



ARIPO

Guidelines for the Domestication of the Marrakesh Treaty

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**ARIPO GUIDELINES
FOR THE
DOMESTICATION
OF THE
MARRAKESH TREATY**

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PREFACE

The Lusaka Agreement establishing the African Regional Intellectual Property Organization (ARIPO) sets out one of the objectives of the Organization as *“to promote the harmonization and development of the intellectual property laws, and matters related thereto, appropriate to the needs of its members and of the region as a whole;”* The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled was signed by 80 World Intellectual Property Organization (WIPO) member states of which 9 were ARIPO Member States in June 2013 at Marrakesh, Morocco.

The Thirty-eighth Session of the Administrative Council of ARIPO held at Victoria Falls, the Republic of Zimbabwe, November 17 to 21, 2014, approved Draft Guidelines for the Domestication of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled.

This Guide is an important document for ARIPO Member States as it will help them to persuade their governments and expedite the process of either ratifying or acceding to the Marrakesh Treaty and domesticating the Treaty in their national laws for the benefit of persons who are blind, visually impaired or print disabled. This will help in the fight against the book famine and open doors to attaining knowledge hence development in the Member States and Africa at large through the accessible format copies that are “copies of a work in an alternative manner or form which give 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”.

We appreciate the contributions from the First Session of the Technical Committee on Copyright and Related Rights (TCCR), the Thirty-eighth Session of the Administrative Council, Ms. Keitseng Nkah Monyatsi, the ARIPO Secretariat as a whole and all those who contributed in one way or another to enable the publication of this Guide.

We hope that the Guide will be very useful to expedite the process.

Yours Sincerely,

Fernando Dos Santos
DIRECTOR GENERAL

CHAPTER 1

GUIDELINES FOR ARIPO MEMBER STATES IN DOMESTICATION OF THE MARRAKESH TREATY

1.1. Background

The Lusaka Agreement establishing the African Regional Intellectual Property Organization (ARIPO) sets out one of the objectives of the Organisation as *'to promote harmonization and development of intellectual property laws...appropriate to the needs of its members.'* This means that ARIPO should give its Member States guidance on intellectual property (IP) laws including the enactment, review and implementation of IP laws. Such guidance extends to ensuring that national laws are compliant with international instruments, at the same time enabling optimisation of benefits extended by such instruments, yet not neglecting obligations of Member States.

The WIPO Standing Committee on Copyright and Related Rights (SCCR) discussed limitations and exceptions to copyright protection. The discussions centred on access to works by persons who are blind, visually impaired and print disabled to comply with the United Nations Convention on the Rights of Persons with Disabilities. Lack of commercially available works in accessible format copies in markets is one of the challenges faced by people who are blind, visually impaired or otherwise print disabled particularly in developing countries and least developed countries.

In June 2013, member states of WIPO gathered in Marrakesh, Morocco, in a Diplomatic Conference to negotiate and conclude an international treaty that will facilitate access to published works for persons who are blind, and those who have visual impairments and other print disabilities. The Diplomatic Conference adopted the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled* (hereinafter *"the Marrakesh Treaty"* or *"the Treaty"*) on June 27, 2013. The Treaty has been signed by eighty WIPO member states, of which nine are Member States of ARIPO. The ARIPO Member States that signed the Treaty are Ghana, Kenya, Mozambique, Namibia, São Tomé and Príncipe, Sierra Leone, Sudan, Uganda and Zimbabwe.

The Treaty has entered into force on September 30, 2016, which is three months after June 30, 2016, the date by which twenty eligible states had deposited instruments of ratification or accession. By October 5, 2016, the Treaty had been ratified by Australia, Argentina, Brazil, Chile, Democratic People's Republic of Korea, Ecuador, El Salvador, Guatemala, India, Mali, Mexico, Mongolia, Paraguay, Peru, Republic of Korea, Tunisia and Uruguay, and acceded to by Botswana, Canada, Israel, Liberia, Saint Vincent and the Grenadines, Singapore, and the United Arab Emirates.

