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IPA Guide to the Marrakesh Treaty

A WIPO Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities, of 27 June 2013

A guide for publishers and their trade associations in membership with the IPA

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List of Contents

Introduction.....	6
1. Summary.....	7
2. The Context of the Marrakesh Treaty: On the Road to Equal Access for Visually Impaired Persons (VIPs) and for Persons With a Print Disability (PWPDs).....	8
2.1 Blind vs Visually Impaired Persons vs ‘Persons with a Print Disability’	8
2.2 The Promise of Technology, Better Standards and Ongoing Innovation.....	9
2.3 The Role of Collaboration, Discovery Made Accessible and the Merger of Private & Public Offerings.....	10
2.4 Human Rights, Education & Public Procurement.....	11
2.5 The Marrakesh Treaty as a Facilitation of Greater Accessibility Treaty.....	12
2.6 The Marrakesh Treaty and the International System of Copyright Treaties and Conventions	12
2.7 The Marrakesh Treaty and the Accessible Book Consortium (ABC): the Co-ordination Role of WIPO and the Effort of International Stakeholders:	13
3. The Marrakesh Treaty (MT): A Closer Look at the Provisions of the Treaty.....	13
3.1 Key Terms and Provisions (Art. 2 MT).....	144
a. ‘Works’ Covered	144
b. Accessible Format Copy (‘AFC’).....	14
c. Authorised Entity (‘AE’, 2(c) MT)	15
d. Beneficiary Persons (VIPs/PWPDs)	19
e. Domestic Copyright Exception (Art. 4 MT).....	20
f. Technological Protection Measures (Art. 7 MT).....	21
i. Import	222
ii. Export (Art. 5 MT)	222
g. Cross-border Exchange (Art. 5 and Art. 6 MT)	244
3.2 The Marrakesh Treaty and the International Copyright System	25
a. General Position.....	25
b. Reservations/Declarations	26

c.	Rescinding the MT	26
3.3	The Marrakesh Treaty and the Publisher.....	26
a.	Access before the Marrakesh Treaty: The past, transitory and ongoing role of licensing	276
i.	Historical efforts before the Marrakesh Treaty (before June 2013).....	27
ii.	Access mechanisms prior to all countries joining Marrakesh: the transitory role of licensing.....	277
b.	Access after the Marrakesh Treaty: the continued role of licensing	288
c.	Access beyond the Marrakesh Treaty	299
4.	General Recommendations for Ratification/Accession and National Implementation of the Marrakesh Treaty	29
4.1	Countries acceding to or ratifying the MT should actively consider also ratifying the Berne Convention, WCT or TRIPs.....	299
4.2	Countries should be clear to insist on lawful access to source copies from which AFCs may only be made.	309
4.3	Countries should take into account the growing proportion and development of BAPs and the need to carve-out works that are ‘commercially available’ in accessible formats.....	3030
4.4	Countries should create a national roundtable or forum on accessibility.....	310
4.5	Countries should provide for legal mechanisms to correct inappropriate uses or unintended systematic supply of AFCs, especially cross-border	3130
4.6	Countries should seek transparency from AEs generally regarding their compliance with MT and from AEs that benefit from state or donor funds	31
4.7	Countries should guard against extraneous issues advanced to weaken copyright and irrelevant for facilitating greater access	321
4.8	Countries should guard against the temptation to go beyond equal access to unwarranted free access.....	322
5.	Recommendations for the International Publishers Association.....	322
5.1	IPA should continue at the international level to coordinate the efforts of stakeholders in the publishing industry and in the value chain from author to reader on issues of accessibility.....	332

