

## THE MARRAKESH TREATY: AN EIFL GUIDE FOR LIBRARIES

December 2014



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In June 2013, member states of the World Intellectual Property Organization (WIPO) adopted the “Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled”.

The goal of the treaty is to end the book famine – the fact that only about 7% of published books are made available globally in accessible formats, such as Braille, audio and large print, and DAISY<sup>1</sup> formats. In the developing world, the figure is less than 1%. This situation is partly due to barriers created by copyright law, barriers that the treaty seeks to remove.

For this reason, EIFL supported negotiations over five years at WIPO, and participated in the Diplomatic Conference that led to the adoption of the treaty in Marrakesh. With examples from EIFL partner countries, Lesotho, Lithuania and Mongolia, delegates heard how a WIPO treaty for persons with print disabilities can really change lives.

To complete the work at WIPO and to fulfill the promise of the universal right to read for persons with print disabilities, EIFL is supporting ratification of the treaty in partner countries, and its implementation into national copyright law.

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<sup>1</sup> Digital Accessible Information System (DAISY)

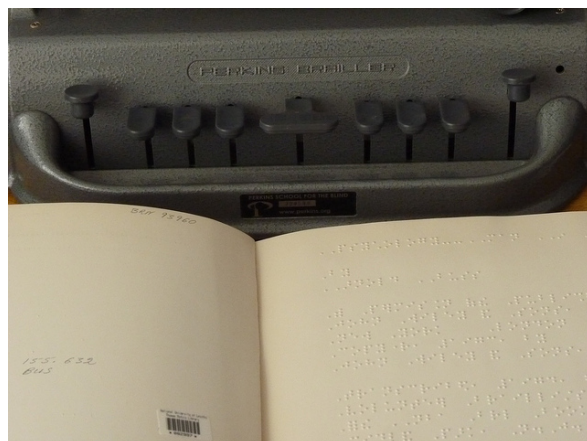
The Marrakesh Treaty represents a significant development in international copyright law because it is the first treaty devoted exclusively to creating international minimum standards for the benefit of users of copyright protected materials. It has the potential to greatly increase the availability of materials in accessible formats globally. The ability to share these accessible formats across borders will benefit people with print disabilities all around the world, in both developed and developing nations.

This guide is in two parts. **Part One** provides a straightforward introduction to the treaty, its key provisions, and the role of libraries in contributing to the treaty's objectives.<sup>2</sup>

**Part Two** provides a practical interpretation of the major technical provisions in line with public interest goals of enabling access to knowledge. It also contains recommendations for implementation in order to realize the opportunity the treaty offers to libraries to increase the reading materials available to people with print disabilities. Librarians therefore need to be involved in the development of implementing national legislation to ensure the maximum possible benefit, and to effectively meet the objective of the treaty – to end the book famine.

Libraries are key to the success of the treaty for two main reasons:

- Throughout the world, libraries are one of the primary sources of Braille, audio, large print and digital format materials for blind and visually impaired people<sup>3</sup>.
- Only blind people's organizations, libraries and other so-called "authorized entities" can send accessible format copies to other countries.



Perkins Braille, Thomas Mofolo Library, Lesotho

While the guide is aimed at libraries, it can be easily adapted for use by other institutions meeting the treaty's definition of "authorized entity". It will also be available in French and Russian.

We hope that you find the guide useful. We welcome comments and feedback.

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<sup>2</sup> For a more detailed discussion of the Treaty see A User Guide to the Marrakesh Treaty, <http://www.librarycopyrightalliance.org/bm~doc/user-guide-marrakesh-treaty-1013final.pdf>

<sup>3</sup> Libraries in every country have a long history serving people with print disabilities. Libraries of all types, whether special libraries for blind people or general libraries that provide equal access to information services to all its users regardless of disability, are instrumental in providing accessible reading materials for education, work and leisure purposes.

The full text of the Marrakesh Treaty in print, audio, Daisy and Braille formats can be accessed here: <http://www.wipo.int/treaties/en/ip/marrakesh/>

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## PART ONE INTRODUCTION TO THE MARRAKESH TREATY

### I. Background

In most countries, copyright law presents a legal barrier to the making and distribution of copies of works in formats accessible to print disabled people. For example, making a copy of a work in an accessible format such as Braille, without the authorization of the rights-holder, could constitute an infringement of the reproduction right. The unauthorized distribution of the accessible format copy could infringe on the distribution or making available to the public right. Similarly, the cross-border exchange of accessible format copies could trigger infringement liability.

For this reason, over 50 (primarily developed) countries have adopted copyright exceptions that allow the making and distribution of accessible format copies. However, over 130 WIPO member states, in which the majority of print disabled people live, do not have such exceptions. Moreover, the existing exceptions often do not explicitly permit the sending or receiving of accessible format copies between countries.

The Marrakesh Treaty seeks to remove the barriers in two main ways:

- By requiring countries which ratify the Treaty to have **exceptions in domestic copyright law** for the benefit of print disabled people. This means that countries which ratify the treaty must ensure their laws allow blind people, libraries and other organizations to make accessible format copies without having to ask permission from the copyright holder (usually the author or publisher), and to distribute the accessible copies domestically.