It has been established that the majority of persons who are blind and visually impaired live in developing countries and least developed countries. At the same time, it has also been found that the levels of access to information and employment by these people are lowest in such countries. In other words, developing countries have not been able to adequately provide for the needs of persons who are blind and visually impaired, thus leading to their low levels of participation in and contribution to socio-economic activities of their countries. Therefore, developing and least developed countries are encouraged to ratify or accede to the Treaty and ensure implementation at national level. Most ARIPO Member States have narrowly construed limitations and exceptions in their copyright laws and these limitations and exceptions may have been used by institutions such as libraries to facilitate access to copyright protected works by persons who are blind and visually impaired. However, these provisions are generally not adequately utilised. In most cases authorization has to be sought and it has been found that it is often difficult for institutions to acquire authorisation from rights holders to convert materials into accessible formats, leading to limited and delayed access to information.

These narrowly construed limitations and exceptions generally do not specifically facilitate access to works by persons who are blind, visually impaired or otherwise print disabled, especially in the digital environment. Currently, Rwanda is the only ARIPO Member State whose copyright law provides limitations and exceptions that permit the reproduction and distribution of works for the benefit of visually impaired persons (Article 215, Rwanda Law of Protection of Intellectual Property, 2009). The Member States' blind, visually impaired and print disabled nationals stand to benefit more if the law is reviewed in light of the Treaty and where necessary revised to include provisions on limitations and exceptions that permit the reproduction and distribution of works for the benefit of these groups.

ARIPO takes note of the varying legislative systems of its Member States. In some Member States, international instruments can be enforced without necessarily having to include corresponding provisions in the national law, while in other Member States the opposite is true. These Guidelines will therefore better serve Member States whose legal systems require that following ratification or accession to international instruments the relevant national law has to include corresponding provisions in order to give effect to such instruments in the jurisdiction.

1.2. Benefits of Ratifying or Acceding to the Marrakesh Treaty

In view of the potential benefits presented by the Treaty to beneficiary persons, especially those in developing countries, ARIPO encourages its Member States to ratify or accede to the Treaty. Some key benefits that can be derived from ratification of or accession to the Treaty include:

- i. The Treaty's focus on access to published works is consistent with the United Nations Convention on the Rights of Persons with Disabilities, which clearly links copyright and human rights;
- ii. The Treaty provides the minimum flexibilities in copyright laws needed to ensure full and equal access to information by persons who are blind, visually impaired and print disabled;
- iii. The Treaty offers an opportunity for works to be converted into accessible formats without the need for authorization by the author or copyright holder of a published work. The elimination of the need for authorization allows works to be made available in accessible format copies as quickly as possible;
- iv. The Treaty, through its cross-border exchange provision, provides opportunities for cost saving. Authorised entities may pool resources together, convert published works into accessible formats and exchange such works for access by beneficiary persons;
- v. Entities such as libraries may be able to borrow from each other for the purpose of serving beneficiary persons.

As a result of challenging and competing priorities, the Treaty gives an opportunity for developing and least developed countries to increase access to information by their nationals who are blind, visually impaired and print disabled, hence ARIPO's recommendation for its Member States to ratify or accede to and domesticate the Treaty.

1.3. Guidelines for Proposed Legislative Approaches

Article 4(1)(a) provides that *"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."*

This article makes it mandatory for contracting parties to provide limitations and exceptions in their

national copyright law to permit the reproduction, distribution and making available to the public of accessible format copies of works for beneficiary persons. The Article recognizes the territorial nature of copyright protection. The inclusion of such limitations and exceptions in the national copyright law broadens avenues through which access to information by beneficiary persons can be improved within and across jurisdictions. In addition, if limitations and exceptions are provided in the national law, it becomes easier to resolve disputes within established national systems and structures.

Article 10(3) of the Treaty states *“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.”*

ARIPO recommends that in order to avoid ambiguity, Member States should consider introducing specific limitations and exceptions in their national copyright laws for the benefit of beneficiary persons as defined by the Treaty. That is, in addition to already existing limitations and exceptions (where applicable), Member States should include limitations and exceptions that facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled as provided by the Treaty.

