

MEMORANDUM

To All IFRRO Members

From IFRRO General Counsel

Re Analysis of WIPO Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled

Date 5 July 2013

A. EXECUTIVE SUMMARY

The WIPO Diplomatic Conference concluded successfully on 28 June 2013 with the adoption of the *Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled* (available [here](#)).

This Memorandum aims at providing a first legal analysis from a rightholder perspective, and concludes as follows:

- The Treaty is an exceptional treaty, providing access to specifically defined beneficiaries.
- The Treaty is an access treaty rather than an exceptions and limitations Treaty.
- The Treaty leaves it to the individual country to decide whether to make the exception or limitation subject to remuneration.
- The Treaty reconfirms the role of Authorised Entities as a means to facilitate access to works in accessible formats for persons who are blind, visually impaired, or otherwise print disabled. This means that the WIPO-facilitated TIGAR and the EU-facilitated ETIN initiatives to create a network of authorised entities for the cross-border exchange of accessible format copies of works maintain their relevance.
- The Treaty includes many references to the “three-step test” and to obligations in other international treaties, providing assurance to rightholders that it will be applied, *de facto*, to all files that are exchanged internationally.
- Even though there is no mandatory reference to “commercial availability” in the Treaty, rightholders should be able to argue that the “commercial availability” requirement needs to be observed, based on the second limb of the “three-step test” (“normal exploitation”). The Treaty certainly has the flexibility to allow countries at different speeds or stages of development to take into account the level of commercially available offerings.
- Although there is a reference to “fair practices, dealings or uses” – in the specific context of exceptions and limitations in favour of blind, visually impaired, or otherwise print disabled persons, subject to international obligations – we do not interpret this as an explicit reference to the concepts of “fair use” or “fair dealing”.

For IFRRO members, the Treaty should not *per se* bring about changes. Countries in which RROs administer statutory licences in respect of accessible format copies are allowed to maintain such arrangements. We also continue to encourage RROs to respond positively to requests from authors and publishers to facilitate the making and cross-border exchange of accessible format copies, including participating in the TIGAR and ETIN projects. We would like to remind you that the IFRRO website has a specific page dedicated to these issues, which also includes tools to facilitate RRO engagement ([here](#)).

B. COMMENTS ON THE RECITALS

Overall, the wording in the Recitals can be supported.

Recitals 8, 9, 10 seem to be well-balanced and can be considered as being supportive of our sector. These are important and valuable provisions.

Also, Recital 10 reaffirms the obligations with respect to the “three-step test”:

Recognizing both the importance of rightholders’ role in making their works accessible to persons with visual impairments or with other print disabilities and the importance of appropriate limitations and exceptions to make works accessible to these persons, particularly when the market is unable to provide such access,

Recognizing the need to maintain a balance between the effective protection of the rights of authors and the larger public interest, particularly education, research and access to information, and that such a balance must facilitate effective and timely access to works for the benefit of persons with visual impairments or with other print disabilities,

Reaffirming the obligations of Contracting Parties under the existing international treaties on the protection of copyright and the importance and flexibility of the three-step test for limitations and exceptions established in Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works and other international instruments,

The only Recital which might be misinterpreted is Recital 12, with harmonisation of limitations and exceptions being listed as a goal of this Treaty:

Recognizing the importance of the international copyright system and desiring to harmonize limitations and exceptions with a view to facilitating access to and use of works by persons with visual impairments or with other print disabilities.

However, as a certain compatibility of national laws to allow legal and secure cross-border exchange of files is required in order for the Treaty to work in practice, this Recital can be considered as being acceptable from our perspective.

C. COMMENTS ON THE ARTICLES

Article 1

Relation to other Conventions and Treaties

Nothing in this treaty shall derogate from any obligations that Contracting Parties have to each other under any other treaties, nor shall it prejudice any rights that a Contracting Party has under any other treaties.

We do not have any specific comments with respect to Article 1.