WBU campaign poster

- By making it legal to **send and receive** accessible versions of books and other printed works from one country to another. This means that the sending of accessible format works across national borders is permitted, helping to avoid costly duplication efforts in different countries by multiple institutions (that are often publicly funded or have charitable status). It will allow institutions with larger collections of accessible books to share these collections with blind and visually people in countries with fewer resources, and to better serve print disabled people in every country by providing reading material in any language that is needed.

“Authorized entities” are central to the architecture of the treaty. Libraries are central to the concept of authorized entities. As defined<sup>4</sup>, the term “authorized entity” encompasses most libraries. Libraries, and other authorized entities, are allowed to undertake the domestic production and distribution of accessible materials. Importantly, only authorized entities are permitted to send accessible format copies to other countries.

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<sup>4</sup> Article 2(c) "authorized entity" means an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations.

## II. Ratification and implementation into national law

Following its adoption in June 2013, the treaty was open to WIPO member states for signature for one year. It is encouraging that 80 countries signed within the year, including 22 EIFL partner countries. Under international law, signing a treaty indicates a country's political support. However for a Treaty to enter into force, it must be ratified. The treaty will take effect when it is ratified by 20 countries, and then it is binding on those countries. India became the first to ratify the Marrakesh Treaty on June 24, 2014. When it is ratified, the treaty's provisions are implemented into national law through, for example, amendments to the copyright law and other relevant laws.

To check the current status of ratifications, click this link:

[http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=843](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=843).

## III. The Treaty's Key Provisions

### A. Definitions: Libraries and the Marrakesh Treaty

From a practical point of view, the most important provision of the treaty for libraries is the definition of "authorized entity" because it defines the organization that makes and distributes the accessible format copies, and under what conditions. Article 2(c) defines an authorized entity as "an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or a non-profit organization that provides the same services to



Learning to use Booksense readers at Ulaanbaatar City Public Library, Mongolia

beneficiary persons as one of its primary activities or institutional obligations"<sup>5</sup>.

Thus both a specialized agency providing services to blind people, such as a talking books library, and a general service library, such as an academic or public library that provides the same services to all its users regardless of disability, would constitute an authorized entity.

In addition, the library or other authorized entity "establishes and follows its own practices"<sup>6</sup> to ascertain that the recipients are bona fide beneficiary persons, to limit the distribution of accessible format copies to beneficiary persons or other authorized entities, to discourage the reproduction and distribution of unauthorized copies, and to maintain due care, and records of, the handling of accessible copies.

Thus, any library or institution that meets the broad criteria set out in Article 2(c) qualifies as an authorized entity. To ensure that the accessible copies are used for bona fide purposes, the authorized entity establishes its *own* practices in this regard. Importantly, the treaty does not contemplate rules being established for it by the government, nor an approval process or mechanism.

Note that the definition of authorized entity also includes for-profit entities using public funds to provide services on a non-profit basis to people with print disabilities.

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<sup>5</sup> Footnote 2 Agreed statement concerning Article 2(c) elaborates that the phrase "entities recognized by the government" may include entities that receive financial support from the government for the purpose of providing services to beneficiary persons.

<sup>6</sup> Article 2(d) Definitions



## B. Other Important Definitions

**Beneficiary person.** The treaty includes a broad definition of “beneficiary person”<sup>7</sup> – the type of person the treaty is intended to benefit. There are three groups of beneficiaries:

1. people who are blind;
2. people who have a visual impairment that prevents them from reading printed works, and people who have a perceptual impairment, such as dyslexia that makes it hard to learn to read, write and spell correctly;
3. people with a physical disability that prevents them from holding or turning the pages of a book.

Although the treaty is directed towards people with print disabilities, Article 12(2) confirms the important point that it does not prevent the adoption of copyright exceptions for the benefit of people with other disabilities.

**Types of works.** The Treaty applies to published literary and artistic works in the form of text, notation or illustrations, including in audio form, such as audio books<sup>8,9</sup>. Significantly, audio-visual works such as films do not fall within the definition of works, although textual works embedded in audiovisual works, for example educational multimedia DVDs, would appear to be covered.

**Accessible format copy.** Article 2(b) describes an “accessible format copy” as a copy of a work in a form which gives a beneficiary person “access as feasibly and comfortably as a person without visual impairment or other print disability.”



A DAISY player and audio book at Helsinki City Library. Photo credit: [mace](#)

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<sup>7</sup> Article 3 Beneficiary Persons

<sup>8</sup> Footnote 1 Agreed statement concerning Article 2(a)

<sup>9</sup> In some countries, audio books and other sound recordings are protected not by copyright, but by related rights. Footnote 13 Agreed statement concerning Article 10(2) makes clear that in countries with related right protection for sound recordings, the treaty requires the adoption of exceptions to those related rights, as well as to copyright.

## C. Substantive Obligations

The substantive core of the Treaty is contained in Articles 4 through Article 7.



