The WTO Panel in the "Homestyle" case stated that the purpose of an exception is not part of the assessment in the first step.[178] It will instead be specifically scrutinized in the second and third step of the test, according to Ricketson and Ginsburg.[179] Those scholars also state that there is no apparent reason to let this interpretation apply only to TRIPS and not to the Berne Convention,[180] and this is a valid point for the whole decision even though one has to keep in mind the different legal backgrounds, the Berne Union and the WTO.

4.2.4.2 The Second Step

The exception or compulsory license shall not conflict with the normal exploitation of the work. The WTO Panel believed that "exploitation" of works refers to the activity by which copyright owners employ the exclusive rights conferred on them to extract economic value from their rights to those works.[181] The WTO Panel provided, without specifying its viewpoint clearly, two possible connotations of 'normal exploitation': either the regular or typical exploitation, or a somewhat more normative, if not dynamic approach, conformation to a type or standard.[182] Ricketson argues that the second, dynamic approach seems to be most consistent with the context and object and purpose of the Berne Convention. Therefore, he proposes the definition of 'normal exploitation' of the WTO Panel: "in addition to those forms of exploitation which currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance.[183] However, the Panel was clear in that 'normal exploitation' means something less than full exercise of exclusive rights, since such a definition would put all potential exceptions in conflict with the normal exploitation of the work.[184]

Ricketson states that exceptions for the assisting of visually or hearing impaired persons allows such uses which may have the potential to conflict with a normal exploitation of the work, and therefore it may be necessary to consider here the balance of non-normative considerations, as between the real needs of such users and the economic interests of authors in exploiting their works.[185] Ricketson also provides a very valid point, interesting in the application of Article 9(2) on exceptions for persons with disabilities: the context of the treaty, the presence of the other exceptions in the Berne Convention, and the second step of the three-step test, show an

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[178] *United States - Section 110(5) of US Copyright Act, supra* note 160, para. 6.111. See also concurring discussion in Ricketson and Ginsburg, supra note 76, p. 764 *et seq*.
[179] Ricketson and Ginsburg, *supra* note 76, p. 767 para. 2.
[180] *Ibid*., para. 2 *in fine.*
[181] *United States - Section 110(5) of US Copyright Act, supra* note 160, para. 6.165.
[182] *Ibid*., para. 6.166.
[183] *Ibid*., para. 6.180 See also Ricketson and Ginsburg, supra note 76, p. 769 *in fine et seq*.
[184] *United States - Section 110(5) of US Copyright Act, supra* note 160, para. 6.167.
[185] Ricketson, *supra* note 158, p. 76 *in fine et seq*.

implicit balancing exercise requiring consideration of non-economic as well as economic normative considerations.[186]

4.2.4.3 The Third Step

The exception or compulsory license should not unreasonably prejudice the legitimate interests of the author, such interest being derived from, in a normative perspective, the interests that are justifiable in the light of the general copyright objectives.[187] Compensation mechanisms can sometimes be instrumental in defeating a finding of unreasonableness. Therefore this step often leads to the introduction of a requirement of payment of remuneration to the right-holder, i.e., choice of a compulsory license instead of exception.[188] Ricketson states that the answer to the third step as regards the assisting of hearing and visually impaired may well be that this is an area that should be subject to a requirement to pay equitable remuneration.[189] This must however depend on the scope of the exception, and different uses may lead to different requirements, so that the national provision combines an exception with a compulsory license.

The large majority of the countries in Sullivan's study on exceptions for the visually impaired provide pure exceptions, in the meaning that there is no requirement of payment of remuneration to the right-holder.[190] The World Blind Union argues that as long as the additional cost of creating accessible material lies with the users or voluntary organizations, compensation to right-holders is not justified.[191] However, Sullivan submits information that in practice, many right-holders have agreed to licensing deals without subsequently claiming the remuneration, royalty, stipulated in the deal.[192]

4.2.5 Exceptions from the Right of Adaptation

The Berne Convention does not provide any explicit exception to the right of adaptation, but Judith Sullivan claims that it is possible to argue for an exception being permitted by the minor exceptions doctrine to the right to cinematographic adaptation rights in Article 14.[193] On the other hand, she sees no clear possibility of this doctrine to be applied on the main adaptation right in Article 12.[194] Yet, there is a chance that one could argue successfully that any adaptation which is made when making material accessible to the visually impaired is a species of reproduction and covered

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[186] Ricketson and Ginsburg, *supra* note 76, p. 772, para. 1 *in fine.*
[187] *United States - Section 110(5) of US Copyright Act, supra* note 160, para. 6.224, para. 2.
[188] Ricketson, *supra* note 158, p. 80. *See also* Sullivan, *supra* note 2, p. 17, para. 1.2.1.
[189] Ricketson, *supra* note 158, p. 80.
[190] Sullivan, *supra* note 2, p. 116.
[191] *Ibid*., para. 1.
[192] *Ibid*., para. 1 *in fine.*
[193] *Ibid*., p. 18 para. 1.2.2.
[194] *Ibid*.

by permissible exceptions to that right instead.[195] Similar possibilities of exception are argued in terms of the Rome Convention, TRIPS and the WCT – the WPPT does not guarantee the right of adaptation.[196]

However, when it comes to the transfer of a work from one type of text format to another, that act can be classified as reproduction according to the WIPO definition of reproduction: it is just a new fixation of a work or object of related rights sufficiently stable in a way that it may be perceived. This means that the exclusive right of adaptation does not cover changes of text formats in order to make versions suitable to persons with specific disabilities, such as Braille books or books changed from analogue to electronic format. Those are instead subject to the right to reproduction, and those uses will depend on an exception or non-voluntary license to that exclusive right, for example under Article 9(2) of the Berne Convention, or possibly be allowed under the *de minimis* principle.

There still exist cases where the making of accessible copies involves the adaptation right, of course, such as the recording of talking books for example in MP3 format and audio-description of audiovisual works. The exclusiveness of this right entails that anyone wanting to make an adaptation must seek permission from the right-holder, and pay compensation for it. It is usually not profitable to make this type of adaptation, because the group of users is small; therefore one can argue that international copyright law would allow an exception to the right of adaptation, not prejudicial to the legitimate interests of the author, by analogy from the three-step test for exceptions to the right of reproduction.

4.2.6 Exceptions for the Making of Translations

The possibility of introducing national exceptions to the right of translation, in spite of lack of such explicit provision in the Berne Convention, has been much debated. The WTO Panel states that in addition to the rights of public performance, translations of literary works also belong to the minor exceptions doctrine.[197] Sam Ricketson presents two possible bases for such an exception: one is that translations are a species of reproduction[198]. The other is that an interpretation of the Conventional text as *excluding* the possibility of implying parallel exceptions to the right of translations would lead to a manifestly absurd result (in the meaning of Article 32(b) of the Vienna Convention on the Law of Treaties).[199] This result cannot be intended by the framers of the Convention and its revised Acts. Furthermore, one could say that such a result would be in conflict with the fundamental nature of the Berne Convention (VCLT Article 31(1) in fine), as an international union of States with widely differing linguistic backgrounds.[200] On the Stockholm Conference in 1967, an exception to the

[195] Sullivan, *supra* note 2, p. 18.
[196] *Ibid*., pp. 19, 21, 24 and 26, respectively.
[197] *United States - Section 110(5) of US Copyright Act, supra* note 160, p. 19, footnote 57.
[198] Ricketson, *supra* note 158, p. 38 para. 1.
[199] *Ibid*., p. 38 para. 2.
[200] Ricketson, *supra* note 158, p. 38 para. 2.

right of translation was widely discussed and it resulted in a Statement in the Report of Main Committee I:

> "While it was generally agreed that Articles 2*bis*(2), 9(2), 10(1) and (2), and 10*bis*(1) and (2), virtually imply the possibility of using the work not only in the original form but also in translation, subject to the same conditions, in particular that the use is in conformity with fair practice and that here too, as in the case of all uses of the work, the rights granted to the author under Article 6bis (moral rights) and reserved, different opinions were expressed regarding the lawful uses provided for in Articles 11*bis* and 13."[201]

The articles for which the Report showed a clear support of implied exceptions to the right of translation are regarding, respectively: certain uses of lectures and speeches, general exceptions from the right of reproduction, quotations, illustrations for teaching, and certain uses of articles or broadcast works on current events and other ways of reporting current events. Diverging views were expressed on the right of broadcasting of translations, and on the recording of musical works and their lyrics. This accepted statement should be classified as an ancillary or subsequent agreement between the Member States of a treaty, which shall be taken into account as an interpretative aid (VCLT Article 31(3)(a)).

