



# IMPLEMENTING THE MARRAKESH TREATY IN EUROPEAN UNION MEMBER STATES

## **A GUIDE FOR LIBRARIES**

**1 October 2017**

## ABOUT IFLA

The International Federation of Library Associations and Institutions (IFLA) is the leading international body representing the interests of library and information services and their users. It is the global voice of the library and information profession.

## ABOUT EBLIDA

EBLIDA is the European Bureau of Library, Information and Documentation Associations, an independent umbrella association of library, information, documentation and archive associations and institutions in Europe.

## ACKNOWLEDGEMENT

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## FEEDBACK

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## PREFACE

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

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

For this reason, a number of library associations supported negotiations over five years at WIPO, and participated in the Diplomatic Conference that led to the adoption of the Treaty in Marrakesh.

The Marrakesh Treaty represents a major development because it has the potential to increase the availability of materials in accessible formats globally. The ability to share these accessible formats significantly across borders will benefit people with print disabilities all around the world, in both developed and developing nations.

This guide is in two parts. **Part 1** provides a straightforward introduction to the Treaty, its key provisions, and the role of libraries in contributing to the Treaty’s objectives.<sup>2</sup>


**Part 2** provides a practical interpretation of the major technical provisions in line with public interest goals of enabling access to knowledge. It also contains recommendations for implementation in order to realise the opportunity the Treaty offers to libraries to increase the reading materials available to people with print disabilities. Librarians therefore need to be involved in the development of implementing national legislation to ensure the maximum possible benefit, and to effectively meet the objective of the Treaty – to end the book famine.

Libraries are key to the success of the Treaty for two main reasons. They are both one of the primary sources of accessible format works (as well as being dedicated, expert service providers), and they also have a special role, under the Treaty, in making and sharing copies of works, including across borders. With this guide, we hope, they will be able to advocate for rules at national level that allow them to realise their potential.

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

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



*This Guide is adapted by kind permission from 'The Marrakesh Treaty: an EIFL guide for libraries', designed for countries looking to implement the Treaty directly. In the case of the European Union (EU), where the parameters for national implementation have been set at EU level, an adaptation of the guide in order to support the process of transposition into national law appears more appropriate.*

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# 1 Introduction to the Marrakesh Treaty

## I Background

In many European countries, and most others around the world, copyright law makes it illegal to make and/or distribute copies of works in formats accessible to people with print disabilities without seeking the authorisation of the rightholder. The same laws can also mean that anyone involved in sharing works across borders, including for no personal financial gain, could be infringing copyright.

Yet even as the law prevented libraries and others from making these copies, the market itself failed to provide more than a small fraction of all books published in accessible formats. This contributed, in large part, to the 'book famine' - a massive market failure which saw people with print disabilities unable to enjoy the same access to information as those able to see and read without problems. The problem is particularly acute in developing countries, many of whom use European languages, but who, thanks to copyright laws, could not access works held in European collections.

For this reason, the Member States of the World Intellectual Property Organization (WIPO) agreed the Marrakesh Treaty<sup>3</sup> in June 2013. This removes unnecessary barriers in two main ways:

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

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

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<sup>3</sup> [http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=301016#\\_ftn6](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=301016#_ftn6)

The Treaty creates the concept of ‘authorised entities’ – institutions or organisations which, alongside beneficiaries and individuals acting on their behalf, can make use of the Treaty’s provisions.

“Authorized entities” are central to the architecture of the Treaty, and libraries are central to the concept of “authorized entities”. As defined, the term “authorized entity” encompasses most libraries. Libraries, and other “authorized entities”, are allowed to undertake the domestic production and distribution of accessible materials. Importantly, the Treaty requires that “authorized entities” be permitted to send accessible format copies to other countries.

## II EU ratification and national transposition

Following its adoption in June 2013, the Treaty was open to WIPO member states for signature for one year. After a slow start, caused in part by attempts by some Member States to question the legality of ratifying the Treaty at the EU level, drafts for a Directive and Regulation implementing Marrakesh in the EU were published in September 2016. The final **Directive (EU) 2017/1564**<sup>4</sup> and **Regulation (EU) 2017/1563**<sup>5</sup> were published in the Official Journal (L 242) of 20 September 2017<sup>6</sup>.

These proposals advanced quickly, with strong engagement by libraries and the European Blind Union in order to argue against the creation of unnecessary and harmful barriers to access. By May 2017, there was agreement between the European Parliament and Council of Ministers on provisions that not only ruled out a number of steps that would have been harmful for libraries, but which also left it to Member States to decide on other controversial points, within strict limits.

It is the Directive that contains the key elements set out above - the rights to make and share accessible format copies of works, both within and across borders in the EU. Directive (EU) 2017/1564 must be transposed into Member States’ national laws by 11 October 2018. Regulation (EU) 2017/1563, which shall apply from 12 October 2018, simply extends the possibilities for exchanging works to non-EU countries which are parties to the Treaty.

