

# Copyright Exceptions Across Borders: Implementing the Marrakesh Treaty

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## Abstract

*This article reviews state ratification and implementation of the Marrakesh Treaty since its conclusion in 2013. We find that most states have adhered closely to the Treaty's text, thus creating a de facto global template of exceptions and limitations that has increasingly enabled individuals with print disabilities, libraries and schools to create accessible format copies and share them across borders. The article argues that the Marrakesh Treaty's core innovation—mandatory exceptions to copyright to promote public welfare—together with consultations with a diverse range of stakeholders, may offer a model for harmonising human rights and IP in other contexts.*

## Introduction

At the time of its conclusion in 2013, the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (Marrakesh Treaty or the Treaty)<sup>1</sup> was hailed as a “miracle”.<sup>2</sup> Like all international agreements, however, its practical impact hinges on implementation. This article evaluates how the Marrakesh Treaty has fared in this respect. We argue that the Treaty's core innovation—a system of mandatory exceptions in national copyright laws to enable the creation and sharing of accessible format copies across borders—shows promising signs of achieving its objectives and may suggest new strategies for reconciling intellectual property and human rights in practice.

Ratification of the Marrakesh Treaty has been geographically broad and includes countries at varying levels of development. The ever-growing number of Contracting Parties in both the industrialised and developing world means that the number of print-disabled individuals who can benefit from the treaty is substantial and increasing.<sup>3</sup> In addition, recent ratifications by the United States and the European Union—which have the largest collections of accessible format works—are critical steps toward ensuring a supply of books available for cross-border sharing under the Treaty's terms.

Our review of the Marrakesh Treaty's implementation patterns reveals a number of findings with potentially broad legal and policy implications. First, many countries have joined the Treaty without amending their copyright laws. Although this raises questions about how the agreement will be given effect in national legal orders, the structure of the Treaty enables some of its objectives to be realised even without implementing legislation. In particular, the Treaty permits individuals with print disabilities, as well as entities such as libraries and schools, to create accessible format copies and share them with other authorised recipients. As we explain below, some libraries and disability rights groups began sharing accessible format works as soon as the Treaty entered into force in their respective jurisdictions.<sup>4</sup>

Second, the Treaty demonstrates that mandatory exceptions to copyright can reasonably coexist with robust copyright protection. Many ratifying states have closely tracked the Treaty's text in national implementing legislation, creating a common template of exceptions and limitations that facilitates the sharing of accessible format works across borders. Very few countries have varied from this template to adopt optional provisions that provide additional protections to copyright owners. In fact, some states have capitalised on the opportunity of joining the Marrakesh Treaty to expand exceptions and limitations to include a broader range of disabilities or to encourage other socially valuable activities. This suggests that states view harmonised global copyright exceptions—at least those benefitting the print disabled—to be an appropriate way to promote public welfare.

Third, the Treaty also provides a model for reconciling human rights and intellectual property. The Convention on the Rights of Persons with Disabilities<sup>5</sup> (CRPD) requires states to consult with persons with disabilities when considering policies that affect them. The

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<sup>1</sup> The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, WIPO Doc. VIP/DC/8, 27 June 2013 (entered into force 30 September 2016).

<sup>2</sup> Vera Franz, “The Miracle in Marrakesh: Copyright Reform to End the ‘Book Famine’”, Open Society Foundation — Voices (28 June 2013), <https://www.opensocietyfoundations.org/voices/miracle-marrakesh-copyright-reform-end-book-famine> [Accessed 22 April 2020].

<sup>3</sup> As of 1 March 2020, 64 countries and the European Union (on behalf of its 28 Member States) were parties to the Marrakesh Treaty. See WIPO-Administered Treaties: Contracting Parties, > Marrakesh VIP Treaty (Marrakesh Contracting Parties), [https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=843](https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=843) [Accessed 22 April 2020].

<sup>4</sup> Accessible Books Consortium, “First Cross-Border Book Transfer by ABC Following Entry Into Force of Marrakesh Treaty” (30 September 2016), [https://www.accessiblebooksconsortium.org/news/en/2016/news\\_0010.html](https://www.accessiblebooksconsortium.org/news/en/2016/news_0010.html); Krista L. Cox, “University of Toronto Makes First International Transfer of Accessible Books to Kyrgyzstan under Marrakesh Treaty” (17 May 2018), Association of Research Libraries, <https://www.arl.org/news/university-of-toronto-makes-first-international-transfer-of-accessible-books-to-kyrgyzstan-under-marrakesh-treaty/> [Both accessed 22 April 2020].

<sup>5</sup> Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (24 January 2007) art.30(1) and 30(3) (CRPD).

Marrakesh Treaty concretely illustrates how these consultations can create bridges between rights holders, their representative organisations, and intellectual property interest groups in ways that promote more effective treaty implementation. In Uganda, for example, the CRPD gave disability rights organisations an opportunity to be involved in domestic intellectual property reforms.<sup>6</sup> In the United Kingdom and New Zealand, libraries, educational institutions, and other civil society groups shaped their respective governments' discretionary choices in deciding how to implement the Treaty.<sup>7</sup>

The remainder of this article proceeds as follows. The second part provides brief background and context. The third part summarises the Marrakesh Treaty's key provisions. The fourth part surveys how the agreement is being ratified and implemented by the Contracting Parties, as well as how consultations with a diverse range of stakeholders can influence how governments give effect to the Treaty. A brief conclusion considers the legal and policy implications of these patterns for other efforts to reconcile human rights and intellectual property.

## Background and context

The overarching objective of the Marrakesh Treaty is to expand the availability of copyrighted works to the world's estimated 300 million individuals with print disabilities. Many of these individuals—not only those who are blind or visually impaired, but also persons with physical and perceptual disabilities—are unable to read books or consume cultural materials because those works are unavailable in formats that they can access.

This lack of access has been labeled a “book famine”.<sup>8</sup> Copyrighted materials are widely available, as are the technologies to make them accessible. However, restrictions imposed by national copyright laws prevent these works from being transformed into accessible formats and distributed to individuals with print disabilities. The book famine is especially severe in the Global South. Although 90 per cent of print-disabled persons reside in developing and least developed countries, less than 1 per cent of published materials in those states are available in accessible formats.<sup>9</sup>

Deprived of access to books, newspapers and online materials, individuals with print disabilities cannot participate meaningfully in society.<sup>10</sup> This affects numerous internationally recognised human rights, including, most notably, the rights protected by the CRPD.

