

THE WORLD BLIND UNION GUIDE TO THE MARRAKESH TREATY

More Praise for
***The World Blind Union Guide to the
Marrakesh Treaty***

“This Guide to the Marrakesh Treaty, written by world-renowned copyright scholars, is essential for anyone who aims to transpose, interpret, and apply the norms in the Treaty in an effective manner, finally giving visually impaired people real access to knowledge and culture.”

Lucie Guibault

Institute for Information Law
University of Amsterdam

“This book provides a timely, clear, and insightful guide to a complex and novel legal subject with immense practical significance. A must-read for anybody interested in making accessible versions of printed material available to disabled people.”

Anna Lawson

Professor of Law and Director of the
Centre for Disability Studies
University of Leeds

THE WORLD BLIND UNION GUIDE
TO THE MARRAKESH TREATY

Facilitating Access to Books for
Print-Disabled Individuals

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**The Marrakesh Treaty to Facilitate
Access
to Published Works for Persons Who
Are
Blind, Visually Impaired, or
Otherwise Print Disabled**

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- 1: [*World Intellectual Property Organization, Extraordinary General Assembly: A Decision Text \(December 18, 2012\)*](#)
- 2: [*Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled \(adopted on June 27, 2013, entered into force on September 30, 2016\)*](#)
- 3: [*Signatories and Contracting Parties to the Marrakesh Treaty*](#)
- 4: [*Convention on the Rights of Persons with Disabilities and Optional Protocol \(adopted on December 13, 2006, entered into force on May 3, 2008\)*](#)
- 5: [*Signatories and Contracting Parties to the Convention on the Rights of Persons with Disabilities*](#)

6: *Berne Convention for the Protection of Literary and Artistic Works (Paris Text, as last amended on September 28, 1979)*

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ty from the perspectives of copyright law, human rights law, and disability law, as well as the technological issues related to the creation, access, and use of accessible format copies. The workshop discussions were significantly enriched by the insights of three negotiators of the Treaty and other experts present at WIPO in Geneva and at the Diplomatic Conference in Marrakesh.

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Foreword

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled marks a breakthrough in enabling the blind and other print-handicapped persons to access the printed word. Ensuring that visually impaired persons have sustainable access to published works on the same terms as sighted persons is an important milestone toward realizing the vision of a world in which all persons can participate fully and equally in the political, economic, and cultural life of society.

In about one-third of the world's na-

tions, exceptions to local copyright laws have long assisted blind persons such as me in obtaining books and other materials in accessible formats, such as Braille and audio recordings. Even where these exceptions existed, however, books in accessible formats could not cross international borders. In Spain, for example, there are approximately 100,000 accessible books, whereas Argentina has only about 25,000. Yet Spain's accessible books cannot be exported legally to Argentina or to other Spanish-speaking countries. The Marrakesh Treaty (MT) enables accessible format copies to cross borders where the exporting and importing countries both have appropriate copyright exceptions. The MT not only facilitates these cross-border exchanges, it also prescribes a framework for harmonizing copyright exceptions to benefit all print-handicapped persons.

Like most treaties, the MT contains a number of complex provisions. This Guide skillfully unpacks these provisions to make the Treaty comprehensible to parliamentarians and publishers, as well as to persons with disabilities and to our representative organisations.

The Guide is divided into three parts.

The first part explains why the MT should be broadly interpreted because it brings about a convergence between intellectual property treaties and human rights covenants and conventions—and especially the Convention on the Rights of Persons with Disabilities (CRPD). In the middle part, the nuts and bolts of the MT are explained to assist ratifying countries in enacting national implementing legislation. The final part discusses how to put the Marrakesh Treaty into practice, including making the MT and its implementing legislation part of each country’s national disability action plan.

As a former member and past chair of the United Nations Committee on the Rights of Persons with Disabilities, I am especially pleased that the authors of this Guide have provided a useful and highly accessible resource for those seeking to understand and give effect to the Marrakesh Treaty. The Committee has been urging countries to speedily ratify the Marrakesh Treaty as a means of making the printed word accessible, thus fulfilling one of the major aims of the CRPD. I hope that when fully implemented with the aid of this Guide, the MT will increase the very small percentage of works avail-

able in accessible formats and help to equalize what remains a very uneven playing field.

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the
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Sydney, Australia
30 November 2016

Executive Summary

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (Marrakesh Treaty, MT, or Treaty) is an international agreement negotiated under the auspices of the World Intellectual Property Organization (WIPO) and adopted at a diplomatic conference in Marrakesh, Morocco, in June 2013. The overarching objective of the MT is to expand the availability of copyrighted works to the nearly 300 million individuals with

print disabilities around the world. Many of these individuals—who include not only those who are blind or visually impaired but also persons with physical reading or perceptual disabilities—currently lack adequate access to books and other cultural materials in accessible formats.

The Marrakesh Treaty has enjoyed strong support from countries around the world. Fifty-one countries signed the MT at the conclusion of the diplomatic conference in Marrakesh in June 2013; as of July 2016, more than 75 countries have signed the Treaty. The MT entered into force on September 30, 2016, three months after 20 states had ratified the Treaty.*

Governments in ratifying countries will face a variety of legal and policy choices as they decide how to incorporate the MT into their national legal systems. These choices will determine whether the Treaty realizes its overarching objective—to enhance the human rights of print-disabled

* The first twenty countries to ratify the MT were: Argentina, Australia, Brazil, Canada, Chile, Democratic People’s Republic of Korea, Ecuador, El Salvador, Guatemala, India, Israel, Mali, Mexico, Mongolia, Paraguay, Peru, Republic of Korea, Singapore, United Arab Emirates, and Uruguay.

persons by facilitating their ability to create, read, and share books and other cultural materials in accessible formats.

The World Blind Union Guide to the Marrakesh Treaty: Facilitating Access to Books for Print-Disabled Individuals provides a comprehensive analysis of the MT to help countries to achieve this goal. The Guide is intended for multiple audiences, including:

- parliamentarians and policymakers, who adopt domestic legislation and regulations to give effect to the Treaty;
- judges and administrators, who interpret and apply those laws;
- disability rights organizations and other civil society groups, who advocate for the Treaty's implementation and effective enforcement;
- international and national monitoring and oversight bodies, who review government implementation and enforcement measures; and
- print-disabled individuals, who are the MT's explicitly identified "beneficiary persons."

To assist these actors and other stakeholders, the Guide offers a general con-

ceptual framework for interpreting and implementing the Marrakesh Treaty, an article-by-article analysis of the Treaty's key provisions, and specific legal and policy recommendations for giving effect to these provisions. The Guide is intended to be read either as a whole or selectively. For readers who wish to focus on specific topics, the Guide is written in such a way that each section should stand on its own without the need for additional background reading.

In terms of its conceptual approach, the Guide views the MT as an international agreement that employs the legal doctrines and policy tools of copyright law to advance human rights ends. This approach is inspired by several features of the Treaty, including its express references to widely-adopted international human rights instruments in the first paragraph of the Preamble, its status as the first multilateral agreement to establish mandatory exceptions to the exclusive rights of copyright owners, and its designation of print-disabled individuals as the Treaty's beneficiaries. At the same time, the Guide recognizes that states have obligations under international intellectual property law as well as international hu-

man rights law. These preexisting commitments—which include the three-step test for constraining exceptions to copyright that is found in several intellectual property treaties—must also be respected by governments in deciding how best to give effect to the MT.

The Guide explains the legal and policy options that the Marrakesh Treaty provides to ratifying countries, and it offers recommendations for choosing among the available options in light of states' preexisting human rights and copyright commitments. For example, the Guide urges states to enact mandatory exceptions to copyright that the Treaty designates as presumptively compatible with existing intellectual property treaties. These "safe harbor" provisions include exceptions to the exclusive rights of reproduction, distribution, making available to the public, and public performance (Article 4), and exceptions for cross-border transfers of accessible format copies (Article 5). For ratifying countries that choose a different approach, such as general fair use or fair dealing exceptions, the Guide offers a number of recommendations to assist governments in tailoring implementing legislation to their domestic policy goals

and the needs of print-disabled persons.

The Guide also adopts a position on MT clauses that are permissive rather than mandatory. The two most important of these optional provisions are the commercial availability requirement in Article 4(4) and the remuneration requirement in Article 4(5). The first clause permits a country to ban the creation of accessible format copies if the copyright owner has already made the work commercially available in that particular format. The second clause permits a state to require compensation as a condition of creating or distributing accessible format copies. The Guide considers these optional provisions to be in tension with the MT's overarching objectives. Accordingly, the Guide urges states to eschew these optional measures.

In its final part, the Guide addresses the implementation of the Marrakesh Treaty. Giving domestic effect to the MT is not a difficult, complex, or expensive endeavor. At the most basic level, each ratifying country must revise its national copyright laws to authorize the making, using, and sharing of accessible format copies, including sharing across borders.

As with any treaty, changes to national law alone may not ensure effective reali-

zation of the MT's objectives. The Guide thus recommends that states build on their existing implementation of human rights treaties by taking a range of concrete steps to monitor and enforce the MT. In particular, officials should consult with print-disabled individuals and their representative organizations, create effective legal procedures to remedy violations, empower national human rights and intellectual property institutions to oversee implementation of the Treaty, and report on implementation measures to the United Nations. The institutions and administrative mechanisms for carrying out these activities already exist in most national legal systems or can be easily adapted to include the implementation of the MT.

Introduction

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (the Marrakesh Treaty, MT, or Treaty) creates mandatory exceptions to copyright for the benefit of individuals with print disabilities. The rights in the MT that flow from these exceptions share a common overarching aim: to facilitate the ability of these individuals to make, consume, and share copyrighted works in accessible formats.

The Marrakesh Treaty was negotiated against the backdrop of a worldwide paucity of printed works and cultural materials in accessible formats—often referred to as a “book famine.” This global famine is alarming in its scope and impact. Many of the estimated 300 million print-disabled persons around the world, especially those living in developing countries, lack adequate access to printed materials in accessible formats even though the technology to create such works has long existed and continues to evolve rapidly. Unable to read newspapers, enjoy books, or research on the Internet, these individ-

uals cannot participate meaningfully in society. The result is a violation of numerous internationally recognized human rights, including, most notably, the rights protected by the Convention on the Rights of Persons with Disabilities (CRPD). Adopted by 168 countries as of October 2016—more than 85 percent of the United Nations membership—the CRPD requires governments to ensure that intellectual property laws do not prevent disabled persons from accessing books and other cultural materials.

Collective action to end the book famine required a forceful multilateral response in the form of a new treaty to harmonize exceptions to copyright to benefit print-disabled individuals. A legally binding international agreement was needed for several reasons. First, the scarcity of copyrighted works in accessible formats is a global problem that requires a global solution. All national laws limit copyright protection to achieve important public policy goals, and exceptions for the blind are among the most long-standing of these limitations. Nonetheless, more than two-thirds of countries have not adopted such exceptions. In addition, many of the exceptions that exist do not fully satisfy the

needs of print-disabled persons, especially in developing nations and with respect to new technologies such as e-books and audiobooks.

Second, because copyright laws are territorial in scope, many existing national exceptions do not permit the import or export of accessible format copies. It is neither desirable nor efficient for every country to provide all of the accessible format copies needed to end the book famine in its territory, especially if such copies are readily available elsewhere. Thus, a principal goal of the MT is to require states to adopt copyright exceptions that facilitate the exchange of accessible format copies across borders.

Third, most of the world's nations are already required to facilitate access by disabled persons to copyrighted works, either by the human rights treaties they have joined or by their own domestic legislation. The most concrete example of this legal commitment appears in the widely-ratified CRPD, mentioned above. The MT provides a template for countries to satisfy these preexisting international obligations, including by building on steps they have already taken to give effect to the CRPD and other human rights trea-

ties.

Inspired by these multiple rationales for global collective action, this Guide provides a roadmap for interpreting and implementing the Marrakesh Treaty. The World Blind Union hopes to assist government officials, policymakers, disability rights organizations, and civil society groups who will decide how to give effect to the MT in ratifying countries. The Guide identifies the legal and policy choices available to these actors, and it offers recommendations that advance the Treaty's foundational objective—to use mandatory exceptions to copyright protection to expand the availability of accessible format books and cultural materials to print-disabled individuals.

As the first international agreement to require exceptions to copyright to enhance the human rights of a specific population, the Marrakesh Treaty lies at the intersection of international human rights law and international intellectual property law. In interpreting and implementing the MT, therefore, public officials and private actors must strive to comply with both sets of legal obligations.

But how can governments achieve this consistency? The Guide offers a practical

answer. It conceives of the Marrakesh Treaty as an international instrument that employs the legal doctrines and policy tools of copyright to achieve human rights objectives. This vision of the Treaty underpins the analysis in the Guide. It informs the general interpretive principles described in Chapter 1, the article-by-article analysis and policy options discussed in Chapter 2, and the recommendations for implementing the MT in domestic law reviewed in Chapter 3.

This framing of the Marrakesh Treaty as a multilateral agreement that uses intellectual property means to achieve human rights ends has a number of general implications. First, it requires governments to ensure that their implementation of the MT is effective. Treaty rights and obligations that exist on paper but not in reality are insufficient; they will not expand the availability of accessible format copies to print-disabled persons.

Second, the Guide's conceptual approach informs its recommendations about the policy options available to governments. The Marrakesh Treaty expressly refers to other copyright conventions and human rights instruments. The MT cannot be interpreted in isolation from

these legal texts, including the three-step test for exceptions and limitations that appears in multiple intellectual property agreements. Nevertheless, by providing what this Guide labels as “safe harbor” exceptions for creating, using, and sharing accessible format copies, the MT affirms that the three-step test is flexible enough to coexist with states’ ongoing commitments to protecting human rights.

Third, where states have discretion under the Treaty, the Guide recommends choices that promote rather than limit access. For example, the Guide urges states to reject optional clauses in the MT concerning remuneration and commercial availability. Although these provisions are formally compatible with the Treaty, their implementation could significantly limit the access of beneficiary persons, thus undermining the Treaty’s object and purpose.

Finally, the MT does not restrict preexisting authority under domestic and international law to adopt exceptions and limitations to copyright that serve public interest goals. States may continue to rely on this authority to create, preserve, and extend such exceptions and limitations—including those that further the human

rights of persons with disabilities—provided that doing so is compatible with the intellectual property agreements they have ratified. Thus, although the MT provides a model for protecting the rights of print-disabled individuals to access copyrighted works, the Treaty does not preclude states from going beyond its terms.

The remainder of this Guide proceeds as follows. Chapter 1 begins with a brief introduction to the intellectual property and human rights regimes. It then identifies three general principles of treaty interpretation that inform the Guide’s analysis—emphasizing the MT’s object and purpose, adapting the Treaty to changing conditions, and promoting consistency with the CRPD.

Chapter 2 consists of an article-by-article analysis of the MT’s requirements. It describes the Treaty’s basic structure and identifies the legal and policy choices available to governments for each of its key provisions—including the definitions of “accessible format copy,” “authorized entities,” and “beneficiary persons”—and the exceptions and limitations to copyright protection that all ratifying countries must adopt.

Chapter 3 of the Guide turns to implementation. The core obligation of ratifying states is to revise national copyright laws to authorize print-disabled individuals and authorized entities to make, consume, and share accessible format copies, including across borders. But as with any treaty, changes to the law may not be enough to ensure the MT's effectiveness. The Guide thus recommends that governments build on their preexisting implementation of human rights agreements by taking a range of concrete steps to monitor and enforce the MT. These steps include consulting with print-disabled individuals, creating legal procedures to remedy violations, empowering national institutions to monitor and enforce international commitments, and reporting on implementation measures within the United Nations' human rights system.

Chapter 1

Guiding Principles for the Marrakesh Treaty

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (Marrakesh Treaty, MT, or Treaty) is an international agreement that seeks to eliminate the barriers that copyright law creates for print-disabled individuals in accessing books and other cultural materials. The MT achieves this objective by requiring states to adopt exceptions and limitations to copyright to enable the creation and distribution of accessible format copies, including across borders.

The Marrakesh Treaty seeks to advance human rights using the legal and policy tools of copyright. The very first lines of the MT's Preamble emphasize the overlap between these two legal fields, recalling "the principles of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in society, proclaimed in the Universal Declaration of Human Rights and the United

Nations Convention on the Rights of Persons with Disabilities” (CRPD), and recognizing “the need to maintain a balance between the effective protection of the rights of authors and the larger public interest.” The MT thus helps to fulfill the promise made by contracting states in Article 30(3) of the CRPD “to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.”

The MT’s distinctive blend of human rights and intellectual property means that the interpretation and implementation of the Treaty must take account of the legal obligations and principles of both fields. This Guide offers a comprehensive approach to these issues. It suggests policy options and practical considerations to promote the effective realization of the MT’s objectives in a range of local settings. Before turning to these proposals, Section 1.1. of the Guide provides a brief introduction to the international human rights and intellectual property regimes, with an emphasis on copyright. Section 1.2 then explains how the human rights objectives that the MT seeks to achieve inform the interpretation of the Treaty

under long-standing principles of public international law.

1.1. The Marrakesh Treaty at the Crossroads of Human Rights and Intellectual Property

The international human rights and international intellectual property (IP) regimes have expanded exponentially over the last two decades, leading to increased engagement between the two legal fields. Interpreting and implementing the MT will require careful consideration of the complementary and sometimes competing goals of each regime.

1.1.1. The International Human Rights Regime

The international system that protects the fundamental rights of all human beings arose following the Second World War. Confronted with clear evidence of mass atrocities, the victors of that conflict resolved that abuses perpetrated by a state against its own citizens and within its own borders would no longer be the concern of that state alone. The initial response to this commitment was to create the United Nations and vest it with responsibility for maintaining international peace and secu-

rity and promoting universal respect for and observance of international human rights. Soon after its founding, the United Nations began the task of drafting the Universal Declaration of Human Rights (UDHR), a nonbinding resolution adopted unanimously by the UN General Assembly in 1948. During the decades that followed, the international human rights system focused on two principal tasks—expanding and refining a list of protected rights and freedoms, and creating international institutions and monitoring mechanisms to ensure that states respect those rights and freedoms in practice.

The core of international human rights law is contained in three legal instruments—the UDHR, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR)—collectively known as the International Bill of Rights. The ICCPR and ICESCR, both adopted in 1966, translate the aspirational norms of the UDHR into legally binding obligations for states. The ICCPR protects a broad range of civil and political liberties, such as freedom of expression, freedom of thought, privacy, and the right to take part in the conduct

of public affairs. The ICESCR protects the right to education, the right to participate in cultural life, and the right to enjoy the benefits of scientific progress and its applications, among other rights. Many of these rights are also incorporated in national constitutions, legislation, administrative regulations, and judicial decisions.

In addition to the ICCPR and the ICESCR, eight other UN treaties address specific human rights issues, including racial discrimination, torture, women's rights, children's rights, and disability rights. The treaty addressing the rights of individuals with disabilities is the Convention on the Rights of Persons with Disabilities (CRPD). Each of these UN treaties creates an international monitoring mechanism known as a "treaty body"—a committee of legal and other experts charged with overseeing that treaty's implementation and assessing whether states are complying with the rights that it protects. For the CRPD, these functions are performed by the Committee on the Rights of Persons with Disabilities (CRPD Committee). Article 39 of the CRPD gives the Committee the competence to, among other functions, "make suggestions and general recommendations based on the

examination of reports and information received from the States Parties.” Although the suggestions and recommendations of the CRPD Committee—referred to as General Comments—are not binding and cannot amend the CRPD, the interpretations generated by the Committee are entitled to “great weight” because of their unique role as independent expert bodies established to monitor state compliance with the treaties.¹

1.1.2. The International Intellectual Property Regime

The 1967 Convention Establishing the World Intellectual Property Organization (WIPO) defines “intellectual property” as rights relating to “literary, artistic and scientific works; performances of performing artists, phonograms and broadcasts; inventions in all fields of human endeavor;

¹ As the International Court of Justice recently explained regarding another treaty body, the UN Human Rights Committee, “[a]lthough the Court is in no way obliged ... to model its own interpretation ... on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty.” *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 2010 ICJ Rep. 639, 664.

scientific discoveries; industrial designs; trademarks, service marks, and commercial names and designations; protection against unfair competition; and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.”