In order to guide libraries and library associations within individual countries as the transposition process starts moving, this guide focuses on the provisions in the relevant European law, with references to the Treaty where useful.

*To check the current status of ratifications, visit*

[www.wipo.int/treaties/en/ShowResults.jsp?lang=en&Treaty\\_id=843](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&Treaty_id=843)<sup>7</sup>

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<sup>4</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2017.242.01.0006.01.ENG&toc=OJ:L:2017:242:TOC](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.242.01.0006.01.ENG&toc=OJ:L:2017:242:TOC)

<sup>5</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2017.242.01.0001.01.ENG&toc=OJ:L:2017:242:TOC](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.242.01.0001.01.ENG&toc=OJ:L:2017:242:TOC)

<sup>6</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2017:242:TOC>

<sup>7</sup> See also the list of implementing legislation already in place in different countries: <http://www.arl.org/publications-resources/4347-marrakesh#.WceUBtFx3b1>

### III Key provisions

#### A) Definitions: libraries and the EU's implementation of the Marrakesh Treaty

From a practical point of view, the most important provision for European libraries is Directive's definition of "**authorised entity**" because it defines the organisation that makes and distributes the accessible format copies, and under what conditions. **Article 2(4)** of the Directive defines an "authorised entity" as "an entity that is authorised or recognised by a Member State to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a public institution or non-profit organisation that provides the same services to beneficiary persons as one of its primary activities, institutional obligations or as part of its public-interest missions."

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

In short, any library or institution that meets the broad criteria set out in Article 2(4) qualifies as an authorised entity.

#### B) Other important definitions

**Beneficiary person** The Directive includes a broad definition of "beneficiary person" – the type of person the Treaty is intended to benefit. According to the definition set out by **article 2(2)**, there are four groups of beneficiaries, any of whom could benefit from the provisions of the Directive:

- 1 *people who are blind;*
- 2 *people who have visual impairments that cannot be improved to as to give them the ability to read as well as someone without such an impairment (for example by using glasses)*
- 3 *people who have a perceptual or reading disability that prevents them from reading printed works, and people who have a perceptual impairment, such as dyslexia that makes it hard to learn to read, write and spell correctly;*
- 4 *people with a physical disability that prevents them from holding or turning the pages of a book, or to move their eyes sufficiently to read normally.*

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



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

**Accessible format copy** **Article 2(3)** of the Directive describes an “accessible format copy” as a copy of a work in a form which gives a beneficiary person “access as feasibly and comfortably as a person without any of the impairments or disabilities referred to in point 2<sup>10</sup>”. Examples of accessible formats mentioned in Recital 7 of the Directive include Braille, large print, adapted e-books, audio books and radio broadcasts. This list is *not* exhaustive, and it will be important to resist any efforts to limit the list of formats which can be considered accessible in national transpositions.

## C) Substantive obligations concerning national law, cross-border exchange and technological protection measures

### **Mandatory exceptions**

While the Treaty allows members some flexibility in terms of how to achieve its goals, EU Member States are obliged, through **Article 3(1)** of the Directive, to provide in their national law an exception to the right of reproduction, communication, making available, distribution or lending to beneficiary persons<sup>11</sup>. The limitation or exception should permit the changes that are needed to make the work accessible in the alternative format. In other words, it should be possible for libraries to make, lend and distribute accessible format copies of works.

A number of conditions are set out for these uses:

- The beneficiary person, person acting on their behalf, or authorised entity has lawful access to the work
- When an authorised entity is making or supplying accessible format copies, it is doing so for the exclusive use of a beneficiary person
- The conversion does not introduce changes other than those needed to make the work

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<sup>8</sup> Article 2(1) of Directive (EU) 2017/1564 offers the following definition: ‘work or other subject-matter’ means a work in the form of a book, journal, newspaper, magazine or other writing, notation including sheet music, and related illustrations, in any media, including in audio forms such as audiobooks and in digital format, which is protected by copyright or related rights and which is published or otherwise lawfully made publicly available;’. See also footnote 1 Agreed statement concerning Article 2(a) in the Marrakesh Treaty

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

<sup>10</sup> Point 2 “beneficiary persons” of article 2

<sup>11</sup> Directive (EU) 2017/1564 therefore provides for an exception to the exclusive rights set out in Articles 2, 3 and 4 of the Information Society Directive (2001/29/EC), Article 5 and 7 of the Database Directive (96/9/EC), Article 1(1), Article 8(2) and (3) and Article 9 of the Rental and Lending Directive (2006/115/EC) and Article 4 of the Software Directive (2009/24/EC). The EU has not taken up the possibility highlighted in the Treaty to include exceptions to exclusive performance rights.

accessible

- The authorised entity has lawful access to the work;
- Authorised entities must be acting on a non-profit basis<sup>12</sup>.
- The 'Three Step Test' is respected - i.e. any activities carried out under the exception should not conflict with the normal exploitation of the work or other subject matter, or unreasonably prejudice the legitimate interests of the rightholder.