Adopted by 180 countries as of October 2019—more than 90 per cent of the United Nations membership—the CRPD requires Member States to take appropriate measures to ensure that all persons with disabilities “[e]njoy access to cultural materials in accessible formats” and that intellectual property laws “do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials”.<sup>11</sup>

As we explained in a 2017 book, *The World Blind Union Guide to the Marrakesh Treaty: Facilitating Access to Books for Print-Disabled Individuals* (WBU Guide), the Treaty draws inspiration from and builds upon these provisions of the CRPD. Neither entirely a human rights convention nor an intellectual property agreement, the Marrakesh Treaty is situated at the intersection of the two fields and combines them in innovative ways. By mandating exceptions to copyright law to protect the rights of individuals with disabilities, the Treaty employs the legal and policy tools of intellectual property law to advance human rights ends.<sup>12</sup>

This conceptual framing is noteworthy for several reasons. The Marrakesh Treaty is the first international agreement to require, not just to permit, exceptions and limitations to copyright. It is also the first treaty to internationalise such exceptions by creating a mechanism to facilitate the cross-border exchange of covered works. Although copyright exceptions for the blind have long existed in some countries, the Marrakesh Treaty requires all Contracting Parties to adopt such exceptions, specifies the contours of those exceptions, and expands them to include all print-disabled individuals. This substantially reduces the financial and practical barriers to creating literary and cultural materials in accessible formats and to sharing those materials across borders.

## Overview of key provisions

Contracting Parties undertake to give effect to the Marrakesh Treaty in several ways. The WBU Guide contains a detailed analysis of these obligations and offers practical recommendations for giving them effect. Here, we present a succinct overview of the Treaty's main provisions and the discretionary choices that it provides to governments.

Articles 4, 5, and 6 comprise the heart of the Treaty. Article 4 requires that national copyright laws include a limitation or exception to the rights of reproduction, distribution, and making available to the public to facilitate the availability of accessible format copies,

<sup>6</sup> Interview with member of the National Union of Disabled Persons of Uganda, Geneva (28 September 2016).

<sup>7</sup> Implementation of the Marrakesh Treaty in the United Kingdom and New Zealand is discussed below.

<sup>8</sup> Franz, “The Miracle in Marrakesh”, Open Society Foundation — Voices (28 June 2013), <https://www.opensocietyfoundations.org/voices/miracle-marrakesh-copyright-reform-end-book-famine> [Accessed 22 April 2020].

<sup>9</sup> IFLA, “Getting Started Implementing the Marrakesh Treaty — for Persons with Print Disabilities: A Practical Guide for Librarians” (March 2018), p.10, <https://www.ifla.org/publications/node/71175?og=29> [Accessed 22 April 2020].

<sup>10</sup> See, e.g., Asia IP, “The Fight Against the ‘Book Famine’” (22 February 2018), <https://www.asiaiplaw.com/index.php/article/the-fight-against-the-ldquo-book-famine-rdquo> [Accessed 22 April 2020] (“The limited access to published materials has greatly impeded persons with print disabilities from education, healthcare, employment, cultural and other socio-economic participation.”); World Health Organization and World Bank, *World Report on Disability* (2011), p.10 (“A growing body of empirical evidence from across the world indicates that people with disabilities and their families are more likely to experience economic and social disadvantage than those without disability.”).

<sup>11</sup> CRPD art.30(1) and 30(3). The Committee on the Rights of Persons with Disabilities has repeatedly called on CRPD states parties to ratify and implement the Marrakesh Treaty to help fulfil these obligations. See, e.g., General Comment No.4, art.24 (Right to inclusive education), U.N. Doc. No.CRPD/C/GC/4 (2 September 2016), para.22.

<sup>12</sup> Laurence R. Helfer, Molly K. Land, Ruth L. Okediji and Jerome H. Reichman, *The World Blind Union Guide to the Marrakesh Treaty: Facilitating Access to Books for Print-Disabled Individuals* (Oxford: Oxford University Press, 2017), pp.8–11 (“WBU Guide”).

including by making any technical or other modifications necessary for accessibility. Articles 5 and 6, respectively, require Contracting Parties to allow the export and import of copies in accessible formats.

The Treaty allows states to implement these provisions in a variety of ways, including by relying on general fair use or fair dealing doctrines. However, the WBU Guide urges all Contracting Parties to adopt the bespoke exceptions set forth in arts 4, 5 and 6. These “safe harbour” exceptions are presumptively compatible with other intellectual property agreements, including with respect to the three-step test. Choosing these multilaterally sanctioned templates also enhances certainty and predictability, and it facilitates cross-border exchanges of accessible format copies by standardising national implementation of the Treaty.

Article 4 also contains two optional clauses that restrict the availability of literary and artistic works to the print-disabled. The first clause allows states to condition the creation, distribution or making available of accessible format copies upon the payment of a royalty or licence fee to the copyright holder. The second permits states to prohibit the creation of accessible format copies of books and cultural materials if the copyright holder has already made that format commercially available upon reasonable terms.

The WBU Guide recommends that states reject both of these options because they would introduce needless complexity and financial burdens that could deter print-disabled persons and entities such as libraries from making or sharing accessible format copies. These risks are especially concerning for the millions of print-disabled persons in developing and least-developed countries.

Effective implementation of the Marrakesh Treaty also requires adhering to the agreement’s capacious definitions of “beneficiary persons” (in art.3) and “authorized entities” (in art.2(c)). With respect to print-disabled individuals, the WBU Guide recommends that states adopt an approach to visual impairment that is consistent with the CRPD’s evolving concept of disability and that reflects the reality of progressive vision loss. With respect to authorised entities, the WBU Guide highlights that the Treaty includes not only organisations whose primary mission is to provide services to the blind, but also a larger group of public and non-profit bodies—such as schools, libraries, and civil society groups—whose activities benefit society as a whole, including individuals with print disabilities.

Finally, the WBU Guide emphasises that the Marrakesh Treaty provides a floor, not a ceiling. States may, for example, adopt exceptions to copyright that apply to persons with other types of physical or mental disabilities as well as exceptions for other public interest uses—provided, however, that they do so consistently with the human rights and intellectual property agreements to which they are parties.

## Ratification and implementation

The Marrakesh Treaty seeks to facilitate the creation and cross-border exchange of copyrighted works in formats accessible to print-disabled individuals. To achieve these goals, a large number of countries must ratify and implement the Treaty. This section reviews progress toward achieving these objectives.

In terms of ratification, the number of Contracting Parties is growing rapidly. The Treaty’s increasing visibility, together with ratification campaigns by civil society groups, mean that widespread, if not universal, membership is within striking distance. In contrast, the status of implementation is in flux. Most Contracting Parties have joined the Treaty without first amending their copyright laws. However, the countries that have adopted or are considering implementing legislation are doing so in a variety of ways that merit further study. These decisions may influence the practices of other countries, and, more broadly, the extent to which the Treaty will achieve its core objectives.