This subsection focuses on copyright, which protects original works of authorship, such as the literary and artistic works that are the subject of the MT. A copyright exists as soon as a work of authorship, whether published or unpublished, is expressed in a tangible form. However, copyright protects only the form in which original ideas are expressed; the ideas themselves may be freely used by others. The owner of a copyrighted work has the exclusive right to, among other things, reproduce the work, prepare adaptations of the work (including translations), and distribute copies of the work. In addition to these economic rights, some countries also protect moral rights, including the rights to be named as the author and to object to derogatory treatment of a work.

The international rules protecting copyright have expanded significantly over the last century. Early bilateral and regional

copyright treaties required states to grant foreign nationals the protections provided to their own nationals and established minimum standards of protection. These agreements focused on protecting the exclusive rights of creators and copyright owners, leaving states to regulate limitations and exceptions to those rights through domestic legislation. At the end of the nineteenth century, these principles were incorporated into a multilateral convention—the Berne Convention for the Protection of Literary and Artistic Works—which was revised and broadened over the next century to expand the protection of copyrighted works and regulate national exceptions and limitations. The administration of the Berne Convention was later entrusted to the WIPO.

In 1994, intellectual property (IP) was added to the mandate of the World Trade Organization (WTO) through the adoption of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement). The TRIPS Agreement enhanced the substantive protections of preexisting IP treaties—including the Berne Convention—and constrained states' authority to enact domestic limitations and exceptions. These heightened

protections are mandatory for the entire WTO membership. The TRIPS Agreement also required WTO members to expand the mechanisms for the domestic enforcement of IP rights. Disputes over the interpretation and application of the treaty are adjudicated by the WTO Dispute Settlement Body, which can authorize trade sanctions against WTO members.

1.1.3. Conflict or Coexistence between the Regimes?

The simultaneous expansion of IP law and human rights law has increased the intersection between the two regimes, leading previously unrelated rules and institutions to interact in new and sometimes contested ways. Initially, some actors in the UN human rights system identified a direct conflict between the two regimes. These actors viewed expansive IP protections, such as those in the TRIPS Agreement, as making it more difficult for states to comply with human rights treaties.² For example, copyright provides exclusive rights that prevent third parties

² *Statement on Human Rights and Intellectual Property*, U.N. ESCOR Comm. on Econ., Soc., & Cultural Rts., 27th Sess., Agenda Item 3, para. 12, U.N. Doc. E/C.12/2001/15 (2001).

from reproducing or distributing protected works. If a copyright owner is unwilling or unable to make the work available in an accessible format, persons with print disabilities cannot access that work. Without an applicable exception, the result is a restriction of these individuals' rights to freedom of expression, education, and cultural participation.

To resolve these conflicts, human rights experts urged states to recognize the primacy of human rights over IP laws and treaties on the ground that human rights are more fundamental. Advocates of this "conflicts approach" encouraged states to disregard or modify IP rules if necessary to comply with international human rights obligations. These advocates also highlighted conflicts to support the call to reform IP laws in ways that enhanced the protection of human rights, reframing demands for access to copyrighted works as internationally mandated entitlements that are equivalent or even superior to the economic rights of IP owners.

The conflicts approach usefully focused on the human rights consequences of IP and the importance of ensuring access to copyrighted works—issues that the IP regime had neglected. At the same time,

however, the conflicts approach neglected the ways in which individual innovation and creativity—goals pursued by the IP system—are also essential to the fulfillment of human rights. Scholars, policy-makers, and NGOs thus began to envision the human rights and IP regimes as asking the same basic question—how to give authors and inventors sufficient incentives to create and innovate while providing the public with adequate access to the products of their intellectual efforts. This has been called the coexistence approach.

This coexistence approach sees the two regimes as congruent rather than in conflict. Proponents of this approach accept the essential compatibility of the two regimes, while recognizing that they are sometimes in tension over how to strike the balance between incentives on the one hand and access on the other. For example, copyright provides an incentive for the creation of literary and artistic works by granting authors exclusive economic rights. Article 15 of the ICESCR recognizes a similar idea. It states that everyone has the right “[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or

she] is the author.” Although human rights law does not protect IP as such,³ it does protect the creative activities of individuals, including the economic interests of authors in achieving an adequate standard of living and their moral interests in maintaining the integrity of their works. Within both the IP and human rights regimes, therefore, IP is a means rather than an end; it is a mechanism to foster creativity and innovation and thereby contribute to the greater social good.

Both copyright law and human rights law also emphasize the importance of ensuring access to the products of creators’ efforts. Article 15 of the ICESCR balances

³ Intellectual property rights are protected under the right of property guaranteed in Article 1 of Protocol No. 1 to the European Convention on Human Rights. *Anheuser-Busch v. Portugal*, Application No. 73049/01, Eur. Ct. Hum. Rts. (Grand Chamber 2007). The right of property does not, however, appear in any UN human rights treaty. Further, even in Europe, as the UN Special Rapporteur in the Field of Cultural Rights has noted, the right of property merely obliges states to respect the IP rights they have recognized; it does not require them to create such rights or to adopt any particular approach to protecting IP. *Copyright Policy and the Right to Science and Culture, Report of the Special Rapporteur in the Field of Cultural Rights*, Farida Shaheed, A/HRC/28/57 ¶ 53 (Dec. 2014) [hereinafter SR Copyright Report].

the protection of authors with the right of everyone “[t]o enjoy the benefits of scientific progress and its applications.” Article 7 of the TRIPS Agreement identifies the treaty’s objectives as contributing to innovation and technology transfer “to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations,” whereas Article 8 recognizes the ability of states to take measures consistent with the treaty to promote the public interest. National laws include exceptions and limitations to copyright to achieve such interests. Common examples include copying by archives and libraries, limited quotations for purposes of commentary and criticism, and certain educational uses. Some countries have also enacted exceptions and limitations that expand access to copyrighted works to persons with visual disabilities, such as the provision of Braille copies.⁴ These statutory provisions help states to achieve

⁴ WORLD INTELLECTUAL PROPERTY ORGANIZATION, STUDY ON COPYRIGHT LIMITATIONS AND EXCEPTIONS FOR THE VISUALLY IMPAIRED, SCCR/15/7 (2007) (prepared by Judith Sullivan) [hereinafter WIPO STUDY], http://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_7.pdf

goals that IP law shares with human rights law.

Nonetheless, there are important divergences in the orientation of the two regimes. As compared to IP laws and treaties, human rights instruments emphasize societal goals over private economic interests. In addition, at the international level, the stronger enforcement mechanisms of IP treaties—such as in the TRIPS Agreement and in other recently negotiated bilateral, regional, and plurilateral IP treaties—have led states to emphasize IP protection without sufficiently considering its impact on human rights. For example, threats of economic sanctions or WTO complaints create incentives for states to enact copyright laws with fewer exceptions and limitations than may be needed to fully realize human rights.

Partly as a result of these pressures, many states have not taken full advantage of the flexibilities recognized in international IP law to ensure adequate access to copyrighted works. For example, prior to the adoption of the Marrakesh Treaty, only 57 countries had enacted an exception to copyright permitting persons with print disabilities to create

accessible format copies.⁵ The limited number of states adopting such an exception has been an important factor contributing to the book famine mentioned in the Introduction to this Guide.

1.1.4. Using Copyright Tools to Achieve Human Rights Ends

The Marrakesh Treaty uses the specific policy tool of exceptions and limitations to copyright to expand the global availability of accessible format copies of books and cultural materials. Such exceptions and limitations are found in all national laws. For example, most states permit certain uses of copyrighted material by libraries and educational institutions without the permission of the copyright owner. Some countries have broader and more flexible doctrines of fair use or fair dealing. Whatever approach a country follows, exceptions and limitations “constitute a vital part of the balance that copyright law must strike between the interests of rights-holders in exclusive control and the interests of others in cultural participation.”⁶

International human rights instruments

⁵ *Id.* at 9.

⁶ SR Copyright Report, *supra* note 3, ¶ 61.

also recognize the societal benefits of exceptions and limitations. Most notably, the CRPD requires ratifying states to revise IP laws and adopt other policies to facilitate access to cultural materials. Article 30(1) of the CRPD requires states to “take all appropriate measures to ensure that persons with disabilities ... [e]njoy access to cultural materials in accessible formats,” and Article 30(3) obligates states to “take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.”⁷

⁷ Other international and regional instruments identify the importance of exceptions to copyright to achieving human rights goals. The European Union’s InfoSoc Directive provides that “Member States should be given the option of providing for certain exceptions or limitations for cases such as ... for use by people with disabilities” and that “[i]t is in any case important for the Member States to adopt all necessary measures to facilitate access to works by persons suffering from a disability which constitutes an obstacle to the use of the works themselves, and to pay particular attention to accessible formats.” Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, ¶¶ 34, 43 [hereinafter InfoSoc Directive]. The Council of Europe has also called on Member States to “take appropriate steps ...

The CRPD Committee has repeatedly called on states to ratify and implement the Marrakesh Treaty.⁸ In a 2013 General Comment focused on the principle of accessibility, the Committee stressed the cross-border human rights impact of the MT.⁹ The UN Special Rapporteur in the Field of Cultural Rights has also urged states to ratify the MT and to “ensure that

to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by people with disabilities to cultural materials, while respecting the provisions of international law.” Council of Europe, Committee of Ministers Rec(2006)5, 3.2.3.vii (5 Apr. 2006).

⁸ The CRPD Committee has included this call for ratification in reviewing reports from Denmark, New Zealand, Korea, Belgium, Ecuador, and Mexico. In a General Comment on the right to education, the Committee has also called on states to ratify and implement the MT. *General Comment No. 4: Article 24 (Right to inclusive education)*, U.N. Doc. No. CRPD/C/GC/4 (2 Sept. 2016), ¶ 22.

⁹ The General Comment asserts that the Marrakesh Treaty “should ensure access to cultural material without unreasonable or discriminatory barriers for persons with disabilities, including people with disabilities living abroad or as a member of a minority in another country and who speak or use the same language or means of communication, especially those facing challenges accessing classic print materials.” Committee on the Rights of Persons with Disabilities, *General Comment No. 2: Article 9 (Accessibility)*, U.N. Doc. No. CRPD/C/GC/2 (22 May 2014), ¶ 45 [hereinafter General Comment No. 2].

their copyright laws contain adequate exceptions to facilitate the availability of works in formats accessible to persons with visual impairments and other disabilities, such as deafness.”¹⁰

Ratification and implementation of the Marrakesh Treaty is thus a concrete way for states to realize the obligations, set forth in the CRPD and in other human rights instruments, to remove barriers to the accessibility of cultural materials. Legislation proposed by the European Union to implement the MT underscores this point and recognizes the permissibility of limiting intellectual property to achieve human rights ends:

The proposed Directive [and Regulation] support[] the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community, as enshrined in Article 26 of the Charter of Fundamental Rights of the European Union (‘the Charter’). The Directive [and Regulation] also reflect[] the Union’s commitments under the UNCRPD.

¹⁰ SR Copyright Report, *supra* note 3, ¶ 116.

The UNCRPD guarantees people with disabilities the right of access to information and the right to participate in cultural, economic and social life on an equal basis with others. In view of this, it is justified to restrict the property rights of rightholders in light with the Union's obligations under the Charter.¹¹

As Chapter 2 of the Guide explains in more detail, the MT requires Contracting Parties to adopt exceptions and limitations in their national laws to enable the creation and dissemination of accessible format copies of certain copyrighted works

¹¹ Proposal for a Regulation of the European Parliament and of the Council on the cross-border exchange between the Union and third countries of accessible format copies 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, COM(2016) 595 final, 2016/0279 (COD) (Sept. 14, 2016), p. 5; Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of 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, COM(2016) 596 final, 2016/0278 (COD) (Sept. 14, 2016), p. 6.

and to share these works across borders. As previously noted, only 57 countries had adopted some version of these exceptions and limitations prior to the negotiation of the MT. A central objective of the Treaty, therefore, is to encourage all states to adopt a common set of exceptions and limitations to enhance the human rights of print-disabled persons.

1.2. Interpretive Principles for the Marrakesh Treaty

This subsection identifies a set of principles for interpreting the MT as a treaty that promotes human rights objectives using the legal and policy tools of copyright. It also explains how these principles should guide the choices that government officials make in implementing the Treaty.

1.2.1. Emphasize Object and Purpose

The overarching goal of treaty interpretation is to give effect to the objective intent of the parties as manifested in the text of the treaty as a whole. The Vienna Convention on the Law of Treaties (VCLT) codifies customary international law rules governing the interpretation of treaties. Under Article 31(1) of the VCLT, a treaty is to be interpreted “in good faith in ac-

cordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Article 31 identifies three elements for interpreting a treaty—text, context, and object and purpose. None of these elements is to be given priority over any other. Treaty interpretation thus requires an interpreter to consider the specific clause at issue, other provisions such as the preamble, and what those terms and the context in which they appear reveal about the intention of the parties and the objectives of the agreement.

To identify the ordinary meaning of a particular treaty provision, an interpreter may consider common uses of terms, dictionary definitions, the grammar and syntax of the provision, as well as the use of the same or similar language elsewhere in the treaty. The ordinary meaning must also be understood in light of the context of the treaty as a whole. Under VCLT Article 31(2), the context of the treaty includes the text of the entire treaty, the preamble, any annexes, and “[a]ny agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty.” For example, the thirteen “Agreed Statements” in

the footnotes of the Marrakesh Treaty are an integral part of the MT's context and thus relevant to understanding the ordinary meaning of its terms.¹²

Consistent with its focus on the parties' objective intent, the VCLT permits interpreters to consider drafting history—the documents associated with the negotiation of the treaty—only in specified circumstances. Article 32 allows recourse to the treaty's preparatory work and the circumstances of the treaty's conclusion, either "to confirm the meaning" that results from application of the primary principles of interpretation, or "to determine the meaning" when the interpretation in the ordinary course "(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasona-

¹² It is also possible to consider the CRPD as a "relevant rule[]" of international law applicable in the relations between the parties" to be taken into account, together with the context of the treaty, under VCLT Article 31(3)(c). It is unclear whether the CRPD would need to be ratified by some, most, or all of the parties to the MT, have passed into customary law, or be accepted by all parties to the MT, to be considered a "relevant rule." RICHARD K. GARDINER, *TREATY INTERPRETATION* 302–04, 310–17 (2d ed. 2015). As explained below, however, the CRPD is an important reference point for interpreting the MT regardless of whether it qualifies as a "relevant rule" under VCLT Article 31(3)(c).

ble.” Thus, if it is not possible to identify a reasonable interpretation from the ordinary meaning of the terms in context and in light of the treaty’s purpose, it would be appropriate to refer to the drafting history. The VCLT gives the drafting history a supplementary role in treaty interpretation because it can be unreliable evidence of the agreement’s meaning. Most notably, the records of negotiations are often incomplete or may not reflect the political compromises that were made to adopt the agreement.

The VCLT also requires that text be interpreted in ways that promote the treaty’s object and purpose.¹³ The object and purpose include both the specific legal consequences contemplated in the agreement as well as the overall goals of the parties.¹⁴ An interpreter should look to

¹³ The central role of object and purpose in interpreting treaties, particularly those designed to protect individuals, has been repeatedly affirmed by international tribunals. See, e.g., *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 15, 23; *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, 1984 Inter-Am. Court H.R. (ser. A) No. 4, ¶ 23; *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, Eur. Ct. Hum. Rts., ¶ 171 (Grand Chamber 2012).

¹⁴ EIRIK BJORGE, THE EVOLUTIONARY INTERPRETATION OF

the treaty as a whole to ascertain its object and purpose. However, consulting the preamble is often one of the best ways to identify a treaty's aims because these introductory clauses typically indicate why governments negotiated the agreement.

States are also required to implement the MT in ways that ensure that its provisions are effective. Effective interpretation is a general principle, or canon of construction, that guides the interpretation of all international agreements. Under this principle, it is reasonable for the interpreter to assume that the parties "intend the provisions of the treaty to have a certain effect, and not to be meaningless."¹⁵ Thus, all other things being equal, an interpreter should choose an interpretation that renders a term effective in achieving the treaty's object and purpose over an interpretation that does not.

The MT's overarching object and purpose is to promote the human rights of individuals with print disabilities by expanding their access to copyrighted works consistently with existing rules of interna-

TREATIES 113 (2014).

¹⁵ OPPENHEIM'S INTERNATIONAL LAW, VOLUME 1 (PEACE) 1280 (Robert Jennings & Arthur Watts eds., 9th ed. 2008).

tional IP law. Several features of the Treaty support this conclusion. First, as its title proclaims, the Treaty seeks “*to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*” (emphasis added). Second, the Preamble explicitly references the UDHR and the CRPD and reiterates the parties’ desire “to harmonize limitations and exceptions [to copyright] with a view to facilitating access to and use of works by persons with visual impairments or other print disabilities.”¹⁶ Third, the MT expressly identifies print-disabled individuals as “beneficiary persons,” underscoring the centrality of their

¹⁶ These references underscore that the MT helps states to achieve the accessibility goals of international human rights law, including the obligation in CRPD Article 30(3) to “ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.” See *also* Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa, adopted on February 25, 2016, Article 19.2(d), http://www.achpr.org/files/news/2016/04/d216/disability_protocol.pdf (requiring states to ensure that “persons with visual impairments or with other print disabilities have effective access to published works, including ... by making changes as appropriate to the international copyright system”).

human rights to achieving the Treaty's aims. Finally, unlike other IP treaties, the MT does not expand the rules of copyright protection; rather, it requires ratifying states to adopt mandatory exceptions to copyright and identifies those exceptions as presumptively compatible with existing international IP rules.

For all of these reasons, states and other actors should interpret and implement the Marrakesh Treaty to further its object and purpose of enhancing the availability of accessible format copies to print-disabled persons. Although the MT uses the doctrines and policies of copyright law to achieve this goal, the Treaty's fundamental aim is to enhance the human rights of these individuals. When deciding how to give effect to the MT, therefore, states should interpret the MT in ways that advance this object and purpose.¹⁷ Chapter 2 of the Guide identifies specific policy proposals and recommendations consistent with this approach.

¹⁷ For treaties that are designed to protect individuals, interpretations that are more protective are to be favored over those that are less protective. Rudolf Bernhardt, *Evolutionary Treaty Interpretation, Especially of the European Convention on Human Rights*, 42 GERMAN Y.B. INT'L L. 11, 14 (1999).

1.2.2. Adapt the Marrakesh Treaty to Changing Conditions

The Marrakesh Treaty should be interpreted and implemented in light of contemporary circumstances and in ways that respond to changes in law, policy, and technology. Decision-makers should give a treaty term an evolutionary meaning (rather than the meaning fixed at the time of the instrument's adoption) if it appears from the text, context, and object and purpose that the meaning should evolve over time. For example, a generic term may indicate that the drafters intended the meaning to evolve over time to take account of present-day conditions and challenges. A term may also be read in light of current conditions to account for new technological developments or other circumstances the drafters did not or could not have considered. These evolutionary approaches help to ensure that a treaty remains effective in realizing its object and purpose.