**Article 3(4)** of the Directive underlines that **Technological Protection Measures** (TPMs) that prevent the enjoyment of the exception should not enjoy legal protection, regardless of whether the work has been purchased or is merely licensed. In other words, it should be possible to remove technical tools that prevent the creation or sharing of accessible format copies of works. The Treaty itself calls for contracting parties to 'take appropriate measures' to ensure that beneficiary persons can enjoy the exceptions it provides for.

It remains the case that EU law merely states that removal of such TPMs is legal, but does not necessarily provide for an effective or simple process for doing so. Other methods, such as obliging rightholders to offer keys to open digital locks, could also work.

**Article 3(5)** underlines that even in the terms of a contract or license signed to access a copyrighted work prevent the making or sharing of accessible format copies, these terms shall be unenforceable.

### **The Optional Restriction: remuneration**

**Article 3(6)**<sup>13</sup> of the Directive allows Member States the option to oblige authorised entities making use of the actions permitted by the Treaty to provide compensation. Unlike the other provisions in Article 3, this is not an obligation on Member States.

*Such a provision would be costly, both in financial and administrative terms, and would pose an unacceptable restriction on the ability of libraries and others to fulfil the objectives of the Treaty.*

The use of such a compensation clause is limited in **Recital 14** of the Directive - it can only be applied:

To the activities of authorised entities operating within a given Member State, and not those elsewhere. Therefore, for example, a French rightholder would not be able to claim compensation from a Belgian library if this library receives an accessible format copy of a book from France.

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<sup>12</sup> Note that non-profit basis does not preclude the charging of fees on a cost recovery basis for services provided.

<sup>13</sup> Member States may provide that uses permitted under this Directive, if undertaken by authorised entities established in their territory, be subject to compensation schemes within the limits provided for in this Directive.

- If it makes it no more burdensome (including in terms of the form and level of compensation) to send a copy of a work across borders than within them. In other words, a library based in Paris should find it as easy to send a book to Brussels as to Bordeaux.
- If the level of compensation takes account of the non-profit nature of the activities concerned, of the public interest objectives of the Directive, of the possible harm to rightholders, and of the need to ensure cross-border dissemination of accessible format works.
- If the particular circumstances of the case are considered, as regards the making of particular copies of works.
- When there is more than minimal harm to a rightholder. If harm is minimal, there should be no obligation of payment. There is no clear definition of what ‘minimal’ means.

It is important to note that while the Marrakesh Treaty gives States the option to maintain a commercial availability test (an obligation to verify whether a work is available on the market in an accessible format, before making or sharing such a copy), the European Union has chosen to exclude this possibility. This is an important step – such obligations will at best take up time, and at worst will make it impossible to make or share copies in situations where there is not sufficient information about what books (and formats) are available. This would cause particular harm when sharing copies with developing countries, but would also exclude beneficiaries in relevant countries from being able to work with initiatives such as BookShare.

**Article 3(6)** is based on Article 4(5) of the Treaty. This provision catered for the small number of countries that already had such provisions in their national law, in order to facilitate their signature of the Treaty. There is no obligation for Member States to implement such a provision, and indeed to do so, or maintain existing provisions, works counter to the goal of maximising the availability of accessible materials to library users with print disabilities. As the original work has already been paid for, a double payment scenario should be avoided. Libraries should vigorously oppose the inclusion of these optional provisions in the implementing national law.

### **Cross-border exchange of accessible format copies within the European Union**

**Article 4** of the Directive provides that a Member State must permit authorised entities established on their territory to create, communicate, make available, distribute or lend accessible format copies of works to authorised entities or individuals based in other EU

Member States<sup>14</sup>. Similarly, authorised entities (and individual beneficiary persons) should be allowed to receive accessible format copies from authorised entities elsewhere in the European Union.

The same provisions around contract terms, technological protection measures and compensation apply. As set out in the recitals to the Directive, the sending of a work should not be more burdensome when the recipient is in a different country.

This notwithstanding, **Article 5** of the Directive sets out further conditions on authorised entities making and sending copies of works to other EU Member States<sup>15</sup>. Rather than prescribing specific actions, it provides that authorised entities shall 'establish and follow' its own practices in order to achieve the following objectives:

- Accessible format copies should only be distributed, communicated or made available to beneficiary persons or other authorised entities;
- Unauthorised reproduction, distribution, communication or making available of accessible format copies should be discouraged by taking 'appropriate steps';
- Original works, as well as accessible format copies made of them, should be handled with care, and records kept;
- Information on how authorised entities are complying with these rules should be published and updated, online or through other channels;
- Authorised entities should at all time comply with data protection rules (also highlighted in Article 7 of the Directive)

In addition, authorised entities are obliged to provide, on the request of a beneficiary person, other authorised entity or rightholder, a list of accessible works available, and in what format, and the names and details of other authorised entities with which it has exchanged accessible format copies of works.