5.2	IPA should regularly inform its members about accessibility trends and the implementation and application of the MT. IPA should assemble and promote accessibility guidelines such as those of its member trade associations (e.g. http://publishers.org.uk/campaigns/accessibility/publisher-guidelines/).....	332
5.3	IPA should promote and ensure through the ABC that catalogues of a national nature of accessible books are widely discoverable and searchable.	332
5.4	IPA should remain the natural stakeholder to liaise with WIPO and the World Blind Union and the ABC to improve accessibility, and to support efforts that improve possibilities for collaboration.....	333
5.5	IPA should disseminate information on standards and technology and the evolving best practice landscape in publishing in the field of accessibility	333
5.6	IPA should monitor the correct implementation and application of the MT provisions as part of the overall International Copyright System.....	333
6.	Recommendations for National Publisher Associations	333
6.1	Regional, national and local publisher associations are encouraged to work closely with local organisations representing visually impaired/print disabled persons and to discuss whether and how the MT should be implemented. Demonstrating willingness to collaborate is the best recipe to avoid unbalanced national implementations and for the MT to have an overall positive effect on increasing the accessibility of literary works	333
6.2	Publisher Associations should ensure that when the copyright exceptions are implemented, the stipulations and flexibilities of the MT are implemented in such a way that a balanced solution is achieved	333
7.	Recommendations for Publishing Houses	344
8.	Conclusion	344
	ANNEX 1	366
	Frequently Asked Questions (FAQ's)	366
a.	What is the Marrakesh Treaty?	366
b.	What is the ABC?	366
c.	What is TIGAR?.....	366
d.	Where can I get the full text of the Treaty?.....	377
e.	What are the practical consequences of the conclusion of the Marrakesh Treaty? ..	377
f.	What is the objective and purpose of the Treaty?	387
g.	What are the obligations of countries that become Contracting Parties?.....	388

h. What is the impact of the Three-Step Test on the Treaty obligations?	388
i. What policy space do Contracting Parties (countries adopting the MT) retain when implementing the MT?.....	399
j. May publishers argue that all exceptions and limitations should be limited to works that are not commercially available in an appropriate accessible format?.....	399
k. May publishers ask for a reference to the Three-Step Test in the cross-border regulations?	4040
l. What works are covered by the Treaty?.....	4040
m. Who are beneficiary persons?.....	41
n. Is the Treaty a precedent for future treaties?	411
o. In what way does the Treaty reinforce positive practice?	411
p. How will the Marrakesh Treaty work in practice?	4242

Acknowledgements

This Guide is based on the author's first-hand experience gained between 2003-2016 as a representative of the international and South African publishing industry before, during and after the Diplomatic Conference at Marrakesh on 27 June, 2013.

As such, this author has benefited from a multitude of interactions with representatives from the World Blind Union, WIPO, WIPO Member States, Publisher Associations in membership of IPA, the South African Library for the Blind, and many other organisations and persons too numerous to be listed here. The author feels particularly indebted (in no particular order) to the following persons: George Kerscher, Alicia Wise, Martin Moscoso, Nicol Faasen, François Hendrickz, Dan Pescod, Jim Russell, Marianne Diamond, Jim Fruchterman, Cristina Mussinelli, Catherine Blache, Piero Attanasio, Fiona Philips, Allan Adler, Jessica Sanger, Jos Borghino, Olav Stokkmo, Monica Halil Lovblad, Michele Woods, Geidy Lung, Mark Seeley, YS Chi, Benot Mller, Brian Crawford, Jens Bammel, Tarja Koskinnen-Olsen, all of the other initiators of the original WIPO Stakeholder Platform involved in setting up the Trusted Intermediary Guidelines and, of course, the authors of the above-referenced legal guides: Anita Huss, Silke von Lewinski and Mihly Ficsor. Any errors and omissions are entirely the responsibility of the authors.

12 October 2016

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http://www.stm-assoc.org/2014_02_17_STM_NonCom_v_1_0.pdf

Introduction

It is sometimes said that the character of a society or community is best measured by how it treats its most vulnerable members. If that is a plausible standard, then let us one day value the publishing industry by how it engaged to help empower those readers who are blind and print disabled.

The International Publishers Association (IPA) has commissioned this Guide to WIPO's Marrakesh Treaty. The Guide hopes to help identify, remove, overcome or work around all or some of the barriers, whether legal, technical, workflow, design, habit, social, psychological, collective or individual, which result in literature that is easily available to sighted readers not being equally available to visually impaired and print disabled readers.

Commenting on the coming into effect of the Marrakesh Treaty (MT), Richard Charikin, President of IPA, welcomed it as potentially having enormous societal benefit. The MT has rightly been recognized as an important tool to increase the number of literary works available as so-called 'Accessible Format Copies'(AFC) worldwide and to maximize the number of visually impaired and print disabled readers that may thus gain access to literary works. Sometimes, the MT may well offer the only tools to facilitate access to a literary work in a special format suited for readers who are unable to read like sighted readers. Thus, this Guide offers an introduction to the MT, explaining its scope and merit, as well as an interpretation consistent with other international copyright treaties. In addition, the Guide makes recommendations for the ratification/accession and national implementation of the MT.