### Ratification trends

The Marrakesh Treaty entered into force on 30 September 2016 with 20 Member States, just over three years after it was adopted.<sup>13</sup> An accelerating number of states and the European Union (EU) have since joined the Treaty—two more by the end of 2016, nine in 2017, 11 in 2018, 16 in 2019, and six more by the middle of 2020—bringing the total number of Contracting Parties to 64.<sup>14</sup> As a result of this rapid evolution, print-disabled individuals and authorised entities can copy and share accessible format works among countries on six continents.

The Treaty’s geographic scope took a “giant leap forward” in 2018 when the EU ratified the agreement,<sup>15</sup> bringing all 28 of its Member States into the Marrakesh fold.<sup>16</sup> In the same year, the United States adopted the Marrakesh Treaty Implementation Act,<sup>17</sup> which paved the way for ratification early in 2019. These major

<sup>13</sup> Marrakesh Treaty art.18 (providing that the agreement “shall enter into force three months after 20 eligible parties ... have deposited their instruments of ratification or accession”).

<sup>14</sup> Marrakesh Contracting Parties, [https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=843](https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=843) [Accessed 22 April 2020]. The Treaty entered into force for the three most recent Contracting Parties—Indonesia, Nicaragua and Switzerland—in April and May 2020.

<sup>15</sup> Electronic Information for Libraries (EIFL), “Giant leap forward for Marrakesh Treaty in 2018” (13 December 2018), <https://www.eifl.net/news/giant-leap-forward-marrakesh-treaty-2018> [Accessed 22 April 2020].

<sup>16</sup> Although most EU Member States signed the Treaty at the close of the diplomatic conference in Marrakesh, a dispute later arose over whether the Treaty is a “mixed agreement” or falls under the EU’s exclusive competence. The Court of Justice of the EU endorsed the latter view. Opinion 3/15, EU:C:2017:114 (14 February 2017), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=187841&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=337751>. The EU timed its ratification to align with the date by which Member States were required to transpose the Treaty into their respective national laws pursuant to a Directive and Regulation. Council Decision 2018/254 (15 February 2018), [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A3432018D0254#ntc6-L\\_2018048EN.01000101-E0006](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A3432018D0254#ntc6-L_2018048EN.01000101-E0006) [Both accessed 22 April 2020]. The Directive and Regulation are discussed in detail below.

<sup>17</sup> The Marrakesh Treaty Implementation Act, Pub. L. No.115-261.

content-producing countries provide vital inputs for the Marrakesh sharing ecosystem. Equally consequential is the accession of a growing number of developing states.<sup>18</sup> The Treaty is expected to have the greatest practical impact in these countries, significantly enhancing access to books and other cultural materials for some of the world's most vulnerable communities.<sup>19</sup>

Hailed by the World Intellectual Property Organization (WIPO) then Director-General, Francis Gurry, as “the fastest moving of the WIPO treaties ... most probably in the history of the Organization”,<sup>20</sup> Marrakesh's global reach is poised to expand even further. A score of countries that signed the instrument at the diplomatic conference in 2013 have not yet ratified it. Library organisations, disability rights groups and WIPO are actively encouraging these and other countries to ratify or accede to the agreement.<sup>21</sup> If these trends continue, the goal of “a universal, worldwide Treaty” encompassing accessible format works “produced in any corner of the globe” may be attainable in just a few years.<sup>22</sup>

### Implementation patterns

The existing Contracting Parties to the Marrakesh Treaty fall into two broad categories: countries that joined the agreement without adopting any measures to give it effect domestically, and countries that adopted implementing legislation, primarily by amending their national copyright laws. States have also taken different approaches to the Treaty's optional provisions for conditioning the creation, distribution and making available of accessible format copies upon the payment of remuneration to the copyright holder, or upon such copies not being commercially available on reasonable terms in the relevant market.<sup>23</sup>

### Ratification without domestic implementation

According to recent studies by WIPO and by the Association of Research Libraries, 35 Contracting Parties have ratified or acceded to the Marrakesh Treaty without adopting implementing legislation or revising their national laws.<sup>24</sup> Of these, the copyright statutes of 19 states—primarily developing countries in Africa, the Middle East, and Latin America—lack an explicit exception for print-disabled individuals.<sup>25</sup> An additional 19 Contracting Parties had previously adopted such provisions, often years before the Treaty was concluded in 2013.<sup>26</sup>

Many of the pre-Marrakesh exceptions are narrower than what the agreement requires. Some of the discrepancies between the Treaty and national laws relate to beneficiaries or covered works. For example, the Dominican Republic and Nigeria limit their respective exceptions to the blind or sightless,<sup>27</sup> whereas Marrakesh's definition of “beneficiary persons” is substantially broader.<sup>28</sup> The exceptions in South Korea and Uganda apply only to Braille copies, omitting many other accessible formats.<sup>29</sup> Other inconsistencies relate to exclusive rights. Azerbaijan, for example, permits the “reproduction of lawfully published works,” but not their distribution, making available or public performance.<sup>30</sup> The most common omission—and the most consequential in terms of promoting cross-border sharing—is the absence of authority to import or export accessible format copies.<sup>31</sup>

What happens to Marrakesh-mandated definitions and exceptions in countries that do not resolve these discrepancies? In most monist states that follow the civil law tradition, ratified treaties in principle receive direct effect without the need for implementing legislation. In reality, the legal landscape is more complex, notably with regard to the relationship between treaties and legislation,

<sup>18</sup> For example, Afghanistan, Belize, Bolivia, Cabo Verde, the Cook Islands, Indonesia, Kiribati, the Marshall Islands, Morocco, Nicaragua, the Philippines, Thailand, Uganda, and Zimbabwe all joined the Treaty in 2018, 2019 and 2020. See Marrakesh Contracting Parties, [https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=843](https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=843) [Accessed 22 April 2020].

<sup>19</sup> EIFL, “The right to read: EIFL supports the Marrakesh Treaty and its implementation into national copyright law” (2019) (EIFL, “The right to read”), <https://www.eifl.net/eifl-in-action/right-read> [Accessed 22 April 2020].

<sup>20</sup> WIPO, “European Union Joins WIPO's Marrakesh Treaty, Greatly Expanding Coverage”, PR/2018/822 (1 October 2018) (WIPO, “EU Joins Marrakesh”), [https://www.wipo.int/pressroom/en/articles/2018/article\\_0008.html](https://www.wipo.int/pressroom/en/articles/2018/article_0008.html) [Accessed 22 April 2020].