No guidance is given on the interpretation of these provisions in the recitals or elsewhere in the Directive. The original Treaty suggests that a 'good faith' test should apply, i.e. the authorised entity should not know, or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons. The authorised entity may

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<sup>14</sup> Note that the European legislation only talks about authorized entities as having the possibility to send accessible copies to other countries. There is no reference to whether others may be able to do this.

<sup>15</sup> The same provisions apply to non-EU Member States which are Contracting Parties to the Treaty itself (see *Exchanges with non-EU countries* below)

decide whether “to apply further measures,” in addition to those it employs in the domestic context, to confirm the beneficiary status of a person it is serving in another country<sup>16</sup>.

### **Exchanges with non-EU countries**

The Regulation extends these provisions to non-EU countries which are Contracting Parties to the Marrakesh Treaty. **Article 3** of the Regulation states that once a copy has been made in accordance with the rules set down in the Directive (Article 3(1)), it should be possible to distribute, communicate or make available to beneficiary persons or authorised entities outside of the EU.

Similarly, **Article 4** allows that authorised entities and individual beneficiaries can also receive copies of accessible format works from non-EU countries which are parties to the Marrakesh Treaty, and then use them in line with national legislation adopted in the transposition of the Directive. The regulation also reproduces Article 5 of the Directive, setting out obligations on authorised entities.

Nonetheless, the Regulation, in its **Recital 8**, also encourages Member States to implementing initiatives to promote the Treaty and the exchange of accessible format copies, such as guidelines or best practices on making and disseminating accessible format copies, in consultation with representatives of authorised entities, beneficiary persons and rightholders.

### **Registration and authorisation**

**Article 6** of the Directive provides that Member States encourage authorised entities established on their territories and making use of Marrakesh provisions to communicate their names and contact details. Member States must then in turn provide this information to the Commission for entry onto a single database.

**Recital 13** of the Directive mentions 'authorisation or recognition requirements that Member States may apply to authorised entities'. However, it then underlines that these should not have the effect of preventing institutions which comply with the definition set out in the Directive from enjoying the exceptions it sets out. This reflects the Agreed Statement to Article 9 of the Marrakesh Treaty, which notes that the Treaty 'does not imply mandatory registration for authorised entities nor does it constitute a precondition for authorised entities to engage in activities recognised under [the] Treaty'.

## **D) Reporting, Review and Impact on Other Legislation**

**Article 8** of the Directive provides for a minor change to the broader, optional exception for uses for people with disabilities included in the 2001 Information Society Directive. The change ensures that the fact that the more general exception is not obligatory in no way

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<sup>16</sup> Footnote 7 Agreed Statement concerning Article 5(2)

changes the mandatory nature of the specific exception for people with print disabilities.

**Article 9** of the Directive calls on the Commission to report on the availability of accessible format works in different formats, including those resulting from technological change. It should also take account of the availability of works for people with other disabilities, and assess whether extending the Directive to benefit them also would help.

**Article 10** of the Directive calls for a review of impact within five years of transposition (so by autumn 2023), looking at what changes may be necessary. There is an explicit demand to review the impact of compensation schemes on the availability of accessible format copies of works across borders. The Directive calls on the Commission to take account of the views of relevant civil society actors, as well as any evidence of significant negative impacts on the commercial offer of accessible format works.

**Article 11** provides that the Directive shall be transposed by 11 October 2018.

## IV Next Steps

The Marrakesh Treaty has the potential to increase significantly the availability of copies in formats accessible to people with print disabilities, both within and outside of the EU. To realise this potential, libraries and other institutions that serve people with print disabilities should encourage their governments to use the transposition of the Directive to increase and facilitate access.

While individual Member States have less room for manoeuvre than other countries implementing the Treaty, the lack of detail in the EU legislation, as well as some optional provisions, mean that libraries and other authorised entities still need to advocate for the best possible result for people with print disabilities<sup>17</sup>. Part Two of this guide provides suggestions and recommendations for how this might be achieved.

EBLIDA, IFLA and EIFL, in cooperation with the European Blind Union, is supporting libraries in EU Member States to make the case for a good transposition. When the legislation is fully transposed in domestic law, libraries can then perform the range of services envisaged by the Treaty: the creation and distribution of accessible format copies to people with print disabilities. And libraries can play their part in ending the book famine.