Diplomatic Conference image

### Article 4 National Law Limitations and Exceptions

#### Mandatory exceptions

[Article 4\(1\)](#) requires countries to provide in their national law an exception to the right of reproduction, distribution, and making available to the public “to facilitate the availability of works in accessible format copies for beneficiary persons.” The limitation or exception should permit the changes that are needed to make the work accessible in the alternative format. In addition, countries may provide for an exception to the right of public performance, such as for the public reading of a poem or a play.

Countries have significant flexibility in how they can meet the obligation in Article 4(1). One way to comply is set out in [Article 4\(2\)](#) whereby an authorized entity would be permitted to make an accessible format copy, or to obtain an accessible format copy from another authorized entity, and to supply the copy directly to a beneficiary person by any means under the following conditions:

- the authorized entity has lawful access to the work;
- the conversion does not introduce changes other than those needed to make the work accessible;
- the copies are supplied for the exclusive use of beneficiary persons;
- the activity is undertaken on a non-profit basis<sup>10</sup>.

Additionally, the beneficiary person or someone acting on their behalf, such as a family member or a librarian, may make an accessible format copy for the use of the beneficiary person.

Alternatively, [Article 4\(3\)](#) sets out that a country can also fulfil Article 4(1) by providing other limitations or exceptions in national copyright law.

#### Optional restrictions: commercial availability and remuneration

Articles 4(4) and 4(5) are optional provisions that, if implemented into national law, would restrict the freedoms allowed under the treaty.

[Article 4\(4\)](#) allows a country to confine the exceptions<sup>11</sup> to works that are not available on the commercial market under reasonable terms for beneficiary persons in that market. For a library, this means that it would first have to conduct a search to check whether the work is commercially available in an accessible format before it could make an accessible copy. As it would be difficult to ascertain with certainty whether a work is available in a particular format and at a reasonable cost for

<sup>10</sup> Note that non-profit basis does not preclude the charging of fees on a cost recovery basis for services provided.

<sup>11</sup> Described above in Articles 4(1), 4(2) and 4(3)

beneficiary persons, especially in cross-border situations, the practical effect would be to render the exception almost unworkable. It would therefore delay the making of the accessible copy, and many libraries do not have the staff or resources to undertake such checks on a case-by-case basis. The level of risk - an assessment of the likelihood of the institution being sued by the copyright owner in the event that an accessible format copy of a commercially available work is made - might mean that the library declines to offer the service at all<sup>12</sup>. Of course, if an accessible format copy is available on the commercial market, a library can always in any case decide to purchase such a copy.

[Article 4\(5\)](#) provides the option to subject the exceptions to remuneration: the payment of a fee to the rightsholder (for published works in library collections, the rightsholder is usually the publisher). In other words, a country could adopt a statutory licence rather than an absolute exception. This provision, like [Article 4\(4\)](#) discussed above, would also have a chilling effect on the making of accessible copies, especially for libraries in low-income countries with very limited book budgets. It is important to note that the work has already been purchased, the accessible format copy is made for the sole purpose of providing equal access to the work, and the activity is undertaken on a non-profit basis.

[Articles 4\(4\) and 4\(5\)](#) cater for a small number of countries that already have such provisions in their national law. In order to maximize the availability of accessible materials to library users with print disabilities, they should not be used as a model for other countries, especially low-income countries. As the original work has already been paid for, a double payment scenario should be avoided. For these reasons, libraries should oppose the inclusion of these optional provisions in the implementing national law.

### **Article 5 Cross-Border Exchange of Accessible Format Copies: Export**

[Article 5\(1\)](#) provides that a country must permit an authorized entity to send (export) an accessible format copy made under an exception to an authorized entity in another country, or directly to a beneficiary person in another country. As with [Article 4](#), [Article 5](#) provides countries with flexibility on how to implement this obligation.

One way to comply with [Article 5\(1\)](#) is set out in [Article 5\(2\)](#), which stipulates that the domestic copyright law of the sending country must allow an authorized entity to distribute the accessible format copy to a beneficiary person, and to an authorized entity in another country, under the condition that the authorized entity meets the test of good faith (whereby the authorized entity did not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons). The authorized entity may decide whether “to apply further measures,” in addition to those it employs in the domestic context, to confirm the beneficiary status of a person it is serving in another country<sup>13</sup>.

### **Article 6 Cross-Border Exchange of Accessible Format Copies: Import**

[Article 6](#) is the matching bookend to [Article 5](#). Just as [Article 5](#) obligates countries to permit authorized entities<sup>14</sup> to send accessible format copies to authorized entities or beneficiary persons in other countries, [Article 6](#) obligates countries to allow authorized entities or beneficiary persons to receive (import) accessible format

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<sup>12</sup> During negotiations, the World Blind Union opposed the requirement of a commercial availability check: <http://www.worldblindunion.org/English/news/Pages/WIPO-Treaty-Commercial-Availability.aspx>. In the final treaty text that was adopted, commercial availability is an optional provision.

<sup>13</sup> Footnote 7 Agreed Statement concerning [Article 5\(2\)](#)

<sup>14</sup> Note that only authorized entities can send accessible copies to other countries.



copies from other countries.