1.4. Guidelines for Proposed Legislative Amendments

ARIPO recommends that amendments to the national copyright laws should, at a minimum, cover elements discussed under this section.

1.4.1 Definitions

The terms listed below should be defined and ARIPO recommends that the definitions should be drawn from the Treaty as they are.

- i. **Article 2(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.

This definition allows for any accessible format that may be necessary to facilitate access to information by beneficiary persons. This takes cognisance of the diversity of needs depending on the type or condition of disability which varies from one person to another. Furthermore, it allows for the use of various technologies to reproduce accessible format copies that meet such needs, thus promoting access to information by persons who are blind, visually impaired and print disabled. This definition does not restrict the limitations and exceptions to a particular known technology such as Braille, but encompasses known technologies and those that have yet to be developed to facilitate access to information by beneficiary persons.

Member States can consider expanding on the definition by adding the sentence “Persons who assist beneficiary persons can have a work made in accessible format copy for the beneficiary person in order to facilitate that assistance” in order to allow for flexibilities at the implementation stage and to be in line with Article 4(2)(b) of the Treaty.

- **Article 2(c): Authorised 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.

An authorized entity establishes and follows its own practices:

- i. to establish that the persons it serves are beneficiary persons;
- ii. to limit to beneficiary persons and/or authorised entities its distribution and making available of accessible format copies;
- iii. to discourage the reproduction, distribution and making available of unauthorized copies; and
- iv. to maintain due care in, and records of, its handling of copies of works, while respecting the privacy of beneficiary persons in accordance with Article 8.

Broadly, this definition allows entities that serve beneficiary persons on a non-profit basis to use limitations and exceptions to enable access to published works by beneficiary persons. The definition is suitable for situations that prevail in most African countries, where it is common to find non-governmental organisations more involved in providing educational and other services to beneficiary persons. The practices for authorised entities are designed to offer some guidelines while not putting an undue burden on the entities. These provisions could be placed in the law or in implementing regulations.

ii. Article 3: Beneficiary Persons

A beneficiary person is a person who:

- a. *is blind;*
- 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; or*
- 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.*

The definition of beneficiary persons covers persons who, due to blindness, visual impairment or other disability are not able to access information from printed works. Including the definition as it is in the national law will promote availability and access to formats suitable for persons whose condition prohibits them from having access to information on an equal basis with others.

ARIPO recommends that when including the definition of a beneficiary person in the national law, Article 3(b) on the ‘...cannot be improved...’ should not be subject to any conditions for medical diagnostic procedures and treatments. (See Agreed Statement to Article 3(b)¹). This is due to the potential difficulty to access and afford the required medical diagnostic procedures. Rather, Member States should be guided by the existing practices used by institutions that already serve beneficiary persons.

1.4.2. Role of Authorised Entities, Beneficiary Persons and Persons Acting on Their Behalf

i. Authorised Entities

The role of authorised entities, beneficiary persons and persons acting on behalf of beneficiary persons in exercising privileges granted by the limitations and exceptions on this matter should be clear in

¹ Nothing in this language implies that “cannot be improved” requires that the use of all possible medical diagnostic procedures and treatment.

the national copyright law. Primarily, the law should give authorised entities permission to carry out activities without the need to seek authorisation from the copyright holder. These activities include:

- a. converting published works into accessible format copies;
- b. supplying/making available accessible format copies to beneficiary persons by any means;
- c. obtaining from other authorised entities (within and outside the country) accessible format copies;
- d. distributing accessible format copies for beneficiary persons in other contracting parties (see discussion of applicable requirements of Article 5 below).

ii. **Beneficiary Persons and Persons Acting on their Behalf**

The permission granted to authorised entities to make accessible format copies for beneficiary persons should equally be extended to the beneficiary persons themselves and persons acting on their behalf. (See Article 4(2)(b).) Therefore, unless otherwise stated, throughout these Guidelines actions related to making accessible format copies that are permitted for authorised entities shall also be permitted for beneficiary persons or persons acting on their behalf.