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<sup>17</sup> See one possible model statute for implementation at <http://infojustice.org/wp-content/uploads/2013/09/model-statute-for-marrakesh-implementation.pdf>

# 2 Recommendations for National Implementation of the Marrakesh Treaty

*\*Based on a text by Luis Villarroel Villalon LL.M<sup>18</sup>*

This set of recommendations for implementation of the Marrakesh Treaty is aimed primarily at librarians in EU Member States whose governments must now transpose the EU Marrakesh Directive<sup>19,20</sup>. It can also be used as a tool by policy-makers.

The recommendations provide a practical interpretation of the major technical provisions in the EU Directive and Regulation, in line with broad public interest goals of access to knowledge. They offer guidance and suggestions in order to help realise the opportunity that the Treaty offers to libraries to increase the reading materials available to people with print disabilities, and thereby to effectively meet the original objective of the Marrakesh Treaty – to end the book famine. These recommendations should be read together with Part 1 of this guide. We welcome comments and feedback.

## I Beneficiaries of the Treaty

The Directive protects access for **persons who are blind, have a visual impairment, or who are otherwise print disabled e.g. who are dyslexic or are unable to physically hold a book**. Therefore, the Directive provisions do not apply to persons with other types of disabilities, although the Directive underlines that this does not prejudice the creation of exceptions for them, and there is an explicit suggestion that expansion of the beneficiary group should be considered in future (**Article 9** of the Directive).

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<sup>19</sup> Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2017.242.01.0006.01.ENG&toc=OJ:L:2017:242:TOC](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.242.01.0006.01.ENG&toc=OJ:L:2017:242:TOC)

<sup>20</sup> To note, the Directive requires transposition, while the Regulation applies directly. However, given that the Regulation merely extends the application of provisions covered by the Directive, its effect also relies on effective transposition of the Directive.

## Recommendations

- 1.1 *To meet the obligations of the Marrakesh Treaty, countries shall provide limitations and exceptions to benefit persons who are blind, have a visual impairment, or who are otherwise print disabled. Therefore, it is important to ensure that the exceptions provided apply not only to persons who are blind or visually impaired, but also include other disabilities that impair access to printed works. In defining beneficiaries, Member States legislation should include examples of other print disabilities, in a non-exhaustive manner.*
- 1.2 *Moreover, where it is possible, libraries should support the creation of exceptions for people with other disabilities. This is possible under Article 5(3)(b) of the 2001 Information Society Directive. This will benefit people who need the help, promote equal access, and save on future legislative effort.*

## II Type of works and other matter subject to the exceptions and limitations

The Directive requires that the **exceptions shall apply to literary, artistic and scientific works**, as understood in the Berne Convention, that are expressed in the form of “text, notation and/or related illustrations, whether published or otherwise made publicly available in any media”<sup>21</sup>.

This means that text-based books on paper and in digital format such as **newspapers, magazines, comics, audio books, e-books, web pages, sound recordings, etc. are included** along with works that combine text and illustrations, such as comic and picture books (as long as these contain text or notations in any form). As with the definition of beneficiaries, Member States retain the possibility, as foreseen by Article 5(3)(b) of the Information Society Directive, to **extend provisions to cover other works**.

## Recommendations

- 2.1 *Countries should ensure that the limitations and exceptions implementing the Marrakesh Treaty cover all literary, artistic and scientific works expressed through text, notation and/or related illustrations. To facilitate this, it is recommended therefore to include examples of types of works, in a non-exhaustive manner.*
- 2.2 *Countries should, where possible, encourage governments to apply Marrakesh provisions to other types of work, as is already allowed under the 2001 Information Society Directive. This will benefit people with disabilities, promote equality, and reduce legislative effort in future.*

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<sup>21</sup> [www.wipo.int/treaties/en/text.jsp?file\\_id=301016#art2](http://www.wipo.int/treaties/en/text.jsp?file_id=301016#art2)



### III Type of rights covered by the limitations and exceptions provided (copyright and related rights)

The exceptions and limitations provided for in the Treaty **apply not only to copyright, but also to related rights**<sup>22</sup> set out in the Database<sup>23</sup>, Information Society<sup>24</sup>, Rental and Lending<sup>25</sup>, and Software Directives<sup>26</sup>. This provision is critical because text-based works subject to copyright can contain embedded material such as sound recordings made for audio books or artistic performances, that in many jurisdictions are subject to related rights, rather than copyright.

#### **Recommendation**

*3.1 Countries should ensure that the exceptions provided under the Directive apply to both copyright and related rights as required, in order to make literary and artistic works accessible in fulfilment of the Treaty's objective.*

### IV Uses of works to be permitted under the limitations and exceptions

The Directive provides for a **mandatory exception** to the following rights: the right of **reproduction**, the right of **distribution**, lending right, the right of **communication to the public**, and the right of **making available** to the public, as well as the right to **make the necessary transformations** in order to make the work accessible in an alternative format such as audio description of a picture related to text, for example, to describe a painting included in an art history book<sup>27</sup>.