As written above, the only special need of persons with disabilities for an exception from the right of translation is in the case where an organization in one country has translated and made accessible a copyright work, and then wants to export it to another country of the same language. If the import country does not allow for an exception to the right of translation, the organization there will have to translate the work again instead.

4.2.7 Exception for Quotation

This is the only mandatory exception of the Berne Convention, provided in Article 10(1). Quotation of a work which has been lawfully available to the public shall be allowed under the conditions that the quotation is compatible with fair practice and that it is made to the extent justified by its purpose. This exception would apply when a person with disabilities wants to quote a certain work, thus it does promote access to information and cultural life but not in the "passive" consumer form which is the theme of this Thesis.

4.2.8 Exceptions to the right of distribution

It is quite simple; Sullivan states that in general, it seems that exceptions to the right of reproduction for the benefit of the visually impaired which also permit restricted types of distribution of copies so made for those people are

[201] Report of Main Committee I of the Stockholm Revision Conference, p. 1165, as cited in WIPO Guide, *supra* note 77, p. 53 para. BC-8.3.

unlikely to be problematic.[202] Distribution is most probably acceptable in small scale and even more so if they are made with non-commercial purposes.

As regards rental rights, both the WCT and the WPPT have bases for exceptions in Articles 10(1) which set up the three-step test. In the WCT, rental rights only apply to computer programs, cinematographic works and phonograms, and the last of these is weak, in the meaning that Article 7 of the WCT probably only provides for a right of equitable remuneration in the case of such rental activity.[203] In all, the rental rights of the WCT are only exclusive if commercial, and thus non-commercial rental is not protected. Sullivan states that the application of the three-step test may further affect the extent to which commercial distribution and rental can be permitted.[204] This is realistic. The same restrictions and openings apply to the WPPT.[205] There is no clear common understanding of 'commercial' in the international agreements. The Swedish Government has interpreted the phrase, from an EU Directive and into the provisions on material for persons with disabilities, as aiming at the entity responsible of the production or distribution of the material, leaving out eventual commercial purposes of subcontractors and users.[206]

In TRIPS, exceptions to the right of rental are governed by Article 13 and its three-step test. Therefore, non-commercial loans are likely to be more permissible than commercial,[207] and since the TRIPS does not require protection of a right of non-commercial rental, such rental can be allowed in a Contracting Party for the benefit of persons with disabilities.

4.3 Conclusions from this Chapter

The uses which would benefit persons with disabilities the most, and which are possible to allow according to international agreements, are as follows. The copyright limitation of news of the day means that organizations and even the public can make such articles accessible to persons with disabilities, and distribute them. As long as official texts are not protected in national copyright law the same applies to them.

As regards purpose-specific exceptions such as the exceptions for education and private copying, they are of course restricted in that sense, but are otherwise great for persons with disabilities in situations where alteration of the work is not necessary, but merely the act of reproduction. This applies to such self-help as using electronic texts for Braille refreshable displays or Braille printing.

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[202] Sullivan, *supra* note 2, p. 18, para. 1.2.3., section 4.
[203] *Ibid*., p. 24, para. 1.5.2.
[204] *Ibid*.
[205] *Ibid*., p. 26, para. 1.6.3.
[206] Swedish Proposition 2004/05:110, p. 173 *et seq*. (*especially* p. 174 *in fine*) regarding the implementation and interpretation of Article 5(3)(b) of the EU Infosoc Directive, and considering which entities shall be eligible to receive licenses for reproduction of works for the benefit of persons with disabilities.
[207] Sullivan, *supra* note 2, p. 22, para. 1.4.3.

The minor exceptions doctrine benefits persons with disabilities in many cases, such as where a performance of a work is accompanied by sign language interpretation, or where a literary work is recited likewise.

The result of application of the three-step test on uses by persons with disabilities depends much on how precise the provision can be on end beneficiary, uses and purposes. For example, the three-step test may lead to an introduction of a requirement of certain proof of disability, because the permitted use would otherwise not be sufficiently “special”.

5 Analysis of Danish and Swedish Legislation with Thematic Issues

In this Chapter, the copyright and related rights legislation of the European Union (EU) and its member States Sweden and Denmark will be presented. Thereafter, some thematic issues which often are problematic when it comes to this type of exception will be presented, with special regard to the Swedish and Danish solutions. Because of this disposition of the Chapter, provisions on DRMs, end beneficiaries and import/export regulations will only be lightly described in the presentations of the Danish and Swedish copyright Acts.

5.1 The European Union

The European Union, funded in Rome in 1957, includes 27 European states and *inter alia* Denmark and Sweden. The European Council and Parliament have legislative power in certain fields, as provided in several treaties. The EU has had a strong development of disability rights in the latest decade, based on anti-discrimination legislation. It has also signed the Convention on the Rights of Persons with Disabilities on its opening day;[208] its Member States will also sign the Convention individually. The EU did not sign the Optional Protocol.

Several EU directives touch upon copyright and related rights, and those apply as if they were national law after the implementation period, provided that the wording is clear enough. The InfoSoc Directive, also called the Copyright Directive, of 2001 is the most interesting here.[209] On July 14 2003 the European Commission made a press release stating that only Greece and Denmark has implemented the Directive before December 22 2002 which was the implementation date.[210] It also stated that since that date, also Italy and Austria had brought their legislation into compliance with the Directive,[211] which means that Sweden was not considered to be ready with the implementation by that time.

Recital 43 (from the Preamble) highlights the importance of Member States adopting "all necessary measures to facilitate access to works for persons suffering from a disability which constitutes an obstacle to the use of the works themselves, and to pay particular attention to

[208] UN Enable website, 'Countries' (list of States parties).
[209] Infosoc Directive, *supra* note 122. According to Article 13(1), the Member States should bring into the force the laws, regulations and administrative provisions necessary to comply with the Infosoc Directive within a rather short implementation period - before 22 December 2002.
[210] Cunard *et al*, *supra* note 13, p. 77, para. 1.
[211] *Ibid*.

accessible formats". It is unclear what the particular attention is meant to result in.

According to Article 5(3) of the Infosoc Directive, the Member States may provide for limitations or exceptions to the rights of reproduction, communication to the public and making available to the public (Arts. 2 and 3) in certain cases. According to 5(3)(b), "uses, for the benefit of people with a disability" may be allowed if they are directly connected to the disability, the use is of non-commercial nature and it is only to the extent required by the specific disability. Section (4) of Article 5 provides that an exception which is allowed under Article 5(3)(b) may be accompanied also by an exception or limitation to the right of distribution as referred to in Article 4, to the extent justified by the purpose of the authorized act of reproduction. Therefore the Member States may for example allow rental, lending, or sale. However, the right of distribution should not be exhausted by the use of the exception of Article 5(3)(b), because this is clearly not justified by the purpose of the rule. Moreover, Article 5(5) renders the three-step test which all the exceptions of sections (3) and (4) must also fulfill.

The Rental Directive of 2006 requires the Member States to guarantee the rights of authorizing or prohibiting rental and lending of a work or object of related rights.[212] Those rights were not guaranteed in the Infosoc Directive, but in the previous Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, which had been amended many times.[213]

Article 2(1)(a) defines rental as making available for use, for a limited period of time and for direct or indirect economic or commercial advantage. Lending is defined as making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public (Article 2(1)(b)). Article 6(1) provides that the Member States may derogate from the exclusive public lending right of Article 1, provided that at least authors obtain remuneration. The Member States are free to determine this remuneration taking account of their cultural promotion objectives. Furthermore, according to Article 6(3), they may also exempt certain categories of establishments from the payment of remuneration in such cases. This provision may apply to libraries lending out accessible material. Furthermore, Chapter II of the Directive deals with related rights. Those can be subject to national limitations, as long as it is the same kind of limitation as it provides for in connection with the protection of copyright in literary and artistic works (Article 10(2)(1)), for example to the benefit of persons with disabilities. 'Limitations' clearly means what is in this Thesis

[212] Article 3(1) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (Official Journal of the European Communities 2006 L 376 pp. 28-35).