Article 2

Definitions

For the purposes of this Treaty:

(a) “works” means literary and artistic works within the meaning of Article 2(1) of the Berne Convention for the Protection of Literary and Artistic Works, in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media;¹

It is apparent that embedded interactive components are included under the definition of “works”. Text embedded in audiovisual works is, arguably, included (cf. the closing statement made by Indonesia in Marrakesh).

(b) “accessible format copy” means a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability. The accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons;

The definition of “accessible format copy” is not well drafted: “as feasibly” sounds strange, and “comfortably” is rather vague, but it can be hoped that it will not provide any big issues in the future implementation process on a national level.

(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.²

“Authorized entity” (AE), as defined, seems to be fine. Ideally, the provision would have included a description of who would enable monitoring and compliance with an AE’s obligations (on the other hand, cf. Article 5 and 9).

Article 3

Beneficiary Persons

A beneficiary person is a person who:

(a) is blind;

¹ Agreed statement concerning Article 2(a): For the purposes of this Treaty, it is understood that this definition includes such works in audio form, such as audiobooks.

² Agreed statement concerning Article 2(c): For the purposes of this Treaty, it is understood that “entities recognized by the government” may include entities receiving financial support from the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis.

(b) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or³

(c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading;

regardless of any other disabilities.

Article 3 contains a broad definition of beneficiaries, but is, at the outset, fine.

Article 4

National Law Limitations and Exceptions Regarding Accessible Format Copies

1. (a) *Contracting Parties shall provide in their national copyright laws for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public as provided by the WIPO Copyright Treaty (WCT), to facilitate the availability of works in accessible format copies for beneficiary persons. The limitation or exception provided in national law should permit changes needed to make the work accessible in the alternative format.*

The obligation in Article 4.1(a) to create a national copyright exception for the benefit of persons with print disabilities is one of the core provisions of the Treaty.

Unfortunately, there is no reference to the moral rights of the author.

(b) Contracting Parties may also provide a limitation or exception to the right of public performance to facilitate access to works for beneficiary persons.

Performers involve another set of rightholders, and there is no detailed description/regulation on public performances, so the consequences in practice are not entirely clear. The right of translation is not explicitly included here (however, cf. Article 4.3 and footnote 4 below).

3. *A Contracting Party may fulfil Article 4(1) by providing other limitations or exceptions in its national copyright law pursuant to Articles 10 and 11.⁴*

Article 8 of the Berne Convention provides that authors enjoy the exclusive right of making and authorising the translation of their works. This right is distinct from other rights such as the right of reproduction, the right of communication to the public or the lending right.

A reference to the right of translation has been inserted in an agreed statement to paragraph 3 of Article 4. It states: “It is understood that this paragraph neither reduces nor extends the scope of applicability of limitations and exceptions permitted under the Berne Convention, as regards the right

³ *Agreed statement concerning Article 3(b): Nothing in this language implies that “cannot be improved” requires the use of all possible medical diagnostic procedures and treatments.*

⁴ *Agreed Statement concerning Article 4(3): It is understood that this paragraph neither reduces nor extends the scope of applicability of limitations and exceptions permitted under the Berne Convention, as regards the right of translation, with respect to persons with visual impairments or with other print disabilities.*

of translation, with respect to persons with visual impairments or with other print disabilities.” Having such a reference in the Treaty apparently gave comfort to countries wishing to apply the translation right.

Consequently, the statement added no new elements, but there is no mentioning that the exceptions and limitations in this Treaty do not include or imply a limitation to the right to translate works.

4. *A Contracting Party may confine limitations or exceptions under this Article to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market. Any Contracting Party availing itself of this possibility shall so declare in 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.*⁵

Positively, the condition of commercial availability was kept in Article 4 so that the Treaty does not affect the legitimate market which already serves beneficiary persons at national level. However, commercial availability is only a “may” clause in the national exceptions, and is subject to notification.