<sup>21</sup> See, e.g., EIFL, “The right to read”, <https://www.eifl.net/eifl-in-action/right-read>; European Blind Union, “Campaigns and Activities — The Marrakesh Treaty” (2019) (EBU, “Campaigns and Activities”), <http://www.euroblind.org/campaigns-and-activities/current-campaigns/marrakesh-treaty> [Both accessed 22 April 2020].

<sup>22</sup> WIPO, “EU Joins Marrakesh” (1 October 2018), [https://www.wipo.int/pressroom/en/articles/2018/article\\_0008.html](https://www.wipo.int/pressroom/en/articles/2018/article_0008.html) [Accessed 22 April 2020].

<sup>23</sup> Marrakesh Treaty art.4(4) and 4(5).

<sup>24</sup> WIPO, “Revised Scoping Study on Access to Copyright Protected Works by Persons with Disabilities, SCCR/38/3 (13 March 2019) (prepared by Blake E. Reid and Caroline B. Ncube) (“Revised WIPO Scoping Study”), [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=431197](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=431197) [Accessed 22 April 2020]; Association of Research Libraries, “National Implementations of the Marrakesh Treaty by Countries That Have Ratified or Acceded to the Treaty” (28 February 2020) (prepared by Jonathan Band and Krista Cox) (ARL, “National Implementations”), <https://www.arl.org/wp-content/uploads/2020/02/2020.02.28-MarrakeshTreaty.pdf> [Accessed 6 May 2020].

<sup>25</sup> The 19 states are: Afghanistan, Bolivia, Botswana, Burkina Faso, Costa Rica, Ghana, Guatemala, Honduras, Jordan, Kenya, Lesotho, Mali, Marshall Islands, Morocco, Qatar, Saudi Arabia, Trinidad and Tobago, Tunisia, United Arab Emirates and Venezuela.

<sup>26</sup> The 19 states are: Argentina, Azerbaijan, Brazil, Cape Verde, Chile, Democratic People's Republic of Korea, Dominican Republic, El Salvador, India, Indonesia, Moldova, Mongolia, Nicaragua, Nigeria, Panama, Philippines, Republic of Korea, Switzerland and Uganda.

<sup>27</sup> Law No.65-00 of 21 August 2000, on Copyright (Dominican Republic), art.44(3); Copyright Act (Nigeria), Second Schedule, reprinted in “Revised WIPO Scoping Study”, pp.39, 92.

<sup>28</sup> Marrakesh Treaty art.3.

<sup>29</sup> Compare Copyright Act of 1957 (Act No.432 of 28 January 1957, as amended up to Act No.5015 of 6 December 1995), art.30(1) (Republic of Korea); Copyright and Neighbouring Rights Act 2006, s.15 (Uganda), reprinted in “Revised WIPO Scoping Study”, pp. 100–101, 122–123, with Marrakesh Treaty art.2(b).

<sup>30</sup> Compare Law of the Republic of Azerbaijan on Copyright and Related Rights (as amended up to Law No.636-IVQD of 30 April 2013) art.19(6), reprinted in “Revised WIPO Scoping Study”, p.12, with Marrakesh Treaty arts 4 and 5.

<sup>31</sup> See “Revised WIPO Scoping Study”, p.2 (indicating that only nine countries expressly authorise the import and export of accessible format copies). Most recently, New Zealand revised its copyright statute to authorise cross-border exchanges. See Copyright (Marrakesh Treaty Implementation) Amendment Act 2019 s.69A.

and the extent to which national courts apply international agreements that have not been executed.<sup>32</sup> Given these complexities, if a dispute arose in these states relating to the creation or sharing of accessible format copies, it is uncertain whether government officials or judges would give effect to the Marrakesh Treaty over conflicting or ambiguous domestic laws.

The failure of states to implement the Marrakesh Treaty reflects a common pattern in the political economy of treaty accession. Ratification is often easier, faster and less costly than the contentious, complex and slower process of revising national law. For some countries, therefore, implementing legislation may simply require more time. For example, Nigeria deposited ratification instruments for four WIPO conventions in 2017 in advance of an ongoing effort to overhaul its copyright and neighboring rights laws.<sup>33</sup> In Lesotho and Mongolia, libraries prioritised ratification as a first step toward building political support for domestic copyright reforms benefitting persons with disabilities.<sup>34</sup>

In other countries, however, ratification without implementation may reflect the government's desire to avoid conflicts among competing interest groups. The Marrakesh Treaty provides several legal and policy options for Contracting Parties to give effect to its provisions. Some of these choices—such as the remuneration and commercial availability options discussed above—are contentious and have been the subject of intensive lobbying by copyright owners, libraries, and disability rights groups in countries that have adopted implementing legislation.<sup>35</sup> A state that joins but does not implement the Marrakesh Treaty can avoid, or at least defer, the resolution of these controversies.<sup>36</sup>

Unlike many human rights treaties, however, realising the objectives of the Marrakesh Treaty may not have to wait for implementation. In particular, the Treaty itself has provided the impetus for some print-disabled individuals and authorised entities to create and share

accessible format copies across borders.<sup>37</sup> For example, on “September 30, 2016, the day the Treaty entered into force”, a WIPO official hailed “the first cross-border exchange[s] ... among Brazil, Chile and Argentina”.<sup>38</sup> These three countries have pre-Marrakesh copyright exceptions for the blind, but their laws do not authorise import or export of accessible format copies.<sup>39</sup> It also appears that Bookshare—a library that has the world's most extensive collection of accessible ebooks (over 700,000 titles)—is making these works available to members in other Marrakesh-ratifying states, whether or not they have adopted implementing legislation.<sup>40</sup>

Of course, the adoption of legislation that explicitly authorises cross-border exchanges by all Marrakesh parties is highly desirable, both to encourage these emerging practices and to reduce the “confusion in interpretation and discrepancies between countries”.<sup>41</sup> Yet, the fact that these exchange networks have arisen even in the absence of such legislation suggests that private ordering may be an important, if less visible, way to achieve the Marrakesh Treaty's goals.

### *Ratification with domestic implementation*

To date, 51 countries (including the 28 EU Member States) have adopted legislation to give effect to the Marrakesh Treaty. These laws are quite diverse. A few countries, such as the Cook Islands and Kyrgyzstan, have transposed one or more Treaty articles into their national copyright statutes, in some cases nearly verbatim.<sup>42</sup> Other states have broadened pre-existing exceptions to incorporate the Treaty's wider definitions of accessible format copies, beneficiary persons, authorised entities, and covered works, or have extended existing exceptions to all exclusive rights referenced in the agreement, including the export and import of accessible format copies.