[213] *Ibid*., *see* Recital 1, which provides that in the interest of clarity and rationality the said Directive (of 1992) should be codified. *See also* Article 14 of the 2006 Rental Directive, which declares the older Directive repealed.

called ‘exceptions’. Additionally, any compulsory license to the rights of Chapter II of the Directive may be provided only to the extent to which they are compatible with the Rome Convention (Article 10(2)(2)). Finally, an extra guarantee for fair limitations is provided in Article 10(3) which recites the three-step test and applies to the whole Article.

5.2 Denmark: Ophavsretslov 8.7.1961/404[214]

In Denmark, Section 17 of *Ophavsretslov* provides exceptions for persons with disabilities. Before a major amendment in 2005, the exception for persons with disabilities only aimed at end beneficiaries who could not read print.

Section 11 provides general rules on the exceptions. In the first paragraph, it states that the exceptions shall be applied without prejudice to the rights of Section 3, i.e., the moral rights of integrity and of paternity – to be identified as the author in accordance with the requirements of proper usage. Additionally, Section 11(2) provides that under the Chapter on exceptions, the work may not be altered more extensively than is required for the permitted use. This should not be problematic in the application of Section 17, because the accessibility is better if the work is not altered too much. However, this provision might pose some problems on the use of Section 17 for persons with intellectual disabilities, and attention has to be made to the real need of alteration (for example, simplification) so that it is within the frames of Section 11(2). When the work is used publicly, the source shall according to the same paragraph of Section 11 be stated in accordance with the requirements of proper usage. This clearly applies for example to performance in sign language, or radio or TV broadcasts of works. Paragraph (3) of Section 11 provides that an exception must not be used with a copy based on a circumvention contrary to Section 75(c)(1), meaning the circumvention of effective technological measures without the consent of the right-holder.

All elements of Section 17 are restricted to published (*udgivne*) works; it is not enough that the work has been made public. According to Section 8(2) a work is considered published if, with the consent of the author, copies of the work have been put on the market or otherwise distributed to the public. The right of distribution is guaranteed in Section 2(1), and in Section 19(1) the principle of regional exhaustion of the right is established. However, the second sentence of 19(1) provides that as regards lending and rental, the exhaustion shall apply also to sale or assignment in any other form to others outside the European Economic Area. This rule does however not apply to distribution to the general public through rental in 19(2). But it allows for example the lending out by Danish libraries of copyright protected items acquired outside the European Community.[215]

[214] See copy of Article 17 in English in Supplement A.
[215] G. Westkamp, ‘Information Access, Lex Digitalis and Fundamental Rights in Modern Copyright Law’, 2007, p. 159.

The Act provides three openings for the benefit of persons with disabilities: reproduction and distribution of works for those who cannot access print (paragraph (1)), production of talking books for visually or print impaired (3) and recording and production (*gengivelse*) of radio or TV broadcasts for visually or hearing impaired persons (4).[216] Section 17 applies not only to copyright but also related rights, because the separate Sections of Chapter 5 on "other rights" refer to it.

Before assessing Section 17, one must know that the exception is overridable by contract, meaning that a user or organization can when buying a copy agree not to use it in a certain way as otherwise allowed in an exception.[217] It has to be an agreement between the user and the right-holder and not merely a unilateral declaration.[218]

The first exception is general and allows the provision of works lawfully made public, in accessible forms to persons who cannot access the works in the usual way. The last part means that the work in its original format is not accessible or can only be accessed with an "unreasonable collection of powers".[219] Thus it allows both reproduction and adaptation. It is important to note that the exception applies to both the visually and the hearing impaired, and enables according to the preparatory work of 1996 for instance especially designated reproductions in print and image combined with sign language, clear dictation or similar.[220] The copy can only be used and distributed in non-commercial purposes, according to the second part of paragraph (1), and the material must be designated to the use of persons with disabilities.[221] The distribution methods can, after the 2005 amendment, include non-commercial lending, where the beneficiary covers the distribution costs but nothing more.[222] Paragraph (1) does not apply to audio recordings of literary works; so-called talking books and other cases of sound recording of literary works for instance in multimedia products are instead subject to a compulsory license in paragraph (3)[223]. Neither does paragraph (1) apply to uses consisting solely of sound recordings of musical works (see paragraph (2)). The latter limitation is based on the assumption that the selection of musical works is so broad for *all* groups of the population that there is no need for an opening to production especially for

[216] P. Schønning, *Ophavsretsloven med Kommentarer*, 2005, p. 284, B: Kommentarer til § 17.
[217] *Ibid*., p. 233, para. 3.
[218] *Ibid*., p. 233, para. 4.
[219] *Ibid*., p. 285, para. 3, referring to the preparatory work of 1990: Betænkende 1197/1990, p. 141.
[220] *Ibid*., p. 286, para. 3.
[221] *Ibid*., p. 286, para. 6.
[222] 'Forslag til lov om ændring i Ophavsretsloven. Arkiver, biblioteker og museer samt syns- og læsehandicappede m.v.' (Preparatory work). Lovforslag L 78 2004 (4 November 2004). Para. 4.3.2, third section regarding the second part of Section 17(2).
[223] Second para. of Section 17, *see also* 'Forslag til lov om ændring i Ophavsretsloven. Arkiver, biblioteker og museer samt syns- og læsehandicappede m.v.', *supra* note 222, p. 12, 4.2.2, para. 3.

persons with disabilities.[224] Otherwise, all other types of works are covered, such as audiovisual works and works of fine art.[225]

The second exception, in paragraph (3), is in fact a compulsory license for talking books which renders the author a right of equitable remuneration. It enables the recording and distribution of literary works which are made public. Before 2005, paragraph (3) allowed only the production and distribution of physical copies,[226] but now it also includes online distribution and other "other forms of production and distribution".[227] The use and distribution of talking books must not be for commercial purposes, as fixed in the same paragraph *in fine*. Thus the typical distribution method is lending. The Danish commercial market for talking books is big, but *Danmarks Blindebibliotek*, (Denmark's Library for the Blind) is the main producer of talking books customized for persons with disabilities, with around 500 books per year, serving around 10 000 persons.[228] The Library for the Blind is under the Cultural Ministry, which also prepares the copyright and related rights legislation. The compulsory license needed for this is governed by Section 47(1) of the Copyright Act, and if an agreement cannot be reached, an official board called *Ophavsretslicensnævnet* (Copyright License Tribunal) determines the conditions.[229] Danmarks Blindebibliotek has an agreement with three collective management organizations, regarding the definition of disability, conditions of distribution, security etc.[230] Documents showing participation in education for the dyslectic, or medical certificates of disability, shall be required for access to material from the library.[231] Furthermore, digital copies shall have individual numbers.[232] The agreement also stipulates that *Danmarks Blindebibliotek* shall contact commercial publishers before the production of a talking book, in order to avoid double production;[233] even though double publishing is not forbidden it is quite unnecessary since persons with disabilities can normally also access the commercial talking books.

The third exception (paragraph (4)) allows government, municipal and other social or non-profit institutions to record from TV or radio broadcasts, in analogue or digital format,[234] exclusively for the benefit of visually or hearing impaired. It is not a requirement that the institution be

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[224] Lovforslag, *supra* note 222, 4.2.2, Kulturministeriets overvejelser, para. 4.
[225] *Ibid*., 4.2.2. *in fine.*
[226] For example, rental, communication to the public via the Internet, and transfer of "talking newspapers" via telephone was not covered by the license. *See* Schønning, *supra* note 216, p. 288 *in fine.*
[227] Lovforslag, *supra* note 222, 4.4.2 Kulturministeriets overvejelser, para. 2.
[228] *Ibid*., 4.1. Indledning og baggrund for lovforslaget, para. 4.
[229] Schønning, *supra* note 216, p. 288, para. 4.
[230] The collective management organizations are Den danske forlaeggerforening, Dansk forfatterforening and Danske skönlitteraere forfattere. Lovforslag, *supra* note 222, p. 13 para. 4.4.2, sections 4-6.
[231] *Ibid*., 4.4.2 para. 5.
[232] *Ibid*., para. 6.
[233] *Ibid*., para. 7.
[234] Schønning, *supra* note 216, p. 289, para. 5 "Stk. 5" first section.

official, but it must not be run for profit.[235] Paragraph (4) requires the entering of an extended collective license (*aftalelicens*), and according to the last sentence of paragraph (4) the recorded material can then be used for the purpose of activities covered by the license. Extended collective licenses are covered by Section 50, which stipulates that it is an agreement on the exploitation of the works in question with an organization comprising a substantial number of authors of a certain type of works which are used in Denmark, including also other works of the same nature although the authors of those works are not represented by the organization (paragraph 1). The preparatory work of Section 17(4) of 1995 exemplifies that the license can cover only a certain work, or that only a few copies are allowed.[236] The proposition also proposes that not only TV programmes with captioning or added sign language interpretation, but also the adding of such functions to the recorded material is covered.[237]

5.3 Sweden: Upphovsrättslag (1960:729)[238]

The Swedish Act on Copyright in Literary and Artistic Works is commonly called *Upphovsrättslag* (1960:729). In spite of its name, it also covers related rights. The provision on disabilities is Article 17, with four paragraphs. The Article was completely revised and modified on July 1 2005,[239] together with large parts of the Copyright Act. The revision was mostly due to technological advances and the fact that the other Nordic countries had already changed their copyright legislation in a rather uniform way.[240] The Swedish Government had stated that the Swedish copyright regime was already in harmony with the Infosoc Directive,[241] even though it refers much to the Directive in the preparatory work.