The positive mechanisms provided for in the MT alone are, however, not expected to significantly alter the proportion of world literature being made available to visually impaired and print disabled readers and sighted readers alike (estimated at 1-5%). Consequently, the Guide also aims to give some necessary context to this international instrument and to point to technological, collaborative, transactional and other mechanisms that may increase access. Therefore, legislators, policy makers, publishers, their trade associations and other stakeholders may also use the Guide as a signpost to orient their efforts and to choose from among available tools those best suited to make a meaningful and active contribution towards achieving equal access to published and unpublished literary works.

Finally, the Guide will also point to the potential risks and pitfalls of giving in to extraneous interpretations of the MT or to allowing overbroad local and/or national implementation of

exceptions and limitations. The potential for harm to result from unintended consequences of implementation is particularly great because the MT facilitates the cross-border exchange of copyright-protected works. A wrong or harmful implementation in one country thus risks not being somewhat or sufficiently circumscribed or self-contained, but reverberating throughout many or all other countries that are contracting parties to the MT. We can liken this to a wave reaching very distant shores or a weak link compromising an entire chain. Fortunately, the MT does contain built-in safeguards and allows for implementing national corrective mechanisms to counter the eventuality of misuse and to preserve the integrity of the cross-border exchange system.

1. Summary

According to *National Geographic*, September 2016 edition, approximately one in every 200 people on Earth—39 million of us—cannot see. Another 246 million have severely reduced vision. These ‘visually impaired persons’ or ‘persons with a print disability’ (VIPs/PWPDs) can access an estimated 5% of all written information and literary works (e.g. books, websites, traffic signs, gravestones) that sighted people can read. This deleterious state of affairs has been termed the ‘book famine’.

The MT was concluded on 27 June 2013 in Marrakesh under the auspices of the World Intellectual Property Organization (WIPO) and came into effect on 30 September, 2016. The MT creates four obligations for ratifying countries (referred to as ‘Contracting Parties’):

- A national exception or limitation in copyright law to make ‘Accessible Format Copies’ (AFCs) of published works and to supply them to VIPs/PWPDs. Limitations and exceptions would affect the right of reproduction, the right of distribution, and the right of making works available to the public, as provided by the WIPO Copyright Treaty (WCT) and the Berne Convention. The limitation or exception provided in national law should permit the changes needed to make a published literary work accessible in an alternative format. The MT explains that an Authorised Entity (AE) may make AFCs, which can then be distributed by non-commercial lending or by electronic communication. The conditions for this activity include having lawful access to the work, introducing only those changes needed to make the work accessible, and supplying the AFCs only for use by VIPs/PWPDs;
- An importation clause for AFCs that mirrors the above national exception;
- An exception to distribute and make available AFCs across borders to Authorised Entities (AEs) and to VIPs/PWPDs. This specific limitation or exception requires the use of the works exclusively by beneficiary persons;

- An obligation to ensure that Technical Protection Measures (TPMs) do not prevent print disabled persons from having access to works.

The MT contains several mandatory safeguards, most importantly:

- The Three-Step Test which is the international yard-stick for the legitimacy of all exceptions, now including those for visually impaired and print disabled persons;
- The way that the MT defines ‘AFC’, and how an ‘Authorized Entity’ (AE) is obliged to conduct its activity according to firm practices, which the AE itself must establish and follow;
- The recognition that import and export of AFCs by AEs is restricted in some cases, e.g. where these entities are situated in countries that have not acceded to the Berne Convention and/or the WIPO Copyright Treaty.

Further optional safeguards are the possibility to implement a so-called ‘commercial availability’ requirement at the national level—perhaps the most controversial aspect of the MT. Some countries currently recognize this requirement in their laws, e.g. Australia, Canada, Denmark, Germany, Singapore and UK. Under the MT, countries can confine limitations or exceptions to those works that cannot be ‘obtained commercially under reasonable terms for beneficiary persons in that market’.

2. The Context of the Marrakesh Treaty: On the Road to Equal Access for Visually Impaired Persons (VIPs) and for Persons with a Print Disability (PWPDs)

2.1 Blind vs Visually Impaired Persons vs ‘Persons with a Print Disability’

As mentioned above, world-wide, some 39 million people are blind and 246 million are visually impaired or dyslexic. The latter category, dyslexia, ranges from only light impairment (such as the condition affecting this Guide’s author) to the inability to read a text without assistive technology. The category of ‘print disabled’ or ‘people with a print disability’ also includes persons who are paralyzed and who cannot manipulate a book or e-book. Moreover, there are other visual disabilities that require alternate formats, such as letters highlighted in white or yellow or undulating text or text written in light typeset set against a black page background.