The more uses that are permitted under the exception, the better this will enable those making or receiving and distributing accessible formats.

#### **Recommendation**

*4.1 National law should include a limitation or exception to all the rights expressly mentioned in the Directive: the rights of reproduction, distribution, communication, lending, making available, and to make the transformations necessary to make an accessible format, importation and exportation.*

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<sup>22</sup> Also called neighbouring rights See [https://cyber.harvard.edu/copyrightforlibrarians/Module 4: Rights, Exceptions, and Limitations#Neighboring and .22S ui\\_Generis.22\\_Rights](https://cyber.harvard.edu/copyrightforlibrarians/Module%204%20Rights%20Exceptions%20and%20Limitations#Neighboring%20Rights)

<sup>23</sup> 96/9/EC

<sup>24</sup> 2001/29/EC

<sup>25</sup> 2006/115/EC

<sup>26</sup> 2009/24/EC

<sup>27</sup> Article 3 (Directive) Permitted Uses

## V Libraries as authorised entities

According to the Directive and Regulation, “authorised entities”<sup>28</sup> must be permitted to send accessible format copies to another country that is party to the Treaty. Authorised entities may send such copies either to another authorised entity, or directly to a beneficiary in the other country.<sup>29</sup> Alongside individuals, they can also receive accessible format copies.

**Authorised entities therefore have a crucial role in the effective implementation of the international exchange of accessible format copies.** In addition, authorised entities are often active in the creation and distribution of accessible works within a country.

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

In order to meet the definition in the Treaty, a **library must establish and follow its own practices to ensure that the persons it serves are beneficiary persons, to limit the distribution** of accessible format copies to beneficiaries, to **discourage the use of unauthorised copies**, and to **maintain due care** in handling copies of works and in keeping records, while respecting the privacy of the library users<sup>30</sup>.

The Treaty is clear that **registration cannot be made a requirement for an institution to act as an authorised entity** (Agreed Statement to Article 9 of the Treaty), although Member States can encourage them to do so, ostensibly in the interests of facilitating cross-border exchange (although the reference to 'transparency' in the title of the section implies a more cynical motivation).

**Authorised entities are expected to take 'appropriate steps' to prevent accessible format copies getting into the hands of non-beneficiaries, to keep records** of their activities, to **publish information** about how they carry out their work, and to **share catalogues** of books held, and other authorised entities with which they have exchanged books. In all of these

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<sup>28</sup> For an organisation or institution to be considered an “authorised entity” that can produce, internationally exchange and distribute accessible formats under the Marrakesh Treaty, it must meet two requirements. Firstly, there is a general requirement relating to the nature of the institution and the type of activities it undertakes, such as the provision of educational services, instructional training, adaptive reading or information access to beneficiary persons, in accordance with national policies and legal obligations. The activities must also be undertaken on a non-profit basis (see Article 2(4) of the Directive). Secondly, to ensure that accessible format copies are not misused, the entity establishes and follows its own practices and procedures (see Article 2(4) of the Directive).

<sup>29</sup> Article 4 of the Directive: Only “authorised entities” are expressly allowed to send accessible formats to other countries within the Marrakesh system, while both authorised entities and individuals can receive.

<sup>30</sup> Article 2(4) of the Directive

rules, libraries need to **respect data protection rules**.

### **Recommendations**

- 5.1 *The transposing law or regulations concerning libraries as authorised entities should, in line with the Directive, provide an assurance that the library can establish and follow its own practices with regard to the provision of accessible format copies, as long as this is undertaken in good faith and is reasonable according to local circumstances and conditions.*
- 5.2 *If the national law transposing the Directive includes a list of types of entities that might qualify as authorised entities, it is very important to ensure that libraries providing services on a non-profit basis are included.*
- 5.3 *Government guidelines or best practices with regard to the provision of accessible formats to beneficiary persons should be elaborated in consultation with representative groups such as library associations and library consortia, together with other authorised entity producers of accessible formats. They should in no circumstances be used to make libraries' work in helping people with print disabilities more complicated than their work with other users.*
- 5.4 *Libraries should put in place procedures and practices for due care in the production and distribution of accessible format materials for persons with disabilities. They should also follow data protection rules.*
- 5.5 *Any effort to implement mandatory authorisation or registration of authorised entities should be resisted as illegal according to the Marrakesh Treaty's Agreed Statements. Libraries should also reject bureaucratic and burdensome requirements as concerns record keeping, and should ensure that rules around responding to demands for information are strictly proportionate.*

## **VI Conditions for the application of the limitations and exceptions in national law**

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

The activities undertaken by the authorised entity or the person producing or making the accessible format available shall be on a **non-profit basis**<sup>31</sup>. It is important to note that the non-profit status does not prevent an authorised entity from charging fees on a cost recovery basis or from receiving funds, for example, to finance the production or distribution of accessible formats.