It remains to be seen how many countries will indeed make use of this possibility. A “shall” clause would have been ideal, in order to effectively ensure that national exceptions and limitations do not conflict with the “three-step test”, but we can – and should – still argue that this condition is part of the “three-step test” obligations. In order to do so, rightholders will need to make their case based on the second condition of the test, “normal exploitation”, in particular where relevant files are fully accessible in significant quantities.

The Treaty certainly has the flexibility to allow countries at different speeds or stages of development to take into account the level of commercially available offerings. This is re-enforced by the important Recital 8 (cf. *supra*).

5. *It shall be a matter for national law to determine whether limitations or exceptions under this Article are subject to remuneration.*

Article 4.5 leaves it to the individual country to decide whether to make the exception or limitation subject to remuneration.

The condition of commercial availability, initially also included in Article 5, has been removed from this Article, which means that rightholders will need to argue in respect of the cross-border exchange of accessible format copies on the basis of “normal exploitation” under the “three-step test” (cf. *supra*):

Article 5

Cross-Border Exchange of Accessible Format Copies

1. *Contracting Parties shall provide that if an accessible format copy is made under a limitation or exception or pursuant to operation of law, that accessible format copy may be distributed or made*

⁵ *Agreed Statement concerning Article 4(4): It is understood that a commercial availability requirement does not prejudice whether or not a limitation or exception under this Article is consistent with the three-step test.*

*available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party.*⁶

There is a risk that the wording “pursuant to operation of law” in Article 5.1 might introduce some legal uncertainty.

2. *A Contracting Party may fulfill Article 5(1) by providing a limitation or exception in its national copyright law such that:*

(a) authorized entities shall be permitted, without the authorization of the rightholder, to distribute or make available for the exclusive use of beneficiary persons accessible format copies to an authorized entity in another Contracting Party; and

(b) authorized entities shall be permitted, without the authorization of the rightholder and pursuant to Article 2, to distribute or make available accessible format copies to a beneficiary person in another Contracting Party;

*provided that prior to the distribution or making available 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.*⁷

From a practical perspective, it will probably be impossible for an AE in one Member State to verify with certainty whether an AE in another Member State indeed qualifies as one. In some cases, foreign AEs and e.g. local publishers will probably be in direct competition.

Positively, however, the Treaty reconfirms the role of AEs as a means to facilitate access to works in accessible formats for persons who are blind, visually impaired, or otherwise print disabled. This means that the WIPO-facilitated TIGAR and the EU-facilitated ETIN initiatives to create a network of authorised entities for the cross-border exchange of accessible format copies of works maintain their relevance.

4. *(a) When an authorized entity in a Contracting Party receives accessible format copies pursuant to Article 5(1) and that Contracting Party does not have obligations under Article 9 of the Berne Convention, it will ensure, consistent with its own legal system and practices, that the accessible format copies are only reproduced, distributed or made available for the benefit of beneficiary persons in that Contracting Party’s jurisdiction.*

(b) The distribution and making available of accessible format copies by an authorized entity pursuant to Article 5(1) shall be limited to that jurisdiction unless the Contracting Party is a Party to the WIPO Copyright Treaty or otherwise limits limitations and exceptions implementing this Treaty to the right of distribution and the right of making available to the public to certain special cases which

⁶ *Agreed statement concerning Article 5(1): It is further understood that nothing in this Treaty reduces or extends the scope of exclusive rights under any other treaty.*

⁷ *Agreed statement concerning Article 5(2): It is understood that, to distribute or make available accessible format copies directly to a beneficiary person in another Contracting Party, it may be appropriate for an authorized entity to apply further measures to confirm that the person it is serving is a beneficiary person and to follow its own practices as described in Article 2.*

*do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder.*⁸⁹

An unambiguous commitment to the application of the “three-step test” to new obligations created in this Treaty would have been ideal. Even though this Article is not well drafted, it provides some assurance that all existing international obligations of Contracting Parties will be respected regarding the “three-step test”. The aim is obviously to accommodate the different international obligations related to it: the “Berne gap”, i.e. different standards of Contracting Parties who just ratified the Berne Convention, TRIPS or the WCT.