With regard to the MT, states will need to interpret and implement the rights of print-disabled individuals in light of new technologies and evolving meanings of disability. The objective intent of the Treaty's drafters was to ensure that individuals with

print disabilities can make and share accessible format copies even as the methods of copying and distribution change over time. This is implied by the text of the Treaty, which defines “accessible format copy” by reference to whether a copy is accessible rather than by reference to any particular technology. As a result, states should not restrict exceptions and limitations to existing formats or particular technologies. Rather, implementing legislation should be open-ended to explicitly encompass technologies that may be developed in the future. An open-ended definition also ensures the broadest possible access to copyrighted works. Thus, although states may provide examples of accessible format copies (e.g., large print, digital text, e-books, among others) in implementing legislation, they should expressly indicate that these examples are illustrative rather than exhaustive.

1.2.3. Promote Consistency with the CRPD

One of the MT’s objectives, as set forth in the Preamble, is to realize the “principles of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in society” protected

in the CRPD and the UDHR. These cross references reveal that the MT embodies many of the same core principles and values embraced by the CRPD. Moreover, given that more than 85 percent of UN member states have ratified the CRPD, most MT ratifying countries will have already joined the CRPD. As a result, the interpretations of the CRPD Committee can help guide states in making choices that fulfill the MT's object and purpose.¹⁸ This subsection discusses the origin of the CRPD and the core principles developed by the CRPD Committee that animate the convention.¹⁹

¹⁸ States may have obligations under other human rights treaties to ensure the accessibility of cultural materials for individuals with print disabilities. See, e.g., Committee on Economic, Social and Cultural Rights, *General Comment No. 5 (Persons with disabilities)*, U.N. Doc E/1995/22 (1994), ¶ 5.

¹⁹ Trade tribunals have also stressed the importance of integrating different international regimes. E.g., *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (1998), ¶ 129 (emphasizing that exceptions to free trade rules “must be read by a treaty interpreter in the light of contemporary concerns of the community of nations”); *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R (2011), ¶ 845 (stressing the “principle of systemic integration which ... seeks to ensure that international obligations are interpreted by reference to their normative environment in a

1.2.3.1. Background to the CRPD

The CRPD is a legally binding human rights agreement aimed at promoting and protecting the rights of individuals with disabilities. It entered into force on May 3, 2008 and is accompanied by an Optional Protocol that authorizes individuals and groups to file communications alleging violations of the CRPD by states that have ratified the Optional Protocol. As of October 2016, 168 countries have ratified the CRPD and 92 countries have ratified the Optional Protocol. The CRPD Committee, a treaty body created by the convention, reviews these communications and reports from all States Parties regarding implementation of the convention. The Committee reports to the UN General Assembly about its work.

The impetus for adopting the CRPD was the recognition that the rights of individuals with physical and mental disabilities, although already implicit in other international human rights instruments, were not adequately realized or protected. The CRPD builds on these preexisting instruments by articulating rights with greater

manner that gives coherence and meaningfulness to the process of legal interpretation”) (internal citations and quotations omitted).

precision and by providing more specific descriptions of state duties. In particular, the CRPD emphasizes that disabled persons possess human rights that states are obligated to realize, requires the provision of remedies to individuals whose rights have been violated, and mandates the involvement of disabled persons in the creation and implementation of laws, policies, and technologies that affect their rights.

1.2.3.2. Central Principles of the CRPD
Accessibility and non-discrimination are central interpretive principles of the CRPD and, by extension, of the MT, which seeks to realize, in part, the rights outlined in the CRPD.

Accessibility. A central purpose of the CRPD is to enable the participation of individuals with disabilities in all aspects of society. Article 1 provides that the convention's purpose is "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity." Paragraphs "e" and "y" of the Preamble identify as two of the convention's goals contributing to eliminating the social disadvantage experienced by persons with disabilities and promoting their full partic-

ipation in all spheres of life in both developed and developing countries.

Accessibility of the physical, social, economic, and cultural environment is a critical precondition for disabled individuals to participate fully in society and to enjoy their rights. The emphasis on accessibility reflects the social model of disability that underlies the CRPD. This model recognizes that disability does not result from an individual's physical or mental condition but is rather the product of environmental barriers that prevent an individual with an impairment from fully participating in society on a basis of equality with others. (CRPD, Preamble.) A rights-based approach to disability requires the state to remove barriers to the enjoyment of rights and to create the conditions needed for all individuals to participate meaningfully in society. The importance of accessibility has been reaffirmed by the CRPD Committee, which has devoted a General Comment to this principle. According to the Committee, accessibility is a precondition for the realization and enjoyment of rights protected under the CRPD.²⁰ For example, access to information is a precondition for the realization of the rights to freedom of

²⁰ General Comment No. 2, *supra* note 9, ¶ 36.

expression, to education, and to participation in culture.²¹

Several articles of the CRPD expressly require states to take steps to ensure access to printed works. These include provisions that protect access to information and communications (Article 9), freedom of expression (Article 21), the right to education (Article 24), and the right to participate in cultural life (Article 30).²² More specifically, Article 30 requires states to modify copyright and other IP laws to facilitate access to cultural materials—an obligation the CRPD Committee has indicated can be satisfied in part by joining the Marrakesh Treaty.²³

²¹ *Id.* ¶¶ 38, 39, 44.

²² These rights are also protected by other treaties, including the ICCPR and ICESCR. The right to take part in cultural life, for example, is guaranteed by Article 15.1(a) of the ICESCR. The CRPD provides a more detailed description of what that right means for individuals with disabilities and what duties states have in realizing the right—which in this case includes the obligation to ensure that IP laws do not prevent individuals with disabilities from participating in culture. CRPD, art. 30(3). Thus, although the CRPD makes this more explicit, a state that had ratified the ICESCR but not the CRPD would still be required to eliminate barriers that prevent individuals with print disabilities from accessing cultural materials, including barriers created by IP law.

²³ General Comment No. 2, *supra* note 9, ¶ 45.

Non-Discrimination. Non-discrimination is a core principle of international human rights law and the cornerstone of every human rights treaty. The focus on equality in the CRPD is emphasized in Article 1, which notes that the convention's purpose is to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities." Article 4 obligates states to take all appropriate measures to change laws and policies in order to eliminate discrimination against people with disabilities.

Discrimination exists when a state fails to ensure accessibility or to remove barriers that prevent individuals from enjoying their rights on an equal basis with others. As the CRPD Committee has explained, the state's duty to ensure access to information and communication must be understood in light of the obligation to avoid discrimination. "Denial of access to ... information and communication ... constitutes an act of disability-based discrimination that is prohibited by article 5 of the Convention."²⁴

In its General Comment No. 2, the CRPD Committee makes explicit the close

²⁴ *Id.* ¶ 34.

relationship between accessibility and non-discrimination. According to the Committee, Article 9's commitment to ensuring that individuals with disabilities have equal access to goods and services "stems from the prohibition against discrimination; denial of access should be considered to constitute a discriminatory act, regardless of whether the perpetrator is a public or private entity."²⁵ Thus, in discussing state obligations, the Committee notes explicitly that "[d]of access should be clearly defined as a prohibited act of discrimination."²⁶ As applied to the Marrakesh Treaty, the principles of accessibility and non-discrimination direct ratifying countries to facilitate the availability of covered copyrighted works in a wide

²⁵ *Id.* ¶ 13. In the General Comment, the Committee explicitly links the obligations in Article 9 regarding accessibility with the prohibition on non-discrimination in Article 5. *Id.* ¶ 34 (denial of access, including to information and communication, "constitutes an act of disability-based discrimination that is prohibited by article 5 of the Convention"); *cf. Szilvia Nyusti and Péter Takács v. Hungary (Views)*, Communication No. 1/2010, U.N. Doc. No. CRPD/C/9/D/1/2010 (21 June 2013), ¶ 9.4 (noting the conceptual connection between accessibility and non-discrimination in finding a violation of Article 9 based on the state's failure to ensure the accessibility of bank ATMs).

²⁶ General Comment No. 2, *supra* note 9, ¶ 29.

array of accessible formats, and to ensure that print-disabled individuals can access, enjoy, and share copyrighted works on substantially the same terms as fully sighted persons.

1.2.3.3. Consultations with Stakeholders

An important provision in the CRPD is the obligation to consult with affected individuals and groups, including with regard to implementing treaty obligations in domestic law and policy. This consultation requirement appears in Article 4(3) of the convention, which provides:

In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

The obligation to consult does not end with the adoption of implementing legislation. CRPD Article 33(3) provides that civil society groups, disability rights organiza-

tions, and persons with disabilities “shall be involved and participate fully in the monitoring process” of the convention. Consultations provide the government with crucial input in drafting appropriate legislation and regulations, and help it to identify and surmount barriers to realizing the CRPD’s objectives.

To ensure consistency with the CRPD and other human rights treaties, states that ratify the Marrakesh Treaty should consult with print-disabled individuals, and with organizations that advocate for and provide services to those individuals, at all stages of the implementation process. These stages include preparing and reviewing implementing legislation, identifying appropriate monitoring institutions, evaluating whether the Treaty’s access and sharing provisions are actually being utilized, and preparing reports to international human rights bodies. To facilitate broad participation in these activities, governments should make all relevant documents and proceedings available in accessible formats.

States should also consult with print-disabled individuals both when designing legislation to incorporate the MT in domestic laws and policies, and when moni-

toring how those laws and policies operate in practice. For example, states with greater administrative capacity might launch a consultation process in connection with the drafting of implementing legislation, inviting disability rights organizations to submit proposals for new laws and regulations, attend public hearings on draft legislation, and testify before or make written submissions to parliamentary committees considering such legislation. States with more limited capacity might form a steering group composed of print-disabled individuals and their representative organizations to provide input to the government as it implements the MT.

The obligation to consult regarding MT monitoring processes could include, for example, involving authorized entities and disability rights organizations in the design of empirical studies to determine whether MT-required exceptions and limitations in copyright laws are in fact expanding the availability and cross-border exchange of accessible format copies. Such groups are also crucial partners for raising awareness about the rights provided by the MT awareness that encourages policy-relevant feedback regarding effective implementation of the Treaty.

The Legal and Policy Choices in the Marrakesh Treaty

As discussed in Chapter 1, a central objective of the Marrakesh Treaty is to facilitate the creation, sharing, and distribution of accessible format copies for the benefit of print-disabled individuals. To accomplish this goal, the MT requires ratifying states to amend their national laws to include a variety of exceptions and limitations to the exclusive rights of copyright holders. Chapter 2 of this Guide provides an article-by-article overview of the MT's core provisions and offers guidance for interpreting and implementing those provisions in ways that are consistent with the Treaty's objectives. Each topic begins with a brief overview followed by the text of the relevant provision. We then provide a detailed analysis of the text and recommendations for how states should incorporate the relevant obligations into their respective national laws.

2.1. Copyrighted Works Covered by the Marrakesh Treaty

The Marrakesh Treaty applies to a broad category of works protected by copyright. In particular, Article 2(a) provides that exceptions and limitations for the benefit of print-disabled individuals apply to particular “literary and artistic works”—a term of art defined in international copyright law. However, the MT goes beyond that definition by emphasizing that the Treaty applies to such works regardless of the media in which they appear.

TEXT OF THE MARRAKESH TREATY

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

The phrase “literary and artistic works” defined in Article 2(1) of the Berne Convention is extremely broad. It includes “every production in the literary, scientific and artistic domain,” with the exception of audiovisual works. Specific copyrighted works in Article 2(1) that are therefore protected under the Marrakesh Treaty include: “books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works,” as well as “illustrations, maps, plans, sketches.”

Article 2(1) of the Berne Convention underscores that a literary or artistic work is eligible for copyright protection “whatever may be the mode or form of its expression.” Article 2(a) of the MT incorporates this phrase by reference and expands its scope. Specifically, Article 2(a) clarifies that literary and artistic works are covered by the MT regardless of whether they are “published or otherwise made publicly available in any media.” The Agreed Statement to Article 2(a) also makes clear that literary and artistic works “includes such works in audio form, such as audiobooks.”

The provisions described above yield

two primary insights. First, the MT applies to both published and unpublished works. Thus, a print-disabled individual can make and share accessible format copies of works that are considered unpublished under national law. Second, it means that MT rights are technology neutral. Print-disabled individuals can make and share copyrighted works regardless of the media or technological format in which those works appear. Thus, for example, a state that ratifies the MT must provide exceptions and limitations enabling beneficiary persons to make and share not only audiobooks but also “born digital” works originating in a digital form, such as e-books, wikis, electronic records, and webcomics.²⁷

2.2. Accessible Format Copies

A central feature of the MT is the authorization for beneficiary persons and authorized entities (defined in the next subsection of the Guide) to create accessible format copies. Article 2(b) of the MT defines “accessible format copy” in flexible and format-neutral terms to ensure that

²⁷ See Ricky Erway, *Defining “Born Digital,”* Online Computer Library Center (Nov. 2010), <http://www.oclc.org/content/dam/research/activities/hiddencollections/borndigital.pdf>.

print-disabled individuals may use whatever format will provide them with access that is as feasible and comfortable as that enjoyed by non-print-disabled individuals.

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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.

Article 2(b) makes clear that beneficiary persons and authorized entities may make a copy of a covered copyrighted work in any manner or form needed to ensure access. In particular, the MT does not limit the making of copies of such works to special formats, such as Braille, that are traditionally used only by print-disabled individuals. To the contrary, “accessible format copy” is defined as a copy made in a “manner or form which gives a beneficiary person access to the work.” Depending on the individual and his or her disability, this may include formats that can also be used by non-print-disabled individuals—such as an e-book or audiobook.²⁸ Limiting the MT to copies that can *only* be used by print-disabled individuals—as one commentator appears to suggest²⁹—would unreasonably exclude from the MT’s benefits all disabled persons who do not or cannot use such special formats.

²⁸ The Agreed Statement concerning Article 2(a) defines “works” as including “audio form, such as audiobooks.”

²⁹ See Mihály J. Ficsor, *Commentary to the Marrakesh Treaty on Accessible Format Copies for the Visually Impaired* at 15, ¶ 6 (2013).

Several additional considerations underscore the importance of the flexible, format-neutral approach adopted by Article 2(b). First, it is impossible to predict in advance the specific needs of all individuals with print disabilities. The particular format or formats that enable such individuals to access a work “as feasibly and comfortably” as a non-print-disabled individual—whether e-book, audiobook, DAISY, or EPUB3—will depend on the particular type of disability and its interaction with other physical or mental conditions, among other factors. Second, a flexible, format-neutral approach ensures that the MT will evolve to take into account the emergence of new technologies. States should therefore expressly include a flexible, format-neutral definition in national implementing legislation, both to encompass future technological evolution and to promote the accessibility of covered works.

2.3. Authorized Entities

2.3.1. Introduction and Overview

To ensure that individuals with print disabilities enjoy broad access to literary and artistic works, the MT empowers a variety of actors to create and share accessible

format copies. These actors include not only “beneficiary persons” themselves (a phrase analyzed in detail below), but also a “primary caretaker or caregiver” of such a person, as well as anyone “acting on ... behalf” of a beneficiary person. (Article 4(2)(b).) This expansive list reflects the reality that many print-disabled individuals require assistance to engage in daily life activities, including accessing and reading books and consuming cultural materials.

In recognition of these challenges, the MT also designates an additional category of actors—known as “authorized entities”—to assist print-disabled persons. Authorized entities are entitled to make accessible format copies, obtain such copies from other beneficiaries and authorized entities, and distribute or make available those copies to beneficiary persons and to authorized entities in other countries. Authorized entities are thus crucial to achieving the MT’s overarching objective of overcoming the considerable barriers that print-disabled individuals currently face in making and sharing accessible format copies.

This section of the Guide analyzes the phrase “authorized entity” as defined in

Article 2(c) of the MT. As explained below, such entities may be government or public institutions or non-profit organizations or groups that provide a range of services to individuals with print disabilities. Some authorized entities primarily serve print-disabled communities. However, the MT recognizes a much larger group of public and non-profit groups and bodies—including schools, libraries, healthcare organizations, and civil society groups—whose activities are intended to benefit society as a whole, including individuals with print disabilities.

In addition, Article 2(c) defines an authorized entity as an entity that creates and follows its own practices to, among other things, ensure that the persons it serves are beneficiary persons. An authorized entity is required to limit its distribution of accessible format copies to beneficiary persons or other authorized entities. The MT leaves it to authorized entities themselves to develop and monitor these practices. For this reason, and because of the diversity of organizations and groups that can qualify as authorized entities, a wide variety of practices will be consistent with Article 2(c).

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Article 2(c): “authorized entity” means an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations.

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 authorized 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 [on respect for privacy].

2.3.2. Types of Authorized Entities

The MT defines authorized entities principally by reference to the services that they provide to individuals with print disabilities. Article 2(c) lists four distinct services—(1) education, (2) instructional training, (3) adaptive reading, or (4) information access. Each service is separated by the word “or,” which means that an organization or group that engages in only one of these activities still qualifies as an authorized entity (although it may carry out multiple activities). The service or services the organization or group offers must be provided on a non-profit basis. For-profit private entities—such as for-profit universities and schools, medical facilities, and Internet service providers—do not qualify as authorized entities even if they provide one or more of the listed services to persons with print disabilities. (As noted below, however, a for-profit organization may be an authorized entity if it is authorized or recognized by the gov-

ernment.)

The Treaty does not define the terms “non-profit” or “for-profit”; accordingly, this determination will be made under each state’s applicable domestic laws. However, non-profit status does not preclude an authorized entity from charging a fee for making or sharing accessible format copies, for example, to cover its expenses. Restrictions, if any, on the fees that authorized entities can charge for performing these services will also be determined by each state’s domestic laws regulating the non-profit sector.

Although for-profit organizations generally do not qualify as authorized entities under the MT, this does not mean that these entities are prohibited from making accessible format copies and sharing them with print-disabled persons, with or without charging a fee. Such services, however, need to be justified under copyright exceptions other than those required by the MT, or under other national laws, such as legislation protecting the rights of disabled persons.

Authorized entities can be—but are not required to be—recognized by the government. As explained below, an authorized entity can be any group or organiza-

tion that provides services to beneficiaries. This is made explicit in the first two sentences of Article 2(c), which describe two distinct types of authorized entities—organizations recognized by a government, and organizations without such recognition. A recognition process may help to provide assurances to organizations or groups that they are entitled to make and share accessible copies. However, any such process must avoid burdening authorized entities or chilling unrecognized organizations from exercising rights under the MT.

2.3.2.1. Entities Providing Services to Beneficiaries

Any non-profit organization or group is entitled to make and share accessible format copies if it provides one of the listed services to beneficiary persons. As stated earlier, an organization or group does not need to be recognized by or otherwise obtain permission from the government in order to make and share accessible format copies as part of the services it provides to print-disabled individuals. This is apparent from the second sentence of Article 2(c), which refers to any “non-profit organization that provides [covered] services to beneficiary per-

sons.” The Agreed Statement to Article 9 further underscores this conclusion, rejecting “mandatory registration” as “a precondition for authorized entities to engage in activities recognized under this Treaty.”³⁰

Consistent with this view, any organization that provides one or more services listed in Article 2(c) can act as an authorized entity and carry out all of the activities permitted by the MT without government approval or the permission of copyright owners. Authorized entities encompass organizations whose mission is to assist print-disabled individuals with services such as education, instructional training, and accessible format printed works and cultural materials. Such groups include, for example, the World Blind Union, similar global advocacy organizations and their regional and national affiliates, schools, libraries, and printing houses that primarily serve persons with print disabili-

³⁰ The Agreed Statement concerning Article 9 provides: “It is understood that Article 9 does not imply mandatory registration for authorized entities nor does it constitute a precondition for authorized entities to engage in activities recognized under this Treaty; but it provides for a possibility for sharing information to facilitate the cross-border exchange of accessible format copies.”

ties.