Importantly, Article 6 stipulates that this obligation to import applies only to the extent that the national law of a country would permit an authorized entity or a beneficiary person to make an accessible format copy. Accordingly, if a country's national law permits authorized entities, but not beneficiary persons, to make accessible format copies, that country would only be required to permit authorized entities to import accessible format copies. Therefore, to ensure that an authorized entity in one country can supply accessible copies directly to a beneficiary person in a second country, the copyright law in the second country should have an exception that allows beneficiary persons (and not just authorized entities) to make accessible format copies<sup>15</sup>.

### Article 7 Obligations Concerning Technological Measures

Article 7 provides that a technological protection measure, such as a copy or access control, cannot prevent a beneficiary person from enjoying the exceptions provided under the treaty, even when a country prohibits the circumvention of technological protection measures in its general copyright legislation. Thus, in such cases the country must adopt a mechanism such as an exception to the circumvention prohibition to permit an authorized entity, for example, to make an accessible format copy. Other mechanisms -- for example, requiring the rightsholder to provide the authorized entity with a key to open the digital lock -- would also appear to satisfy Article 7.



Credit: Ingram Image

### D. General Principles Concerning National Implementation

Articles 10 and 11 articulate general principles concerning national implementation.

Article 10 'General Principles on Implementation' underscores the flexibilities countries have in how they implement the treaty. Article 11 'General Obligations on Limitations and Exceptions', on the other hand, stresses that this flexibility is limited by existing treaty obligations, particularly the so-called 'three-step test'<sup>16</sup>. Thus the treaty should be understood as creating minimum standards for exceptions, within the context of the three-step test.

As some countries are not bound by the three-step test with regard to exceptions to some or all rights because they are not members either of the Berne Convention, the WIPO Copyright Treaty, or the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)<sup>17</sup>, some developed countries wanted to ensure that these countries did not somehow misuse the treaty provisions in cross-border situations.

Article 5(4) provides safeguards that a receiving country that does not have three-step test obligations will ensure that the authorized entity may not re-export the

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<sup>15</sup> Note that a country has the discretion to impose restrictions on imports, as in Article 4(4) commercial availability requirement and/or as in Article 4(5) a remuneration requirement, see Footnote 10 of the Marrakesh Treaty.

<sup>16</sup> Article 9(2) Berne Convention for the Protection of Literary and Artistic Works. It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

<sup>17</sup> Least Developed Countries that are members of the WTO have been granted a TRIPS waiver until 1 July 2021. [http://www.wto.org/english/tratop\\_e/trips\\_e/ldc\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/ldc_e.htm)

accessible copy to another country, or that the making of the accessible copy is subject to the three-step test before it may be sent to the receiving country<sup>18</sup>.

## E. Other Provisions: Respect for Privacy and Co-operation for Cross-Border Exchange

**Article 8** ‘Respect for Privacy’ provides that countries “shall endeavour to protect the privacy of beneficiary persons on an equal basis with others.” Libraries believe strongly in protecting the privacy of all those who use its services, that includes the right to read anonymously. In many countries, libraries are subject to laws on data protection. Implementation of the treaty should not interfere with the privacy of beneficiary persons, for example, in distribution mechanisms for accessible formats.

**Article 9** ‘Cooperation to Facilitate Cross-Border Exchange’ contains provisions designed to facilitate cross-border exchanges, such as the voluntary sharing of information to assist authorized entities in identifying one another. Under Article 9(2), countries agree to assist their authorized entities in making information available concerning their practices relating to accessible format copies; but authorized entities are not required to disclose this information<sup>19</sup>. Presumably assistance could take the form of website hosted by a country or the provision of additional funding to authorized entities.

## IV. Next Steps

The Marrakesh Treaty has the potential to significantly increase the availability of copies in formats accessible to print disabled persons. To maximize this potential, libraries and other institutions that serve print disabled people should encourage their governments to ratify the treaty. Then, they should urge their governments to take the necessary steps to implement the treaty in domestic law. Because the treaty provides countries with important options on how to implement the treaty, libraries and other authorized entities should advocate to secure an implementation that best serves the interests of people with print disabilities<sup>20</sup>. Part Two of this guide provides suggestions and recommendations for how this might be achieved.

**ENDING THE BOOK FAMINE IN SENEGAL**  
Project Manager: Awa Diouf Cissé <cisseawa@yahoo.fr>

THE GOAL OF THE MARRAKESH TREATY IS TO HELP END THE BOOK FAMINE... THE FACT THAT ONE OF THE CHALLENGES BOOKS ARE MADE AVAILABLE GLOBALLY TO ACCESSIBLE FORMATS IN THE DEVELOPING WORLD, THESE WORDS WOULD BE MOST RELEVANT BECAUSE OF THE FACT THAT THE TREATY IS...