Article 6

Importation of Accessible Format Copies

*To the extent that the national law of a Contracting Party would permit a beneficiary person, someone acting on his or her behalf, or an authorized entity, to make an accessible format copy of a work, the national law of that Contracting Party shall also permit them to import an accessible format copy for the benefit of beneficiary persons, without the authorization of the rightholder.*¹⁰

It would have been preferable to have a clear-cut reference to „commercial availability“ or an unambiguous reference to the „three-step test“ in the importation provision (Article 6). However, as there are so many references to the “three-step” test throughout the Treaty, it can be assumed that, in practice, the „three-step test“ will be applied to all files that are exchanged internationally.

Article 7

Obligations Concerning Technological Measures

*Contracting Parties shall take appropriate measures, as necessary, to ensure that when they provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures, this legal protection does not prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty.*¹¹

As to the provision on Technological Protection Measures (TPMs; Article 7), there is a reference to what the WIPO Beijing Treaty on Audiovisual Performances had started to say in an agreed statement regarding the use of TPMs, i.e. that the use of TPMs should not impair the exercise of exceptions and limitations generally established by law with regards to copyrights and related rights ([here](#)).

However, a different approach was needed for this Treaty since this is an exceptional treaty, providing access to specifically defined beneficiaries. The agreed statement added here states that TPMs might be used for AEs to ease their work and make possible the making/distribution/making available of the

⁸ Agreed statement concerning Article 5(4)(b): *It is understood that nothing in this Treaty requires or implies that a Contracting Party adopt or apply the three-step test beyond its obligations under this instrument or under other international treaties.*

⁹ Agreed statement concerning Article 5(4)(b): *It is understood that nothing in this Treaty creates any obligations for a Contracting Party to ratify or accede to the WCT or to comply with any of its provisions and nothing in this Treaty prejudices any rights, limitations and exceptions contained in the WCT.*

¹⁰ Agreed statement concerning Article 6: *It is understood that the Contracting Parties have the same flexibilities set out in Article 4 when implementing their obligations under Article 6.*

¹¹ Agreed statement concerning Article 7: *It is understood that authorized entities, in various circumstances, choose to apply technological measures in the making, distribution and making available of accessible format copies and nothing herein disturbs such practices when in accordance with national law.*

accessible format copies of works (cf. footnote 10). Further research would be required which countries would require amendments in their national laws in order to comply with this provision.

Article 8

Respect for Privacy

In the implementation of the limitations and exceptions provided for in this Treaty, Contracting Parties shall endeavour to protect the privacy of beneficiary persons on an equal basis with others.

From a rightholder perspective, a privacy provision was desirable, but not absolutely indispensable. Ideally, a fair balance between the adequate and effective enforcement of copyright and the expectations of beneficiaries with respect to privacy should have been mentioned in Article 8.

Article 9

Cooperation to Facilitate Cross-Border Exchange

1. Contracting Parties shall endeavor to foster the cross-border exchange of accessible format copies by encouraging the voluntary sharing of information to assist authorized entities in identifying one another. The International Bureau of WIPO shall establish an information access point for this purpose.

2. Contracting Parties undertake to assist their authorized entities engaged in activities under Article 5 to make information available regarding their practices pursuant to Article 2, both through the sharing of information among authorized entities, and through making available information on their policies and practices, including related to cross-border exchange of accessible format copies, to interested parties and members of the public as appropriate.

3. The International Bureau of WIPO is invited to share information, where available, about the functioning of this Treaty.

4. Contracting Parties recognize the importance of international cooperation and its promotion, in support of national efforts for realization of the purpose and objectives of this Treaty.¹²

The provision that WIPO and its Member States should accelerate the collaboration and information sharing, as a prerequisite for international file exchange, and provide a point of information that includes both discovery tools and information on accessible copies, can be welcomed.