To the extent that the sum of written materials (95% of what is in print) that remains inaccessible to affected persons includes also publicly available in-copyright material

that is not available through Open Access, copyright protection may present a barrier to making these materials being more readily available to VIPs/PWPDs.

The salient point is that the category of ‘Persons with Print Disabilities’ does not include persons with a learning disability or persons unable to speak a particular language. Thus, under no circumstances should the MT be put forward as an international instrument that authorizes the abridgement, adaptation, and simplification of literary works to suit the needs of persons with a *learning disability* or lack of command of a language, or impaired ability of comprehension.

2.2 The Promise of Technology, Better Standards and Ongoing Innovation

While copyright subsisting in a literary work potentially constitutes a barrier to making literary works accessible, it is by no means so that by ‘peeling back’ the layer of copyright the work in question becomes accessible. From the perspective of VIPs/PWPDs, a work in a written format is essentially like a work that is undecipherable—akin to a work protected by very strong encryption or ‘copy-control’ mechanisms that ‘lock’ the work in an unintelligible and un-navigable format.

It is, in other words, possible to comprehend the challenge of accessibility from the perspective of Information Technology as a problem of ‘peeling back’ layers of code that prevent access to a work. With the help of IT and standards, various groups are in fact addressing technological layers that render a work inaccessible (by sometimes converting or reformatting a work to render it in an accessible format).

As if the above layers of technological barriers were not enough, there are at least three more factors that make the challenge of equal access so complex:

First, visual disability is not equal disability: an accessible format that may work well for one set of VIPs is useless for another. It depends on the type of disability, and each of the many types requires its own formatting options;

Second, even under a scenario where a public domain text (for argument’s sake) is available in an accessible format for some or all types of visual disability, the discovery of such availability may not itself be so accessible—as a result, the entire accessible work is de facto invisible, undiscoverable and unavailable. The entire distribution chain—whether funded privately (booksellers, Amazon), or through

non-profit or state bodies—needs to work together to add accessibility to the definition of discoverability;

Third, even persons with the same perceptual disability and a common discoverable work may require different formats in order to access it due to their different personal skills. The elderly or the young among VIPs/PWDPs may have different abilities in their use of technology, such that a notionally usable format may be rendered inaccessible for persons unfamiliar with it.

Among the many groups concerned with the important work of harnessing standards and technology in this field are the following groups with close links to publishing:

- International Digital Publishing Forum (IDPF, www.idpf.org), the trade and standards organization for the publishing industry;
- EDItEUR (www.editeur.org), the trade standards body for the global book, e-book and serials supply chains, with over 110 members in 25 countries around the world;
- European Digital Reading Lab (<https://edrlab.org/>, <https://edrlab.org/edrlab/readium-lcp-principles>). The EDR-Lab is the European head office of the IDPF and of the Radium Foundation (<http://readium.org>), which develops tools for the distribution of this format;
- Open Source Technology for EPUB 3 and the Open Web Platform (www.readium.org);
- DAISY Consortium (www.daisy.org), a global partnership of organizations committed to creating the best way to read and publish for everyone;
- WIPO's Accessible Books Consortium (ABC), brings together many global stakeholders and compiles a catalogue of 'Born-Accessible Publications' and AFCs, with the aim of increasing the number of books worldwide in accessible formats and to make them available to people who are blind, have low vision or are otherwise print-disabled (www.accessiblebooksconsortium.org).

2.3 The Role of Collaboration, Discovery Made Accessible and the Merger of Private & Public Offerings

From the foregoing, it follows that the only way to significantly alter the landscape, to ‘end the book famine’, is through a collaborative environment that will allow each actor to work in synchronized and harmonious ways with all the other actors in the book chain, from authors to readers. This includes the traditional value chain of publisher and bookseller, but also includes technology and software providers, cloud hosts and search engines, governments, UN organizations such as WIPO, and NGOs, charities, ‘Authorized Entities’ (as described in the Marrakesh Treaty), funders, learning institutions (including adult and further education and training) and private parties and civil society.

2.4 Human Rights, Education & Public Procurement

Apart from copyright law, technology and standards, skills and education, there are other bodies of law that may affect the challenge of accessibility. It is beyond the scope of this Guide to introduce these bodies of law in detail, but it is necessary to reference two of them to alert the reader that some mechanisms exist outside the law of copyright that may affect publishing and—particularly—accessible publishing.

The UN Convention on the Rights of Persons with Disabilities (<http://www.un.org/disabilities/convention/conventionfull.shtml>) and national disability laws seek to advance equal treatment of the disabled (including VIPs/PWPDs).