Article 1 of the Act is almost identical to the list of protected works in Article 2 of the Berne Convention. In Article 2 the exclusive right to "exploit the work" by making copies or making it available to the public, "in the original or an altered manner, in translation or adaptation, in another literary or artistic form, or in another technical manner", is guaranteed (para. 1). Making available to the public is in paragraph (3) of Article 2 defined as communication to the public, public performance, public exhibition of copies of the work or distribution for example by sale, leasing and lending. Paragraph (4) of Article 2 adds that as acts of communication to the public or public performance shall also be deemed acts of communication or performance that, in the framework of commercial activities, occur to or for a relatively large group of persons.

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[235] Schønning, *supra* note 216, p. 289, para. 5 third section.
[236] *Ibid*., p. 289 in fine *et seq*.
[237] *Ibid*., p. 290.
[238] See Article 17 in English version in Supplement B.
[239] The amending law was *Lag* (2005:359) *om ändring i lagen* (1960:729) *om upphovsrätt till litterära och konstnärliga verk*.
[240] Olsson, *supra* note 132, p. 169, para. 4.
[241] *Ibid*.

All parts of Article 17 apply only to copies which are made public, and provision on that is found in Article 8(1): it means that the work has lawfully been made available to the public. The pre-2005 version of Article 17 provided that the work had to be published, a stricter requirement which led to the exclusion of material published on the Internet when it was not clear whether it was lawfully published or not.

As regards moral rights, Article 11(1) of the Swedish Act refers to Article 17 and other exceptions in that Chapter, and provides that those provisions do not limit the author's rights under Article 3; i.e., the moral rights of paternity and integrity. Therefore 11(2) provides that when a work is used publicly on the basis of those provisions the source should be stated to the extent and in the manner required by proper usage. Section 3(1) of the Copyright Regulation[242] specifies that when an organization or library makes or communicates copies or works using the exception in Article 17(2) of the Act, the author shall be informed if possible without inconvenience. Section 3(2) adds a requirement that information on the title, year of preparation and producer, as well as the information items described in Article 11 of the Copyright Act. Furthermore, the producer shall establish a register of the copies produced (Section 3(3)). Section 3, second Paragraph, provides that when a library or organization distributes or communicates copies to persons with disabilities in such a way that the person may keep a copy, the author shall be informed about this if it can be done without inconvenience. A side note can be made, that according to Article 3, the moral rights may only be waived by the author in relation to uses which are limited as to their character and scope, so as regards licenses and agreements for the benefit of persons with disabilities, it is not self-evident that the author can waive his/her moral rights.

Article 11(2) also stipulates, *in fine*, that the work may not be altered more than necessary for the use. This limits the possibility of making adaptations, for example in order to obtain an accessible format; however, the necessary adaptations for the use by persons with disabilities are normally quite obvious and therefore allowed.

The uses allowed under Article 17 are as follows. Under the general, first paragraph, anyone can make, by means other than sound recording, copies of literary, artistic or visual art works that persons with disabilities need in order to be able to enjoy the works, and distribute them. This does not give any right to communicate the copies, only to distribute physical copies in different ways such as sale, rental and gift.[243]

The second paragraph entitles libraries and organizations as decided by the Government to also communicate the copies of the first paragraph, and make, distribute and communicate talking books and other sound recordings to persons with disabilities who need them, and finally to "make such copies" of works transmitted on TV or radio, and of cinematographic works, that deaf or hearing impaired need in order to be able to enjoy the works, and to distribute and communicate the copies. The concept of communication includes transfer of digital files to the computer

[242] *Upphovsrättsförordning* (SFS 2005:362).
[243] Olsson, *supra* note 132, p. 222, para. 2.

of the beneficiary, which was not allowed before 2005.[244] Talking books for persons with disabilities may be produced even if the work is already commercially available in that format.[245] This was not allowed before 2005, but now the Government did so because there was sometimes a lack of talking books, and the competition with the previous talking book was expected to be very little because of the strict rules on distribution in Article 17(2).

The rule on TV, film and radio recordings allows also the adding of sign language and other alterations necessary.[246] The Government provided in the Proposition that it in fact would like the rule on TV, radio and audiovisual works to apply to all disabilities, but an inclusion of more beneficiaries than the hearing impaired would require more research and preparation.[247]

The third and fourth paragraphs condition the use of the above-mentioned exceptions: firstly, the reproduction, distribution and communication to the public of copies must not be carried out for commercial purposes or any other purposes than those mentioned in Article 17. In the preparatory work, the Government stated that it interpreted the EU non-commerciality condition as requiring that the entity responsible of the production and distribution is non-profit.[248] On the other hand, the entity may subcontract the production to commercial companies. Furthermore, the beneficiary may use the material at work, but not sell or give it to anyone who does not fulfill the requirements of Article 17.[249] The fourth paragraph of Article 17 contains a compulsory license. It provides namely, that when libraries or organizations with support in 17(2) distribute or communicate copies that the beneficiaries may keep, remuneration shall be paid. Furthermore, the second sentence of 17(4) also provides that the authors has a right to remuneration when more than a few copies of works with support of the general paragraph (1) are transmitted to persons with disabilities. The Government assumed in the Proposition that the cost bearer would in the case of talking books be the person with a disability, but states that the person would presumably consider it reasonable in those cases where the example can be kept.[250] However, it is not stated whether the Government also accepts that the beneficiary covers additional costs compared to the work in its original form.

DRMs are protected under Chapter 6 a of the Swedish Copyright Act, with a definition of technological protection measures in second paragraph of Article 52(b) as any effective technology aimed at preventing or restricting the reproduction or making available of works. This will be explored below as a separate issue.

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[244] Olsson, *supra* note 132, p. 223, para. 3.
[245] Proposition, *supra* note 206, p. 176, para. 1.
[246] Olsson, *supra* note 132, p. 224, para. 2.
[247] Proposition, *supra* note 206. p. 181, para. 2.
[248] *Ibid*., p. 174, para. 2 *in fine.*
[249] *Ibid*., p. 175, para. 3.
[250] *Ibid*., p. 183, para. 1.

5.3.1 Swedish Value-Added Tax on Talking Books

Unfortunately, this is an example of a situation where legislative actions are not coordinated in a country. The Swedish copyright policy on audio-recorded literary works is positive, with an exception in Article 17(4) enabling production by certain qualified organizations and libraries. The Swedish value-added tax (VAT) on such books is also reduced from 25 to 6 per cent, on equal footing with print books.

The reduction must probably now be abolished, because the common EU tax policy is to allow reduced VAT only on print copies, and on medical aids for persons with disabilities.[251] The European Commission has sent a formal request to Sweden to amend its legislation on this point.[252] This affair affects both Swedes with full sight and persons with visual or hearing impairment using talking books, and the organizations producing and distributing them. "A book is a book, no matter if it is read with your fingers, ears or eyes", the leader of the national organization for the visually impaired (SRF) argues.[253] As a side note, one can mention that MP3 files and other downloadable files of literary works in recorded or text version are categorized as services, and not goods, in EU tax law. Therefore those internet files will probably never enjoy tax reduction, and the Swedish Government is only arguing that sold CDs and computer memory cards should enjoy VAT reduction. The Swedish Ministry of Foreign Affairs has asked the European Commission to include talking books in its list of permitted VAT-reduced goods on *inter alia* the ground that exclusion would be a discriminative act in violation of Article 5 of the Convention on the Rights of Persons with Disabilities, on accessibility.[254]

A librarian writes in an Internet newspaper that the Swedes with disabilities would not suffer much from VAT non-reduction, because around 40 000 titles in DAISY (CD-ROM) format already are recorded by a library in Stockholm, ready to be sent to local libraries for lending.[255] On the other hand, she does not mention that it normally takes months for libraries to prepare talking books, while a commercial book is often released simultaneously as a talking and print book.

