

IMPLEMENTING THE MARRAKESH TREATY IN EUROPE

LIBRARY POSITIONS

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled of 2013 marks a historic step forwards for people with print disabilities who had long been prevented from accessing information by a market failure.

In effect, if the person or business holding the copyright to a book decided not to make it available in an accessible format then access was closed off. This created the book famine – the severe lack of books in accessible formats on the market.

The Treaty sets a clear objective: a print disability should not preclude a person's ability to exercise his human right of access to information, research and culture. To protect this right, governments must create exceptions allowing the making and sharing of accessible format copies of works for individual beneficiaries, without their needing to clear rights, for non-commercial purposes.

To achieve this, the EU's implementation of the Treaty must remove the barriers that caused the book famine in the first place, and must certainly not create new ones. The choices Europe makes will affect not only its own citizens, but also people with print disabilities around the world.

Libraries have a central role to play in facilitating access. They are crucial repositories of books and other works, including in accessible formats. They have experience of managing and exchanging copyrighted materials, including internationally, and their staff are trained to respect rightholders' interests. Libraries were also at the heart of the drive to make the Treaty of Marrakesh happen, and as 'authorised entities', charged with making and sharing accessible works, they will be central to implementation. We therefore call on MEPs and Member States to endorse the below proposals:

1. Protect Recital 11 of the Directive, and strengthen its effect by including the following Article in both the Directive and Regulation (as 4bis): 'Member States shall impose no additional conditions on recourse to the provisions contained in Articles 3 and 4 of this Directive/Regulation, including but not limited to compensation schemes or prior verification of the commercial availability of accessible format copies'.

2. New paragraph in Article 3 of the Directive and Regulation: 'Any contractual provision contrary to the provisions provided for Articles 3 and 4 of this Directive/Regulation shall be unenforceable.'

3a. Recital (5) of the Regulation – Redraft to read: "In order to improve the availability of accessible format copies and to prevent the illegal dissemination of works and other subject-matter, Member States shall facilitate the agreement of best practice guidelines between representative groups of authorised entities which engage in the production, distribution or making available of accessible format copies, users and rightholders."

3b. Article 5.1 of the Regulation – Redraft first sentence, in line with Art. 2(c) of the Marrakesh Treaty¹, to read: 'An authorised entity established in a Member State carrying out the acts referred to in Articles 3 and 4 shall establish and follow its own practices to ensure that...'

3c. New Paragraph 3 in Article 5 of the Regulation: 'The obligations upon authorised entities set out in this Article shall be applied proportionately.'

4. Ensure no additional requirements are added to Article 2(4) of the Regulation and of the Directive - so the text remains: "authorised entity" means an organisation providing education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis, as its main activity or as one of its main activities or public-interest missions.'

¹ <http://www.wipo.int/wipolex/en/details.jsp?id=13169>

I. Resist efforts to make Marrakesh rights conditional on commercial availability checks or payment of supplementary remuneration

Recital 11 of the EU Draft Directive explicitly forbids member states from imposing additional requirements for the application of the exception, such as compensation schemes or the prior verification of the commercial availability of accessible format copies. The Treaty itself makes the inclusion of such requirements optional, but this represents a political expedient, aimed at facilitating agreement for a small minority of countries with such measures already in place. The right solution for print disabled people remains to bar any such requirements.

i) Commercial availability checks

An obligatory prior verification of the commercial availability of accessible format copies would add no value for rightholders, increase costs for the non-profit authorised entities that will make accessible copies available, and restrict access for beneficiaries. The process of searching to discover if the right format of a book for a particular person is commercially available in a given country is likely to be onerous and a waste of time. It is worth remembering that it was precisely the lack of such works that created the book famine that led blind and visually impaired people to campaign for the Treaty. Nonetheless, when books in the right format are available on the market, purchase is likely to prove cheaper than creating a new format.

As concerns cross-border exchange of books in accessible formats, it can be almost impossible to exclude that a certain book is on sale, in the right format, in a recipient country. This will be the case in developing or transition countries that lack sufficient publishing information infrastructure. Faced with this risk, an authorised entity is likely to refuse to exchange a work, for fear of prosecution. Rightholders can resolve this issue by making accessible copies; they should not be permitted to profit from the work libraries do to compensate for publisher indifference to the needs of the visually impaired.

Australian experience suggests that commercial availability checks can undermine exceptions: a large-print work may be on sale, so excluding use of the exception. However, if a reader needs a bigger font still, or a digital copy, the version on the market is useless, leaving the reader without access.

ii) Payment of supplementary remuneration

Obliging the payment of supplementary remuneration to rightholders would be harmful and senseless. Given that it was the lack of anticipated revenue that caused the market failure behind the book famine in the first place, there is no reason to offer compensation for the production and sharing of accessible format books, especially when this is done for non-commercial purposes.