Article 4(2)(b) recognises that information needed by a beneficiary person can be made in an accessible format copy either by another individual or by the beneficiary person themselves. This is an empowering provision allowing the making of an accessible format copy by a beneficiary person or another individual assisting the beneficiary person. Therefore, the copyright law should include this provision; otherwise if the limitations and exceptions only cover actions by authorised entities, and if an individual carries out an activity under such limitations and exceptions, the activity may be deemed to be in violation of the copyright law.

1.4.3. Coverage of the Limitations and Exceptions

Article 4(1) (a): Limitations and Exceptions related to exclusive rights granted under the copyright law.

The most important element of the limitations and exceptions to facilitate access to published works by persons who are blind, visually impaired or otherwise print disabled is for the law to grant permission for authorised entities, beneficiary persons or persons acting on their behalf to carry out actions that enable accessible format copies to be made accessible to beneficiary persons without having to seek authorisation from the copyright holder prior to carrying out those actions. In that regard, the law should allow the permitted action to be carried out under the limitations and exceptions for purposes of serving beneficiary persons. Although the Marrakesh treaty is silent on the subject of enforcement, Member States may wish to consider also incorporating offence and penalty provisions so a copyright holder can sue for infringement.

a. Right of Reproduction

Copyright laws generally prohibit the making of copies of protected works in any form or number without authorisation of the copyright holder. Ordinarily, this includes converting a work into an accessible format copy and making a copy of a work that is published in an accessible format without such authorisation. The Treaty makes it permissible for an authorised entity, a beneficiary person, or another person acting on his or her behalf, to reproduce a work in an accessible format for use by beneficiary persons. This promotes the availability of accessible format copies to address the access to information famine faced by beneficiary persons. The permission to reproduce published works can also facilitate and serve as a basis to use and make effective other limitations and exceptions to promote availability and access to published works in accessible format copies. The limitations and exceptions for reproduction rights feeds into permission to distribute and

make available to the public, thus enabling public performance and cross-border exchange of accessible format copies for use by beneficiary persons and vice-versa. Therefore, the national copyright law should grant permission to authorised entities, visually impaired persons and persons acting on their behalf to reproduce published works without authorisation of the copyright holder.

b. Right of Distribution

Permission for authorised entities to be able to distribute works in accessible format copies without authorisation from the copyright holder will promote access to published works by beneficiary persons.

This permission is important as combined with limitations and exceptions allowing cross-border exchange of works it allows for various avenues through which a beneficiary person may get access to information. This includes authorised entities distributing works to beneficiary persons within or outside a country, or exchange between authorised entities within the same jurisdiction. It also allows for an authorised entity (and beneficiary person or person acting on that beneficiary's behalf) that receives an accessible format copy from an authorised entity in another contracting party to distribute such copies within its national borders, and in some cases outside those borders.

As indicated above, the rights subject to limitations and exceptions as provided in the Treaty are inter-dependant; therefore it is important for all of them to be included in the limitations or exceptions adopted in the national law in order to achieve the objective of the Treaty. The limitation or exception to the right of distribution should be included in the national copyright law as broadly as the Treaty provides and should not be restricted to any particular form of distribution.

c. Right of Making Available to the Public

The copyright holder's exclusive right to make works available to the public makes it unlawful for an unauthorised third party to provide copyright-protected works to the public through interactive means, including digital means. A limitation or exception on this right under the Treaty gives authorised entities permission to disseminate works in accessible format copies for use by beneficiary persons.

d. Article 4(1)(b): Right of Public Performance

The Treaty makes it optional for contracting parties to include in national copyright laws a limitation or exception to the right of public performance. In view of the challenges faced by beneficiary persons in developing countries, ARIPO recommends that Member States include a limitation or exception for public performance in their national laws. That is, the limitation or exception on the right of public performance should be included among those stipulated above. This will promote access to information by beneficiary persons when they participate in forums where published works are being publicly performed.