Laws governing the submission of schoolbooks and learning materials may also provide in some countries that a publisher, whose schoolbook or learning material is approved for use in learning institutions (typically K-12), shall submit a plain text version in electronic format to the government department concerned with education. This obligation is designed to ensure the timely supply of a plain text version of the prescribed learning material to any VIP/PWPD learners. This would typically be an obligation contained in a law or in a condition of a tender or public procurement process and is distinct, and also very different, from the aims and scope of permitted acts under the Marrakesh Treaty. In the case of the public procurement law, the publisher typically supplies a publisher-grade original file in a particular, very basic format. The subject of regulation is the supply of a genuine ‘raw’ electronic text of the approved learning material and not the production of an AFC by reproduction or copying of a lawfully obtained published genuine copy of a literary work. Only this latter case falls within the scope of the Marrakesh Treaty.

In some countries, notably Germany, the above obligation is not the result of a procurement condition. Rather, the obligation is part of a binding agreement between the trade association of educational publishers and Medibus, a consortium of libraries for the blind. The said contract also stipulates a copyright license by which designated state or school bodies are authorized to make AFCs from genuine final copies of the whole or parts of textbooks or schoolbooks efficiently sourced directly from publishers in a streamlined fashion (a clear description of who must request what from whom by when, and who must deliver what, where and when). The ability to produce an AFC directly from a publisher reduces not only the production costs, but also the chance of inadvertent errors.

2.5 The Marrakesh Treaty as a Facilitator of Greater Accessibility

The title of the Marrakesh Treaty was decided upon by the Diplomatic Conference that adopted it. By that title, the MT is both a ‘facilitation treaty’ in law and also in the sense that its object and main purpose is to increase the availability of accessible books through the making of so-called ‘AFCs’ and their distribution, including across borders. These are copies that present a literary work (as defined) in an *alternative format* that renders them accessible to a VIP/PWPD. Any reproduction and intermediate step, even though generally restricted by copyright, must be permitted under an exception if it is necessary and leads to greater accessibility than would otherwise be the case.

The Marrakesh Treaty in its recitals fully acknowledges that it is not the only mechanism that can yield an end to the book famine and that, in fact, technological solutions and the concept of the ‘Accessible Mainstream Publication’ (AMP) or the ‘Born-Accessible’ work is needed to achieve equal access for a far greater proportion of VIPs/PWPDs than is the case today.

2.6 The Marrakesh Treaty and the International System of Copyright Treaties and Conventions

Apart from being a ‘facilitation’ treaty, one of the arrows in the quiver of targeted measures towards ending the book famine, the Marrakesh Treaty is also one of the international legal instruments in the pantheon of copyright and intellectual property treaties that create the international system of copyright protection today administered by WIPO. Indeed, many of the provisions of the Marrakesh Treaty may only be

understood and correctly interpreted by reference to other treaties and conventions on copyright and intellectual property.

Moreover, it is posited here that one of the achievements of the 2013 Diplomatic Conference at Marrakesh was to enshrine the principles in the Marrakesh Treaty that, if correctly applied, are consistent with international copyright norms. Therefore, it is also very important to implement the Marrakesh Treaty into national laws in ways conducive to a consistent interpretation of the national law within international copyright norms.

The MT leaves Contracting Parties the freedom to implement its provisions by taking into account their own legal systems and practices, including determinations on ‘fair practices, dealings or uses’, provided they comply with their Three-Step Test obligations under other treaties. The Three-Step Test is a basic principle used to determine whether an exception or limitation is permissible under the international system of norms on copyright and related rights. It includes three elements. Any exception or limitation: (1) shall be confined to certain special cases; (2) shall not conflict with the normal exploitation of the work; and (3) shall not unreasonably prejudice the legitimate interests of the rightsholder.

2.7 The Marrakesh Treaty and the Accessible Book Consortium (ABC): the Coordination Role of WIPO and the Effort of International Stakeholders

The single most important contribution of the ABC, in this writer’s view, is to draw together all significant international role-players in the field of accessibility and to bring about a comprehensive catalogue that will be searchable in accessible format. The ‘world catalogue’ will include literary works available as AMPS, born-accessible titles, and AFCs world-wide. Already today the availability through the ABC is impressive and comprises approximately half a million titles ready to be exchanged in MT countries and participating non-MT countries.