5.4 Defining the End Beneficiary

Exceptions or compulsory licenses for persons with disabilities often are directly referring to a certain national definition or measurement, but neither the Danish nor Swedish legislation has defined the beneficiaries with the help of any external judgments. Sweden uses the phrase 'persons with

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[251] Annex III to the VAT Directive 2006/112/EC, *as cited in the press release* 'VAT: Infringement Procedures against Italy and Sweden'.
[252] *Ibid*.
[253] Nummi-Södergren, 'LEDAREN Hantverk, mörkerrädsla och ljudboksmoms', 2007, para. 6. The quote is *"En bok är en bok, oavsett om man läser med fingrarna, öronen eller ögonen."*.
[254] K. Cooper, 'Sverige försvarar låg ljudboksmoms' , *in fine.*
[255] E. Skog, 'Harmsen debatt om ljudboksmoms', *in fine.*

disability', which is in the risk zone of being too wide, but the preparatory work defines it rather thoroughly. As we will see, the Danish Copyright Act is much more precise in its Article 17, identifying exactly the disability required in order to benefit from the exception. This is of course good for the right-holders, but it makes the Article unfit for the users who only almost fit into the requirements, or who suffer from multiple disabilities which separately do not fulfil the requirement.

5.4.1 Denmark

Article 17(1) of the Danish Copyright Act is rather general and aims at persons who cannot read print text, or suffer from speech impediment, visual or hearing impairment. Speech impediment (*talelidende*) is for example dumbness and aphasia. Article 17(1) excludes for example persons with intellectual disabilities and probably also persons with other physical impairments, for example who cannot manipulate books. The first paragraph of the Swedish Article, as explored below, encompasses instead all persons with disabilities who cannot access the work.

The third paragraph of Article 17 provides an exception allowing the making of talking books for both the visually impaired and 'backward readers', which in the original, Danish language is *læsehandicappede*; reading or print impaired. As stated above, *Danmarks Blindebibliotek* has entered into an agreement with three collective management organizations, and the condition for access to the material of the library is either a medical certificate or a document certifying participation in education for the dyslectic.

Article 17(4) allows the use of radio or TV broadcasts, not including other audiovisual works as in the Swedish 17(4), for the benefit of both the hearing and visually impaired.

5.4.2 Sweden

According to the Swedish Proposition, the first paragraph of Article 17 before 2005, on production and use of material by persons with disabilities, excluded the hearing impaired, because the provision was devoted to the Braille format.[256] Now, Article 17(1) by intent encompasses all persons with disabilities, not excluding for example persons with dyslexia, as long as the person needs special copies in order to access the work.[257] There is no explicit requirement that the beneficiary of the exception in the first paragraph proves his/her disability, but the Government states that there has to be a connection between the use of a customized copy and the person's disability.[258]

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[256] Proposition, *supra* note 206, para. 8.10.2 Övervägande – Skälen för regeringens förslag – Vilka personer omfattas av inskränkningen?, p. 172, section 1.
[257] *Ibid*., p. 173, section 3.
[258] Proposition, *supra* note 206, p. 173, para. 1.

Article 17(2) enabled before 2005 only the production of talking books on the basis of a literary work, a medium which normally does not benefit the hearing impaired. The former 17(2) in fact excluded all persons with disabilities except the visually impaired.[259] As written above, Article 17(2)(2) now allows the sound recording of talking books, which in practice is usually limited to the visually impaired, even though nothing hinders its application for persons with intellectual or physical disabilities.

Article 17(2)(3) allows the reproduction and alteration of radio and audiovisual works only for the hearing impaired, which is deplorable when the visually impaired need audio-description in order to enjoy audiovisual works, and the adding of such a feature is not covered by the first paragraph either because it includes sound recording. The Danish Article 17(4) is obviously better than the Swedish Article 17(2)(3), because the latter does not include the visually impaired, even though the Danish provision does not cover audiovisual work which is not broadcast on TV.

5.5 Digital Rights Management (DRMs) and Access to Works

DRM is explained in the first Chapter. It is necessary in order to protect the copyrighted content in this digital era, as material could otherwise be in practice freely copied, printed, used and transferred for example via the internet. However, DRM is a powerful tool which can sometimes be a hinder to de facto enjoyment of copyright exceptions. This applies to all users, but to persons with disabilities in particular, because they often depend on having access to documents and works in electronic form, in order to let a computer program present it in another, accessible form. This is especially valid for visually impaired and persons with print disabilities. DRM often also hinders organizations or companies relying on an exception or non-voluntary license from adding accessibility features such as audio-description, TSS software access, or altering the work or object of related rights in other ways.

There have been recent examples where such DRM measures have been found to hinder legal access to documents, for example private copying under an exception. In spite of this, self-help where the circumvention of the measure is done by the user is in several national legislations illegal, even in the case where the user relies on an exception allowing the access.[260] This is for example the case in Sweden, as will be shown below.

[259] Olsson, *supra* note 132, p. 221 para. 1.
[260] Westkamp, *supra* note 215, p. 231.

5.5.1 International Obligations

Under Article 11 of the WCT, the member States are obliged to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures when such are used by authors in connection with the exercise of their rights under the Berne Convention or the WCT, and restrict acts which are not authorized by the authors concerned or permitted by law. As Ricketson writes, this was an entirely new kind of provision to be included in an international copyright agreement, at its adoption in 1996, requiring member States to take certain steps to prevent third parties circumventing technological measures.[261] However, the rule did not create or enlarge the exclusive rights as such, but enhance the exploitation and enforcement of exclusive rights in the digital environment.[262] The provision leaves a lot of margin of appreciation as to how to implement it in the national context.

Article 18 of WPPT is a similar provision, requiring protection from circumvention. Both those internet treaties of 1996 provide for limitations and exceptions, and the inter-relationship between protection against circumvention and copyright limitations and exceptions is difficult and controversial from the point of view of copyright policy.[263] While practically every right-holder wants to provide access to the work as long as it is in accordance with permission or copyright exception, it is in practice difficult to condition the access, and restrict it to only the legal uses. This problem is both technological and legal.

Article 6(1) of the Infosoc Directive also sets up a standard for protection of 'any efficient technological measures'. It also forbids the handling of certain devices made for the circumvention of DRMs (paragraph (2)). A mandatory exception is provided in Article 6(4)(1), dealing with the relationship between exceptions and DRMs. It says that notwithstanding the legal protection of paragraph 1, and only in the absence of voluntary measures taken by right-holders, Member States shall take appropriate measures to ensure that right-holders make available to the beneficiary of an exception or limitation provided for in national law such as for example Article 5(3)(b) the means of benefiting from that exception or limitation, to the extent necessary to benefit from it and where that beneficiary has legal access to the protected work or subject-matter concerned. According to Recital 51, the right-holders must have a "reasonable period of time" to enter into agreements with for example manufacturers of consumer electronics and other products, and developers of DRM. The exception of Article 6(4) only provides that the right-holders shall be permitted to remove or circumvent the DRM, and does not open for allowing the users to do so. According to Article 6(4)(4) the exception to DRM protection does not apply to "on demand" services. This means that the EU or EEA countries are not obliged according to the Infosoc Directive to ensure access to pay-per-view/listen/download or video-on-demand

[261] Ricketson, *supra* note 158, p. 81.
[262] Ricketson and Ginsburg, *supra* note 76, Vol. II, p. 965, para. 15.01.
[263] Ricketson, *supra* note 158, p. 81.

services,[264] for example for visually impaired people who buy e-books and cannot enjoy them. This situation is probably often covered in national marketing legislation instead, requiring that the terms of the online service must be clear. Article 7 of the Infosoc Directive also requires protection against the removal or alteration of electronic rights-management information.

5.5.2 Denmark

According to Section 75(c)(1), it is not permitted to circumvent effective technological measures without the consent of the right-holder. In paragraph (4), effective technological measures are defined as "any effective technological measures that, in the normal course of their operation, are designed to protect works and performances and productions, etc. protected under this Act", without specifying the protection. Nevertheless, the Danish definition in general corresponds to the definition of DRMs in this Thesis.