**OBJECTIVES**

- Identify the need for copyright legislation in Senegal in consultation with the Ministry of Culture, Youth and Sports, the National Library and Archives, the African Regional Office, Senegal
- Develop final strategy plan to support the development of a national copyright law for digital adaptation
- Prepare an advisory committee with members to address copyright concerns faced by persons with print disabilities
- Meet with members and government officials
- Develop legal guide to enable interested individuals and organizations to have awareness in Senegal

**RESULTS SO FAR**

- Further meeting held to plan activities and promotion
- Information meetings held with local officials on the Marrakesh Copyright Office role, benefits of digital & communication for access the treaty implementation
- Selection of an advisory leader (e.g. Awa Diouf Cissé) and other members to address copyright issues and advisory affairs
- Development of a national copyright law for digital adaptation
- In the spirit of the Marrakesh Treaty, the project will continue to support the development of a national copyright law for digital adaptation
- Local copyright experts have knowledge of the Treaty and its implications and will continue to support public interest groups of access to knowledge

The project is supported by a grant from EIFL (World Book Project) - December 2014

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Poster of EIFL-supported project in Senegal

EIFL, in cooperation with the World Blind Union, is supporting libraries in partner countries to advocate for ratification. When the treaty is implemented in domestic law, libraries can then perform the range of services permitted by the treaty: the creation and distribution of accessible format copies to print disabled people. And libraries can play their part in ending the book famine.

<sup>18</sup> For more detail, see *A User Guide to the Marrakesh Treaty*, <http://www.librarycopyrightalliance.org/bm~doc/user-guide-marrakesh-treaty-1013final.pdf>

<sup>19</sup> Footnote 12 Agreed Statement concerning Article 9 states ‘It is understood that Article 9 does not imply mandatory registration for authorized entities nor does it constitute a precondition for authorized entities to engage in activities recognized under this Treaty; but it provides for a possibility for sharing information to facilitate the cross-border exchange of accessible format copies’.

<sup>20</sup> See one possible model statute for implementation at <http://infojustice.org/wp-content/uploads/2013/09/MODEL-STATUTE-FOR-MARRAKESH-IMPLEMENTATION.pdf>

## PART TWO RECOMMENDATIONS FOR NATIONAL IMPLEMENTATION OF THE MARRAKESH TREATY

Luis Villarroel Villalon<sup>21</sup>

This set of recommendations for implementation of the Marrakesh Treaty is aimed primarily at librarians in EIFL partner countries who are advocating to their governments to ratify the treaty. It can also be used as a tool by policy-makers when implementing the treaty into national law. The recommendations provide a practical interpretation of the major technical provisions in the treaty in line with broad public interest goals of access to knowledge. They offer guidance and suggestions in order to help realize the opportunity that the treaty offers to libraries to increase the reading materials available to people with print disabilities, and thereby to effectively meet the treaty's objective – to end the book famine. These recommendations should be read together with Part One of the “The Marrakesh Treaty: an EIFL Guide for Libraries”. We welcome comments and feedback.

### I. Beneficiaries of the Treaty

The Marrakesh Treaty to Facilitate Access to Published Works<sup>22</sup> protects access for persons who are blind, have a visual impairment, or who are otherwise print disabled e.g. who are dyslexic or are unable to physically hold a book. Therefore the treaty provisions do not apply to persons with other types of disabilities.

#### Recommendation:

1.1 To meet the obligations of the Marrakesh Treaty, countries shall provide limitations and exceptions to benefit persons who are blind, have a visual impairment, or who are otherwise print disabled. Therefore, it is important to ensure that the exceptions provided apply not only to persons who are blind or visually impaired, but also include other disabilities that impair access to printed works. To facilitate this, it is recommended therefore to include examples of other print disabilities, in a non-exhaustive manner.

*For recommendations on persons with disabilities outside the scope of the Marrakesh Treaty, please see Section IX below.*

### II. Type of Works and Other Matter Subject to the Exceptions and Limitations

The Marrakesh Treaty requires that the exceptions shall apply to literary, artistic and scientific works, as understood in the Berne Convention, that are expressed in the form of “text, notation and/or related illustrations, whether published or otherwise made publicly available in any media”<sup>23</sup>. This means that text-based books on paper and in digital format such as newspapers, magazines, comics, audio books, e-books, web pages, sound recordings, etc. are included along with works that combine text and illustrations, such as comic and picture books (as long as these contain text or notations in any form).

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These recommendations are the personal opinion of the author, subject to revision, and do not necessarily reflect the views of employers, institutions, or countries with which he is or has been affiliated.

<sup>22</sup> <http://www.wipo.int/treaties/en/ip/marrakesh/>

<sup>23</sup> [http://www.wipo.int/treaties/en/text.jsp?file\\_id=301016#art2](http://www.wipo.int/treaties/en/text.jsp?file_id=301016#art2)

However, it is implicit that works such as artistic performances, sound recordings (phonograms), or broadcast signals that fall outside the definition of “work” in most jurisdictions are also subject to the exceptions in the Marrakesh Treaty, so long as these works are embedded in or related to a work as defined in the treaty.

### Recommendation:

2.1 Countries should ensure that the limitations and exceptions implementing the Marrakesh Treaty cover all literary, artistic and scientific works expressed through text, notation and/or related illustrations. To facilitate this, it is recommended therefore to include examples of types of works, in a non-exhaustive manner.