<sup>32</sup> See, e.g., Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford: Oxford University Press, 2016); André Nollkaemper, *National Courts and the International Rule of Law* (Oxford: Oxford University Press, 2011).

<sup>33</sup> Desmond Oriakhogba, “As we celebrate Nigeria's ratification of the WCT, WPPT, The Beijing Treaty and Marrakesh Treaty...”, *UCT IP Unit Blog* (2017), <http://ip-unit.org/2017/as-we-celebrate-nigerias-ratification-of-the-wct-wppt-the-beijing-treaty-and-marrakesh-treaty/> [Accessed 22 April 2020].

<sup>34</sup> EIFL, “The Right to Read in Mongolia”, <https://www.eifl.net/eifl-in-action/right-read-mongolia/> (“the Mongolian Libraries Consortium ... took the lead in organizing a campaign for ratification of the treaty in Mongolia”); EIFL, “The Right to Read in Lesotho”, <https://www.eifl.net/eifl-in-action/right-read-lesotho/> (Lesotho Library Consortium held a multi-stakeholder seminar in 2017 to develop a national action leading to accession of the Treaty in 2018) [Both accessed 22 April 2020].

<sup>35</sup> See, e.g., Letter to Prime Minister of Thailand regarding Thailand's Implementation of the Marrakesh Treaty (10 December 2018), [https://www.eifl.net/sites/default/files/resources/eifl\\_ifla\\_letter\\_to\\_prime\\_minister\\_of\\_thailand.pdf](https://www.eifl.net/sites/default/files/resources/eifl_ifla_letter_to_prime_minister_of_thailand.pdf); EIFL, AfLIA and IFLA Press Release, “Malawi: embrace the spirit of the Marrakesh Treaty — no commercial availability test (4 August 2017), [https://www.ifla.org/files/assets/clm/statements/malawi\\_marrakesh\\_statement.pdf](https://www.ifla.org/files/assets/clm/statements/malawi_marrakesh_statement.pdf); see also Catherine Saez, “Access Treaty for Visually Impaired Readers (Finally) Steps Forward on EU Ratification”, *IP Watch* (11 May 2017), IP Watch, <https://www.ip-watch.org/2017/05/11/access-treaty-visually-impaired-readers-finally-steps-forward-eu-ratification/> (discussing European Blind Union's opposition to EU Directive permitting member states to require remuneration for distribution of accessible format copies) [All accessed 22 April 2020].

<sup>36</sup> A partial exception concerns the option to confine exceptions and limitations to works that are not commercially available in the relevant market. A Contracting Party exercising this option must file a “notification deposited with the Director General of WIPO at the time of ratification of, acceptance of or accession to this Treaty or at any time thereafter”. Marrakesh Treaty art.4(4).

<sup>37</sup> These cross-border exchanges are likely being facilitated by the small number of Contracting Parties that expressly authorise imports and exports of accessible format works. The legislation of these countries allows cross-border exchanges with any Contracting Party, without regard to whether a country has itself authorised such exchanges. See, e.g., Marrakesh Treaty Implementation Act, 17 U.S.C. §121A (United States); Copyright (Marrakesh Treaty Implementation) Amendment Act 2019 s.69A (New Zealand).

<sup>38</sup> Asia IP, “Fight Against the ‘Book Famine’”, p.7, <https://www.asiaiplaw.com/index.php/article/the-fight-against-the-ldquobook-faminedquo> [Accessed 22 April 2020].

<sup>39</sup> “Revised WIPO Scoping Study”, pp.7–8, 21, 30–31.

<sup>40</sup> Natalie Abbott, “Marrakesh Treaty in Action” (May 2019), *Library Journal* pp.32, 34, <https://www.libraryjournal.com/?detailStory=Marrakesh-Treaty-in-Action> [Accessed 22 April 2020] (reporting that ebook library “Bookshare can import books from other Marrakesh-ratifying countries ... and make them available to Bookshare members in ... other Marrakesh-ratifying countries”); see also Bookshare — Book Availability, <https://www.bookshare.org/cms/help-center/book-availability> [Accessed 22 April 2020] (“Once the treaty becomes law, and once the U.S. ratifies the treaty, all Bookshare books will be available to members in countries that have ratified the treaty!”).

<sup>41</sup> Asia IP, “Fight Against the ‘Book Famine’”, p.3, <https://www.asiaiplaw.com/index.php/article/the-fight-against-the-ldquobook-faminedquo> [Accessed 22 April 2020].

<sup>42</sup> Copyright Act 2013 (amended in 2019) (Cook Islands), art.24 (accessible format and authorised entity), reprinted in ARL, “National Implementations”, pp.21–22; Law on Copyright and Related Rights of the Kyrgyz Republic, 14 January 1998 (amended on 9 March 2017), art.4 (authorised entity, beneficiary person, and accessible format copy); art.20(1) (limitations and exceptions to exclusive rights), reprinted in ARL, “National Implementations”, p.60.

The US is a paradigmatic example of the latter type of implementation. Since a 1996 revision of the Copyright Act known as the Chaffee Amendment, the US has permitted libraries and academic institutions to create and distribute accessible copies of books and other non-dramatic literary works to the “blind or other persons with disabilities” without remuneration to right holders.<sup>43</sup> The Marrakesh Treaty Implementation Act, adopted in October 2018, expands, updates and clarifies several aspects of this law to conform to the Treaty and make the exception “even more helpful to the blind, visually impaired, and print disabled”.<sup>44</sup>

Notably, the US declined to impose a commercial availability requirement in the revised exception. To date, only six Contracting Parties—Australia, Canada, Japan, Liberia, Malawi and Singapore<sup>45</sup>—have included this option in implementing legislation, thus raising the concerns identified in the WBU Guide, discussed above.<sup>46</sup> In contrast, New Zealand, which required commercial unavailability in its pre-Marrakesh exception, eliminated that condition when revising its copyright law in 2019 to implement the Treaty.<sup>47</sup>

The EU adopted a different approach to implementation that reflected its status as a regional economic integration organisation with exclusive competence to ratify the Marrakesh Treaty.<sup>48</sup> In 2017, the European Commission adopted two legal instruments—a Directive<sup>49</sup> to govern implementation within the common market, and a Regulation<sup>50</sup> to address sharing between EU Member States and non-EU Marrakesh countries.