The MT does not, however, limit authorized entities to groups that primarily serve persons with print disabilities. To the contrary, providing services to print-disabled persons need only be “one of [the group’s] primary activities or institutional obligations.” (Article 2(c) (emphasis added).) This phrase should be interpreted broadly to include educational institutions, libraries, healthcare organizations, civil society groups, and other governmental or non-profit organizations that are open to the general public or that serve a broader membership or client base—if one of their primary activities is providing a service listed in Article 2(c). For example, interpreting language in U.S. law that is narrower than the MT, the federal district court in *Authors Guild, Inc. v. HathiTrust* nonetheless found that libraries of general educational institutions have a primary mission to distribute materials to print-disabled individuals and thus qualify as authorized entities under the Chafee Amendment to the 1976 Copyright Act—the exception benefitting print-disabled individuals in the United States.³¹

³¹ *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445, 465 (S.D.N.Y. 2012), *aff’d in part and vacated*

Including organizations that serve the general public as “authorized entities” furthers the MT’s human rights objectives in multiple ways. The more generous funding that many such organizations receive allows them to provide more extensive or lower-cost services to print-disabled individuals. The inclusion also enables beneficiary persons to be educated and trained in the same institutions as individuals without print disabilities, facilitating social integration. For these reasons, states should encourage general purpose organizations to serve as authorized entities and should clearly reflect that policy in national implementing legislation.

2.3.2.2. Government Recognized Entities

Authorized entities can also be organizations that are explicitly recognized or approved by the government to make and share accessible format copies. Entities in this category could be public institutions, such as a bureau within a government ministry or a public library. They may also be private, non-profit institutions, such as disability rights groups or advocacy organizations. Finally, this category includes

in part on other grounds, 755 F.3d 87 (2d Cir. 2014).

for-profit entities, such as a for-profit prison that is recognized by the government as providing services to print-disabled individuals.

Governments may adopt a process for these bodies to apply for recognition or establish criteria that, if satisfied, presumptively confer recognition upon such entities. These processes or criteria may be included in legislation or administrative regulations, or applied on a case-by-case basis. Whichever approach is adopted, the state should provide assurances that recognized entities are entitled to make and share accessible format copies without the permission of copyright holders, thereby deterring threats of copyright infringement lawsuits.

Governments that adopt a recognition or certification process must, however, ensure that any such process does not become a barrier for organizations that provide services to print-disabled individuals, including authorized entities not recognized by the government. For example, any such process must be easy to follow and avoid placing a financial burden on applicants. In addition, the government must clearly communicate to applicants, civil society groups, and the public that

recognition is not necessary for an organization serving beneficiaries, as well as beneficiaries themselves, to make and share accessible format copies.

It is also important to distinguish government recognition from how an authorized entity is funded. As the Agreed Statement to Article 2(c) explains, recognized entities include but are not limited to “entities receiving financial support from the government.”³² So long as the organization or group is non-profit, the fact that it receives all, some, or none of its funding from the state does not affect its status as an authorized entity.

2.3.3. The Practices of Authorized Entities
The second half of Article 2(c) describes four practices that define authorized entities and that relate to the activities they perform under the MT, that is, making, accessing, and cross-border sharing or distribution of accessible format copies. Three of the four practices seek to ensure

³² The Agreed Statement concerning Article 2(c) provides: “For the purposes of this Treaty, it is understood that ‘entities recognized by the government’ may include entities receiving financial support from the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis.”

that these activities are carried out on behalf of beneficiary persons and other authorized entities, and that non-qualifying individuals, groups, and organizations do not benefit from these activities. The fourth practice directs authorized entities to exercise due care in processing and handling copies of works, to maintain records regarding such works, and to respect the privacy rights of beneficiary persons.

These four practices are cumulative; an authorized entity is defined as engaging in all of them. However, the Treaty does not prescribe the content of these practices. Instead, Article 2(c) permits each entity to “establish[] and follow[] its own practices.” This language makes clear that the entity itself is responsible for creating and implementing these required practices in good faith. Nothing in the MT empowers governments to monitor or inspect the activities or records of authorized entities to verify that they are following the four practices (although other domestic laws or regulations may confer such authority).³³

³³ THE MARRAKESH TREATY: AN EIFL GUIDE FOR LIBRARIES 5 (Dec. 2014) (“[A]ny library or institution that meets the broad criteria set out in Article 2(c) qualifies as

This interpretation of Article 2(c) reflects the diverse array of authorized entities included in the MT and the practical impossibility of imposing a one-size-fits-all standard. It also means that governments should not impose mandatory accreditation or certification standards with regard to these practices. Such requirements could create undue practical or financial burdens, especially for entities in developing nations. It should thus be sufficient, at least in ordinary cases, for a resource-strapped entity in a developing country to adopt and follow its own practices.

2.4. Beneficiary Persons

2.4.1. Introduction and Overview

A core objective of the Marrakesh Treaty is to assist print-disabled individuals who are unable to access books and other cultural materials in traditional formats. The MT refers to these individuals as “beneficiary persons,” a term that underscores the importance that the negotiators attached to enabling these individuals to create and share accessible format cop-

an authorized entity... . [T]he treaty does not contemplate rules being established for it by the government, nor an approval process or mechanism.”).

ies. This Guide uses the terms “print-disabled individuals” and “individuals with print disabilities” interchangeably to refer to the beneficiary persons protected by the Treaty. Consistent with the MT’s overarching human rights objectives, the Guide also refers to these individuals as “rights holders”—persons who are legally entitled to create and share accessible format copies and to receive state assistance in doing so.

This section of the Guide analyzes the phrase “beneficiary persons” in Article 3 of the MT and suggests how states should implement that provision in national law. As explained below, Article 3 encompasses three different categories of print-disabled persons. These categories are defined by reference to the functional and social barriers that prevent disabled individuals from accessing traditional printed works. The medical, physical, or other causes of these impairments—such as traumatic brain injury, dyslexia, or dementia—are not relevant to the definition of beneficiary persons.

If existing national law exceptions and limitations to copyright do not currently apply to all three categories of print-disabled individuals, a state that ratifies

the MT must expand those provisions to comply with the Treaty. The simplest way to do this would be to track the language in Article 3. However, states may also choose to apply the MT to persons with disabilities in general, both in recognition of the fact that beneficiary persons often have other disabilities and to give effect to the CRPD and to other international law obligations.

TEXT OF THE MARRAKESH TREATY

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.

2.4.2. Categories of Beneficiary Persons

Article 3 identifies three categories of beneficiary persons. These categories, which are listed in paragraphs (a), (b), and (c), are separated by the word "or." An individual who falls in only one of the three paragraphs qualifies as a beneficiary person (although some print-disabled persons may be covered by more than one category). In addition, the "regardless of any other disabilities" clause that ends Article 3 makes clear that print-disabled individuals who also experience other types of disabilities—such as mental, intellectual, or auditory impairments—qualify as beneficiary persons under the MT. Finally, the definition is not limited to permanent disabilities. Individuals who experience temporary blindness or visual impairment, perceptual or reading disability, or a physical disability that interferes with reading, are entitled to benefit from

the MT for as long as that condition persists.

2.4.2.1. Blindness

States may rely on preexisting definitions of blindness in their respective national laws to extend the MT to individuals referenced in paragraph (a). Many countries have adopted definitions of blindness that include persons who experience less than a total loss of visual acuity (the ability to discern letters and numbers at a given distance) or visual field (the area in which objects can be seen in peripheral vision). India, for example, has adopted both a simple definition (the inability to “count fingers from a distance of 6 meters or 20 feet”) and a technical definition (“[v]ision of 6/60 or less with the best possible spectacle correction”).³⁴ Canada follows a different approach, defining blindness as a best-corrected visual acuity of 20/200 or worse in the better eye, or a visual field of less than 20 degrees.³⁵

These and other flexible definitions of blindness recognize that an individual can

³⁴ Government of India, National Program for Control of Blindness, <http://npcb.nic.in/index1.asp?linkid=55>

³⁵ CNIB, Glossary of AMD Terms, <http://www.cnib.ca/en/your-eyes/eyeconditions/amd/resources/glossary/Pages/default.aspx>

be functionally without sight even if he or she retains limited visual ability. The definitions also take account of the fact that many print-disabled adults acquire visual disabilities by degrees as they age. Inasmuch as nothing in the MT limits or qualifies the word “blind” in paragraph (a) of Article 3, these preexisting functional definitions of legal blindness should be understood as fully consistent with the Treaty. In addition, states should consider adjusting their national law definitions to reflect the flexible approach to “blindness” that the MT adopts.

2.4.2.2. Visual Impairment or Perceptual Disability

The second category of beneficiary persons, defined in Article 3(b), includes individuals who have a visual impairment or a disability that relates either to perception or to reading. There are three important aspects of subsection (b). First, this part of the definition extends the MT to individuals whose visual impairments do not rise to the level of blindness but nevertheless leave them “unable to read printed works to substantially the same degree” as those without such an impairment or disability.

Second, subsection (b) extends the def-

inition of beneficiaries to individuals with perceptual or reading disabilities. An individual who does not have a visual impairment but who experiences a reading disability, such as dyslexia, that prevents him or her from reading printed works to substantially the same degree as someone without that disability, is also a beneficiary person.

Third, the impairment or disability must not be readily capable of being improved such that the individual acquires visual function that substantially corresponds to the visual function of persons who do not have such an impairment or disability. For example, the MT would not apply to a person whose visual impairment can be corrected with eyeglasses, provided that such correction is physically and financially accessible to that individual.

It is important to understand the type of improvements that would lead print-disabled and non-print-disabled persons to have a "substantially equivalent" ability to read covered works. The MT's negotiators attached considerable importance to this issue, as reflected in the Agreed Statement clarifying the phrase "cannot be improved." The Agreed Statement provides that an individual remains covered

by paragraph (b) even if theoretical or potential “medical diagnostic procedures and treatments” exist that would alleviate his or her impairment or disability.³⁶ This means, for example, that consistent with the human rights principle of autonomy, an individual does not cease to be a MT beneficiary simply because there is a possibility that his or her visual impairment could be improved by existing or future treatments or technologies.

Interpreted from a human rights perspective, paragraph (b)’s “cannot be improved” clause should not place an unreasonable burden on print-disabled individuals with limited financial means, including those in developing countries. In deciding whether an improvement is in fact “available,” a State Party to the MT may thus take into account not only the state’s level of economic development and its public health system, but also the affordability of the improvement to individuals with a visual impairment or a perceptual or reading disability.

The medical condition known as cata-

³⁶ The Agreed Statement to Article 3(b) provides: “Nothing in this language implies that ‘cannot be improved’ requires the use of all possible medical diagnostic procedures and treatments.”

tracts—in which the lens of the eye becomes progressively opaque—illustrates how Article 3(b) takes account of different levels of resources available to individuals in countries around the world. Early-stage cataracts can be treated with corrective eyeglasses. As the condition progresses, however, restoring vision usually requires surgery. In countries where such surgeries are not widely available or are financially inaccessible, a state could reasonably conclude that individuals with cataracts are covered by paragraph (b) because their impairment cannot realistically be improved. Even where such treatments are available and financially accessible, however, each ratifying state has the discretion to determine what constitutes an impairment that “cannot be improved,” taking into account the needs of individual beneficiaries and relevant local contexts.³⁷

³⁷ Cf. *S.H. and Others v. Austria*, Application No. 57813/00 ¶ 97, Eur. Ct. Hum. Rts. (Grand Chamber 2011) (concluding that governments have a wide “margin of appreciation” (i.e., broad discretion) to regulate in vitro fertilization treatments given divergent national responses to “medical and scientific developments” and different ways to “achieve a balance between the competing public and private interests”).

2.4.2.3. Physical Reading Disability

The third category of beneficiary persons encompasses individuals whose physical disabilities prevent them from reading a traditional printed book or other publication. The physical disabilities referred to in this paragraph include the inability to hold or manipulate a book or to focus or move the eyes in a usual manner. Examples include quadriplegia, cerebral palsy, tremor, brain or spinal injury, or motor-neuron and neurodegenerative diseases such as amyotrophic lateral sclerosis (ALS). Individuals with these physical conditions experience challenges in accessing traditional reading materials similar to persons who are blind or have visual impairments.

2.4.3. Defining Beneficiary Persons in Implementing Legislation

The categories of print-disabled individuals described in Article 3 provide a minimum standard for beneficiary persons protected by the MT. All ratifying states must meet this standard when implementing the Treaty. We describe below three issues that may arise when countries implement Article 3 and suggest how those issues should be resolved.

First, for states that have not previously adopted exceptions to copyright that benefit print-disabled individuals, the simplest way to implement Article 3 would be to track the language of its three paragraphs as written. Legislation that does not track that language risks narrowing the definition of beneficiary persons and thus not complying fully with its Marrakesh Treaty obligations. For example, Singapore adopted the Copyright (Amendment) Act 2014 prior to ratifying the MT in 2015. The Act defines a “person with a reading disability” as “(a) a blind person; (b) a person whose sight is severely impaired; (c) a person unable to hold or manipulate books or to focus or move his eyes; or (d) a person with a perceptual handicap.” Singapore’s Act largely tracks the categories of beneficiaries in MT but is more restrictive than the MT because Article 3 of the MT also encompasses persons who have a “reading disability.”

Second, countries whose national copyright laws already provide exceptions and limitations for the print-disabled must review and, if necessary, revise those laws to ensure that they include all of the different manifestations of disability de-

scribed in each paragraph of Article 3. For example, Section 32.01 of Canada's Copyright Act defines "print disability" to include the "severe or total impairment of sight"—a phrase that is significantly narrower than the "visual impairment or a perceptual or reading disability" referenced in paragraph (b) of Article 3. Other states' national copyright laws are even more restrictive and will need to be revised when they ratify the MT. For example, Indonesia's copyright statute contains an exception for "reproduction of a scientific, artistic and literary work in Braille for the purposes of the blind," and the Armenian copyright law exempts only "reproduction in Braille, or by other special ways foreseen for the blind."³⁸ In addition to applying to only one of the three categories of individuals referenced in Article 3, neither law incorporates the flexible, format-neutral approach of MT Article 2(b), discussed above.

Third, states may choose to harmonize laws that implement the MT with laws that implement broader definitions of disability in international agreements or

³⁸ Indonesian Copyright Law, art. 15(d); Law on Copyright and Related Rights of 15 June 2006 (Armenia), art. 22(2)(ii).

regional legislation. For example, India and Israel (both of which have ratified the Treaty) extend the right to make and share accessible format copies to any disabled person.³⁹ In addition, the EU Information Society Directive stresses that it is “important for the Member States to adopt all necessary measures to facilitate access to works by persons suffering from a disability which constitutes an obstacle to the use of the works themselves, and to pay particular attention to accessible formats.”⁴⁰ Article 5.3(b) of the Directive thus authorizes the adoption of copyright exceptions and limitations for “uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability.”⁴¹ In giving effect to this provision, many EU countries have enacted exceptions that

³⁹ Law for Making Works, Performances and Broadcasts Accessible for Persons with Disabilities (Law Amendments), §1(A), 2014 (Israel), http://www.wipo.int/wipolex/en/text.jsp?file_id=341960 ; The Copyright (Amendment) Act, § 32, 2012 (India) http://www.wipo.int/wipolex/en/text.jsp?file_id=342028

⁴⁰ InfoSoc Directive, *supra* note 7, preamble ¶ 43.

⁴¹ *Id.* art. 5(3)(b).

benefit individuals with a broad array of physical and mental disabilities.⁴²

Nothing in the Marrakesh Treaty requires states to narrow preexisting copyright exceptions that go beyond the minimum requirements of Article 3. Thus, for example, a state that already extends access and sharing rights to individuals with other disabilities is not required to change that law before it can ratify the MT. To the contrary, such retrogressive measures would be incompatible with the MT's overarching human rights objectives. Adopting a broader definition of beneficiary persons is also consistent with the "evolving concept" of disability recognized in the CRPD's Preamble. Moreover, such an approach responds to

⁴² For example, Austria's Federal Law on Copyrights on Literary and Artistic Works and Related Rights exempts the reproduction and dissemination of materials for "disabled persons." Federal Law on Copyrights on Literary and Artistic Works and Related Rights, No. 58/2010 (Austria), art. 42d(1). The Irish Copyright and Related Rights Act, 2000 (No. 28 of 2000), arts. 104, 252, identifies the beneficiary of such an exception as "a person who has a physical or mental disability." The copyright law of France defines beneficiaries as "people with one or more disabilities," including disabilities that are "physical, sensory, mental, cognitive or psychological." Law No. 2006-961 of 1 August 2006 on Copyright and Related Rights in the Information Society (France), art. L. 122-5, 7°.

the practical reality—reflected in Article 3’s “regardless of any other disabilities” clause—that many individuals with visual impairments also have other disabilities and experience multiple forms of discrimination.⁴³

At the same time, a state that adopts a broader definition of beneficiary persons must ensure that this choice is compatible with the IP treaties it has ratified. The MT does not limit preexisting flexibilities available under these treaties, and the references in MT Article 11 to the three-step test (discussed below) make clear that international IP commitments remain in force. Thus, to the extent that a state broadens the categories of beneficiaries covered by the MT, it will need to justify that choice by reference to other international obligations, including human rights instruments such as the CRPD.

2.5. Exceptions and Limitations to Copyright in National Law

2.5.1. Introduction and Overview

The Marrakesh Treaty requires ratifying

⁴³ *E.g.*, EUROPEAN UNION NON-DISCRIMINATION LAW AND INTERSECTIONALITY: INVESTIGATING THE TRIANGLE OF RACIAL, GENDER AND DISABILITY DISCRIMINATION (Dagmar Schiek & Anna Lawson eds., 2011).

countries to introduce in their national laws specific exceptions and limitations (E&Ls) to several exclusive rights of copyright owners. The inclusion of mandatory E&Ls is one of the Treaty's signature achievements. These mandatory provisions are supplemented by certain non-mandatory E&Ls which, if adopted, will increase the availability of accessible format copies and enable states to fully extend MT rights to beneficiary persons and authorized entities. The mandatory and non-mandatory E&Ls are described in Articles 4 through 7 of the MT, which constitute the nucleus of the Treaty's substantive provisions, as well as in Articles 11 and 12, which lay down general conditions for the implementation of E&Ls. This section of the Guide focuses on Article 4, which concerns E&Ls to the exclusive rights of reproduction, distribution, making available to the public, and public performance. Subsequent sections address the cross-border exchange of accessible format copies (Article 5), importation of accessible format copies (Article 6), and technological protection measures (Article 7).

TEXT OF THE MARRAKESH TREATY

Article 4

National Law Limitations and Ex-ceptions Regarding Accessible Format Copies

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

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

2. A Contracting Party may fulfill Article 4(1) for all rights identified therein by providing a limitation or exception in its

national copyright law such that:

- (a) Authorized entities shall be permitted, without the authorization of the copyright rightholder, to make an accessible format copy of a work, obtain from another authorized entity an accessible format copy, and
 - (b) A beneficiary person, or someone acting on his or her behalf including a primary caretaker or caregiver, may make an accessible format copy of a work for the personal use of the beneficiary person or otherwise may assist the beneficiary person to make and use accessible format copies where the beneficiary person has lawful access to that work or a copy of that work.
3. A Contracting Party may fulfill Article 4(1) by providing other limitations or exceptions in its national copyright law pursuant to Articles 10 and 11.
 4. A Contracting Party may confine limitations or exceptions under this Article to works which, in the particular accessible format, cannot be obtained commercially

under reasonable terms for beneficiary persons in that market.

Any Contracting Party availing itself of this possibility shall so declare in a notification deposited with the Director General of WIPO at the time of ratification of, acceptance of or accession to this Treaty or at any time thereafter.