Article 10

General Principles on Implementation

(...)

¹²Agreed statement concerning Article 9: *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.*

3. Contracting Parties may fulfill their rights and obligations under this Treaty through limitations or exceptions specifically for the benefit of beneficiary persons, other limitations or exceptions, or a combination thereof, within their national legal system and practice. These may include judicial, administrative or regulatory determinations for the benefit of beneficiary persons as to fair practices, dealings or uses to meet their needs consistent with the Contracting Parties' rights and obligations under the Berne Convention, other international treaties, and Article 11.

We read Article 10.3 such as not introducing the national concepts of “fair dealing” or “fair use” at international level, even though there is a reference to “fair practices, dealings or uses”, listed alongside “judicial, administrative or regulatory determinations” that may be included in national legislation to establish limitations and exceptions in favour of beneficiary persons. Our interpretation is based on the specific context – exceptions and limitations in favour of a specifically defined group of beneficiaries, subject to international obligations.

Others will, probably, argue that Article 10.3 can be read as breaking new ground and introducing new concepts at international level – which are, however, not required to solve the specific access issues for beneficiary persons.

In any event, Article 10.3 cannot shorten the national transposition process, and cannot determine the way these national legal mechanisms are applied by national judges. It is to be hoped that the specific scope of this Treaty will ensure that this provision will not serve as an (international) precedent for discussions on any other possible exceptions and limitations. Positively, a further reference to the “three-step test” has been built in here as well.

Article 11

General Obligations on Limitations and Exceptions

In adopting measures necessary to ensure the application of this Treaty, a Contracting Party may exercise the rights and shall comply with the obligations that that Contracting Party has under the Berne Convention, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WCT, including their interpretative agreements so that:

- 1. in accordance with Article 9(2) of the Berne Convention, a Contracting Party may permit the reproduction of 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;*
- 2. in accordance with Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, a Contracting Party shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder;*
- 3. in accordance with Article 10(1) of the WIPO Copyright Treaty, a Contracting Party may provide for limitations of or exceptions to the rights granted to authors under the WCT in certain special cases, that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author;*
- 4. in accordance with Article 10(2) of the WIPO Copyright Treaty, a Contracting Party shall confine, when applying the Berne Convention, any limitations of or exceptions to rights to certain*

special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

A clear and simple reference to the “three-step test” would have been preferable under Article 11; as it reads, there is a risk that Article 11 does not sufficiently ensure compatibility with the existing copyright international framework. Also, Article 11 leaves many gaps open as copyright-protected works will travel across borders and between countries of different levels of protection.

Article 12

Other Limitations and Exceptions

1. Contracting Parties recognize that a Contracting Party may implement in its national law other copyright limitations and exceptions for the benefit of beneficiary persons than are provided by this Treaty having regard to that Contracting Party’s economic situation, and its social and cultural needs, in conformity with that Contracting Party’s international rights and obligations, and in the case of a least-developed country taking into account its special needs and its particular international rights and obligations and flexibilities thereof.

2. This Treaty is without prejudice to other limitations and exceptions for persons with disabilities provided by national law.

Ideally, Article 12 should have been temporary only (cf. Article 66 TRIPS), especially as some Contracting Parties, which are not Least Developed Countries, may not be parties to the Berne Convention or other international treaties.

Articles 13-22

The practical provisions contained in Articles 13-22 (signature, entry into force, etc.) are fine.

D. CONCLUSIONS

The Treaty includes so many references to the “three-step test” and to obligations in other treaties, that it can be assumed that it will be applied to all files that are exchanged internationally. Given that the commercial availability requirement is implicit in step 2 (“normal exploitation”), rightholders should be able to argue their case well on that basis.

All in all, it is apparent that the overall message in this Treaty is that copyright is balanced and that it can be effective in both preserving the legitimate rights of rightholders and ensuring access to culture for a specifically defined group of users: persons who are blind, visually impaired, or otherwise print disabled.

- END -