As the WBU Guide explains, the Treaty gives Contracting Parties some flexibility as to how to achieve its goals. The EU Directive guides and, with respect to the Treaty’s optional clauses, narrows that discretion in several ways. It requires Member States to adopt an express exception to the rights of reproduction, communication, making available, distribution and lending—the approach recommended in the WBU Guide. It also obligates those states to give domestic effect to the Treaty’s definitions of covered works, accessible format copies, beneficiary persons, and authorised entities (and the practices such entities must follow). And, perhaps

most notably, the Directive prohibits EU Member States from imposing any additional conditions on the exercise of the exception—including commercial unavailability.<sup>51</sup>

The Directive does, however, permit Member States to require authorised entities to compensate copyright owners. This option was primarily intended to accommodate countries with pre-existing exceptions that included a remuneration requirement.<sup>52</sup> Yet, the Directive substantially limits the discretion of EU members that exercise this option. Copyright owners cannot seek compensation from beneficiary persons themselves or from authorised entities in other EU Member States or non-EU Marrakesh parties. In addition, the level of remuneration must be determined in light of a range of factors, including the public interest in cross-border dissemination of covered works; the non-profit nature of authorised entity activities; and the extent of harm to right holders, which, if minimal, should not be compensated at all.<sup>53</sup>

Most EU members have now transposed the Directive into national law, and it appears that only four states—Austria, Denmark, Germany and Finland—have opted for compensation schemes, with the two Nordic countries doing so only for audiobooks.<sup>54</sup> Outside of the EU, Singapore is the only other Marrakesh Member State that has adopted a compensation provision. A 2014 amendment to Singapore’s copyright act authorises copyright owners to make written requests for “equitable remuneration” for the use of their works by authorised entities.<sup>55</sup>

The previous examples involve implementing legislation that remains within the four corners of the Marrakesh Treaty. However, many Contracting Parties have extended their copyright exceptions beyond what is strictly required by the Treaty by retaining or enacting exceptions that make the Treaty’s benefits available to individuals with aural, cognitive and physical impairments or to persons with disabilities in general.<sup>56</sup> As the WBU Guide explains, nothing in the Treaty precludes states from adopting these more expansive provisions—provisions which in fact may be required by the CPRD.<sup>57</sup>

<sup>43</sup> 17 U.S.C. §121A.

<sup>44</sup> U.S. Copyright Office, “Understanding the Marrakesh Treaty Implementation Act” (October 2019), [https://www.copyright.gov/legislation/2018\\_marrakesh\\_faqs.pdf?locltr=blogcop](https://www.copyright.gov/legislation/2018_marrakesh_faqs.pdf?locltr=blogcop) [Accessed 22 April 2020].

<sup>45</sup> ARL, “National Implementations”, pp.59, 65, 69–70, 87. Argentina requires compensation pursuant to a pre-Marrakesh exception for individuals with “sensory disabilities”. ARL, “National Implementations”, pp.8–9.

<sup>46</sup> WBU Guide, pp.47–49.

<sup>47</sup> Copyright (Marrakesh Treaty Implementation) Amendment Bill, Committee Commentary (2018) (New Zealand Committee Commentary), [www.legislation.govt.nz/bill/government/2018/0109/latest/LMS110851.html#LMS110886](http://www.legislation.govt.nz/bill/government/2018/0109/latest/LMS110851.html#LMS110886) [Accessed 22 April 2020]. We provide additional information about the New Zealand implementation process below.

<sup>48</sup> Opinion 3/15 EU:C:2017:114.

<sup>49</sup> Directive (EU) 2017/1564 (13 September 2017), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017L1564> [Accessed 22 April 2020].

<sup>50</sup> Regulation (EU) 2017/1563 (13 September 2017), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R1563> [Accessed 22 April 2020].

<sup>51</sup> Directive 2017/1564 arts 1–5; see also Recital 14 (“Member States should not be allowed to impose additional requirements for the application of the exception, such as the prior verification of the commercial availability of works in accessible formats, other than those laid down in this Directive.”); Regulation 2017/1563 arts 1–5.

<sup>52</sup> IFLA, “Implementing the Marrakesh Treaty in European Union Member States: A Guide for Libraries” (1 October 2017), pp.10–11, <https://www.ifla.org/DE/publications/node/11858> [Accessed 22 April 2020].

<sup>53</sup> Directive 2017/1564, Recital 14.

<sup>54</sup> EBU, “Campaigns and Activities”, <http://www.euroblind.org/campaigns-and-activities/current-campaigns/marrakesh-treaty> [Accessed 22 April 2020].

<sup>55</sup> Singapore adopted the Copyright (Amendment) Act 2014 art.54(15), reprinted in ARL, “National Implementations”, p.92.

<sup>56</sup> According to a recent WIPO study, the copyright laws of 28 of Marrakesh and non-Marrakesh parties include an exception for persons with disabilities in general; 25 countries have exceptions covering aural disabilities; a further 22 states have exceptions that apply to cognitive or mental disabilities; and exceptions in 19 states extend to physical disabilities. See “Revised WIPO Scoping Study”, pp.1–2. Several countries include more than one category of disability in their copyright laws.

<sup>57</sup> WBU Guide, pp.31–32.

A few Marrakesh countries have gone even further, adopting or proposing a broader array of copyright reforms to accompany their implementation of the Treaty. For example, Kyrgyzstan revised its copyright and neighboring rights law in 2017 to recognise the right of an author to allow public use of her work, open access to works created with public funds, and exceptions and limitations for uses by libraries, archives, and educational establishments.<sup>58</sup> In South Africa, a 2018 Copyright Amendment Bill, which awaits Presidential approval, includes provisions on the accreditation of collecting societies; fair use of copyright works; and exceptions for educational and academic activities, libraries, archives, museums, and galleries.<sup>59</sup> Other developing countries are considering how to build on the Marrakesh Treaty by adopting or expanding exceptions and limitations for libraries, educational institutions, and persons with disabilities.<sup>60</sup>

In sum, a review of the Contracting Parties that have adopted implementing legislation suggests that mandatory exceptions and limitations can comfortably coexist with the protection of copyrighted works. The misuse of these exceptions—a fear that many publishers expressed during the negotiation of the Treaty—has not materialised. This is so even as the number of Marrakesh parties has rapidly increased, and even though all but a handful of these countries have declined to adopt the commercial unavailability and remuneration options that copyright owners demanded.

Some jurisdictions are contemplating further mandatory exceptions. The EU Marrakesh Directive charges the Commission to prepare a report in 2020 on whether exceptions and limitations for the print-disabled should be expanded to include other copyrighted works and other types of disabilities.<sup>61</sup> The EU also plans a more comprehensive review of the Directive by 2023 to assess the impact of compensation schemes on the commercial availability and cross-border exchange of accessible format copies.<sup>62</sup> These reviews may also provide opportunities for copyright owners to lobby governments to narrow exceptions or reconsider the rejection of optional clauses.<sup>63</sup> As the next section explains, however,

the transparency and broad consultations surrounding Marrakesh implementation in many countries may make these initial implementation decisions difficult to reverse.