Article 75d(1) of the Danish Copyright Act states that the Copyright License Tribunal (*Ophavsretslicensnaevnet*) may upon request order the right-holder who has used the DRM mention in Section 75(c)(1), to make such means available to the user which are necessary for the latter to benefit from the provisions of Section […] 17(1)-(3). The order of the Tribunal is connected to a time limit: if the right-holder has not complied with the order of the Tribunal within four weeks, the user may according to the second sentence of Section 75(d)(1) circumvent the DRM notwithstanding the general prohibition in Section 75(c)(1). Of course the circumvention is not always technologically possible without codes etc., but this provision is a quite important threat to the right-holder and can ensure compliance. However, the Swedish method with *vite*, a public fine, also works in combination with time limits which the court determines.

5.5.3 Sweden

According to Article 52(d)(1) of the Swedish Copyright Act, it is prohibited to circumvent any digital or analogue lock which functions as a technological protection measure (hereinafter this will be called DRM, as the definitions correspond). However, the second paragraph provides that the prohibition does not apply when someone who has lawful access to a copy of a work circumvents a DRM in order to be to *watch or listen to* the work. This clearly applies to copyright exceptions and to Article 17. Here it is important to remember that just as the Infosoc Directive provides, the Swedish legislation in Article 52(f)(3) excludes the right to use circumvention in order to watch or listen to a work when an on demand service is used, for instance on downloaded e-books.

In other cases, the user of Article 17 can rely on Article 52(f)(1) which allows the *making use* of a copy of a work that he/she has lawful access to as referred to in the relevant provision, notwithstanding the fact

[264] Cunard et al, *supra* note 13, p. 73, para. 1.

that the copy is protected by DRM. Nevertheless, the DRM must not be circumvented by the user. Similar to the Danish provision, in the situation where a DRM prevents legal use, Article 52(f)(2) guarantees the possibility of courts to, at the request of the potential user, order the right-holder upon penalty of a fine to make it possible for the user to exploit the work in the way prescribed in the provision relied on. Thus the venue is different and the Danish system is more beneficial, since the user does not have to pay administrative fees. The fine is called *vite* and is combined with a certain time limit. If the right-holder does not comply with the order, the fine is adjudged by the same court and a new order combined with a fine and time limit can be issued by the court.[265] Depending on which time limit the Swedish court decides, the end result may be better in Denmark because four weeks is quite a short time. The right-holder should not be forced to reveal the DRM code etc. but instead the idea is for the court order to require an open, non-coded copy of the work.[266] For example, this copy can then be used with added captioning or audio-description to an audiovisual work.

5.5.4 Are DRMs Allowing "Accessibility Software" Access a Feasible Technical Solution?

The underlying issue of this section is whether it is possible and reasonable to require publishers and others to provide material which is accessible for screen-reader software. Of course DRMs occur in all the spectrum of digital copyright and related rights material which can be copied or transferred easily, but for persons with disabilities the access of screen-reader programs to electronic text is most important.
It will most likely never be possible to develop a DRM-protected format which enables usage by virtue of all kinds of copyright exceptions, such as quotation, teaching etc. Therefore one cannot expect such products from the publishers and right-holders. However, the publishers of electronic books are from the software developers, such as Microsoft (Digital Asset Server system for customized electronic publications) and Adobe (Adobe Content Server),[267] normally offered the choice to turn on or off screen-reader access before publication. This access will then be used for Braille display or TTS.[268] Because the audio rights have or may have been sold, publishers choose to turn the function off, as they consider TTS as sound.[269] However, the poor sound quality of TTS should give it a classification of special format exclusively for persons with disabilities.

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[265] Olsson, *supra* note 132, p. 405, para. 4.
[266] *Ibid*., p. 405, para. 2.
[267] Cunard *et al*, *supra* note 13, p. 104, para. 4.2.4.
[268] George Kerscher and Jim Fruchtermann, 'The Soundproof Book: Exploration of Rights Conflict and Access to Commercial eBooks by Persons with Disabilities', para. Protecting the Audio Rights, section 1.
[269] *Ibid*.

The organization W3C (World Wide Web Consortium)[270] states in a background paper that the screen-reader programs which many persons with disabilities use, are normally technologically treated as an attack on data.[271] Yet the organization claims that two approaches could solve the problem: firstly, the presentation software could directly deliver the information in alternative formats for persons with disabilities.[272] Probably the market lacks the incentive to develop such software. The second alternative is that a trust relationship could be established with adaptive access technology providers, i.e., between the right-holders or publishers and the creators of different software.[273] The trust is probably meant to lead to the development of formats which screen-reader programs can access, with the copy control itself kept intact. This is hopeful but has not happened yet. Meanwhile, one finds refuge in the country-specific systems where the right-holder after the sale can be required to provide access.

5.6 The Production of Material Accessible for Persons with Disabilities

5.6.1 National Structure and Culture

Several questions arise here: it can be reasonable that persons with disabilities pay for copies of works, but as it is often more expensive to produce and distribute accessible material (e.g., printing a book in Braille), who should stand for the extra cost? And which are the incentives for transformation of material to accessible formats and distribution of them? Some countries provide that only certain Government approved organizations and libraries may distribute certain copies, like Sweden.

Sometimes there are foundations or organizations which support the creation of copyrighted works in accessible formats financially.

Of course, copyright exceptions or compulsory licenses serve as incentives, in that they facilitate in obtaining approval from the copyright holder. And in the case of pure copyright exceptions, there exists no obligation to pay remuneration to the right-holder. The incentive takes form of reducing the cost for the consumer; however, the producer of the material is often not allowed to act for commercial purposes.[274] Such use of an exception or license is forbidden in Sweden (Article 17(3) which applies to the whole Article) and in the entire Danish provision.

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[270] W3C is an organization developing guidelines for the design of web pages, including developing the DAISY and other accessible technological formats.
[271] G. Kerscher, H. Kawamura, W3C, 'Position Paper: DRM for Persons Who Are Blind AND/OR Print Disabled', section 3: Access Technology is Not an Attack on Data.
[272] *Ibid*.
[273] *Ibid*.
[274] Sullivan, *supra* note 2, p. 32, over two thirds of the countries in her study ruled out profit-making or commercial activity in undertaking activity under an exception for the benefit of visually impaired.

The copyright exceptions of course depend on how the whole treatment of works and copyright and related rights is in the country. A national copyright system includes the copyright legislation, the constitutional rights and freedoms, import and export regulations on copyrighted material and on instruments which could be used for circumvention, and entities such as collective rights management organizations. The national culture and legal tradition affects copyright and related rights much, for example as regards the end beneficiary and uses permitted in exceptions. Another example of this interrelationship is that import and export considerations might affect how the distribution right is shaped. International engagements such as membership in the EU of course affects the national copyright, normally setting up minimum requirements to be introduced on national level with adjustment to the national structure and tradition.

In a study on automated rights systems, Nic Garnett has introduced the concept of 'trusted intermediaries', i.e., trusted third parties on whose assertions the parties to a transaction can rely.[275] Such entities function also in other areas of law, for example a notary public. In copyright, there exist two types of trusted intermediaries: firstly, institutions for registration and legal deposit of copyright materials. Secondly, entities responsible for the collective administration of copyright. [276] *Danmarks Blindebibliotek* has a highly complex licensing infrastructure, and it is a good example of an entity which has developed a role in the acquisition of content, its conversion into accessible formats and its secure delivery to qualified recipients.[277]

Garnett also mentions a very promising project in the US Department of Education, where two national centres are established in order to further develop and implement the NIMAS (National Instructional Materials Accessibility Standard).[278] The objective of the project is to ensure that required texts are available in a timely fashion to students with disabilities.[279]

5.6.2 Denmark

The main Danish producer of talking books for persons with disabilities is *Danmarks Blindebibliotek* (Denmark's Library for the Blind).

In the application of Article 17(4) on the recording of TV or radio broadcasts, any "Government or municipal institution and other social or non-profit institutions" may enter into an extended collective license and act in accordance with it. The preparatory work mentions that the national organization of municipalities (*Kommunernes Landsforening*) and other

[275] Garnett, *supra* note 1, p. 93, C., para. 1.
[276] *Ibid*., para. 2 *et seq*.
[277] *Ibid*.
[278] *Ibid*., p. 94, para. 2.
[279] *Ibid*., para. 4.

groups of institutions are possible licensees.[280] However, it is difficult to find information on how active different parties are.