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<sup>31</sup> Article 2(4)

The **exceptions shall not be limited to a specific format**: any format can be made as long as it serves the purpose of overcoming the disability that impairs the access,<sup>32</sup> and does not introduce changes other than those needed to make the work accessible.<sup>33</sup> Due care should be taken to the integrity of the work.

Specific exceptions in favour of persons with print disabilities are **without prejudice to other general exceptions provided in national law**<sup>34</sup>, such as those for educational purposes, as well as any special provisions that take account of a country's economic situation or social and cultural needs.

Authorised entities may **send accessible format copies either to authorised entities or directly to beneficiary persons located in another country**, provided that they have followed processes designed to ensure that non-beneficiaries do not receive books<sup>35</sup>.

### **Recommendations**

- 6.1 All persons and authorised entities should be permitted to produce and distribute accessible formats within a country for the exclusive use of beneficiary persons and in accordance with the requirements set by national law.*
- 6.2 The implementing law or regulations should make clear that (1) the non-profit nature of the activity applies to the person or entity controlling the production or distribution of the accessible format (rather than a service provider that is part of the production chain), and (2) it does not exclude payment to such commercial entities for their services.*
- 6.3 Transposing legislation should make it clear that the provisions of the Directive cannot be overridden by contract terms or Technological Protection Measures (TPMs). Effective tools must be created to allow the removal of TPMs when they prevent the enjoyment of the exception created.*

## **VII Compensation Requirements**

The EU Directive includes the **possibility of compensation** for rightholders (it is assumed), although it circumscribes this possibility to the activities of authorised entities (i.e. not individuals) within the country in question (so German compensation rules could only apply to German authorised entities).

Any rules should **not make it more difficult to exchange work over borders**, and the level of compensation should **reflect the non-profit nature of the activities concerned**, the public

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<sup>32</sup> Article 4(1)(a)

<sup>33</sup> Article 4(2)(a)(ii)

<sup>34</sup> Article 12 Other Limitations and Exceptions, and Article 4(3) National Law Limitations and Exceptions Regarding Accessible Format Copies

<sup>35</sup> Article 4a (tbc)

interest objectives of the Directive and its goal of promoting cross-border exchange, and the harm to rightholders. The particular circumstances of each case, as concerns the making of copies, should be taken into account, and there should be no compensation where harm is minimal.

While these restrictions, if properly implemented, will limit the scope for extracting compensation payments from libraries or other authorised entities, the best solution from the perspective of authorised entities and those they help is no compensation requirement at all. It is important to remember both that original copies of works must be legally acquired (and so purchased usually), and that the Marrakesh Treaty aimed to respond to a market failure. Compensation requirements would represent a reward for this failure.

Moreover, the application of compensation requirements would exclude authorised entities within a country from taking part in the ABC Global Books Service<sup>36</sup>.

### **Recommendations**

*7.1 For activities undertaken on a non-profit basis, it is very important that the exercise of the exception is not made subject to the payment of a fee<sup>37</sup>.*

*7.2 Where they are maintained, the limitations should be strictly applied, notably to ensure case-by-case analysis of compensation for making copies, and maximum possible use the provisions whereby when harm is minimal, there is no compensation.*

## **VIII Conditions for the cross-border exchange of accessible format copies**

Authorised entities have the express right to distribute and to make available accessible format copies to another authorised entity or directly to a beneficiary person in another EU Member State, or other country that is party to the Treaty<sup>38</sup>. When establishing the conditions for sending the accessible format copy, the originating authorised entity should both **only distribute works to legitimate beneficiaries**, but should also **take appropriate steps to discourage unauthorised copying and distribution of works**. This can be crossed with the principle of “good faith” set out at WIPO<sup>39</sup>, which features in the Marrakesh Treaty itself.

It is important to note that the Treaty **provides that the authorised entity to establish its own practices**<sup>40</sup>. It does not set out particular procedures or systems to be followed that will typically reflect the social and economic circumstances around the world in which authorised

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<sup>36</sup> <http://www.accessiblebooksconsortium.org/globalbooks/en/>

<sup>37</sup> Article 3(3)(b) of the Directive

<sup>38</sup> Article 4 (Directive (EU) 2017/1564), Articles 4, 5 (Regulation (EU) 2017/1563)

<sup>39</sup> Article 5(2) of the Marrakesh Treaty, which underlines that “the originating authorised entity did not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons”.

<sup>40</sup> As discussed in Part Two Section V above. See also Article 2(c) of the Marrakesh Treaty

entities operate, and people with print disabilities live. The Directive and Regulation do, however, suggest that authorised entities publish information about how they comply.