e. Article 5: Cross-Border Exchange of Accessible Format Copies

Seventeen ARIPO Member States are members of the Berne Union, and their national laws are compliant with Article 9 of the Berne Convention, which allows them to distribute internally accessible format copies received from outside their borders, and in some cases to distribute and make those copies available across borders. Member States should include in the limitations and exceptions under discussion a provision that permits cross-border exchange between authorised entities in its jurisdiction and those located in other contracting parties. Authorised entities should be able to exchange works in accessible format copies without having to seek authorisation from the copyright holder, so as to promote circulation of information to beneficiary persons. This will promote timely access to information on reasonable terms. The following needs to be covered by such a provision:

- i. The limitation or exception should permit authorised entities to distribute or make available published works in accessible format copies to other authorised entities, including those in another contracting party.

- ii. Authorised entities should be permitted to distribute or make available accessible format copies directly to beneficiary persons in other contracting parties. Without such a provision, an authorised entity that provides an accessible format copy (whether or not made under a limitation or exception) directly to a beneficiary person in another contracting party may be liable for copyright violation.

f. Article 6: Importation of Accessible Format Copies

The national law should permit in its limitations and exceptions the importations of accessible format copies for the facilitation of access to published works for beneficiary persons by authorised entities and beneficiary persons or someone acting on behalf of the beneficiary persons, as well as the importation of accessible format copies made without authorisation from the copyright holder to serve a beneficiary person in another country. The importation could be for an accessible format copy that was made under the limitations and exceptions of the country of origin.

g. Article 10 (2): Related Rights in Works

The limitations and exceptions to facilitate access to published works by beneficiary persons, should, in the case of works covered by definition in the Treaty including those in audio formats, be extended to related rights where it is necessary to make an accessible format copy for use by beneficiary persons. (See Agreed Statement to Article 10(2)²).

h. Article 7: Technological Measures

It is noted that some ARIPO Member States' copyright laws provide for the protection of technological measures. Where this is the case, ARIPO recommends that the national law should provide a limitation, exception or exemption that allows authorised entities, beneficiary persons, or other persons acting on behalf of beneficiary persons to perform any of the acts permitted by the Treaty where technological measures have been applied to a published work.

1.4.4. Article 4(2)(a): Conditions under which the Limitations and Exceptions should Apply

The rationale behind exclusive rights granted by copyright laws is to promote creativity and exchange of information. The need for copyright laws to provide limitations and exceptions to these exclusive rights for the benefit of persons who are blind, visually impaired and print disabled is perpetuated by the lack of availability of accessible format copies in the market, so as to provide access equal to that available to persons without such disabilities. Therefore, in order to strike a balance between the interests of copyright holders and the need for beneficiary persons to access information, the copyright law must provide conditions under which the limitations and exceptions can be evoked to enable access to information by beneficiary persons. As provided in the Treaty, the permission granted for authorised entities to carry out the activities listed under Article 4(2)(a) of the Treaty should be based on the following conditions:

i. *The authorized entity wishing to undertake said activity has lawful access to that work or a copy of that work*

A third party is expected to use a lawful copy of the work to carry out any of the allowed acts, including conversion into an accessible format copy, reproduction, distribution, making available to the public and facilitating public performance of a work for use by beneficiary persons. This condition addresses the importance of respect for copyright laws thus promoting creativity by ensuring that copyright holders' opportunity for compensation remains on the distribution of lawful copies of their works. Providing access to information by beneficiary persons leads to the need for works to be converted into accessible formats without authorisation, but due regard should be paid to the need to use lawful copies for such purpose.