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

2.5.2. Obligations of Article 4(1)

2.5.2.1. Mandatory Exceptions and Limitations

Article 4(1)(a) requires states to introduce E&Ls in their domestic laws “to facilitate the availability of works in accessible format copies for beneficiary persons.” Specifically, national laws must incorporate E&Ls to the following exclusive rights of copyright owners: the right of reproduction, the right of distribution, and the right

of making available to the public.⁴⁴ These E&Ls authorize two types of activities: (1) the creation of accessible format copies; and (2) the transfer of those copies to beneficiary persons, either directly or via an authorized entity. The following table outlines the types of activities that Article 4(1)(a) requires and provides examples of each activity:

<i>Exclusive right</i>	<i>Types of activities authorized</i>	<i>Examples</i>
Reproduction	<ul style="list-style-type: none"> – Conversion of copies in conventional formats into accessible format copies – Reproduction of accessible format copies 	<ul style="list-style-type: none"> – Creation of an audiobook from a conventional book – Making copies of a Braille book
Distrib-	– Transfer or sale	– Non-

⁴⁴ For additional information about the content and scope of these exclusive rights, see SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND* (2d ed. 2006).

<i>Exclusive right</i>	<i>Types of activities authorized</i>	<i>Examples</i>
distribution	of accessible format copies to or between beneficiary persons, to or between beneficiary persons and authorized entities, or between authorized entities—whether or not through the transfer of ownership	commercial lending of accessible e-books – Gifts and donations
Making available	– Scanning and uploading files into the “cloud” or other digital storage system for purposes of creating a library of works available for use exclusively by beneficiary	– Posting of an audiobook or e-book for download by beneficiaries or authorized entities on

<i>Exclusive right</i>	<i>Types of activities authorized</i>	<i>Examples</i>
	persons	a password-protected site, listservs, or other online communities directed solely at serving print-disabled persons

The last sentence of Article 4(1)(a) provides that the E&L “should permit changes needed to make the work accessible in the alternative format.” Put simply, this sentence clarifies that Marrakesh Treaty beneficiaries and authorized entities are entitled to modify copyrighted works if necessary to make such works accessible to print-disabled individuals. The E&L adopted in national implementing legislation must therefore permit changes that may constitute derivative works under

domestic copyright laws, as well as changes that may interfere with the integrity of a work under Article 6*bis* of the Berne Convention.⁴⁵ Such modifications may include preparing written descriptions of photographs or other art in a book; converting written text into audio, Braille, or other accessible formats; making tactile graphics based on images in a book; or adapting font style or size.

The last sentence of Article 4(1)(a) does not limit the nature or scope of permitted changes; rather, it authorizes any changes necessary to make covered works accessible to beneficiaries. Given the wide array of print disabilities and the differing technological needs of individuals who experience those disabilities, states should fully implement this provision of the Treaty to permit beneficiaries and authorized entities to make whatever modifications are necessary to make a work accessible to all print-disabled persons.

⁴⁵ Article 6*bis* provides in relevant part that “the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”

2.5.2.2. Non-mandatory Exceptions and Limitations

In addition to the mandatory E&Ls required by Article 4(1)(a), Article 4(1)(b) authorizes (but does not require) states to adopt an E&L to the right of public performance. Such an exception would, for example, permit public recital of literary works for the benefit of the print disabled. To implement the Marrakesh Treaty in ways that better promote its human rights objectives, states should adopt the non-mandatory E&Ls referenced in Article 4. By exercising their discretion to adopt such exceptions, states will more effectively advance the MT's goal of maximizing opportunities for print-disabled individuals to create, use, enjoy, and share covered copyrighted works on terms equivalent to non-print-disabled persons.

2.5.3. Modes of Implementing Article 4(1)

The Marrakesh Treaty gives governments considerable flexibility to give effect to Article 4(1) in their respective national legal systems. The two principal modes of implementation are outlined in Articles 4(2) and 4(3):

2.5.3.1. Article 4(2)—The Safe Harbor Option

Article 4(2) provides a model that states may follow in meeting their obligations under Article 4(1). This model incorporates the requirements of the three-step test (TST), also referenced in Article 11, which requires that the E&Ls enacted to implement Article 4(1) be limited to special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder. Article 4(2) thus creates a “safe harbor” for ratifying states because legislation that follows this suggested approach presumptively meets the requirements of the TST. (We discuss the TST in more detail below in Section 2.8 of the Guide.)

Article 4(2) identifies the E&Ls that national legislation must create as well as the conditions for satisfying the TST. The first part of Article 4(2) describes a recommended E&L for authorized entities; the second part describes a recommended E&L for beneficiary persons. States must enact both provisions in order to comply with the MT.

2.5.3.1.1. The Safe Harbor for Authorized Entities

Under Article 4(2)(a), an acceptable E&L for authorized entities is one that permits authorized entities to engage in three distinct activities:

- making an accessible format copy,
- obtaining such a copy from another authorized entity, and
- supplying the copy directly to a beneficiary person, by any means.

Article 4(2)(a) also provides that national legislation must ensure that copies may be supplied by, among other means, non-commercial lending and “by electronic communication by wire or wireless means.” Thus, states must permit distribution and sharing of accessible format copies through the Internet, a library, or other lending system. Finally, Article 4(2) permits authorized entities to “undertake any intermediate steps to achieve those objectives.” This may include, for example, making backup copies of a work, as well as storing or archiving such copies, to enable conversion into a variety of different formats in the future.

The introduction of an E&L for authorized entities is subject to four cumulative

conditions that seek to balance the rights of beneficiary persons against the interests of copyright holders. These conditions delineate the outer boundaries of the safe harbor E&Ls for authorized entities. States must include all four of these conditions in national implementing legislation:

- (i) the authorized entity “has lawful access to that work or a copy thereof;”
- (ii) the work is converted into an accessible format, provided the conversion does not introduce changes to the work beyond those that are necessary to make it accessible;
- (iii) the accessible format copies “are supplied exclusively to be used by beneficiary persons;” and
- (iv) the activity is “undertaken on a non-profit basis.”

With regard to the first condition, “lawful access” includes access by purchase or by license, or access obtained pursuant to another E&L in national copyright law. For example, if a library licenses an electronic copy of a book or other literary or artistic work covered by the MT, the library has lawful access to a copy of the work and its staff may make an accessible format ver-

sion available to beneficiary persons.

2.5.3.1.2. The Safe Harbor for Beneficiary Persons

Article 4(2)(b) also provides a model for adopting an E&L on behalf of beneficiary persons. Under Article 4(2)(b), an acceptable E&L must make it lawful for both a print-disabled individual and someone acting on his or her behalf—such as a caregiver, teacher, or librarian—to make an accessible format copy of a work.

Two cumulative conditions apply to this E&L: the copy must be for the personal use of the beneficiary, and the beneficiary must have “lawful access” to the work or a copy thereof, as explained above. As with the safe harbor for authorized entities, a state that adopts an E&L for beneficiary persons following the template of Article 4(2)(b) will presumptively satisfy the requirements of the TST.

2.5.3.1.3. Implications of the Safe Harbor Options

Following the safe harbor models of Article 4(2) has important consequences for international copyright law and for the settlement of WTO disputes relating to the TRIPS Agreement. In particular, states that follow the multilaterally-sanctioned

template in Article 4(2) have a strong argument that domestic implementing legislation that follows that template does not violate TRIPS or other copyright conventions that include the TST. Finding such legislation to be contrary to these IP treaties would be inconsistent with the Marrakesh Treaty's plain language, undermine its object and purpose, and render Article 4(2) devoid of practical meaning. Moreover, the fact that the Treaty *prescribes* a specific model for implementing its core obligations is strong evidence that that model is consistent with international copyright law, including the TST.

In addition to harmonizing the rights and obligations in multiple international legal instruments, following the safe harbor models of Article 4(2) has other benefits. It enhances certainty and predictability concerning the MT's interpretation, it facilitates the exchange of accessible format copies across national borders, and it demonstrates the benefits of such exchanges to other countries, encouraging them to ratify and implement the Treaty.

2.5.3.2. Article 4(3)—The Sui Generis Option

As an alternative to the safe harbor in Article 4(2), Article 4(3) of the Marrakesh

Treaty permits a ratifying state to fulfill the obligations in Article 4(1) by providing or relying upon “other” E&Ls in its national law. Countries are thus free to develop their own approach to implementing Article 4(1), for example, by relying on existing statutory exceptions to copyright, including doctrines such as fair use or fair dealing. However, a state that chooses this sui generis approach must ensure that the resulting E&Ls are consistent with other Marrakesh Treaty requirements, including the TST referenced in Article 11 and in other provisions of the Treaty.

Although the sui generis option thus gives governments significant discretion to tailor national implementing legislation to their specific policy goals and the needs of domestic beneficiaries, too much variation between the national laws of countries that ratify the Marrakesh Treaty also has a cost. The more that states harmonize their domestic implementation of the MT, the more they will facilitate cross-border exchanges of accessible format copies. This is especially important for developing and least-developed countries, many of which have limited financial and technological means to create such copies domestically and will need to rely on the

copies transferred from developed countries. For this reason, as well as to enhance legal certainty and predictability, states should consider choosing the safe harbor approach over the sui generis option.

2.5.4. Exceptions and Limitations for the Translation of Copyrighted Works

Many copyrighted works are not published in or translated into languages understood by individuals with print disabilities. The availability of such works in local languages is thus a key aspect of ensuring that beneficiary persons fully realize the access and sharing rights provided in the MT. For print-disabled persons in developing and least-developed countries in particular, having an accessible format copy, such as an audiobook, in a language they understand is vital to achieving the Treaty's broader objective of addressing the book famine.

The Agreed Statement to Marrakesh Treaty Article 4(3) clarifies that the enactment of E&Ls pursuant to this provision "neither reduces nor extends the scope of applicability" of E&Ls states may enact to the exclusive right of translation pursuant to the Berne Convention. In other words,

the MT affirms both the scope of the translation right recognized in the Berne Convention as well as the preexisting exceptions to that right.⁴⁶ States may therefore adopt an exception or limitation that enables beneficiaries and authorized entities to translate a work from one language to another to facilitate access to print-disabled individuals, provided that they do so consistently with the Berne Convention.

2.5.5. The Commercial Availability Option
Article 4(4) of the Marrakesh Treaty allows, but does not require, Contracting Parties to confine the E&Ls adopted pursuant to Article 4 “to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market.” Under this “commercial availability option,” a state may choose to narrow the reach of the MT by prohibiting the creation of accessible format copies of works that the copyright owner has made commer-

⁴⁶ As leading commentators on international copyright law have explained, the right of translation has historically been subject to a range of E&Ls in national laws. RICKETSON & GINSBURG, *supra* note 44, § 13.83 (discussing implied exceptions to translation rights).

cially available in that particular format. For example, a state may decide that the E&L should not authorize the conversion of an academic textbook into Braille if that textbook has already been published in Braille and is available for purchase from the publisher.

At the outset, it is important to emphasize that the commercial availability option is format specific. States may only exclude works that are already available in the particular format sought by a print-disabled person. The availability of a work in one accessible format (such as Braille) cannot prevent a beneficiary or authorized entity from creating or sharing a copy in a different accessible format (such as an e-book or audiobook). This also furthers the MT's object and purpose, since not all formats are accessible to all beneficiaries.

Although the MT permits ratifying countries to adopt a commercial availability requirement, doing so increases the challenges for and burdens on print-disabled individuals. This Guide therefore recommends that states extend E&Ls to all covered works, including works that are commercially available. Prior to the negotiation of the MT, few countries whose

copyright laws included E&Ls for print-disabled individuals included a commercial availability provision. Some countries with such a provision limited it to copies available under reasonable conditions.⁴⁷ These differences among countries means there is little guidance as to how such a standard might operate internationally and what impact it would have on the availability of accessible format copies. The unresolved questions relating to the commercial availability requirement include the following:

- What does commercial *availability* entail? Does it require availability in bookstores? Online? Do bookstores carrying the accessible format copy need to be accessible to beneficiaries in terms of geographic location and physical accessibility? Should the notion of availability include affordability?
- What does *commercial* mean? Does the work need to be offered by a for-profit entity? Or does “commercial” refer to how widely the accessible copy is offered?
- *When* should availability be as-

⁴⁷ See WIPO STUDY, *supra* note 4, at 112–13.

sessed? At the time of publication of the work, at the time a print-disabled person seeks to purchase the work, or at some other time?

- *Where* should commercial availability be assessed? Globally? Regionally? In the relevant national market of a print-disabled person?

The absence of settled answers to these questions counsels states to reject the option of restricting E&Ls to accessible format works that are commercially unavailable. Such a restriction would be fundamentally inconsistent with the MT's overarching goal of ensuring that individuals with print disabilities have an equal opportunity to enjoy covered works on the same terms as sighted persons. The restriction also risks restricting the rights that print-disabled individuals have under other copyright E&Ls, such as exceptions for private copying. The lack of clarity about what constitutes commercial availability would also create significant legal risks for authorized entities and beneficiaries that could deter the effective exercise of their rights under the Treaty.

If, notwithstanding these concerns, a Contracting State nevertheless adopts a

commercial availability restriction, this decision cannot diminish the ability of authorized entities to exchange works across borders. Article 5 (discussed below) does not provide affirmative authority for limiting exports to works that are commercially unavailable. Thus, as long as the copy was lawfully made in the jurisdiction in which it originates, it may be exported to other Contracting Parties.

2.5.6. The Remuneration Option

Article 4(5) of the Marrakesh Treaty permits states to decide whether E&Ls adopted pursuant to Article 4 should be subject to remuneration. This optional provision allows states to condition the creation, distribution, or making available of accessible format copies upon the payment of a royalty or other license fee to the copyright holder.

Although the option of requiring remuneration is available to states, it should generally be avoided. Article 4(5) ensures that countries that already have a remuneration requirement are not required to change their existing laws. It also gives states discretion to include a remuneration requirement in newly adopted E&Ls.

However, a widely-adopted remunera-

tion requirement would impede the creation and exchange of accessible format works in at least two respects. First, it would introduce unnecessary complexity that could deter beneficiaries and authorized entities from exercising their MT rights. Second, remuneration creates a financial burden that may make works effectively unavailable for many print-disabled individuals. Remuneration thus poses a particular risk for developing and least-developed countries, as well as for poor individuals in middle-income and wealthy countries.

A broad remuneration requirement also creates a risk of discrimination between print-disabled and non-print-disabled individuals. The exercise of rights under national E&Ls is not typically conditioned on the payment of compensation, and if required, remuneration generally applies only to specific and narrow statutory licenses.⁴⁸ Imposing remuneration for the

⁴⁸ Nor is remuneration required by international human rights law. The Special Rapporteur on Cultural Rights, for example, has explained that uncompensated uses can be consistent with the protection of the interests of authors, particularly where requiring compensation would create a financial or administrative barrier to legitimate uses. See SR Copyright Report, *supra* note 3, ¶ 72.

exercise of MT rights would therefore place a burden on print-disabled individuals that does not generally apply to non-print-disabled individuals. This would not only be inconsistent with the MT's objectives, but could also conflict with a state's obligation to avoid discrimination on the basis of disability as mandated by the CRPD and other international human rights treaties.

States that nonetheless decide to create or retain a remuneration requirement should ensure that it minimizes the burden on print-disabled individuals. If the cost of remuneration falls on individual beneficiaries, it must be set at rates that do not make works financially inaccessible and that are appropriate to economic, social, and cultural circumstances in different jurisdictions.

The *process* for settling on the amount of remuneration must also minimize the burden on print-disabled individuals. A statutory scheme that establishes predetermined rates would provide clarity to MT beneficiaries and authorized entities; requiring those actors to negotiate with each copyright owner, in contrast, risks imposing an infeasible administrative burden. If negotiation is required, the

state must ensure that beneficiaries and authorized entities can continue to enjoy the rights to make and share accessible format copies prior to reaching an agreement over compensation. In other words, copyright owners should not be allowed to prevent beneficiaries from enjoying their rights under the MT by refusing to negotiate or by setting unreasonably high licensing rates. Finally, the government should continually monitor the remuneration requirement to ensure that it does not impede effective implementation of the Treaty.

2.6. Cross-Border Exchange and Importation of Accessible Format Copies

2.6.1. Introduction and Overview

Articles 5 and 6 of the Marrakesh Treaty regulate the cross-border exchange of accessible format copies. These complementary provisions operate in tandem with Article 4 to enhance the global diffusion of such copies, including by requiring states to permit the export and import of accessible format copies subject to certain conditions. The Treaty seeks to accomplish these objectives by requiring exceptions and limitations to the right of distribution of copyrighted

works and the right of making such works available. As with Article 4, although the adoption of these E&Ls is mandatory, the Treaty provides flexibility to states in giving effect to these provisions in legislation implementing the MT or other national laws.

TEXT OF THE MARRAKESH TREATY

Article 5

Cross-Border Exchange of Accessible Format Copies

1. Contracting Parties shall provide that if an accessible format copy is made under a limitation or exception or pursuant to operation of law, that accessible format copy may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party.
2. A Contracting Party may fulfill Article 5(1) by providing a limitation or exception in its national copyright law such that:

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

(b) authorized entities shall be permitted, without the authorization of the rightholder and pursuant to Article 2(c), to distribute or make available accessible format copies to a beneficiary person in another Contracting Party; provided that prior to the distribution or making available the originating authorized entity did not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons.

3. A Contracting Party may fulfill Article 5(1) by providing other limitations or exceptions in its national copyright law pursuant to Articles 5(4), 10 and 11.

4. (a) When an authorized entity in a Contracting Party receives accessible format copies pursuant to Article 5(1) and that Contracting Party does not have obligations under Article 9 of the Berne Convention, it will ensure, consistent with its own legal system and practices, that the accessible format copies are only reproduced, distributed or made available for the benefit of beneficiary persons in that Contracting Party's jurisdiction.
- (b) The distribution and making available of accessible format copies by an authorized entity pursuant to Article 5(1) shall be limited to that jurisdiction unless the Contracting Party is a Party to the WIPO Copyright Treaty or otherwise limits limitations and exceptions implementing this Treaty to the right of distribution and the right of making available to the public to

certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder.

(c) Nothing in this Article affects the determination of what constitutes an act of distribution or an act of making available to the public.

5. Nothing in this Treaty shall be used to address the issue of exhaustion of rights.

Article 6

Importation of Accessible Format Copies

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

2.6.2. Substantive Obligations of Articles 5 and 6

2.6.2.1. Article 5—Export of Accessible Format Copies

Article 5(1) requires states to allow authorized entities within their borders to transfer accessible format copies of covered copyrighted works to authorized entities and beneficiary persons in other Marrakesh Treaty countries. This transfer or export right, which can be exercised by the distribution of physical or electronic copies, does not require the consent or permission of the copyright owner.

Article 5(1) plays an important role in achieving the MT's objectives. First, it addresses the needs of print-disabled individuals in countries with limited financial or technological ability to produce accessible format materials on their own. Without a right to receive copies made abroad, these individuals would enjoy few of the benefits that the MT is designed to achieve. Second, Article 5(1) seeks to increase the exchange and diffusion of these materials between countries and regions at different levels of socioeconomic development, ensuring that countries with limited or no capacity to produce ac-

cessible format copies are not excluded from the MT's benefits. Third, such exchanges avoid inefficiency and duplication of investment in the production of accessible format copies by allowing those works to be shared once they are created, rather than requiring that they be recreated in every country.

The right to export in Article 5(1) applies when the accessible format copy is (1) "made under a limitation or exception" or (2) "pursuant to operation of law." With regard to the first clause, states have considerable leeway to provide the authority to make accessible format copies eligible for export. As explained in greater detail below, the simplest way for a state to authorize the creation of an accessible format copy is by enacting a limitation or exception that is tailor-made for this purpose.