### **Recommendations**

- 8.1 As the Treaty is without prejudice to other exceptions for persons with disabilities provided in national law, beneficiaries shall not be prevented from cross-border sharing of materials in the context of other exceptions, such as private use, that are within the limits of what is permitted nationally.*
- 8.2 Care should be taken to avoid any measures that will harm legitimate cross-border exchanges, drawing on the commitment to encourage such sharing.*
- 8.3 It should be clear in national transposition that libraries and other authorised entities follow their own practices. Similarly, there should be no burdensome requirements in terms of record-keeping or publication of compliance information (see also 5.1 and 5.5).*

## **IX Technological protection measures**

When a country provides legal protection for technological protection measures (TPMs), such as copy or access controls, it shall take measures to **ensure that this does not prevent beneficiary persons from enjoying the limitations and exceptions provided for in the Treaty.**

The most straightforward measure is to allow the circumvention of TPMs to enable the accessible formats to be made or distributed<sup>41</sup>, as well as tools and services needed to undertake the circumvention. If the law only permits circumvention of the TPM, but does not permit the tools and services needed by authorised entities or beneficiaries to undertake the circumvention, the norm will have limited utility.

### **Recommendation**

- 9.1 In addition to the circumvention of technological protection measures for the purposes of making or distributing the accessible formats, national law should permit the tools and services, whether commercial or non-commercial, that enable such circumvention as appropriate.*
- 9.2 Governments should develop simpler and user-friendly means of disapplying TPMs that block access and other uses of works permitted under exceptions.*

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<sup>41</sup>Article 3(3) of the Directive

# 3 Transposing the Marrakesh Treaty

## Summary of Recommendations

*1.1: Ensure that exceptions introduced apply not only to persons who are blind or visually impaired, but also include other disabilities that impair access to printed works. Legislation can include examples, in a non-exhaustive manner.*

*1.2: Extend the effect of exceptions to people with other disabilities, as permitted under Article 5(3)(b) of the 2001 Information Society Directive.*

*2.1: Ensure that all literary, artistic and scientific works expressed through text, notation and/or related illustrations are covered by the provisions.*

*2.2: Apply exceptions to other types of work as required.*

*3.1: Exceptions should apply to both copyright and related rights.*

*4.1: Ensure exceptions are provided to all the rights expressly mentioned in the Directive: the rights of reproduction, distribution, communication, lending, making available, and to make the transformations necessary to make an accessible format, importation and exportation.*

*5.1: Provide explicit assurance that libraries can establish and follow their own practices with regard to the provision of accessible format copies, as long as this is undertaken in good faith and is reasonable according to local circumstances and conditions.*

*5.2: If national legislation includes a list of types of entities that might qualify as authorised entities, libraries providing services on a non-profit basis must be included.*

*5.3: Include library associations and consortia, as well as other authorised entities in the development of any government guidelines or best practices with regard to the provision of accessible formats to beneficiary persons. Ensure that such guidelines do not make libraries' work in helping people with print disabilities more complicated than their work with other users.*

*5.4: Libraries should put in place procedures and practices for due care in the production and distribution of accessible format materials for persons with disabilities. They should also follow data protection rules.*

*5.5: Reject mandatory authorisation or registration schemes for authorised entities. Also*



*reject bureaucratic and burdensome requirements as concerns record keeping, and ensure that rules for responding to information requests are strictly proportionate.*

*6.1: Allow all persons and authorised entities to produce and distribute accessible formats within a country for the exclusive use of beneficiary persons and in accordance with the requirements set by national law.*

*6.2: Make it clear that (1) the non-profit nature of the activity applies to the person or entity controlling the production or distribution of the accessible format (rather than a service provider that is part of the production chain), and (2) payment to commercial entities for their services, as part of the chain, is permitted.*

*6.3: Protect the provisions of the Directive from override by contract terms or Technological Protection Measures (TPMs). Effective tools must be created to allow the removal of TPMs when they prevent the enjoyment of the exception created.*

*7.1: Reject/remove obligations to pay fees for activities undertaken on a non-profit basis<sup>42</sup>.*

*7.2: If these are maintained, apply the criteria for such fees strictly, notably to ensure case-by-case analysis of compensation for making copies, and maximum possible use the provisions allowing that, when harm is minimal, there is no compensation.*

*8.1: Ensure that beneficiaries are not prevented from cross-border sharing of materials under other exceptions, such as private use, that are within the limits of what is permitted nationally.*

*8.2: Avoid any measures that will harm legitimate cross-border exchanges, drawing on the commitment to encourage such sharing.*

*8.3: (See 5.1 and 5.5)*

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

*9.2: Governments should develop simpler and user-friendly means of disapplying TPMs that block access and other uses of works permitted under exceptions.*

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<sup>42</sup> Article 3(3)(b) of the Directive