A comprehensive description of the catalogue and the whole range of activities of the ABC is beyond the scope of this IPA Guide, but a sound description of the practical benefits that the ABC and its precursor ‘TIGAR’ have to offer is available here:

http://www.wipo.int/wipo_magazine/en/2016/05/article_0002.html

3. The Marrakesh Treaty (MT): A Closer Look at the Provisions of the Treaty

3.1 Key Terms and Provisions (Art. 2 MT)

a. 'Works' Covered

The Treaty defines the type of works to which it applies. Article 2(a) refers to the type of publications which can be transcribed / distributed under the terms of the Treaty. These are: 'literary and artistic works in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media'.

'Works' under the MT are only those works within the meaning of the Berne Convention that have already been published or otherwise made publicly available, and which exist in the form of text, notation and/or related illustrations. This form may cover a written text, possibly also musical notations, and also text made available in other media, such as in audio form (in particular audiobooks), as explained in the agreed statement concerning Article 2(a) MT.

The definition therefore covers books, periodicals and other similar textual works, as well as sheet music. It does not cover films. The Treaty does not allow for the contents of a work to be changed (e.g. to 'easy read' format); rather, it allows merely for the work's contents to be transcribed into an accessible format. Although audiovisual works do not fall within the definition of works, textual works embedded in audiovisual works (such as educational multimedia DVDs) would appear to fall within the definition.

The definition only covers works that have been 'published' or have been otherwise made 'publicly available' (e.g. by the author or other rightsholder). The definition does not extend to works made available illegally without the consent of the author or other rightsholder.

Therefore, a work that is 'born accessible', meaning a work which consists of printed text only and which may be used from the outset by both sighted and VIPs/PWPDs through a choice of different display options, is not covered by the Marrakesh Treaty. It is already accessible from the outset and there is no need to facilitate access or to make it accessible to visually impaired persons in an alternative manner on the basis of an exception or limitation.

b. Accessible Format Copy ('AFC')

Article 2(b) MT defines the term 'accessible format copy' or 'AFC'. This is a key concept that legally speaking is hard to define because of the prevailing dynamic technological environment that leads to a changing 'state of the art' of what 'accessible' means.

AFC is best understood in juxtaposition to ‘born-accessible publication’ (BAP), also known as ‘accessible mainstream publication’ (AMP), i.e. a literary work that is already made accessible from first publication ‘*ab initio*’ (to begin with). The above sections on the ‘context’ of equal access also show that AFC is a term that needs to be interpreted relative to the individual beneficiary person or the sub-set or types of disability in question, the beneficiary’s skill, and the enabling technological environment available to the beneficiary person.

It is thus hardly surprising that the MT can only use broad strokes to define AFC in a way that is technology-neutral, and which does not limit the format or the technique used to make a work (more) accessible than the available original publication so that the alternative format makes the work accessible ‘as feasibly and comfortably as for a person without visual impairment or other print disability’.

A second clause in the MT definition adds:

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

The wording of the Marrakesh Treaty contains an ambiguity: an AFC is a format intended to be used *only* by a VIP/PWPD. The MT states verbatim: ‘the accessible format copy is used exclusively by beneficiary persons’. This refers to who is actually using an AFC, not who is capable of using the AFC. In this respect, the second sentence of Article 2(b) MT would perhaps have been better placed in an operative Article of the MT, rather than in the definition section as a limitation on the legal uses of an AFC that are permitted (and those that are not permitted) under the Treaty. That is, the Treaty allows a Contracting Party to permit distribution *only* to beneficiary persons and requires them to maintain the restriction on editing or alterations in ways beyond what the process of creating an AFC requires.

c. Authorized Entity (‘AE’, 2(c) MT)

The role of the ‘Authorized Entity’ (AE) is another critical building block in the MT, and it is a straightforward definition. It is a non-profit or government agency that makes accessible copies of works, and limits distribution of those copies to people with bona fide disabilities, whom the MT calls ‘Beneficiary Persons’ (in this Guide referred to as VIPs/PWPDs). It also may cover for-profit entities that provide services to beneficiary persons using public funds

and on a non-profit basis. There is no specific process of accreditation of or approval mechanism to qualify as an 'AE' in the MT itself. Article 9 provides for WIPO to create a mechanism for AEs to register and to exchange information. However, for an AE to register with WIPO is neither a precondition to participate under the arrangements of the MT, nor is it sufficient. What counts is actual compliance with the MT and national law requirements. Meeting the (broad) criteria in Article 2(c) MT is on face value sufficient from the perspective of the MT.