5.6.3 Sweden

Sweden does not have official subsidies for the production of talking books, but there is a duty of paying remuneration when a copy of the work can be kept (see above regarding Article 17(4). In the Swedish system before 2005, the authors received a type of remuneration, because the government provided funds to the *Sveriges Författarförbund* (Swedish Organization of Writers) which then distributed it to writers and translators. This was said to be out of not copyright but cultural-political reasons, but was clearly connected to talking books. [281] Since 2005, that funding is abolished and instead paragraph 4 of Article 17 was introduced, where remuneration is required in certain situations.

The production of talking books is made by *Tal- och Punktskriftsbiblioteket TPB* (National Speech and Braille Library) but the local regions also provide some services. The most Southern region, Skåne, offers *inläsningstjänst* which is a service in production of talking "books" on behalf of private or public entities, such as news and other information.[282] For private persons needing this, it is made for free and could encompass for example users' manuals, books, newspaper articles and letters.[283]

5.7 Importation and Exportation, Exhaustion of Rights

Importation is a kind of distribution which can benefit the needs of persons with disabilities in two ways: either direct importation to the user or to a library, organization or other entity that prepares and distributes the material to persons with disabilities. It decreases the needs of adaptation, translation (if the countries have a common language), scanning of literature, recording of talking books or other alterations. However, importation depends on whether the importing country provides exhaustion of the right of distribution, and on the copyright and customs regulations in general in both countries involved. Here are discussed only legal and not infringing copies of works.

Article 15(4) of the ICESCR provides that the States Parties "recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields". Cooperation should be part of the balancing act in the legislative process, in the meaning that the legislator should keep in mind

[280] Schønning, *supra* note 216, p. 289, para. 3.
[281] Proposition, *supra* note 206, para. 8.10.1 in fine.
[282] Region Skåne, 'Inläsningstjänst'.
[283] *Ibid*.

the needs of for example persons with disabilities to be able to import and export material, or at least have a clear legislation to turn to for information on such distribution.

It is difficult to arrange import if the country of origin lacks copyright legislation providing for exhaustion of rights.[284] The same must apply to countries which provide only for national exhaustion of rights. However, under the WCT and WPPT, the right of distribution nevertheless persists in works used by virtue of exceptions, because the copies have not been made with the authorization of the right-holder.[285] Those are the only treaties clearly providing for a right to control the distribution of physical copies.

The Infosoc Directive does, as stated above, require regional exhaustion of the distribution right (Article 4(2)), and only when the copy has been sold or transferred with the right-holder's consent.[286] Furthermore, the Member States must according to Article 8(2) take the measures necessary to ensure that right-holders whose interests are affected by infringing activity on its territory can bring an action for damages and/or apply for an injunction and where appropriate also the seizure of infringing material as well as of devices, products and components referred to in Article 6(2). The 'infringing activity' could possibly be importation as well as reproduction, distribution etc without support in legislation or agreement.

As we will see, it is much more secure to enter an agreement with the right-holder about export or import, as national legislation only in rare cases (such as the Danish legislation) is clear about the requirements.

5.7.1 Denmark

In Denmark, the right of distribution is provided in Article 2(1) and closer defined in the third paragraph of the same. The right of distribution is according to Section 19(1) exhausted after the first sale within the EEA, except the right of rental and lending to the public which subsist (see paragraph (2)). As written above, rental which is not made to the general public, and lending, is permitted if a work wherever the first sale has occurred, according to the second sentence of 19(1). Such lending does not limit the right of remuneration, according to the fourth paragraph of Article 19.

Denmark has solved the problem as regards importation. Section 77(1) of the Danish Copyright Act criminalizes the importation of copies of objects of related rights[287] which are produced outside of Denmark under such circumstances that a similar production in Denmark would have been

[284] Sullivan, *supra* note 2, p. 120 f.
[285] *Ibid*., p. 49, para. 3.2.1, section 2 *et seq*.
[286] *Ibid*. Sullivan concludes that action under an exception in the EEA does not lead to any exhaustion of the right of distribution. P. 53, 3.3.1 para. 1.
[287] This is simplified a little – the Article refers to Articles 65-71 which provide protection of performing artists, producers of sound recordings, producers of recordings of moving pictures, the use of sound recordings in broadcasts on radio and television etc. and the rights of broadcasters and producers of photographic pictures and catalogues.

in conflict with the law, if the importation is made with a view to making the copies available to the public, and with intent or gross negligence. Therefore, *e contrario*, copies which would fall under an exception or limitation of Denmark's Copyright Act if made there, can be imported.

As regards exportation from Denmark of intermediate or ready copies, Sullivan states that export to individuals is probably permissible, but not to national organization because of the uncertainty as to whether the organization will control the use as required in the Danish exception.[288]

5.7.2 Sweden

The right of distribution is guaranteed in Sweden's Copyright Act Article 2(3)(4), which includes in the exclusive rights situations "where copies of the work are made available for sale, rental, lending or otherwise is distributed to the public". Article 19 provides some exceptions to the exhaustion of the right, meaning that the right of distribution persists in certain works and regarding certain uses such as

In Sweden, importation of pirate (infringing) copies is allowed if the import is private and only intended for use by the importer himself, in contrast with many other countries.[289] Article 53(1) of the Swedish Copyright Act makes certain copyright and related rights infringements punishable, and 53(4) prohibits and criminalizes importation of copies of works, intended for distribution to the public, where the production would have been illegal under Article 53(1) if made in Sweden. Such importation of infringing copies, if intentional or grossly negligent, will be finished by fine or up to two years imprisonment. This provision means that Swedish organizations or libraries importing works in permanent or intermediate shape can only rely on an exception of another country if the same act would be allowed in Sweden.

Export from Sweden is according to Sullivan probably permitted to individuals, and possibly also to national organizations. However, the latter possibility does not apply to the formats and distribution methods for which the organizations need Government authorization.[290]

[288] Sullivan, *supra* note 2, Annex 3, p. 195.
[289] Olsson, *supra* note 132, p. 309 para. 6.
[290] Sullivan, *supra* note 2, Annex 3, p. 228.

6 Concluding Analysis and Recommendations

Human rights obligations impose on countries certain frames and obligations concerning the national legislation and, even, structure of society. The international copyright law also imposes obligations concerning national legislation, but the obligations are on the other hand of a minimum protection nature regarding protection of copyright. Therefore, in my opinion, human rights law may speak against certain copyright provisions because of the need of another balance between copyright and other rights. Countries parties to the ICESCR are under an obligation to have the balancing act between the rights and interests of the public and the right-holders in mind when shaping national copyright legislation, as I have written above referring to Chapman. Article 15 of ICESCR establishes an obligation to take both interests into account. The outcome and the best legal solution is not always the same, it may depend on the interests of different groups and also on which organizations are active in this respect in the country, and other factors.

6.1 Overview of the Matters Addressed

The obstacles to access of persons with disabilities to culture and information, which have been discussed in this Thesis, can be divided into different fields: legal, technical and practical, and the economic field.

6.1.1 The Legal Obstacle

The most apparent potential legal obstacle is obviously exclusive rights, when they lack the appropriate exceptions. The author is free to authorize such use, but a process to maintain an authorization, license, takes time and the result is not guaranteed, which means the access lingers longer. As stated above, international copyright and related rights agreements do not contain any mandatory exceptions for the benefit of persons with disabilities.

However, human rights law contains an obligation of the State to guarantee the same rights to everyone under its jurisdiction, without distinction as to “other status” which includes disability. Distinction can however be made in certain cases, if reasonable and objective criteria are used. The new Convention will probably change the criteria rather much, because it does in most cases take away the opportunity of such distinctions. This applies for example when the public authorities provide information. Furthermore, according to Article 21, the State Parties shall urge private parties that provide services to the general public, to provide information and services in accessible formats.

The copyright issue has to be solved on a case-by-case basis, having regard to which kind of technology is most available and appreciated among persons with disabilities, which uses could be safe for the content of the rights, and if there are national libraries or organizations which could be trusted intermediaries in licensing agreements.

Importation and exportation regulations might also pose problems, in combination with copyright exhaustion rules. The easiest way to solve this is to assess on a national level the interests of right-holders, other stakeholders, and the international obligations, and make the appropriate changes to duty, importation or copyright legislation, depending on the legal tradition.