The right to export also applies when the accessible format copy is made "pursuant to operation of law." This phrase appears only once in the MT and is undefined. However, because this phrase is identified as an alternative to "a limitation or exception," a reasonable interpretation is that the phrase includes an accessible format copy made pursuant to any provi-

sion of domestic law. In other words, the phrase “operation of law” encompasses domestic laws—such as disability rights and non-discrimination statutes or administrative regulations—that authorize schools and other educational institutions to provide accessible format copies to print-disabled individuals. It also includes laws providing similar authorization to libraries, government agencies, and other non-profit institutions.

In addition, the phrase “operation of law” may apply to works that—although technically satisfying internationally-recognized criteria for copyright protection—are statutorily excluded from copyrightable subject matter. The Agreed Statement concerning Article 5(1), which provides that “nothing in this Treaty reduces or extends the scope of exclusive rights under any other treaty,” confirms that states retain these preexisting flexibilities. Article 5(1), in turn, makes clear that states must allow accessible format copies created pursuant to this authority to be exchanged across borders.

As discussed above, Article 4 allows Contracting Parties to condition the creation of an accessible format copy on the commercial unavailability of the work in

the desired format (although this Guide recommends against adopting such a requirement). This option does not, however, appear in Article 5. It follows from the established principles of treaty interpretation discussed in Chapter 1 that the MT does not provide affirmative authority for such a restriction. The Treaty's human rights objectives further support the conclusion that states should not condition the export of accessible format copies on the commercial unavailability of the particular formatted work in the destination state.

The right to export accessible format works also does not depend on whether the destination state has enacted a commercial unavailability restriction in its domestic law. It is up to the destination state—not the exporting state—to decide under Article 6 (discussed below) whether to limit imports of accessible format copies to works that are not commercially available in that particular format. Governments may not dictate the discretionary policy choices adopted by other MT states in implementing the Treaty. Conditioning export on whether the destination state would allow the copy to be made would be unworkable, and would imper-

missibly burden the exercise of MT rights as it would effectively require authorized entities to know the law of all the jurisdictions in which beneficiaries might use accessible format works.

2.6.2.2. Article 6—Import of Accessible Format Copies

Functioning as a complement to Article 5(1), Article 6 requires states to allow beneficiary persons, someone acting on their behalf, and authorized entities to import accessible format copies for beneficiary persons without the copyright owner's authorization or consent. Two aspects of Article 6 are worth emphasizing—who can import accessible format copies, and the location from which such copies can originate.

As for the first issue, the words “to the extent” in Article 6 link the right of importation to the right to create accessible format copies required by Article 4. A state that allows print-disabled individuals, their agents, and authorized entities to make an accessible format copy must also, therefore, allow those same actors to import such a copy pursuant to Article 6. Stated more plainly: the right to create carries with it the right to import.

Second, Article 6 does not require that

the imported copy originate in a Contracting Party. As a result, countries that have ratified the Treaty may permit importation of accessible format copies from countries that have not ratified the MT. Authorizing importation from these non-MT countries will expand the availability of accessible format copies to print-disabled individuals and authorized entities, wherever they are located.

2.6.3. Modes of Implementation of Articles 5 and 6

As is the case with Article 4, the MT gives governments significant leeway in how they choose to implement Article 5(1) and 6. A summary of the available implementation options follows:

2.6.3.1. Article 5(2)—The Safe Harbor Option

As with Article 4(2), Article 5(2) sets out a method for implementing Article 5(1) that is presumptively compliant with the TST and thus provides a “safe harbor” for MT countries. Specifically, Article 5(2) allows states to implement Article 5(1) by introducing an exception or limitation in their domestic laws that permits authorized entities to distribute or make available accessible format copies to authorized entities or beneficiary persons in another

MT country.

States must make this exception or limitation subject to the following two conditions: (1) if the recipient is an authorized entity, the distribution or making available is for the exclusive use of beneficiary persons; and (2) the sending authorized entity, prior to the transfer, does not “know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons.” The Agreed Statement to Article 5(2) provides that “it may be appropriate for an authorized entity to apply further measures to confirm that the person it is serving is a beneficiary person and to follow its own practices as described in Article 2(c).” Viewed together, Article 5(2) and its Agreed Statement thus strike a careful balance between ensuring that authorized entities are not subject to burdensome requirements or standards, and ensuring that specific transfers of accessible format copies are made in accordance with the conditions set forth in the MT.⁴⁹

⁴⁹ A few countries have imposed restrictions on exports that go beyond the Marrakesh Treaty’s requirements. Israel, for example, appears to require

The Agreed Statement also clarifies that states may not impose additional record-keeping or other administrative burdens on authorized entities. These entities may voluntarily employ further measures to confirm that the individuals whom they serve are beneficiaries. The state cannot, however, require authorized entities to engage in these additional measures. This is confirmed by the Agreed Statement's reference to Article 2(c), which explicitly allows authorized entities to follow their own practices in determining whether the individuals they serve are beneficiaries. Requiring additional measures would risk burdening authorized entities and inhibiting them from sharing copies across borders, thus limiting the effectiveness of the Treaty.

that an authorized entity satisfy itself that the exported copy will not be transferred or used by non-beneficiary persons. Singapore requires that an exporting authorized entity take steps "prescribed in regulations" to verify the identity of the foreign entity or beneficiary person requesting the materials. Because the precise meaning of these provisions is uncertain, they may deter authorized entities from exporting copies even when doing so would be lawful. More importantly, these provisions are incompatible with the MT to the extent that they charge authorized entities with constructive knowledge that exported copies will be used by non-beneficiary persons.

2.6.3.2. Article 5(3)—The Sui Generis Option

As an alternative to the “safe harbor” in Article 5(2), Article 5(3) of the Marrakesh Treaty allows ratifying countries to satisfy the export obligation in Article 5(1) by introducing “other” E&Ls in their domestic laws. In order to enable authorized entities to know what materials they are allowed to export, such laws should clearly define the conditions under which exports are authorized. In addition, E&Ls adopted pursuant to this sui generis option must comply with the requirements of Article 5(4), Article 10 (general principles on implementation), and Article 11 (the three-step test).

Article 5(4) addresses situations in which a country that ratifies the Marrakesh Treaty is not also a party to an IP treaty that requires that state to comply with the three-step test (TST). In such a situation, it is possible that an authorized entity might distribute the work unencumbered by the obligation of the TST. Article 5(4) addresses this by providing that an authorized entity in a state that is not a party to the Berne Convention or the WIPO Copyright Treaty (WCT), or which does not otherwise incorporate the TST in

its domestic law, can receive an accessible format copy made in another state but may not distribute that copy to another jurisdiction.

To be more precise, Article 5(4) puts a jurisdictional limitation on the use of accessible format copies that are exported to authorized entities in countries not bound by the TST:

1. Article 5(4)(a). An authorized entity located in a country that is not a party to the Berne Convention that receives an accessible format copy must ensure that such copy is “only reproduced, distributed or made available for the benefit of beneficiary persons *in that Contracting Party’s jurisdiction*” (emphasis added).
2. Article 5(4)(b). An authorized entity located in a state that is neither a party to the WCT, nor limits E&Ls enacted to implement the Marrakesh Treaty in ways that comply with the three-step test, must confine any distribution and making available of accessible format copies “to that jurisdiction.”

In other words, unless a Contracting Party to the Marrakesh Treaty has also ratified

the WCT, or unless its exceptions and limitations are three-step-test compliant, authorized entities located in that state may receive accessible format copies from abroad and may use and distribute such copies domestically, but may not export those copies to another Contracting Party.⁵⁰

Several other conclusions follow from Article 5(4). First, a MT Contracting Party that is *also* a WCT Member is eligible to permit exports of accessible format copies.

Second, a MT Contracting Party that is *not* a WCT Member but which implements exceptions and limitations following the template provided in Article 4(2)—the “safe harbor” implementation approach that presumptively satisfies the TST—may also permit exports of accessible format copies.

Third, a MT Contracting Party that *is not* a WCT member and implements the Marrakesh Treaty by providing or relying on other exceptions and limitations in its

⁵⁰ The Agreed Statement to Article 5(4)(b) clarifies that the MT does not require Contracting Parties to either: (1) “apply the three-step test beyond its obligations under this [Treaty] or under other international treaties”; or (2) “ratify or accede to the WCT or to comply with any of its provisions.”

domestic law—the *sui generis* approach authorized by Articles 4(3) and 5(3) of the MT—must ensure that these domestic E&Ls are consistent with the TST before permitting exports of accessible format copies.

2.6.4. *Exhaustion of Rights*

Article 5(5) stipulates that the Marrakesh Treaty does not affect the “exhaustion of rights.” The exhaustion principle—also known as the “first-sale doctrine”—provides that once the owner of a particular copy of a work sells or transfers ownership to another person or entity *with the authorization of the copyright owner*, the new owner is free to dispose of that copy in any way he or she deems appropriate, including through resale, donation, or lending. Given that Article 5 and the MT as a whole address transfers that are *not authorized by rights holders*, it may seem unnecessary to include a provision on exhaustion in the Treaty. However, similar provisions appear in many other IP conventions. The primary purpose of these clauses is to emphasize that nothing in those agreements—or in the MT—modifies preexisting international rules concerning exhaustion.

2.6.5. Implementation of Article 6

The Agreed Statement concerning Article 6 specifies that Marrakesh Treaty ratifying countries “have the same flexibilities set out in Article 4 when implementing their obligations under Article 6.” This means that all of the options and discretionary choices available when implementing Article 4 are equally applicable to the implementation of Article 6. These “flexibilities” include:

- Article 4(3) allows states to “fulfill Article 4(1) by providing other limitations or exceptions in its national copyright law pursuant to Articles 10 and 11.” This flexibility allows states to implement Article 6 through the introduction of other E&Ls, subject to their compliance with the TST.
- Article 4(4) permits states to confine Article 4 E&Ls “to works which, in the particular accessible format, *cannot be obtained commercially* under reasonable terms for beneficiary persons in that market” (emphasis added). Accordingly, each state is permitted—but not required—to introduce a “commercial availability” requirement

on imports of accessible format copies.

- Article 4(5) permits states to determine whether Article 4 E&Ls should be made “subject to remuneration.” States thus have the discretion to require that imports of accessible format copies be conditioned on payment of a reasonable royalty to the rights holder.

For reasons discussed in the Guide’s analysis of MT Article 4, a state that adopts the commercial availability option or the remuneration option risks imposing additional hurdles to the creation and cross-border transfer of accessible format copies. Such impediments undermine the MT’s human rights objectives. The negative effects of adopting either provision in the context of Article 6 would be especially severe for beneficiary persons in developing and least-developed countries, many of which have neither the technological capacity nor the financial means to meet the needs of their print-disabled citizens.

2.6.6. Cross-Border Issues Not Addressed in the Marrakesh Treaty

The MT does not address two issues of

great importance for expanding the global availability of accessible format copies. States nevertheless have the discretion to regulate these issues, and doing so would enhance the achievement of the Treaty's objectives:

- Distribution of accessible format copies to non-MT countries. Expanding the exchange of accessible format copies to include exports to and imports from countries that are not members of the MT is neither expressly authorized nor expressly prohibited by the Treaty. However, such an expansion offers significant advantages for beneficiary persons worldwide. First, it would make greater numbers and varieties of accessible format copies available to more people with print disabilities in more countries, thus augmenting the Treaty's effects in MT Contracting Parties. Second, it would demonstrate the benefits of cross-border exchanges.
- Direct exchanges between beneficiary persons. Although also not expressly allowed or prohibited by the Treaty, transfers of accessible format copies

among print-disabled individuals, including in-person exchanges, sharing via online platforms, and transfers among diaspora communities who share a language, would also help to advance the attainment of the Treaty's goals. Direct exchanges between sighted persons are usually effectuated under one of several exceptions in national copyright law, including personal use, fair use, and exhaustion of rights. Similarly, direct exchanges between beneficiary persons should be contemplated either within these exceptions or explicitly recognized in MT-implementing legislation.

In conclusion, the Marrakesh Treaty's cross-border exchange provisions are central to the effective implementation and operation of the Treaty. Working in tandem with the E&Ls required by Article 4, the export and import rights mandated by Articles 5 and 6 aim to establish a global network for diffusing accessible format copies across borders and increasing the availability of such works to all print-disabled individuals without regard to the financial or technological capacity of the countries in which they reside.

2.7. Technological Protection Measures

2.7.1. Introduction and Overview

Prohibitions on the circumvention of technological protection measures (TPMs)⁵¹ have been a requirement of international copyright law since the conclusion of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) in 1996.⁵² Provisions prohibiting the circumvention of TPMs have been incorporated into the national laws of many WIPO member states and in regional and

⁵¹ “TPMs take various forms and their features are continually changing, but some major features remain constant. The most basic and most important kind of TPM is access control technology. One common way of controlling access is encrypting or scrambling the content. In such case the user gets the data but must follow an additional procedure to make it usable. Another form of access control is a procedure that allows access to a source only with proof of authorisation, for example, password protection. The other major type of TPM, copy or use controls, enable the rights owner to allow certain permitted activities but to prevent illicit activities by a user who has access to the work.” IFPI, *The WIPO Treaties: Technological Measures* (2003), <http://www.ifpi.org/content/library/wipo-treaties-technical-measures.pdf>

⁵² See WCT, art. 11; WPPT, art. 18. A provision requiring the effective legal protection of TPMs also appears in Article 15 of the 2012 Beijing Treaty on Audiovisual Performances.

plurilateral trade agreements. As a result, the use of diverse technological tools, often supplemented by restrictive contractual stipulations, has become a standard way that copyright owners regulate access to, and use of, digital works.

However, TPMs can prevent lawful uses of copyrighted works, including accessing, creating, and sharing of accessible format copies by print-disabled persons and authorized entities. Such uses of TPMs can impede the exercise and enjoyment of the rights granted in the Marrakesh Treaty and frustrate the objectives of the CRPD because TPMs impose barriers on disabled individuals that prevent them from fully participating in society. The MT aims to strike a balance between upholding legal rules that prevent the circumvention of TPMs while ensuring that such rules do not deter or impede print-disabled individuals and authorized entities from accessing, creating, and sharing accessible format copies. These issues are addressed in Article 7 of the Treaty.

TEXT OF THE MARRAKESH TREATY

Article 7

Obligations Concerning Technological Measures

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

2.7.2. Analysis

Article 7 requires states that provide legal protection of TPMs to ensure that such protection does not prevent the exercise of the E&Ls required by Article 4, or the rights conferred under Articles 5 and 6 of the Treaty. The exceptions required by the MT are in addition to any existing or future exceptions to TPMs provided under national law. Under Article 7, states must ensure that exceptions to the legal pro-

tection of TPMs exist for individuals with print disabilities and for authorized entities. Accordingly, where national law prohibits the circumvention of TPMs, a state must ensure that this prohibition prevents neither the creation of nor access to digital works, nor their legitimate sharing and use by authorized entities and beneficiary persons.

Several interrelated principles can be gleaned from the text of Article 7. First, states that do protect TPMs must ensure that the rights of MT beneficiaries and authorized entities are not impaired by such protection, either formally (for example, in legislation or administrative regulations) or in practice (for example, due to the actions of copyright owners or other private actors). Article 7 uses the words “shall” and “ensure” to underscore the mandatory nature of this obligation to safeguard the rights of print-disabled persons against uses of TPMs that interfere with MT rights—an emphasis that is required by the MT’s human rights goals.

Second, Article 7 only applies to MT states that prohibit the circumvention of TPMs. A number of countries do not currently have an international obligation to enact such a prohibition, such as those

not parties to the WCT or WPPT. Although Article 7 does not formally apply to these states unless and until they enact laws prohibiting the circumvention of TPMs, it is nonetheless recommended that such states include in legislation implementing the MT an exemption from anti-circumvention laws for the creation and sharing of accessible format copies by authorized entities and beneficiaries. This will ensure that authorized entities and beneficiaries are protected if the state does later adopt legislation prohibiting the circumvention of TPMs, or in cases where private contractual arrangements prohibiting circumvention have a similar effects on MT rights.

Third, the simplest and least burdensome way to implement Article 7 is by enacting a legislative or administrative exemption to the ban on circumventing TPMs. For example, the U.S. Library of Congress (in which the U.S. Copyright Office is located) is empowered to exempt works from the prohibition on circumventing TPMs. Since 2003, it has exempted literary works in electronic form for the use of individuals with disabilities.⁵³ Although

⁵³ For the current version of the regulation, see Exemptions to Prohibition against Circumvention, 37

the Library of Congress process has shortcomings (discussed below), its express exemption sends a clear signal to beneficiaries and authorized entities that they can circumvent TPMs to create accessible format copies.

Without such an express exemption, beneficiaries and authorized entities would have to assert MT-based or other copyright E&Ls as defenses in a lawsuit, and the associated legal risk might cause some to refrain from exercising MT rights. The experience of European Union member states has also shown that relying on courts or administrative agencies to resolve conflicts between copyright E&Ls and TPMs has not been effective in protecting the exercise of lawful rights.⁵⁴ An

C.F.R. § 201.40(b)(2) (2015).

⁵⁴ The EU InfoSoc Directive requires states to ensure that TPMs do not restrict the exercise of copyright exceptions. InfoSoc Directive, *supra* note 7, ¶¶ 51–52. Notwithstanding this requirement, many EU member states have not included a provision in their respective national laws exempting circumvention of TPMs to ensure access, whereas others have included only a general statement about the importance of avoiding conflict or have delegated the matter to a court or agency. None of these approaches have proven effective in ensuring that TPMs do not inhibit lawful access. Caterina Sganga, *Disability, Right to Culture and Copyright: Which Regulatory Option?*, 29 INT’L REV. LAW, COMPUTERS & TECH. 88, 102 (2015).

express legislative or administrative exemption best achieves the object and purpose of the MT in general, and of Articles 4 and 7 in particular.

Any such exemption should also be both permanent and technology neutral. For example, the U.S. Library of Congress, which requires the exemption to be renewed periodically, subject-s beneficiaries to the vagaries of the administrative rule-making process. The earliest versions of the exemption were also limited to “[l]iterary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling of the ebook’s read-aloud function and that prevent the enabling of screen readers to render the text into a specialized format.”⁵⁵ Such a limitation was in tension with the CRPD because it was confined to specific assistive technologies that some print-disabled individuals may not have been able to use or that may not have responded to their needs. The exemption was revised in 2012 to eliminate references to particular formats and to focus on functionality.

⁵⁵ See, e.g., 37 C.F.R. § 201.40(b)(4) (2003).

A technologically neutral approach better fulfills the purposes of the MT because it allows beneficiaries and authorized entities to engage in any activity necessary to make a work accessible regardless of TPMs. Such an approach would also be consistent with the definition of “accessible format copy” in MT Article 2(b) as a copy that permits print-disabled individuals “to have access as feasibly and comfortably as a person without visual impairment or other print disability.”

Other approaches to complying with Article 7 risk incompatibility with the Marrakesh Treaty’s object and purpose. For example, requiring copyright owners to provide authorized entities and beneficiaries with the means to open the “digital lock” created by a TPM risks chilling the exercise of MT rights by placing the onus on beneficiaries and authorized entities to affirmatively request access on a work-by-work basis.

Even creating an express exemption still puts a burden on beneficiaries and authorized entities to take affirmative measures to circumvent a TPM, thus denying individuals with print disabilities access to printed materials on a basis of equality with others. Beneficiaries and au-

thorized entities may lack the technical capacity to circumvent TPMs, or they may be fearful that circumvention—even if allowed—creates a risk of civil liability or even criminal punishment. As explained above, the MT itself emphasizes that print-disabled individuals are entitled to access “as feasibly and comfortably” as someone without a print disability. Access that is possible only if one has the requisite know-how, technology, and risk tolerance needed to break a technological lock is not equivalent to the access enjoyed by non-print-disabled individuals.