### *Transparency, consultations, and evidence-based outcomes*

Unlike most intellectual property agreements, the Marrakesh Treaty was not negotiated and implemented behind closed doors in processes largely driven by content industries. Instead, the diverse coalition of civil society groups that openly campaigned for the Treaty's adoption—disability rights organisations, library associations, and book sharing initiatives—has continued to actively promote its ratification and implementation.<sup>64</sup> Their efforts have been bolstered by the consultation requirements of the CRPD, which pre-date the Marrakesh Treaty and provide a focal point for these groups to seek greater availability of accessible format copies. Several of these initiatives are framed in human rights terms that emphasise the “right to read”.<sup>65</sup> Others involve collaboration among civil society groups to promote a wider range of public interest exceptions and limitations to copyright in national laws.<sup>66</sup>

These efforts are having important, real-world consequences. In preparation for ratifying or implementing the Marrakesh Treaty, several countries engaged in consultations with a broad range of stakeholders, including not only publishers, copyright owners, and collecting societies, but also disability rights organisations, libraries, and other authorised entities. These consultations have encouraged careful consideration of the ways in which the Treaty can achieve the welfare goals shared by both the intellectual property and human rights regimes.

The United Kingdom provides an apt example. The country's Intellectual Property Office held consultations from 2016 to 2018 as it considered how to implement the

<sup>58</sup> EIFL, “Recent Developments in Kyrgyz Copyright Law” (March 2018), [https://www.eifl.net/sites/default/files/resources/kyrgyz\\_2017\\_amendments\\_en\\_online.pdf](https://www.eifl.net/sites/default/files/resources/kyrgyz_2017_amendments_en_online.pdf) [Accessed 22 April 2020].

<sup>59</sup> Copyright Amendment Bill (CAB) Final Version (15 November 2018), [https://libguides.wits.ac.za/Copyright\\_and\\_Related\\_Issues/Version3\\_2018](https://libguides.wits.ac.za/Copyright_and_Related_Issues/Version3_2018); see also Commonly Asked Questions General Questions on the CAB (January 2020), [https://libguides.wits.ac.za/Copyright\\_and\\_Related\\_Issues/FAQs\\_CAB](https://libguides.wits.ac.za/Copyright_and_Related_Issues/FAQs_CAB) [Accessed 22 April 2020].

<sup>60</sup> See, e.g., IFLA, “Time for copyright laws in Africa to change” (14 June 2019), <https://www.eifl.net/news/time-copyright-laws-africa-change> [Accessed 22 April 2020] (reporting the “clear consensus” of the heads of African copyright offices that copyright laws on the continent “must change to allow digital, online and cross-border uses” that extend the Marrakesh Treaty “to other sectors, such as education”).

<sup>61</sup> Directive 2017/1564 art.9; see also New Zealand Committee Commentary, para.33, <http://www.legislation.govt.nz/bill/government/2018/0109/latest/LMS110851.html#LMS110886> [Accessed 22 April 2020] (noting that exceptions for other types of disabilities could be considered during an ongoing review of the Copyright Act 1994).

<sup>62</sup> Directive 2017/1564 art.10(1).

<sup>63</sup> See Jade Kouletakis, “No Man is an Island: A Critical Analysis of the UK's Implementation of the Marrakesh Treaty” (2020) 17(1) *SCRIPT-ed: A Journal of Law, Technology & Society*, pp.69–70 (arguing that “the UK is tentative regarding the commitment to maintain compensation-free access to works”, which it may reconsider prior to or in connection with review of the EU Directive in 2020).

<sup>64</sup> See, e.g., World Blind Union, Marrakesh Treaty Ratification and Implementation Campaign, <http://www.worldblindunion.org/English/our-work/our-priorities/Pages/right-2-read-campaign.aspx> (WBU Campaigns); EBU, “Campaigns and Activities”, <http://www.euroblind.org/campaigns-and-activities/current-campaigns/marrakesh-treaty>; IFLA, “Getting Started Implementing the Marrakesh Treaty — for Persons with Print Disabilities: A Practical Guide for Librarians” (March 2018), <https://www.ifla.org/publications/node/71175?og=29>; Benetech, Marrakesh Treaty, <https://benetech.org/about/resources/marrakesh-treaty/>; Brad Turner, “The Marrakesh Treaty in Action: What You Need to Know” (8 May 2019), <https://benetech.org/marrakesh-treaty-what-you-need-to-know/> [All accessed 22 April 2020].

<sup>65</sup> See, e.g., EIFL, “The right to read”, <https://www.eifl.net/eifl-in-action/right-read>; United National Development Program, “Our right to knowledge: Legal reviews for the ratification of the Marrakesh Treaty for persons with print disabilities in Asia and the Pacific” (2015), [https://www.undp.org/content/dam/rbap/docs/Research%20&%20Publications/hiv\\_aids/rbap-hhd-2015-our-right-to-knowledge.pdf](https://www.undp.org/content/dam/rbap/docs/Research%20&%20Publications/hiv_aids/rbap-hhd-2015-our-right-to-knowledge.pdf); WBU, “Campaigns and Activities”, <http://www.euroblind.org/campaigns-and-activities/current-campaigns/marrakesh-treaty> [All accessed 22 April 2020].

<sup>66</sup> See, e.g., EIFL, Copyright Reform in Nepal, <https://www.eifl.net/eifl-in-action/copyright-reform-nepal> [Accessed 22 April 2020] (asserting that new constitutional and statutory protections of the rights of persons with disabilities, including access to education and social justice, provide a foundation for broader copyright reforms).

EU Directive discussed above.<sup>67</sup> The UK had a pre-Marrakesh exception that included a commercial unavailability requirement, a provision that was incompatible with the Directive. The Government asked interested parties to provide evidence of the consequences of removing commercial availability, including whether the removal should be offset by a compensation requirement (an optional Marrakesh provision that the EU Directive permits). Disability rights groups emphasised that either condition would deter beneficiaries and authorised entities from using the exception. In contrast, right holders were unable to provide evidence of lost sales.<sup>68</sup> The absence of “robust evidence of economic harm to rightholders”, and concerns about administrative and financial burdens for beneficiaries, convinced the UK Government not to introduce the optional compensation scheme.<sup>69</sup>

A similar process occurred in New Zealand. In preparing a report on a Bill to implement the Treaty, the Ministry of Business, Innovation, and Employment solicited comments from a broad range of stakeholders on whether to remove the commercial availability requirement from a pre-existing exception in the Copyright Act.<sup>70</sup> As in the UK, publishers and authors argued that the requirement was needed to avoid lost sales, while most other submitters countered that the condition would discourage authorised entities from making accessible format copies “due to the time, cost, and potential legal risks involved”.<sup>71</sup> Because none of these groups offered evidence to substantiate their claims, the report concluded that “the status quo [should] be maintained”.<sup>72</sup>

However, the Economic Development, Science and Innovation Committee of the New Zealand Parliament rejected this recommendation. Although acknowledging the need “to ensure the commercial viability of the creation and dissemination of ... accessible format copies”, the committee expressed several concerns about adopting a commercial availability test.<sup>73</sup> These included unnecessary formalities, delays, unclear legal standards, the fact that most Contracting Parties have not adopted the test, and the “strong incentive for authorised entities to seek out existing commercially available copies” given “the relatively high cost of producing accessible format copies”.<sup>74</sup> On balance, the committee concluded that “a commercial availability test would disadvantage

print-disabled people disproportionately to the benefit gained by copyright holders”.<sup>75</sup> The final version of the law, adopted in August 2019, omits the requirement.