*For recommendations on works outside the scope of the Marrakesh Treaty, please see Section X below.*

### III. Type of Rights Covered by the Limitations and Exceptions Provided (Copyright and Related Rights)

The exceptions and limitations provided for in the Treaty apply not only to copyright, but also to related rights<sup>24</sup>, such as performers’ right, phonogram producers’ right or broadcaster rights. This important element is expressly recognized in the Agreed Statement concerning Article 10(2): “It is understood that when a work qualifies as a work under Article 2(a), including such works in audio form, the limitations and exceptions provided for by this Treaty apply *mutatis mutandis* to related rights as necessary to make the accessible format copy, to distribute it and to make it available to beneficiary persons”<sup>25</sup>.

This provision is critical because text-based works subject to copyright can contain embedded material such as sound recordings made for audio books or artistic performances, that in many jurisdictions are subject to related rights, rather than copyright. Examples of other types of rights will depend on the individual country, and might include works in the public domain, for example, that in some jurisdictions are granted related rights under certain circumstances.

### Recommendation:

3.1 Countries should ensure that limitations and exceptions provided under the Marrakesh Treaty apply to both copyright and related rights<sup>26</sup> as required, in order to make literary and artistic works accessible in fulfilment of the treaty’s objective.

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<sup>24</sup> Also called neighbouring rights  
[http://cyber.law.harvard.edu/copyrightforlibrarians/Module 4: Rights, Exceptions, and Limitations#Neighboring and .22Sui Generis.22 Rights](http://cyber.law.harvard.edu/copyrightforlibrarians/Module_4:_Rights,_Exceptions,_and_Limitations#Neighboring_and_.22Sui_Generis.22_Rights)

<sup>25</sup> Footnote 13 Agreed Statement concerning Article 10(2)  
[http://www.wipo.int/treaties/en/text.jsp?file\\_id=301036](http://www.wipo.int/treaties/en/text.jsp?file_id=301036)

<sup>26</sup> Importantly, the WIPO Performances and Phonograms Treaty (WPPT), Rome Convention and the TRIPS Agreement expressly say that when a limitation or exception is permitted for copyright, it may also be permitted for related rights. For example, Article 16 of the WPPT provides “(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.”  
[http://www.wipo.int/treaties/en/text.jsp?file\\_id=295578#P133\\_18440](http://www.wipo.int/treaties/en/text.jsp?file_id=295578#P133_18440)

## IV. Uses of Works to be Permitted under the Limitations and Exceptions

The Marrakesh Treaty provides for certain mandatory limitations and exceptions to the following rights: the right of reproduction, the right of distribution, the right of making available to the public, (as provided by the WIPO Copyright Treaty), as well as the right to make the necessary transformations in order to make the work accessible in an alternative format such as audio description of a picture related to text, for example, to describe a painting included in an art history book<sup>27</sup>.

However, the treaty also provides for the possibility of including within the exceptions other uses needed to create accessible formats or to make them available, such as the right of public performance<sup>28</sup>, translation or other rights as permitted by international law<sup>29</sup>.

The more uses that are permitted under the limitations and exceptions, the more comfort will be provided to those making and distributing accessible formats: in essence, empowering those providing access to persons with print disabilities. This is particularly important because a condition of receiving an accessible format copy across a national border (importing) is that the law of the receiving country must permit the production of that format under an exception<sup>30</sup>. Therefore the more types of accessible formats allowed under national law, the more legal certainty there is for a country importing accessible format copies made in another country.

### Recommendation:

4.1 National law should include a limitation or exception to all the rights expressly mentioned in the Marrakesh Treaty and its Agreed Statements: the right of reproduction, distribution, making available (as provided in the WIPO Copyright Treaty Article 8), public performance, and transformations necessary to make an accessible format, importation and exportation when applicable, and translation.

## V. Libraries as Authorized Entities

According to the Marrakesh Treaty, “authorized entities”<sup>31</sup> are the only entities that may send accessible format copies to another country that is party to the treaty. Authorized entities may send such copies either to another authorized entity, or directly to a beneficiary in the other country<sup>32</sup>. Therefore, authorized entities have a crucial role in the effective implementation of the international exchange of accessible format copies. In addition, authorized entities have a key function in the creation and distribution of accessible works within a country.

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<sup>27</sup> Article 4 National Law Limitations and Exceptions Regarding Accessible Formats

<sup>28</sup> Article 4(1)(b)

<sup>29</sup> Footnote 4 Agree Statement concerning Article 4(3)

[http://www.wipo.int/treaties/en/text.jsp?file\\_id=301036](http://www.wipo.int/treaties/en/text.jsp?file_id=301036)

<sup>30</sup> Article 6 Importation of Accessible Format Copies

<sup>31</sup> For an organization or institution to be considered an “authorized entity” that can produce, internationally exchange and distribute accessible formats under the Marrakesh Treaty, it must meet two requirements. Firstly, there is a general requirement relating to the nature of the institution and the type of activities it undertakes, such as the provision of educational services, instructional training, adaptive reading or information access to beneficiary persons, in accordance with national policies and legal obligations. The activities must also be undertaken on a non-profit basis (see Article 2(c)). Secondly, to ensure that accessible format copies are not misused, the entity establishes and follows its own practices and procedures (see Article 2(d)).