² It is understood that when a work qualifies as a work under Article 2(a), including such works in audio form, the limitations and exceptions provided by the Treaty apply mutatis mutandis to related rights as necessary to make the accessible format copy, to distribute it and to make it available to beneficiary person.

ii. The work is converted to an accessible format copy, which may include any means needed to navigate information in the accessible format, but does not introduce changes other than those needed to make the work accessible to the beneficiary person

Changes to a copyright protected work require the authorisation of the copyright holder. This Article only permits the introduction of changes in the work to the extent that they are necessary to make the work accessible by beneficiary person. Therefore any changes beyond what is necessary will be a violation of copyright.

iii. The accessible format copies are supplied exclusively to be used by beneficiary persons

It is noteworthy that the Treaty emphasises that any of the acts permitted by law without authorisation of the copyright holder should be for purposes of enabling or facilitating access to published works by beneficiary persons. This means that accessible format copies made or distributed under the limitations and exceptions that are intended for use by persons other than beneficiary persons will be in violation of copyright. This is an important element for Member States to underscore in the limitations and exceptions under discussion.

iv. The activity is undertaken on a non-profit basis

This condition seeks to deter the possibility of works being reproduced, distributed, made available to the public and publicly performed under the limitations and exceptions while the organisation or person doing so is generating profits from that activity. The ability to facilitate access to published works under the limitations and exceptions is provided so that in the end persons who are blind, visually impaired or print disabled will have access to these works. In addition, the beneficiaries should not have to pay exorbitant prices for accessible format copies, which would often lead to further difficulty in obtaining access to published works. The provision also safeguards the interest of the copyright holder to generate revenue from the use of their works by not allowing users of the limitations and exceptions to make a profit. However, it should be noted that this condition does not imply or require that accessible format copies will be supplied to beneficiary persons at no cost.

If any of these conditions is not met, an entity or person who carries out an act to reproduce, distribute, make available to the public or enable a public performance of a copyright protected work will be in violation of the applicable exclusive right. Therefore, Member States should also take the step of educating beneficiary persons, authorised entities and institutions that provide them with services to promote access to information, and other stakeholders.

v. Article 11: Application of the three-step test

As indicated above, national laws of ARIPO Member States provide other limitations and exceptions (i.e. those not specific to providing works in accessible formats) to copyright protection. And most of these laws attach conditions under which the limitations and exceptions can be used, as per Article 9(2) of the Berne Convention. In most cases, these include:

- a. that the action undertaken must be for special cases;
- b. that the action does not conflict with the normal exploitation of the work; and
- c. that the action is not prejudicial to the legitimate interests of the copyright owner.

Only three ARIPO Member States are party to the WIPO Copyright Treaty (WCT). These are Botswana, Ghana and Namibia. Kenya signed but has yet to ratify. In that light, ARIPO recommends that, in compliance with Article 5(4)(b) of the Marrakesh Treaty, the national law should, in the same manner as it does for other limitations and exceptions, attach the above conditions to limitations and exceptions for providing accessible format copies for beneficiary persons. In that way, authorised entities in contracting parties will be allowed to serve beneficiary

persons in other contracting parties as well. It should be noted that Marrakesh Treaty Member States are not obliged to become party to the WCT. (See Agreed Statement to Article 5(4)(b³)).

1.5. Other Issues to Take into Consideration

1.5.1. Article 2: Works to be Covered by the Limitations and Exceptions

The definition of “works” in the Treaty is drawn from Article 2(1) of the Berne Convention, and covers literary and artistic works “in the form of text, notation and/or related illustrations”. The Berne Convention is broad enough to cover any work protected by copyright, while the Marrakesh Treaty definition does not include certain types of works such as audiovisual works. The Agreed Statement to Article 2(a) confirms that the Treaty covers audio books. The Marrakesh Treaty provides a minimum standard for limitations and exceptions, and Member States may choose to apply the Treaty to a different set of works or a different range of beneficiaries, provided that the conditions of the Berne Convention and other applicable treaties are met. Some countries choose to apply limitations and exceptions in the national laws to all works for which copyright protection is granted by the national copyright laws. The works so protected must have been published, while the accessible format copies must be intended for use by beneficiary persons and should not be exploited for profit. The application of limitations and exceptions should not be unnecessarily limited; for example, the limitations and exceptions should not apply only to literary works used for research and educational purposes.