Moreover, libraries and other authorised entities already pay market prices when they buy books in the first place. It is unfair to demand that they pay again to create an accessible format version, over and above conversion costs. To burden public interest institutions with such costs would draw funds away from activities which help achieve the goals of the Treaty. Finally, for people with print disabilities, the effect is discriminatory – a fully-sighted friend can read the books in a library for free, but Treaty beneficiaries need to pay.

Proposal 1: *Protect Recital 11 of the Directive, and strengthen its effect by including the following Article in both the Directive and Regulation (as 4bis): ‘Member States shall impose no additional conditions on recourse to the provisions contained in this Directive/Regulation, including but not limited to compensation schemes or prior verification of the commercial availability of accessible format copies’.*

II. Protect Marrakesh exceptions from abusive contract terms and technological protection measures

The Marrakesh Treaty makes it clear that technological protection measures should not be abused in order to prevent accessible format books from being legitimately made and shared. In short, use of such tools should help enforce the law, not undermine it. The draft Directive's recognition of this principle is welcome and should be protected. It should be clear that a similar rule applies in the context of the Regulation.

However, libraries in general have long found that their ability to make the most of the rights included in exceptions to copyright, such as those provided by the Marrakesh Treaty, can be overridden by specific terms in contracts or licenses. As is already permitted in the Database and Software Directives, the draft Directive and Regulation should make it clear that contract terms must not take away rights that governments provided in the Marrakesh Treaty.

Proposal 2: New paragraph in Article 3 of the Directive and Regulation: 'Any contractual provision contrary to the provisions provided for in Articles 3 and 4 of this Directive/Regulation shall be unenforceable.'

III. Give libraries and other authorised entities the space and trust they need to implement the Treaty

Libraries and other authorised entities are professional bodies, and have long worked with copyrighted material in a way that respects authors' rights. Such institutions must already comply with the broader obligations of transparency and good governance as apply to any such body, and should not be subject to additional, unnecessary obligations.

It is important to underline that the Marrakesh Treaty itself does not impose reporting requirements on authorised entities. While the focus on transparency is welcome, the Regulation should remain faithful to the original Treaty, and give due respect to libraries and other institutions' long history of developing and implementing rigorous professional standards. To ensure the effective operation of such entities, as well as to maximise the impact of their work and funding, it is essential to take a proportionate approach.

Moreover, it is essential that authorised entities be able to protect the privacy of their users, with no obligation to share highly personal information about individual beneficiaries' specific reading habits or needs. The application of the General Data Protection Regulation (Regulation 2016/679 of the European Parliament and of the Council) should be ensured.

It is also important to recognise that there is no noteworthy evidence of accessible format copies of books being deliberately made available to people other than the intended beneficiary. Imposing controls on authorised entities in order to combat piracy is the equivalent of chasing shadows. Worse still, by risking tying the hands of authorised entities, it goes against the objectives that the Treaty of Marrakesh seeks to attain.

Proposal 3a: Redraft Recital 5 of the Regulation to read: *"In order to improve the availability of accessible format copies and to prevent the illegal dissemination of works and other subject-matter, Member States shall facilitate the agreement of best practice guidelines between representative groups of authorised entities which engage in the production, distribution or making available of accessible format copies, users and rightholders."*

Proposal 3b: Redraft first sentence of Article 5(1), in line with Article 2(c) of the Marrakesh Treaty, to read: *'An authorised entity established in a Member State carrying out the acts referred to in Articles 3 and 4 shall establish and follow its own practices to ensure that...'*

Proposal 3c: Add a new Paragraph 3 to Article 5 of the Regulation: *'The obligations upon authorised entities set out in this Article shall be applied proportionately.'*

IV. Support the development of a comprehensive network of authorised entities

While collections of accessible format books are likely to be concentrated in a small number of larger or specialised libraries, in order to ensure that beneficiaries can have easy access to an entity, it will be important to get smaller, local libraries involved.

In order to maximise access, as well as to maintain the freedom of authorised entities to operate without undue controls, no additional restrictions should be placed on which institutions can support beneficiaries to enjoy the rights granted under the Treaty of Marrakesh. This will follow both the text and letter of the Treaty.

Proposal IV: *Ensure no additional requirements are added to Article 2(4) of the Regulation and of the Directive - so the text remains: “authorised entity’ means an organisation providing education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis, as its main activity or as one of its main activities or public-interest missions.’*

EBLIDA, IFLA

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