The agreed statement concerning Article 2(c) MT elaborates that the phrase 'entities recognized by the government' may include entities that receive financial support from the government for providing services to beneficiary persons. Furthermore, Article 2(c) MT provides that the term 'AE' also includes a government institution or a non-profit organization that provides the same services to beneficiary persons as one of its 'primary activities or institutional obligations', even if the organization is not specifically authorized or recognized by the government to do so. Thus, for example, both a specialized agency providing services to the blind and a general-service library with an institutional program to promote accessibility could constitute AEs.

Be that as it may, the plain meaning of the very term 'Authorized Entity' (AE) denotes an official designation, accreditation or authorization that can be bestowed, approved and—importantly—withdrawn where an AE fails to live up to the requirements of the MT. These are briefly described as follows:

Article 2(c) MT specifies that an AE 'establishes and follows its own practices' to establish that the people it is serving are beneficiary persons; to limit its distribution of accessible format copies to beneficiary persons or AEs; to discourage the reproduction and distribution of unauthorized copies; and to maintain due care in, and records of, its handling of copies of works.

AEs have the duty to establish and follow their own practices in several areas, including establishing that the persons they serve are beneficiary persons, providing services only to those persons, discouraging unauthorized uses of copies, and maintaining 'due care' in handling copies of works. During negotiations, the term 'practices' emerged as acceptable to all. Some delegations feared that 'guidelines' or 'rules' could super-impose WIPO guidelines or rules on national law and act as a limitation on the freedom to implement the MT consistent with national law requirements. Other delegations during the Diplomatic Conference were, however, not content to delete any reference to the establishment of

practices, which inherently refers to a continued application of a workflow that permits interested and affected parties to obtain transparency about any prevailing practices, their evaluation and assessment as to adequacy, effectiveness and proportionality, and not least for consistency with the application of the Three-Step Test.

Practices must be the AE's 'own'. In the opinion of this author, there is at least a dual significance and meaning of the term 'own practice'. Firstly, it is not sufficient for an AE to point to practices that may be ascertained in the abstract, written down in a rule-book or administrative ruling, or theoretically (what lawyers call 'law in the books', as opposed to 'law in action'). What matters is that the conduct must be rule-driven, i.e. a 'practice' or standard procedure must be established and then actually 'followed'. The conduct of an AE 'in practice' is thus capable of measurement against its own stated established standard procedures, i.e. the emphasis is on what activities are undertaken by an AE in actual fact, and whether the practice that is being followed is sufficient to meet the goals and safeguards of the MT, and indeed the AE's own stated mechanisms of compliance.

Secondly, in a cross-border context—and the cross-border aspect must be regarded as the main benefit and novelty added by the MT to the WIPO system of international copyright treaties—an AE must not substitute the 'practices' of other AEs, i.e. AEs in the country of reception of any AFC, but must strictly adhere to their own practices, which by implication are consistent with the national laws of the country where the AE is situated. An AE is thus not able to substitute, for instance, a wider definition of VIP/PWPD that is inconsistent with its national law, or apply a different or lower due diligence standard 'established and followed' by other AEs. The AE is obliged to follow its 'own' (and sound) practices. Naturally, there is a strong case for AEs that collaborate regularly with each other and with stakeholders such as publishers to develop, strictly on a voluntary basis, a shared understanding and expectation of what the AEs' established and followed practices are, especially when cross-border uses are concerned. WIPO may well be a good forum to exchange best practices and to develop greater levels of coherence and convergence of practices over time.

The Marrakesh Treaty does not require an organization to fulfill any formalities or undertake specific procedures to obtain recognition as an 'AE' in its international dealings with other AEs. One advantage of this freedom is that AEs themselves, perhaps also in dialogue with publishers and other stakeholders, are free to create standards and self-correcting rules and, for instance, voluntary codes of conduct that make it 'safe' for AEs and for publishers as rightsholders to deal with their counterpart AEs in other countries. These rules and codes of conduct that in due course AEs situated in different countries might be willing to establish

may also discharge some of the due diligence that the MT imposes on AEs that wish to serve beneficiary persons in other countries. Thus, it is imaginable that where a reputable AE that adheres to any future voluntary standards and codes certifies a beneficiary person to be in its membership, other AEs may be able to trust this certification, discharging their national obligation to limit distribution to legitimate recipients. The MT does not foreclose such practical steps and rules from emerging as voluntary and private agreements rather than as a matter of international law. Also, the MT is silent on national criteria to be set down before an AE is recognized as such, either nationally or internationally. The MT would not, for instance, forbid measures that impose more stringent criteria before an AE is permitted to take part in international exchanges of AFCs. Contracting Parties do have the leeway under the MT to create such procedures at the national level.