<sup>32</sup> Article 5(1) Only “authorized entities” are expressly allowed to send accessible formats to other countries within the Marrakesh system.



As providers of information to beneficiary persons on a non-profit basis, libraries qualify as authorized entities. To fulfil the purpose of the treaty, it is important that all types of libraries - from special libraries serving blind and visually impaired people to academic and public libraries, from well-resourced libraries in major cities and towns to small community libraries in rural areas - are encouraged to take on the role of authorized entities and are empowered to provide print disabled users with timely access to accessible materials.

In order to meet the definition in the treaty, a library must establish and follow its own practices to ensure that the persons it serves are beneficiary persons, to limit the distribution of accessible format copies to beneficiaries, to discourage the use of unauthorized copies, and to maintain due care in handling copies of works and in keeping records, while respecting the privacy of the library users<sup>33</sup>.

### **Recommendations:**

5.1 The implementing law or regulations with regard to libraries as authorized entities should provide an assurance that the library can establish and follow its own practices with regard to the provision of accessible format copies, as long as this is undertaken in good faith and is reasonable according to local circumstances and conditions.

5.2 If the national law implementing the Marrakesh Treaty includes a list of types of entities that might qualify as authorized entities, it is very important to ensure that libraries providing services on a non-profit basis are included.

5.3 Government guidelines or best practices with regard to the provision of accessible formats to beneficiary persons under the terms of the treaty should be elaborated in consultation with representative groups such as library associations and library consortia, together with other authorized entity producers of accessible formats.

5.4 Library by-laws or internal governing regulations should expressly include a provision acknowledging that information access to persons with disabilities is part of its institutional mandate (subject to available resources, where appropriate).

5.5 Libraries should put in place procedures and practices for due care in the production and distribution of accessible format materials for persons with disabilities.

## **VI. Conditions for the Application of the Limitations and Exceptions in National Law**

Any person, including the beneficiaries and authorized entities, may have the right to make accessible format copies, as long as these are made exclusively for the use of a beneficiary person. It is understood that people acting on behalf of beneficiaries, such as librarians, carers, family or friends, are included.

The activities undertaken by the authorized entity or the person producing or making the accessible format available shall be on a non-profit basis<sup>34</sup>. It is important to note that the non-profit status does not prevent an authorized entity from charging fees on a cost recovery basis or from receiving funds, for example, to finance the production or distribution of accessible formats<sup>35</sup>.

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<sup>33</sup> Article 2(d)

<sup>34</sup> Article 4(2)(a)(iv)

<sup>35</sup> Footnote 2 Agreed Statement concerning Article 2(c)

[http://www.wipo.int/treaties/en/text.jsp?file\\_id=301036](http://www.wipo.int/treaties/en/text.jsp?file_id=301036)

The exceptions shall not be limited to a specific format: any format can be made as long as it serves the purpose of overcoming the disability that impairs the access<sup>36</sup>, and does not introduce changes other than those needed to make the work accessible<sup>37</sup>.

Specific exceptions in favour of persons with print disabilities are without prejudice to other general exceptions provided in national law<sup>38</sup>, such as those for educational purposes, as well as any special provisions that take account of a country's economic situation or social and cultural needs. In addition, authorized entities should respect the privacy of beneficiary persons on an equal basis as others, for example, with regard to the protection of personal data or reading habits<sup>39</sup>.

Authorized entities may send accessible format copies either to authorized entities or directly to beneficiary persons located in another country<sup>40</sup>.

### Recommendations:

6.1 All persons and authorized entities should be permitted to produce and distribute accessible formats within a country for the exclusive use of beneficiary persons and in accordance with the requirements set by national law.

6.2 For activities undertaken on a non-profit basis, it is very important that the exercise of the exceptions are not made subject to the payment of a fee<sup>41</sup>, nor to a commercial availability test for the particular accessible format (either for use within the producing country, or for use in another country)<sup>42</sup>.

6.3 The implementing law or regulations should make clear that (1) the non-profit nature of the activity applies to the person or entity controlling the production or distribution of the accessible format (rather than a service provider that is part of the production chain), and (2) it does not exclude payment to such commercial entities for their services.

6.4 It is implicit in the treaty that countries have the freedom to regulate the relationship with contracts *vis a vis* limitations and exceptions for the benefit of persons with print disabilities, as long as the purpose of the treaty is fulfilled. Because access to digital resources is governed by licences, it is strongly recommended that copyright law safeguards the exceptions so that any licence terms cannot override the exercise of limitations and exceptions provided for under the treaty.