To alleviate these burdens, states may consider requiring copyright owners to deposit with a library or government agency copies of works without TPMs so that such copies could be provided to beneficiary persons and authorized entities upon request. This approach would help reduce the chilling effect of TPMs by giving beneficiaries and authorized entities access to the deposited version of a work that does not require circumvention. Providing access to such a depository, however, should be in addition to, not instead of, allowing authorized entities and beneficiaries to circumvent TPMs and make accessible format copies on their

own.

Finally, the Marrakesh Treaty does not require authorized entities to apply TPMs to accessible format copies; the Agreed Statement to Article 7 merely permits such entities to do so.⁵⁶ Inasmuch as ensuring the effective implementation and operation of the Treaty is ultimately the legal responsibility of governments, states must prevent private parties, including authorized entities, from using TPMs to frustrate the realization of these goals.

In sum, the essential purpose of Article 7 is to ensure that TPMs do not impede enjoyment of the rights guaranteed by the Treaty. Avoiding this result is especially important for beneficiaries in developing and least-developed countries, who are likely to be unduly burdened by TPMs. Given that cross-border exchanges of accessible format copies will significantly enhance the social welfare and human rights of print-disabled individuals in some of the world's poorest regions, governments should adopt measures to

⁵⁶ The Agreed Statement on Article 7 provides: "It is understood that authorized entities, in various circumstances, choose to apply technological measures in the making, distribution and making available of accessible format copies and nothing herein disturbs such practices when in accordance with national law."

facilitate the conditions needed for these individuals to effectively enjoy the rights conferred by the MT. Such measures may include, for example, providing exemptions from criminal liability and affirmatively encouraging the development of circumvention technologies available to authorized entities and print-disabled individuals.

2.8. the Three-Step Test

The three-step test (TST) found in multiple IP treaties appears in several provisions of the Marrakesh Treaty. The first reference occurs in Article 5(4)(b), which limits the distribution and making available of accessible format copies to countries whose E&Ls benefitting print-disabled individuals are either (1) expressly subject to the test, or (2) indirectly subject to it by virtue of the state's membership in the WCT. Article 11, in turn, requires application of the TST when Contracting Parties "adopt[] measures necessary to ensure the application of this Treaty."⁵⁷

⁵⁷ More specifically, Article 11 requires application of the TST as set out in Article 9(2) of the Berne Convention, in Article 13 of the TRIPS Agreement, and in Articles 10(1) and 10(2) of the WCT. Each of the four

This section of the Guide explains the policy rationales underlying the TST and the long-standing recognition that E&Ls benefitting the blind are consistent with the test. After describing how this well-settled position informs the proper interpretation of the TST in the MT, the section concludes that the “safe harbor” E&Ls in Articles 4, 5, and 6 are presumptively compatible with the TST.

2.8.1. Policy Rationales of the Three-Step Test

The TST for evaluating exceptions and limitations has been part of international copyright law for nearly half a century. It was first adopted in connection with the codification of the exclusive right to reproduce copyrighted works, which was introduced in the 1967 Stockholm Revision to the Berne Convention. Article 9(2) of the Berne Convention specified that E&Ls permitting the reproduction of works without the authorization of the copyright

paragraphs in Article 11 refers to the TST as embodied in these IP treaties. The Marrakesh Treaty’s multiple references to different iterations of the TST refer to essentially the same substantive standard. Accordingly, this Guide applies a common interpretation of the TST to all Treaty provisions that reference the test.

holder would be allowed upon satisfaction of three conditions—namely, that such reproduction applies to (1) “certain special cases” that (2) do “not conflict with a normal exploitation of the work” and (3) do “not unreasonably prejudice the legitimate interests of the author.”

Since the adoption of the TRIPS Agreement in 1994, the TST has applied to all of the exclusive rights of copyright holders. The WIPO Copyright Treaty of 1996 extended the test to E&Ls to exclusive rights in the digital environment. The TST is thus firmly anchored in international copyright law, a fact that explains its numerous references in the Marrakesh Treaty.

The TST demarcates the policy spaces within which states may legitimately enact E&Ls to the exclusive rights of copyright holders.⁵⁸ In this capacity, the test serves a dual purpose. One objective is to safeguard these rights against unduly expansive and unregulated national limitations or exceptions. A second and equally im-

⁵⁸ See, e.g., MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW 1 (2004) (stating that when “[v]iewed from a functional perspective,” the TST “sets limits to limitations on exclusive rights”).

portant goal, however, is to prevent “encroach[ment] upon the margin of freedom which the member countries regard[] as indispensable to satisfy important social or cultural needs.”⁵⁹ E&Ls that are consistent with the TST are thus not merely permissible restrictions on copyright; they are affirmative expressions of government policy that embody socially desirable and salutary objectives, including the realization of a range of internationally protected human rights.⁶⁰

2.8.2. The Three-Step Test and Exceptions and Limitations for the Blind

Despite its functional importance, the TST has been criticized as vague and ambiguous and thus open to a range of interpretations. For example, although some interpretations of the TST view it as cumulative, such that each step of the test must be satisfied for an E&L to be permissible,

⁵⁹ *Id.* at 48.

⁶⁰ *See, e.g.,* SR Copyright Report, *supra* note 3, ¶ 61 (“Copyright exceptions and limitations—defining specific uses that do not require a license from the copyright holder—constitute a vital part of the balance that copyright law must strike between the interests of rights-holders in exclusive control and the interests of others in cultural participation.”).

others disagree.⁶¹ In practice, the TST's application to actual or potential E&Ls has remained unsettled and contested. Few national courts or international tribunals have interpreted the test in the context of concrete disputes involving domestic copyright laws, and commentators remain divided over how to interpret the handful of decisions that have addressed the test.⁶²

In light of this ambiguity, the drafting history of the 1967 Revision of the Berne Convention is especially useful for identifying those E&Ls that the Berne negotiators expressly discussed and approved. Of critical importance for the MT, the drafting history clearly demonstrates that E&Ls benefitting the blind have been understood to satisfy the TST since its inception.

A review of the negotiating record re-

⁶¹ See SENFTLEBEN, *supra* note 58, at 125–27; Max Planck Institute for Innovation and Competition, *A Balanced Interpretation of the "Three-Step Test" in Copyright Law* (Sept. 1, 2008), <http://www.ip.mpg.de/en/the-institute/events/patentrechtszyklus.html>

⁶² See *United States—Section 110(5) of the U.S. Copyright Act*, WTO Doc. WT/DS160/R (June 15, 2000) [hereinafter WTO § 110(5) Panel Report]. See generally GRAEME B. DINWOODIE & ROCHELLE C. DREYFUSS, *A NEOFEDERALIST VISION OF TRIPS: THE RESILIENCE OF THE INTERNATIONAL INTELLECTUAL PROPERTY REGIME* (2012).

veals that Berne member states agreed in Stockholm to a compromise package deal that codified the exclusive reproduction right in exchange for delineating a common outer boundary to the member states' authority to enact E&Ls to that right in their domestic copyright laws.⁶³ As part of this compromise, the drafters explicitly recognized that certain long-standing E&Ls were understood to presumptively satisfy the TST. To this end, WIPO prepared a list of E&Ls as they existed in 1967. Berne member states understood this list to constitute "certain special cases" consistent with the TST. Notably, the list specifically referenced two provisions benefitting print-disabled individuals:

- (9) Reproductions in special characters for the use of the blind; [and]
- (10) Sound recordings of literary works for the use of the blind.⁶⁴

Thus, the validity of E&Ls benefitting the blind has been accepted since the initial adoption of the TST in 1967. This recogni-

⁶³ See SENFTLEBEN, *supra* note 58, at 81–82.

⁶⁴ Doc. S/1, Records 1967, at 112, n.1 (cited in SENFTLEBEN, *supra* note 58, at 48).

tion has not been questioned in the ensuing five decades, even as international copyright agreements have proliferated. To the contrary, WIPO member states convened a diplomatic conference to adopt the MT for the precise purpose of clarifying and expanding these mandatory E&Ls. This reveals the importance that governments attach to enhancing the ability of persons with print disabilities to access books and other covered works.

2.8.3. Applying the Three-Step Test to the Marrakesh Treaty

The historical importance of E&Ls for the blind—and the understanding that such laws are presumptively compatible with the TST—are important guideposts for interpreting the MT. These long-accepted positions, when viewed in light of the Treaty’s overarching objective of making accessible format copies more widely available to print-disabled individuals, yields four distinct conclusions.

Safe Harbor. As explained elsewhere in this Guide, the core obligations in Articles 4, 5, and 6 of the MT provide “safe harbor” options for E&Ls that allow beneficiary persons and authorized entities to create, share, and exchange accessible

format copies across borders. A state that takes advantage of these safe harbors and enacts domestic E&Ls that follow the approach set forth in the Treaty should be deemed fully compliant with the TST. In particular, countries need not require compensation or limit MT exceptions to works that are commercially unavailable in order to comply with the TST.

Stated differently, the Marrakesh Treaty's carefully negotiated text updates and expands the permissibility of preexisting E&Ls that benefit individuals with print disabilities. Just as the drafters of the 1967 Revision of the Berne Convention expressly identified national E&Ls for the blind as compatible with the TST, so too the negotiators of the MT unequivocally identified a presumptively legal pathway for states to implement the Treaty's core obligations. Any other interpretation would undermine this carefully crafted multilateral bargain and defeat the Treaty's object and purpose.

Flexible Interpretation of the Three-Step Test. The inclusion of the TST in the MT affirms that the test is flexible enough to encompass other E&Ls outside of the safe harbor. The Marrakesh Treaty itself expressly recognizes in Articles 4(3) and

5(3) that states may fulfill their obligations by providing other E&Ls. The “flexibility” of the test for this purpose is underscored in the Treaty’s Preamble,⁶⁵ and further reinforced by the references in MT Article 11 to Articles 10(1) and 10(2) of the WCT. Those provisions of the WCT, in turn, must be understood in light of their associated Agreed Statement, which confirms the flexibility of the TST as consistent with national authority to create and maintain E&Ls.⁶⁶ Taken together, these references to the WCT, as well as the provisions of the Marrakesh Treaty

⁶⁵ The tenth paragraph of the MT’s Preamble reaffirms “the importance and flexibility of the three-step test for limitations and exceptions established in Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works and other international instruments.”

⁶⁶ The Agreed Statement to Article 10 of the WCT provides: “It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.” WCT, Agreed Statement Concerning Article 10.

that incorporate the TST, preserve the discretion of governments to devise their own E&Ls to accomplish the Treaty's objectives.

Application in the Digital Environment. The Marrakesh Treaty's extension of E&Ls to copyrighted works in the digital environment is built on the commitment in the WCT Article 10 Agreed Statement, which envisions the extension of E&Ls appropriate to the digital environment. For example, Article 4(1)(a) of the MT directly invokes the "making available" right of the WCT, and Article 4(2)(a) allows authorized entities to supply accessible format copies to beneficiary persons by "any means, including ... by electronic communication by wire or wireless means." Moreover, MT Article 2 defines "works" to include works "in any media." Taken together, these provisions authorize states to adopt E&Ls that enable print-disabled persons and authorized entities to make and share accessible format copies using the full panoply of social media and digital technologies.

Remuneration. The drafting history of the 1967 Stockholm Revision reveals that states have considerable leeway to choose whether or not to require the

payment of remuneration to copyright owners with respect to E&Ls that are consistent with the Berne Convention. Uncompensated exceptions—whether for private copying, libraries, quotation, or to serve the interests of the blind—are common in national law. Subsequent case law and commentary have recognized, however, that compensation may in some cases ease the tensions between positive law and normative considerations when applying the third and final step of the TST.⁶⁷

Article 4(5) of the Marrakesh Treaty expressly leaves the choice of whether to provide compensation to each government's discretion. Article 4(5) provides that “[i]t shall be a matter for national law to determine whether limitations or exceptions under this Article are subject to remuneration” (emphasis added). If the choice is “a matter for national law,” then that choice cannot be foreclosed by international copyright rules—just as exclusions in the Berne Convention that are “a matter for national law” are per se permissible under that treaty.⁶⁸ As a re-

⁶⁷ See SENFTLEBEN, *supra* note 58, at 131; *cf.* WTO § 110(5) Panel Report, *supra* note 62, ¶ 6.229.

⁶⁸ For example, Article 2(4) of the Berne Convention

sult, a MT state that elects not to require compensation when implementing Article 4 cannot—for that reason alone—violate the TST. A contrary interpretation would not only be at odds with the absence of a compensation requirement in many existing national E&Ls that benefit print-disabled individuals, it would also mean that a discretionary decision that the Treaty expressly delegates to governments is not in fact a choice at all.

Commercial Availability. As previously explained, Article 4(4) of the MT gives countries the option of restricting E&Ls to works in formats that beneficiary persons cannot obtain on commercially reasonable terms. For the reasons discussed elsewhere in this Guide, Contracting Parties should refrain from adopting this condition, which may undermine the Treaty’s important human rights objectives. Moreover, requiring commercial unavailability does not provide legal security that a state’s E&Ls are consistent with international copyright law. To the contrary, as the Agreed Statement to Article 4(4) ex-

provides that “[i]t shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts.”

plains, such a requirement “does not pre-judge whether or not a limitation or exception under [Article 4] is consistent with the three-step test.”

2.8.4. The Three-Step Test and International Human Rights Law

A flexible application of the TST is also reinforced by international human rights law. As noted in Chapter 1 of this Guide, Article 30(3) of the CRPD obligates states to “take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.” The CRPD thus implicitly reinforces the validity of the long-standing E&Ls favoring the print disabled, and expressly mandates affirmative steps—including a flexible approach to the TST—to mitigate tensions between the exclusive rights of copyright owners and the needs of Marrakesh Treaty beneficiaries.

The inclusion of the TST in the Treaty also illustrates a possible role that the test may play in an IP system that respects human rights. As the Special Rapporteur on Culture recently explained,

"[s]tates have a positive obligation to provide for a robust and flexible system of copyright exceptions and limitations to honour their human rights obligations. The 'three-step test' of international copyright law should be interpreted to encourage the establishment of such a system of exceptions and limitations."⁶⁹ This statement sees the TST as mediating between the two legal regimes, ensuring states can apply copyright law in ways that protect human rights and guard against abuses by copyright holders.

⁶⁹ SR Copyright Report, *supra* note 3, ¶ 104.

Putting the Marrakesh Treaty into Practice in National Law

It is essential that the overarching human rights objective of the Marrakesh Treaty—to increase the availability of accessible format copies to print-disabled individuals—is realized not only on paper but also in practice. Article 10(1) of the MT reflects this commitment, emphasizing that each state must “adopt the measures necessary to ensure the application of this Treaty.”

Effective implementation of the MT need not be expensive or complicated, however. At the most basic level, each ratifying country must revise its national copyright laws to authorize the making, using, and sharing of accessible format copies. However, to fully realize the MT’s objectives, states should also build on their preexisting implementation of human rights treaties, including, in particular, the CRPD. Responsibility for putting the MT into practice may also be entrusted-

ed to government IP agencies or offices, working in partnership with human rights institutions.

The sections that follow explain how states can achieve effective implementation by creating legal remedies that allow beneficiaries and authorized entities to assert their rights to create and share accessible format copies (3.1); by vesting authority over the MT in appropriate domestic human rights and IP institutions (3.2); and by authorizing these institutions to engage in monitoring and enforcement activities (3.3).

3.1. Create Legal Remedies

Incorporating the MT into national law is a necessary, but not a sufficient step to ensure the rights of print-disabled persons to make and share accessible format copies. States must also provide remedies for violations of these rights. Access to a remedy is an important principle of international human rights law. It is also critical to ensuring that the rights in the MT are effective in practice. Access to a remedy means that print-disabled individuals and authorized entities must have a means of complaining if the law does not adequately meet their needs or if third

parties violate their rights.

States can provide access to remedies by ensuring that individuals with print disabilities, their representative organizations, and authorized entities can assert the right to create and share accessible format copies as defenses in judicial proceedings. For example, in *HathiTrust*, a recent U.S. lawsuit against libraries that digitized books to enable access by print-disabled individuals, the libraries successfully asserted defenses to claims of copyright infringement under both fair use and the Chafee Amendment—specialized legislation in the U.S. that creates exceptions to copyright for activities on behalf of print-disabled individuals.⁷⁰

States should also ensure that print-disabled individuals and authorized entities can judicially enforce and seek legal confirmation of their rights to create and share accessible format copies. The remedies available to MT beneficiaries should include injunctions, damages, and other forms of relief necessary to fully vindicate these rights. National laws should also permit beneficiaries, authorized entities, and national human rights institutions to

⁷⁰ *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 92 (2d Cir. 2014).

intervene in existing lawsuits.⁷¹ States might also refer to the CRPD or other human rights instruments in MT-implementing legislation to assist courts and other institutions in interpreting the MT to realize its human rights objectives.⁷²

Remedies also provide beneficiaries and authorized entities with the legal certainty and confidence to make, distribute, and share accessible format copies. Even when national law authorizes such activities, these actors may be inhibited from exercising their rights due to vague or ambiguous legal language or the activities of third parties.

States can minimize these chilling effects by ensuring that the exceptions to copyright in MT-implementing legislation are clearly drafted and communicate precisely and unambiguously the rights of

⁷¹ FROM EXCLUSION TO EQUALITY: REALIZING THE RIGHTS OF PERSONS WITH DISABILITIES (HANDBOOK FOR PARLIAMENTARIANS ON THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND ITS OPTIONAL PROTOCOL) 103–04 (2007) [hereinafter HANDBOOK FOR PARLIAMENTARIANS].

⁷² Similarly, some countries provide that national disability law must be read in light of treaties protecting the rights of individuals with disabilities. See UNDP, OUR RIGHT TO KNOWLEDGE: LEGAL REVIEWS FOR THE RATIFICATION OF THE MARRAKESH TREATY FOR PERSONS WITH PRINT DISABILITIES IN ASIA AND THE PACIFIC 42 (2015).

beneficiaries and authorized entities to create and share accessible format copies. Such legislation should also avoid creating additional burdens—such as record-keeping standards, commercial availability requirements, or criteria for verifying beneficiary status—that may deter print-disabled persons and authorized entities from exercising their rights.

Although clearly defining rights and avoiding unnecessary burdens is an important first step, states should also adopt laws and policies that discourage copyright owners from invoking legal proceedings to impede print-disabled individuals and authorized entities from making and sharing accessible format copies. Abusive copyright litigation—and threats of such litigation—can significantly chill the exercise of MT rights. Under both IP law and human rights law, such lawsuits constitute an abuse of rights. States should consider creating civil remedies for harms associated with unfounded lawsuits (such as the common law tort of malicious prosecution), and procedural rules that authorize judges to shift the costs of litigation to the losing party (such as fee-shifting statutes).

States must also ensure that copyright owners do not use contracts to prevent

beneficiaries and authorized entities from creating accessible format works, for example, by including clauses that restrict the use of electronic materials or prohibit circumvention of TPMs. Such contractual clauses defeat the object and purpose of the Treaty. States should therefore consider including a provision in implementing legislation that renders void any contractual clauses that override MT-mandated exceptions and limitations.⁷³

3.2. Empower National Institutions

The Marrakesh Treaty gives states considerable discretion to select institutional arrangements to ensure the effective domestic implementation of the Treaty. States may, for example, vest authority over the Treaty in a national human rights institution (NHRI), an intellectual property office, or an agency charged with protecting civil liberties. They may also distribute these functions across several agencies or ministries.

3.2.1. Human Rights Institutions

One promising option is to connect im-

⁷³ German law, for example, includes such a provision for any contract that overrides an exception to copyright. WIPO STUDY, *supra* note 4, at 45.

plementation of the MT to the processes and institutions already established or envisioned for the CRPD and other human rights treaties. Linking implementation of the MT to these mechanisms helps to ensure that a country's efforts to comply with these treaties are consistent. It also enables the state to build on existing knowledge and expertise, avoid duplication of effort, coordinate activities among government agencies, and provide a coherent policy response to multiple international obligations.