The copyright acts of Denmark or Sweden have been lightly analyzed, and it is impossible to judge on which legislation best equips the organizations, libraries and beneficiaries with the best tools for access. The Danish provision on importation is clear, and it would be preferable for Sweden to provide a similar provision. The area of distribution is however very sensitive and it is not self-evident that organizations should be allowed to send material over borders without the consent of the right-holder.

The second research question was which methods were allowed in international copyright and related rights law, in the work towards access for persons with disabilities to information and cultural life. To summarize the findings from the Chapters on general exceptions and on thematic issues, one might say that for example, communication to the public of works in accessible format can often not be allowed under a pure exception, but reproduction, adaptation, public performance and lending.

6.1.2 The Technical Obstacle

As written in the introduction, the definition of disability includes both a physical defect and some external element. The point where a person perceives him/herself as disabled depends on how well adapted the surroundings are. Copyrighted material makes part of those surroundings, and is sometimes presented in a form which is accessible by persons with disabilities, at least with some actions the person can take him/herself, but sometimes in a format which must be altered or communicated further to be accessible, which makes the user perceive him/herself as a person with disability.

There are cases where it is legal by support of exception, limitation or compulsory license to access copyright protected material, but where such access is made impossible by different protection measures. It is understandable that publishers and other right holders cannot find technical solutions which would protect against illegal copying, whilst providing access for programs using text-to-speech synthesizing or refreshable Braille displays. However, this is often the core problem, and seen in a bigger perspective it is also a possible infringement of the human right to access to cultural life without discrimination. This prompts a solution which is technically fit both to safeguard the interests of right holders and persons with disabilities. In my opinion, the State is responsible of motivating

private actors to provide accessible copies, preferably with no delay compared to other material.

Technological protection measures which in fact hinder TTS or Braille displays to function properly can, in my opinion, not be accepted, because what is meant to be a copy control in fact often becomes an access control for users who are visually or hearing impaired. What is a book worth without words, or a film without picture or description of picture? A possible solution could be the introduction of a kind of "reverse infringement" in copyright law, targeting measures which in fact hinder the end users from accessing the works or objects of related rights which they have bought or have a right to access due to an exception. The remedy of infringement could be, of course, to provide such program access, but also to pay a sum to a public fund aiming at developing reasonable DRMs. This is however not acceptable from a copyright point of view. It would be illogical to, by the way of copyright legislation, impose obligations on right-holders, because its main purpose is to provide protection of artistic and literary works. Another downside of the proposal is that the threat of committing infringement would scare publishers off from posting material at all in electronic formats.

It is technically possible to solve the conflict of safety and DRM versus exceptions, but publishers are still afraid of letting the material out for copying by ordering modified technological solutions. It is therefore important to encourage the ordering of proper technical solutions from one's programmers, and this could maybe be supported by State-funded research on programming.

6.1.3 The Economic Obstacle

Some countries permit the production, distribution and use of certain material only if no such product exists already. If it is already commercially available, the price is crucial – in order to achieve equal opportunities and participation, it is important that persons with disabilities can buy and also access the material at no additional cost. If accessible material is instead produced specifically for persons with disabilities, that is normally made by publicly financed libraries or special organizations financed by foundations. As regards public material, the Convention on the Rights of Persons with Disabilities will, once it enters into force, in many situations oblige the State Parties to provide material also in accessible form. Thus, we have come to the conclusion that persons with disabilities where possible have a right to access to copyright and related rights material at no additional cost compared to other persons.

Questions remain; for example, who shall carry the costs of production, distribution and other actions which often are higher than for other material, when the State does not cover them? The answer will vary depending on the State's culture and traditions in this area. Another question is when it is reasonable to require actions for accessibility, i.e., how much can it cost the State and the private actors? Here the sharing of best practices can provide an encouragement, showing the State what is

possible, and also building up a culture of ambition and compliance among the States parties of ICESCR, the Standard Rules and the new Convention.

6.2 Concluding Recommendations

The recommendations are first and foremost to States, because of the human rights perspective of the Thesis.

In order to ensure a strong and broad support for the international legal framework on copyright and related rights, as much as possible should be left to national judgment. States want to adapt their national legal system to the national structure. Therefore, it would be contra-productive to set up mandatory copyright exceptions or limitations for the benefit of persons with disabilities. In my opinion, the same applies to other exceptions such as for education and library activities. The SCCR included as an agenda item exceptions for education, libraries and persons with disabilities in order to promote dialogue on these issues, and the sharing of best practices.

Some key concerns have risen in the writing process. Many national copyright and related rights exceptions mention only the visually and hearing impaired. Some groups of persons with disabilities seem to be forgotten: persons with intellectual disabilities are hardly mentioned in the legislation, and it is very unclear whether the existent copyright exceptions and limitations are sufficient in order to fulfil the human rights of those persons to access to culture and information. Another forgotten group, which was not even included in this Thesis, is persons with physical disabilities who lack for example the ability to hold or manipulate books, or go to theatres and other public venues. They benefit from TV and radio broadcasts, but more can be often done to realize the right of participation of this group.

- If possible, provide public financial support to organizations providing material in accessible forms, and empower them in legislation
- Focus not only on the production of and access to talking books, but also on for example art for persons with disabilities, and reporting of current events and debates.
- If possible, support the development of new technologies for accessibility, and especially research on solutions for the safe delivery of electronic files accessible by software designed for the visually or hearing impaired
- Introduce an obligation of right-holders to provide access despite DRMs where the use is legal by way of authorization from right-holder, exception or compulsory license. At least this obligation should apply to persons with disabilities, as they otherwise have no other way of access; there is often no other material to buy.
- Encourage private actors such as theatres, art exhibitions, TV and radio to develop and use different methods in order to provide the same or specifically created works which are accessible to persons with disabilities.

Supplement A

Denmark: Ophavsretslov / Consolidated Act on Copyright 30.6.2006/763[291]

Visually - and Hearing - Handicapped Persons

Article 17
1. It is permitted to use and distribute copies of published works if the use and the distributed copies are specifically intended for the blind, visually impaired, the deaf and sufferers from speech impediments, as well as persons who on account of handicap are unable to read printed text. The provision of the first sentence does not apply to the use or distribution of copies for commercial purposes.

2. The provision of subsection (1) does not apply to sound recordings of literary works or use that consists solely of sound recordings of musical works.

3. Sound recordings of published literary works may be used and distributed for use by visually impaired persons and backward readers if this is not done for commercial purposes. The author is entitled to remuneration.

4. Government or municipal institutions and other social or non-profit institutions may, for the use of visually handicapped and hearing-impaired persons, by means of sound or visual recording produce copies of works broadcast on the radio or television, provided the requirements regarding the extended collective license according to section 50 have been met. Such recording may only be used for the purpose of activities covered by the agreement presumed in section 50.

[291] In English: <www.wipo.int/clea/docs_new/pdf/en/dk/dk134en.pdf>, in Danish: <www.retsinformation.dk/Forms/R0710.aspx?id=12014>.

Supplement B

Sweden: Lag om upphovsrätt till litterära och konstnärliga verk / Act on Copyright in Literary and Artistic Works (1960:729)[292]

On the Making of Copies, etc. for Persons with a Disability

Article 17
Anyone is entitled to make, by means other than recording of sounds, such copies of literary and musical works which have been made public and of works of visual art which have been made public, that persons with a disability need in order to be able to enjoy the works. The copies may also be distributed to those persons.

Libraries and organizations as decided by the Government in specific cases may also
1. communicate copies of the works that are referred to in the first Paragraph to persons with a disability who need the copies in order to be able to enjoy the work,
2. by means of sound recording make such copies of literary works that have been made public which persons with a disability need in order to be able to enjoy the works, and to distribute and communicate such sound recordings to those persons, and
3. make such copies of works transmitted on sound radio or television, and of cinematographic works, that dead or hearing-impaired persons need in order to be able to enjoy the works, and to distribute and communicate copies of the works to those persons.

The making of copies, the distribution and the communication to the public pursuant to this Article must not be carried out for commercial purposes, nor must the copies be used for purposes other than those mentioned in the Article.

When libraries and organisations distribute or communicate copies of works to persons with a disability in such a way that those persons may keep a copy of the work, the author has a right to remuneration. The same applies if anyone, pursuant to the first Paragraph, second sentence, transmits more than a few copies to persons with a disability.

[292] As amended up to July 1, 2005 (SFS 2005:359), <www.sweden.gov.se/content/1/c6/05/42/00/8f85f6fa.pdf >.

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