1.5.2 Article 12: Other Limitations and Exceptions

The Treaty specifically provides in Article 12 that Contracting Parties may adopt other limitations and exceptions to benefit beneficiary persons, and that the Treaty is without prejudice to other limitations and exceptions that benefit persons with disabilities. As already indicated, laws of Member States already provide limitations and exceptions to exclusive rights on copyright. These existing limitations and exceptions should not exclude beneficiary persons; rather they should also be available to be used to further enhance access to published works.

For example, if a national law provides limitations or exceptions to the right of translation, where necessary, such limitations and exceptions should both be applied to a work that needs to be translated before being converted into an accessible format copy, or a work in an accessible format copy that needs to be translated into another language; a beneficiary person, authorised entity or person acting on the beneficiary person’s behalf should be able to use the limitation or exception to the right of translation. Other limitations and exceptions may also cover persons with other disabilities. In this regard, ARIPO recommends that when reviewing national laws to implement the Marrakesh Treaty, Member States should consider whether there are other limitations and exceptions that need to be included in the national law to facilitate equal access to published works by beneficiary persons.

1.5.3 Commercial Availability

In view of diverse socio-economic and cultural situations prevailing in developing countries, and in most ARIPO Member States, it may be difficult for authorised entities or beneficiary persons and persons acting on their behalf to ascertain whether or not accessible format copies are obtainable commercially and reasonably in the market.

Therefore ARIPO recommends that each Member State should consider its national situation and make a determination of whether commercial availability or non-availability of a work should be one of the factors to be taken into consideration before the limitations and exceptions are applied to make works accessible for beneficiary persons. (See Article 4(4) and the Agreed Statement concerning Article 4(4)).

³ 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.

CHAPTER 2

SUMMARY

2.1. What are the Objectives of the Marrakesh Treaty?

The main objective of this Treaty is to help end the “book famine”: the global situation whereby only a very few per cent of books published are available in accessible formats that blind and other print disabled people can read. It does so by allowing blind people and organisations serving them to make and send across national borders accessible books and other copyrighted publications, without the need to ask for the (often unavailable) permission of the author, publisher or other holder of copyright.

2.2. What are the Key Elements of the Treaty?

- The Treaty recognises that outdated copyright law acts as a barrier to print disabled people’s access to communication, education and research, and scientific knowledge.
- It recognises the shortage of published works available in accessible formats.
- It also recognises the importance of appropriate limitations and exceptions to copyright law in order to ensure access to published works in accessible formats.
- It acknowledges the need to strike a balance between the protection of the rights of the author and larger public interest, particularly education, research and access to information.
- It defines “Works” (in layman’s terms “works” means books and other published material) in a broad way, allowing almost any published work to be transcribed into an accessible format / distributed under its terms.
- It defines “Accessible format” broadly and helpfully.
- The people the Treaty is designed to serve, which it terms “beneficiaries”, are broadly defined, and includes those who are blind, visually impaired, or have a perceptual or other reading disability.
- It defines in broad terms the organisations that can use the Treaty to make or send accessible books to beneficiaries. It calls these organisations “Authorized entities”.
- The Treaty allows for the exchange of accessible published works across borders from one authorised entity to another, and also from an authorised entity to an individual.
- The Treaty does not allow authorised entities to use its provisions on a profit making basis.

2.3. What is the Significance of this Treaty to Persons with Visual Disabilities?

The Treaty will help to end the “book famine” print disabled people still face and it will speed up the creation and implementation of national copyright limitations and exceptions for persons with print disabilities in the many countries which still do not have these.

It will allow repositories of accessible books, often housed in libraries or blind persons’ organisations, to be shared across national borders. This is vital. At present there is duplication of effort and cost when two such organisations in different countries, but sharing the same language, both have to make an accessible format version of the same book. The Treaty will allow such organisations to pool resources, save money and therefore produce and share a greater number of accessible format books.