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<sup>36</sup> Article 4(1)(a)  
<sup>37</sup> Article 4(2)(a)(ii)  
<sup>38</sup> Article 12 Other Limitations and Exceptions, and Article 4(3) National Law Limitations and Exceptions Regarding Accessible Format Copies  
<sup>39</sup> Article 8 Respect for Privacy  
<sup>40</sup> Article 5(1)  
<sup>41</sup> Article 4(5)  
<sup>42</sup> Article 4(4) A country that chooses to include a requirement of commercial availability must deposit a notification with the Director General of WIPO.

## VII. Conditions for the Cross Border Exchange of Accessible Format Copies

Authorized entities have the express right to distribute and to make available accessible format copies to another authorized entity or directly to a beneficiary person in another country that is party to the Treaty<sup>43</sup>. When establishing the conditions for sending the accessible format copy, the originating authorized entity is subject to the principle of “good faith”<sup>44</sup>. It is important to note that the treaty allows the authorized entity to establish its own practices<sup>45</sup>. It does not set out particular procedures or systems to be followed that will typically reflect the social and economic circumstances around the world in which authorized entities operate, and print disabled people live.

When the receiving authorized entity is located in a country that does not have obligations with regard to the three-step test in international law<sup>46</sup>, it must ensure that the accessible format copy is used only for the benefit of beneficiary persons within the country<sup>47</sup>.

### Recommendations:

7.1 As the Treaty is without prejudice to other exceptions for persons with disabilities provided in national law<sup>48</sup>, beneficiaries shall not be prevented from cross-border sharing of materials in the context of other exceptions, such as private use, that are within the limits of what is permitted under national law.

7.2 Even if a country chooses to set a condition of non-commercial availability on the making and distribution of accessible formats<sup>49</sup>, such a condition should not apply to accessible format copies made for cross-border use, as this would be very burdensome or even impossible for the originating authorized entity to verify.

## VIII. Technological Protection Measures

When a country provides legal protection for technological protection measures (TPMs), such as copy or access controls, it shall take measures to ensure that this does not prevent beneficiary persons from enjoying the limitations and exceptions provided for in the Treaty. The most straightforward measure is to allow the circumvention of TPMs to enable the accessible formats to be made or distributed<sup>50</sup>, as well as tools and services needed to undertake the circumvention. If the law only permits circumvention of the TPM, but does not permit the tools and services needed by authorized entities or beneficiaries to undertake the circumvention, the norm will have limited utility.

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<sup>43</sup> Article 5(1)

<sup>44</sup> Article 5(2) where “the originating authorized entity did not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons”.

<sup>45</sup> As discussed in Part Two Section V above. See also Article 2(d) of the Marrakesh Treaty

<sup>46</sup> As discussed in Part One Section D. General Principles Concerning National Implementation

<sup>47</sup> Article 5(4)

<sup>48</sup> Article 12(2)

<sup>49</sup> As discussed in Part One, C. Substantive Obligations, Article 4 National Law

Limitations and Exceptions

<sup>50</sup> Article 7

## Recommendation:

8.1 In addition to the circumvention of technological protection measures for the purposes of making or distributing the accessible formats, national law should permit the tools and services, whether commercial or non-commercial, that enable such circumvention as appropriate.

## IX. Protection for Persons with Disabilities Not Mandated by the Marrakesh Treaty

The Marrakesh Treaty expressly says that its provisions are without prejudice to other exceptions for persons with disabilities provided in national law<sup>51</sup>. In other words, the treaty does not restrict the granting of rights to persons with other disabilities who need alternative formats in order to access information. For example, a deaf person may rely on subtitling or captioning for communication and interaction. Therefore a country that provides exceptions in national law for persons with other disabilities may retain such exceptions or add new ones, even when they are party to the Marrakesh Treaty.

## Recommendation:

9.1 It is reminded that the Marrakesh Treaty permits a member country to retain and expand limitations and exceptions protecting persons with disabilities other than those mandated by the treaty, who are also prevented from accessing works to substantially the same degree as a person without the disability. Countries are therefore encouraged to avail of this flexibility.

## X. Access to Works not Included in the Marrakesh Treaty

Nothing in the treaty prevents member countries from providing limitations and exceptions to enable beneficiaries to access works not included in the treaty, provided that such exceptions comply with the country's international obligations<sup>52</sup>. Following this principle, a country may provide exceptions that cover other types of works, such as a stand-alone picture that is not combined with text and illustrations. The only effect will be that the production and distribution of such accessible works is not based on the provisions of the Marrakesh Treaty.

## Recommendation:

10.1 Include all works and subject matter covered by copyright and related rights within the scope of works and other subject matter that can be made accessible, making sure to distinguish between works that benefit from the provisions of the Marrakesh Treaty and those that fall outside its scope.

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<sup>51</sup> Article 12(2)

<sup>52</sup> Article 12 Other Limitations and Exceptions

EIFL (Electronic Information for Libraries) is a not-for-profit organization that works with libraries to enable access to knowledge in more than 60 developing and transition economy countries in Africa, Asia Pacific, Europe and Latin America. In a highly networked digital world our activities help people to access and use information for education, learning, research and sustainable community development. Learn more at [www.eifl.net](http://www.eifl.net)

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