The broad consultations in New Zealand and the United Kingdom illustrate an unanticipated strength of the Marrakesh Treaty—the ways in which it brings together disability rights and intellectual property constituencies in discussions about implementation.<sup>76</sup>

### *The importance of a human rights frame*

The idea of an international agreement mandating exceptions and limitations to copyright would have been inconceivable in 1994 following the conclusion of the TRIPS Agreement. Yet a multilateral instrument to establish such exceptions for the print disabled became the subject of negotiations less than a decade later, and today WIPO trumpets the Marrakesh Treaty’s rapid entry into force and its growing number of Contracting Parties. In addition, as the previous discussion indicates, there have been far fewer controversies over how to give effect to the agreement at the regional and national levels than occurred in connection with the negotiation of the Treaty itself. What explains these significant shifts?

We contend that framing copyright exceptions in human rights terms was a game changer, decisively altering the balance in a high-stakes debate over the scope and functions of intellectual property. A human rights frame challenged the traditional structure of multilateral intellectual property agreements, in which private economic rights are broad and mandatory, while public interest exceptions and limitations are narrow and discretionary. The Marrakesh Treaty’s proponents also raised normative arguments sounding in equality and nondiscrimination—principles shared by both intellectual property and human rights law—and they strategically deployed empirical data to expose the massive scope of the book famine and its negative impact on the wellbeing and rights of millions of print-disabled individuals.

The compelling and well-supported claim that individuals with print disabilities are entitled to access books and cultural materials on the same terms as sighted people transformed the negotiations, shifting the debate from concerns about how the Marrakesh Treaty might weaken intellectual property protection to a focus on the fundamental rights of citizenship. The CRPD provided a

<sup>67</sup> Intellectual Property Office, Government Response to Marrakesh Consultation (September 2018), <https://www.gov.uk/government/consultations/uk-implementation-of-the-marrakesh-treaty> [Accessed 22 April 2020].

<sup>68</sup> Intellectual Property Office, Government Response to Marrakesh Consultation (September 2018), pp.3,7, <https://www.gov.uk/government/consultations/uk-implementation-of-the-marrakesh-treaty> [Accessed 22 April 2020].

<sup>69</sup> Intellectual Property Office, Government Response to Marrakesh Consultation (September 2018), p.11, <https://www.gov.uk/government/consultations/uk-implementation-of-the-marrakesh-treaty> [Accessed 22 April 2020] (“In light of the lack of robust evidence of harm to rightholders, and our desire for fair outcomes for authorised entities, we have chosen not to implement any form of compensation scheme.”).

<sup>70</sup> Ministry of Business, Innovation, and Employment, Copyright (Marrakesh Treaty Implementation) Amendment Bill, Departmental Report to the Economic Development, Science and Innovation Select Committee (2019), paras 18–26, [https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/52SCED\\_ADV\\_80988\\_ED2232/ministry-of-business-innovation-and-employment-departmental](https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/52SCED_ADV_80988_ED2232/ministry-of-business-innovation-and-employment-departmental) [Accessed 22 April 2020].

<sup>71</sup> Departmental Report to the Economic Development, Science and Innovation Select Committee (2019), para.27. For example, Benetech asserted that it “would not add accessible format books made in New Zealand to its library, as it cannot afford to police the commercial availability test, especially when most other jurisdictions do not impose it”. *Id.* para.23.

<sup>72</sup> Departmental Report to the Economic Development, Science and Innovation Select Committee (2019), para.29.

<sup>73</sup> New Zealand Committee Commentary, p.3, <http://www.legislation.govt.nz/bill/government/2018/0109/latest/LMS110851.html#LMS110886> [Accessed 22 April 2020].

<sup>74</sup> New Zealand Committee Commentary, p.3, <http://www.legislation.govt.nz/bill/government/2018/0109/latest/LMS110851.html#LMS110886> [Accessed 22 April 2020].

<sup>75</sup> New Zealand Committee Commentary, p.3, <http://www.legislation.govt.nz/bill/government/2018/0109/latest/LMS110851.html#LMS110886> [Accessed 22 April 2020].

<sup>76</sup> See, e.g., Molly K. Land, “The Marrakesh Treaty as ‘Bottom Up’ Lawmaking: Supporting Local Human Rights Action on IP Policies” (2018) 8 UC Irvine L. Rev. 513.

weighty ballast to anchor these arguments. This human rights reframing, and the evidence supporting it, helped the Treaty's proponents to build consensus around a simple yet compelling idea—that intellectual property should be used to reduce, not exacerbate, inequality.

## Conclusion

This article provides an overview of how the Marrakesh Treaty is being ratified and implemented by a rapidly growing and diverse number of countries. We analyse patterns in how governments are giving effect to the Treaty; show that cross-border exchanges of accessible format copies are occurring, even in states that have not adopted implementing legislation; and explain how consultations with a broad range of right holders and civil society groups are influencing the choices that governments are making in giving effect to the Treaty. Framing the Marrakesh Treaty as directed toward the

realisation of human rights objectives played a significant role, both in the negotiations and in facilitating ratification and implementation.

Does the Marrakesh Treaty provide a model for other efforts to reconcile human rights and intellectual property? In terms of substantive norms, the most direct extension would be to address the accessibility of copyrighted works for persons with other types of disabilities. As previously explained, several countries have adopted such exceptions, and WIPO and the EU Commission are studying the issue. Whether the Treaty can serve as a model for other types of exceptions and limitations—such as those benefitting educational institutions, libraries, and archives—is less certain. In terms of process, however, the broader and more transparent consultations involved in adopting exceptions for the print disabled, discussed above, provide a potential roadmap for other treaty implementation efforts that better realise the welfare objectives that are intrinsic to both the intellectual property and human rights regimes.