2.4. What should National Governments do to Implement the Treaty?

National governments should speedily ratify or accede to the Treaty and amend or enact national copyright law to include appropriate limitations and exceptions in line with the Treaty. They should prepare an action plan to implement the Treaty, working with blind people and other disability organisations and other relevant stakeholders such as libraries. Where possible, national governments should provide financial resources to authorised entities and other statutory institutions to help implement the provisions of the Treaty.

2.5 Conclusion

In view of the large numbers of persons living with print disabilities, blindness and visual impairments in the developing world, and Africa specifically, ARIPO strongly recommends that its Member States should ratify or accede to the Marrakesh Treaty. Furthermore, ARIPO also recommends that where applicable, Member States should, as soon as possible, introduce in their national laws limitations and exceptions specific to promoting access to published works in accessible formats for persons who are blind, visually impaired and print disabled.

ARIPO recognises that prior to the Treaty, accessible format copies have been made available through other limitations and exceptions and human rights obligations. Such practices can be continued. It must be noted that the Treaty makes access to published works even wider and smoother by linking human rights and copyright, hence the need to ratify or accede to the Treaty and the importance of its domestication.

Finally, for this Treaty to be of benefit to nationals of Member States, it is important for Member States to engage various stakeholders at national level, to ensure that once the copyright laws are amended to implement the Treaty, the limitations and exceptions are used to facilitate access to published works by beneficiary persons.

CHAPTER 3

APPENDIX:

WORLD BLIND UNION (WBU)

LETTER TO ALL GOVERNMENTS⁴

Dear governments of the world,

I am writing this open letter to you in my capacity as President of the World Blind Union, on behalf of all the world's estimated 285 million blind and partially sighted people.

Blind and partially sighted people the world over suffer from a "book famine", in which only a few per cent of books are ever made in accessible formats we can read such as braille, large print or audio.

One of the barriers to providing a greater number of books is outdated copyright law.

Where a book has been published, but not in an accessible format, two thirds of the world's countries do not have copyright laws that allow blind people and their organisations to make accessible format copies of such a book. Further, if a blind person's organisation has made such a copy, duplication would be avoided and more books made available if it could send that copy to a similar organisation in another country. However, to date that has not been possible due to outdated copyright law.

The great news is that the Marrakech Treaty, which was agreed in June 2013, should remove these legal barriers.

The Treaty should increase the number of national copyright exceptions for blind people. It should also allow the sharing across international borders of accessible books.

This Treaty is fundamental for the setting up and integration of accessible reading networks across the world. For the Marrakesh Treaty to actually help blind people, twenty countries need first to ratify it so that it can enter into force.

Even then, only blind people's organisations in countries which have ratified can share their accessible books. Therefore, for the Treaty to make a difference, a large number of countries from around the world must sign and ratify.

Our request to you now, on behalf of blind people everywhere, is for your country to lead by example. Please ratify the Treaty speedily, and use your diplomatic influence to urge others to do the same.

In that way, we really can open a new chapter in the inclusion of blind and partially sighted people both in your country and across the globe.

Yours faithfully,
Arnt Holte
President,
World Blind Union

⁴ In June 2013 governments put aside their differences and agreed an historic, ground-breaking treaty to help us end the "book famine" in which just a few percent of books are available in formats we can read. This Treaty must be ratified by at least 20 countries come into force, so that we can actually benefit from it. An un-ratified treaty is just a piece of paper. Below is our plea to all the world's governments to finish the job they started in Marrakesh, and allow us to start the job of getting books to people who so badly need them. You can use this letter as a template to write to your own government, asking it to ratify this Treaty.



*ARIPO Office
11 Natal Road, Belgravia
P.O. Box 4228, Harare, Zimbabwe*

*Tel: (+263) (4) 794 054, 794 065, 794 066,
794 068*

Mobile: (+263) (0) 731 559 987, 731 020 609

Fax: (+263) (4) 794072/3

Email: mail@aripo.org

Website: www.aripo.org

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