More important, such a harmonized approach helps to ensure that domestic stakeholders—individuals with print disabilities, their advocacy organizations, and institutions charged with protecting human rights and combatting discrimination against persons with disabilities—participate in key decisions relating to how the MT is given effect. Whatever arrangement a state chooses, the responsible institutions must have the independence, powers, and resources to oversee all issues within their mandates, including, if applicable, the authority to investigate complaints about violations of MT access and sharing rights.

CRPD Article 33 requires states to vest

authority over the CRPD in institutions outside of and within government—both an independent mechanism, such as a NHRI, as well as “focal” and “coordination” points within the government.

NHRIs, which are sometimes referred to as “human rights commissions” or “ombudsmen,” typically share a number of common features. They are permanent institutions, usually created by legislation or executive decree. NHRIs are primarily administrative bodies that issue opinions and recommendations; many also have quasi-judicial powers to review complaints and resolve disputes relating to human rights issues. Principles governing the structure of NHRIs call for these institutions to have responsibility for, among other things, monitoring implementation of human rights treaties, reporting to international supervisory mechanisms about the extent of realization of rights, and promoting awareness of rights among the public.⁷⁴ The independence of NHRIs varies according to their relationship to the government, funding sources, membership, and manner of operation. Ideally, NHRIs should be fully independent of the

⁷⁴ HANDBOOK FOR PARLIAMENTARIANS, *supra* note 71, at 98.

government to enable them to more effectively promote, protect, and monitor implementation of human rights.

The CRPD also obligates states to create “focal” points within the government to protect the rights of disabled individuals. Some countries have established new agencies or offices, for example, within the ministry of justice. Others have augmented the powers of existing bodies, such as an agency charged with protecting civil liberties, and still others have distributed these functions across several agencies or ministries.⁷⁵ Focal points engage in a variety of tasks, such as suggesting revisions to national laws and policies, coordinating governmental activities and initiatives, raising awareness, encouraging participation of individuals with disabilities in policymaking, and collecting and analyzing data. Whatever arrangement a CRPD state party chooses, it must give the institution or institutions sufficient powers to oversee all government activities relating to the CRPD.⁷⁶ The focal point, for example, should have adequate resources and permanent appointments and be established at the highest levels of

⁷⁵ See *id.* at 94.

⁷⁶ *Id.* at 94–95.

government.⁷⁷

The “coordination” point required by the CRPD is typically a public body that coordinates various state actions that affect individuals with disabilities.⁷⁸ It facilitates action relating to the CRPD across different areas and at different levels of government. A coordination point should be permanently established and facilitate the participation of individuals with disabilities in decision-making. Each state should ensure that the institutions and processes it charges with implementing and monitoring the MT are connected to this CRPD coordination point.

3.2.2. Intellectual Property Institutions

Inasmuch as the Marrakesh Treaty uses copyright tools to achieve human rights objectives, the domestic agencies and offices responsible for intellectual property laws and policies should also be involved in efforts to implement the Treaty. However, states should avoid vesting such offices or agencies with sole domestic authority over matters relating to the MT. The MT authorizes print-disabled individuals to access, create, and share accessible

⁷⁷ *Id.* at 94.

⁷⁸ *Id.* at 96.

format copies without the authorization of rights holders. These objectives are in some tension with the mandates, working methods, cultures, and constituencies traditionally given to IP institutions.

Nonetheless, the expertise and relationships that these institutions have established over the years can be useful to achieving the MT's goals. For example, these offices understand the often technical aspects of IP law and policy. They also have the connections to private industry that can help to secure the support of rights holders for MT implementation.

Further, IP offices have assumed responsibility for enforcement efforts related to copyright exceptions in other contexts. The U.S. Library of Congress, for example, oversees the process of exempting actions from anti-circumvention legislation.⁷⁹ Because of the MT's dual nature as a human rights and an IP instrument, the most effective approach to implementation may therefore be to create shared authority between the domestic institutions in both areas.

⁷⁹ See, e.g., Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 37 C.F.R. § 201.40(b)(2) (2015).

3.2.3. Linking to the Marrakesh Treaty Assembly

Contracting Parties should link their national implementation mechanisms to the international institution created by the MT—the Assembly of Contracting Parties. According to Article 13(2), the Assembly is responsible for admitting intergovernmental organizations, deciding whether to convene a diplomatic conference to revise the MT, and, most relevant for present purposes, “deal[ing] with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty.”

Each state is responsible for sending one delegate to the Assembly, who may be assisted by alternates, advisors, and experts. As part of creating national mechanisms to implement the MT, a state should identify an appropriate person to serve as its Assembly delegate and provide him or her with appropriate technical, legal, and other support. This delegate should ideally be someone with knowledge and experience in all three subject areas relevant to the Treaty—disability law, international human rights law, and IP law. An individual with expertise in IP law alone would not be well-

suited to fulfill the MT's overriding human rights objectives. Further, states should give serious consideration to appointing one or more print-disabled individuals to serve as the delegate or as members of the delegation to the Assembly.

3.3. Undertake Enforcement Activities

The domestic institutions that each Contracting Party creates and vests with authority over issues relating to the Marrakesh Treaty should engage in a variety of activities to ensure that print-disabled individuals benefit from the rights in the Treaty.

3.3.1. Monitor Rights

Providing beneficiaries and authorized entities with the ability to pursue remedies on their own behalf will not alone ensure effective enforcement of the Marrakesh Treaty. States must also affirmatively monitor the extent to which print-disabled persons are enjoying increased access to books and other covered works. Monitoring is essential to identify whether the rights conferred by the MT are being realized—that is, whether print-disabled individuals and authorized entities are in

fact creating accessible format works and sharing them with beneficiaries in other countries.

By focusing on the actual enjoyment of rights, monitoring also generates crucial information that states can use to identify and tackle specific barriers to access. For example, monitoring may reveal that beneficiaries and their representative organizations are not taking advantage of their MT rights due to lack of knowledge, threats of litigation, the imposition of restrictive contracts, or efforts by third parties to limit access in other ways. Monitoring also helps to ensure that private actors do not create, due to their size or expertise, *de facto* monopolies that dominate the market for accessible format copies. In these and similar situations, a state will need to take additional affirmative steps to overcome these barriers to ensure that the Treaty's objectives are realized.

Monitoring requires an ongoing process of identifying barriers to access that should begin as soon as a state ratifies the MT and continue at periodic intervals after the Treaty is incorporated into domestic law. For example, the domestic institutions mentioned in the previous sec-

tion should collect data about various aspects of compliance, such as the number of works in different accessible formats, the number of works imported and exported, and the number of users benefiting from access to covered works. Where possible, user data should be disaggregated by geographic region, gender, race, ethnicity or other minority status, income, and age, while respecting the privacy of beneficiary persons in accordance with Article 8. Disaggregated information can help to assess not only general levels of rights enjoyment in a particular country, but also whether access and sharing rights are enjoyed without discrimination, including by vulnerable, marginalized, and disadvantaged populations.

Monitoring processes should follow a national plan of action (discussed below) and be undertaken in consultation with beneficiaries and authorized entities. The domestic agencies and institutions responsible for monitoring should report regularly to the government, and the reports should be publicly available, including in accessible formats. Intellectual property offices, for example, might be tasked with reporting on the number and types of beneficiary persons enjoying MT

rights and whether the number of accessible format copies has increased over time.

3.3.2. Enforce Legal Remedies

The domestic institution or institutions charged with responsibility for overseeing the MT should have the authority to pursue remedies on behalf of beneficiaries. Many states empower governmental bodies to seek direct enforcement of rights, both human rights and intellectual property rights. Such a body might monitor the exercise of, and investigate and remediate violations of, MT access and sharing rights, including, where appropriate, by bringing suit on behalf of persons whose rights have been violated.

The institution or institutions responsible for enforcing remedies might also encourage mediation with copyright owners if they engage in activities that impede the enjoyment of MT rights. NHRIs, for example, often have the authority to mediate or conciliate disputes.⁸⁰ Such dispute resolution processes could play an important role in reducing conflicts among copyright owners, beneficiaries, and au-

⁸⁰ HANDBOOK FOR PARLIAMENTARIANS, *supra* note 71, at 98, 102–03.

thorized entities.

3.3.3. Create a National Plan of Action

States should consider integrating the Marrakesh Treaty's objectives into the national plans of action that they develop to implement their obligations under the CRPD and other human rights treaties.⁸¹ A national action plan is typically a comprehensive document that contains both objectives and measurable outcomes set by the government in consultation with key stakeholders. Efforts to implement the MT might be incorporated into existing national action plans to realize the rights of individuals with disabilities. The plans might, for example, increase awareness of Marrakesh Treaty rights, define objectives for expanding access to print materials in accessible formats, and collect data regarding such access. Australia's national plan of action, for example, calls for "[i]ncreased participation of people with disability, their families and carers in the social, cultural, religious, recreational and sporting life of the community."⁸² Aus-

⁸¹ Vienna Declaration and Programme of Action (25 June 1993), ¶ 71.

⁸² Council of Australian Governments, National Disability Strategy 2010–2020, p. 31.

tria's national action plan emphasizes the importance of raising greater awareness of the issue of accessibility and tasks all government ministries with increased public relations work.⁸³

A national action plan might also identify steps to increase access to accessible format copies. Albania's national plan, for example, calls for "[s]upport for the creation of 'talking books' and publications in brail [*sic*], that includes school curricula, technical, legal and artistic literature," and charges nongovernmental organizations and the Albanian Blind Association with this task.⁸⁴ National action plans also enable a state to identify with specificity which part of the government will be responsible for implementation of which objectives and to identify concrete steps for these entities to carry out. States should ensure that all aspects of the plan are accessible to individuals with print disabilities and their representative organizations.

States might also include in their national plans of action measures to encourage the development of technologies to

⁸³ Austrian National Action Plan on Disability 2012–2020, pp. 43–44.

⁸⁴ Republic of Albania, National Strategy on People with Disabilities, 2006, p. 33, <http://www.osce.org/albania/40201?download=true>

enable print-disabled individuals to circumvent TPMs where needed to create accessible format copies. States should consider promoting such access-enhancing technologies through research and development policies. States should also consider eliminating legal liability for creating technologies used by beneficiaries and authorized entities to circumvent TPMs in order to exercise MT rights.⁸⁵

3.3.4. Engage in Training and Outreach

Training and outreach are critical for ensuring the effectiveness of a state's efforts to implement the Marrakesh Treaty. To achieve this goal, individuals with print disabilities, authorized entities, copyright owners, technology and software developers, and the public at large must understand that print-disabled individuals and authorized entities can make and share accessible format copies without permission of the copyright owner.

Training and outreach initiatives should target all of these actors. Outreach to

⁸⁵ Article 9(2)(h) of the CRPD requires ratifying states to “[p]romote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.”

copyright owners is especially important to reduce the risk that they may, for example, threaten individuals and authorized entities with unfounded litigation or impose contractual terms to defeat MT rights. Broader awareness-raising about the right to create and share accessible format copies will enable print-disabled persons and authorized entities to take advantage of the Treaty. Such knowledge will also help these actors to identify and overcome any burdens on the exercise of these rights and to pursue remedies for violations.

States should also widely publicize their ratification and implementation of the MT, including to schools, libraries, and national and local government agencies. Such dissemination may include, for example, public service announcements and “know your rights” letters. Disability rights organizations are crucial partners in efforts to reach individual beneficiaries; ideally, such organizations should be involved in every stage of implementing the MT, including an ongoing process of consultation. In addition, providing training and resources to government IP agencies would enable the staff of those agencies to respond to inquiries from copyright

owners. Updates about implementing legislation could also be disseminated to lawyers via professional credentialing organizations, such as local or national bar organizations.

3.4. Engage in National Reporting

Marrakesh Treaty Contracting Parties should be prepared to provide information about the access and sharing rights of print-disabled individuals in periodic reports to the United Nations bodies that monitor state compliance with human rights. Three types of institutions engage in this kind of monitoring—the UN treaty bodies (including, in particular, the CRPD Committee), the UN Human Rights Council, and the UN special procedures.

3.4.1. UN Treaty Bodies

As noted in Chapter 1 of the Guide, each of the ten major UN human rights conventions, including the CRPD, creates an international monitoring mechanism known as a “treaty body”—a committee of experts charged with overseeing the implementation of that convention and assessing whether states are complying with the rights it protects. For the CRPD, these functions are performed by the CRPD

Committee.

Treaty bodies engage in four primary activities—reviewing state reports, receiving communications, engaging in investigations, and publishing general comments. First, treaty bodies review reports, submitted by states parties every few years, that describe the measures they have adopted to give effect to the conventions. Committee members pose questions to the officials who present the reports and engage in a dialogue with the officials in public sessions in New York or Geneva. The treaty bodies end their review with concluding observations and recommendations for future action. For example, as mentioned in Section 1.1.4, when reviewing reports from CRPD states parties, the CRPD Committee has urged governments to ratify and implement the Marrakesh Treaty.

Second, the treaty bodies receive complaints, known as communications, from individuals who allege that a government has violated protected rights and freedoms. The committees review the communications, determine whether the state has breached the treaty, and recommend how the government should remedy the violation. However, the treaty bodies can

review individual complaints only if the state has accepted an optional clause or optional protocol recognizing their authority to do so. As of October 2016, 92 of 168 member states of the CRPD had ratified the CRPD Optional Protocol.

Third, the CRPD Optional Protocol also authorizes the CRPD Committee to undertake inquiries in states parties if it receives reliable information indicating grave or systematic violations of the CRPD. As of the end of 2016, the Committee has not undertaken such an investigation.

Fourth, in addition to conclusions and recommendations on individual country reports, the treaty bodies publish “general comments” on issues and problems common to all states parties. For example, in 2014 the CRPD Committee published two general comments, one on accessibility for persons with disabilities and the other on equal recognition before the law. General comments describe protected rights and freedoms in ways that are often more detailed—and more relevant to contemporary circumstances—than the text of the human rights conventions themselves. With regard to the MT’s access and sharing rights, the treaty bodies may provide

normative guidance regarding human rights obligations that overlap with these provisions.

In sum, states may provide information to the CRPD Committee or to other treaty bodies in connection with periodic reporting, in response to communications by print-disabled individuals, or if the Committee initiates an inquiry into MT access and sharing rights. States that ratify the MT should provide such information to the CRPD Committee and, where relevant, to other treaty bodies to which they report, regarding their progress in implementing the MT and any barriers to implementation that they have encountered. To provide such information, national-level human rights and IP institutions charged with overseeing the MT will need to be involved in reporting to the treaty bodies. The officials who prepare a country's periodic reports or respond to communications or inquiries should solicit information from these institutions and other bodies charged with implementing and monitoring the MT.⁸⁶ States should

⁸⁶ Australia, for example, has established a detailed process for soliciting views of relevant government bodies in preparing its periodic reports. See Australian Human Rights Commission, *Inquiry into the Commonwealth's Treaty-Making Process* (Mar. 20,

be aware that print-disabled individuals and their representative organizations can also prepare and submit “shadow” reports to the Committee, which are designed to highlight gaps or inaccuracies in the government’s official report.

None of the pronouncements of the treaty bodies—including observations on country reports, general comments, or decisions reviewing individual complaints—are legally binding. However, as official statements of the experts authorized to monitor compliance with international human rights law, the pronouncements have considerable persuasive and moral authority for states parties. For example, these documents have been cited favorably in litigation before international and national courts, have led some states to change national laws, and have been relied upon by civil society organizations to advocate for domestic legal and policy reforms.⁸⁷

2015),

<https://www.humanrights.gov.au/submissions/inquiry-commonwealth-s-treaty-making-process#fnB8>

⁸⁷ See, e.g., Jarlath Clifford, *The UN Disability Convention and Its Impact on European Equality Law*, 6 EQUAL RTS. REV. 11 (2011); Rosanne van Alebeek & André Nollkaemper, *The Legal Status of Decisions by Human Rights Treaty Bodies in National Law*, in UN

3.4.2. UN Charter Bodies

The UN Charter is the international convention that establishes the United Nations. Several institutions created under the authority of the UN Charter also exercise important functions relating to promoting and protecting human rights. The most important of these institutions is the Human Rights Council, an elected body of 47 UN member states. The Council's functions include the normative development of human rights standards, the appointment of independent experts to conduct studies and fact-finding missions to specific countries or on specific topics, consideration in public and private sessions of complaints alleging human rights violations, and the Universal Periodic Review (UPR) process, which assesses the human rights practices of all 193 UN member states once every four years. States that ratify the MT may be asked about their implementation of the Treaty as part of these processes.

Another human rights institution created under the UN Charter is the Office of the High Commissioner for Human Rights

(OHCHR). Established in 1993, the OHCHR has a capacious mandate that includes promoting respect for human rights and deterring violations worldwide.

3.4.3. UN Special Procedures

From time to time, the Human Rights Council appoints experts to address specific human rights topics or the human rights situation in particular countries. Collectively referred to as “special procedures,” these appointees may be individuals (“Independent Experts” or “Special Rapporteurs”) or groups (“Working Groups”). Experts serve in their individual capacities and engage in a variety of activities: collecting evidence and reporting on human rights violations, developing legal norms, communicating with governments about individual cases, and condemning violations. The reports and other documents generated by the special procedures are not legally binding, but they have significant moral authority and provide an important source of interpretive guidance for understanding the nature of human rights in particular areas. One expert whose work is directly relevant to the MT is the UN Special Rapporteur on the

Rights of Persons with Disabilities.⁸⁸

⁸⁸ The position of the Special Rapporteur was first created in 1993 to monitor implementation of the UN Standard Rules for the Equalization of Opportunities of Persons with Disabilities.

Conclusion

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled is a watershed development in multiple respects. It is the first international legal instrument whose principal aim is to establish mandatory exceptions to the exclusive rights of copyright owners. It also marks the first time that the realization of international human rights has been the explicit objective of a World Intellectual Property Organization treaty and of the international system for the protection of intellectual property.

The Marrakesh Treaty requires ratifying countries to adopt legislation to enable individuals with print disabilities and authorized entities to make and share accessible format copies of covered copyrighted works. The Marrakesh Treaty also facilitates the cross-border exchange of such copies to expand their availability to print-disabled individuals around the world. The Treaty provides a range of op-

tions for states to meet these obligations, raising novel and often challenging questions of interpretation and implementation.

This Guide offers a comprehensive framework for government officials, policymakers, and disability rights organizations to interpret the Treaty and implement it in national law. The Guide's central premise is that the Marrakesh Treaty uses the institutions and doctrines of intellectual property law to achieve human rights objectives. This approach is grounded in the Treaty's Preamble, which references the Universal Declaration of Human Rights and the Convention on the Rights of Persons with Disabilities. The approach is also compatible with the international copyright system and furthers its overarching public welfare goals. Recognizing that states have obligations under both intellectual property and human rights treaties, the Guide offers general principles and specific policy recommendations to interpret and implement the Treaty consistently with both sets of commitments.

This Guide does not purport to answer all questions likely to arise as states implement and apply the Marrakesh Treaty

in their national legal systems. States retain considerable discretion to choose how best to give effect to the Treaty. Many aspects of the Marrakesh Treaty will also evolve over time, shaped by the policy choices of government officials and civil society groups, by new technologies, and by the domestic and international institutions that monitor adherence to the Treaty. These developments should, however, always be guided by the practical needs of the print-disabled individuals who are the Treaty's principal beneficiaries. Keeping the welfare of these individuals in mind will not only strengthen the copyright and human rights regimes, it will also more fully realize the shared aspirations for human flourishing that the Treaty embodies.