Given the fact that author's rights may be restricted for the benefit of the AE (and thus, indirectly VIPs/PWPDs) it seems evident, and has been clarified in the definition, that AEs must not act for profit; otherwise, they would by definition not be 'AE', and may thus not benefit from an exception or limitation under the Treaty. For the same reasons, they must through their practices guarantee certain parameters to avoid an abuse of exceptions and limitations of authors' rights. In particular, they must have and follow their own practices in order to establish that they only serve beneficiary persons rather than also sighted people when making use of a relevant exception or limitation. Also, they must discourage uses in respect of unauthorized copies, and maintain records of their careful handling of their copies, which enables tracking of any illegal acts only to avoid such unwanted situations or mischief recurring in the future. In fact, in any regular public library similar records are being taken in the normal course of activities. Regarding both public libraries for the sighted as well as for AEs, the routine maintenance of records will not conflict with the respect for privacy. As a rule, therefore, such record-taking by AEs will not be in conflict with Article 8 MT on the respect for privacy.

Already existing libraries for the blind and similar institutions that make and supply accessible format copies of published works, to the extent that they fulfil the requirements of the definition in Article 2 MT, are likely to act as AEs under the Treaty. To the extent that they do not yet—or not yet sufficiently—exist, any Contracting Party that wishes to adhere to the MT has an interest in establishing such an AE, and ensuring that said AE will work professionally and in a trustworthy manner. After all, their work is a basis for a well-functioning cross-border exchange of accessible format copies, which is one of the main goals of the MT.

From a practical perspective, it will probably be impossible for an AE in one Member State to verify with certainty whether an AE in another Member State indeed qualifies as one. In some cases, foreign AEs and local publishers risk being drawn into direct competition if the process of vetting AEs is not met.

It is posited in this Guide that at least when it comes to the authorization of a cross-border supply—the heart of the MT—AEs need to fulfill certain minimum requirements of accountability by following practices that are adequate, effective and proportionate to safeguard the interests of rightsholders. Art 5(2) MT and the agreed statement to the said Article make clear that an AE must take measures to ensure that recipients of AFCs are legitimate recipients. The agreed statement makes clear that an AE may impose tighter or additional controls on cross-border deliveries. By implication, the AE needs to establish adequate, effective and proportionate measures domestically as well. If these measures are stringent enough, an AE is free also not to apply additional measures in the context of a cross-border supply.

d. Beneficiary Persons (VIPs/PWPDs)

Article 3 MT defines a beneficiary person as a person who is: a) 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’; 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’. This is a broad definition for which in this Guide the abbreviation VIPs/PWPDs is used. Beneficiary persons include those who have incurred just about any disability that interferes with the reading of printed material. It includes people who are blind, visually impaired, reading disabled (example: dyslexia) or have a physical disability that gets in the way of effectively holding a book, turning pages or focusing on the page.

The agreed statement concerning Article 3(b) MT further explains that the phrase ‘visual impairment or disability ... which cannot be improved’ in Article 3(b) MT does not require ‘the use of all possible medical diagnostic procedures and treatments’. Thus, for example, any disabling visual impairment that cannot be improved using corrective lenses should be understood to qualify. Finally, under Article 3(c) of the Treaty a beneficiary person is also someone who, due to a physical disability, is otherwise unable to hold or manipulate a book or focus or move the eyes to the extent that would normally be acceptable for reading.

VIPs/PWPDs are described in the MT not by reference to medical terms and there is no existing legal definition. It is unclear whether, in the light of the Three-Step Test, Contracting Parties could limit the implementation to some, but not all, categories of beneficiaries mentioned in this Article. A clear, ideally medical, definition of beneficiary persons is highly desirable to safeguard against abuse.

Equally, it is clear that excluded from the category of beneficiary persons are those suffering from a learning disability, weakness or lack of comprehension of a written work, or simple lack of vocabulary or command of a language (e.g. 2nd or 3rd language speakers and learners).

e. Domestic Copyright Exception (Art. 4 MT)

Article 4(1) MT requires countries which ratify the Treaty to enact a domestic copyright exception. Art. 4(2) MT provides an example of how this may be done consistent with the international obligations applicable to most Contracting Parties (hence the opening paragraph of Art. 4(2) MT uses the word 'may'). The illustrative rather than binding nature of Art. 4(2) MT is further confirmed by Art. 4(3) MT which offers Contracting Parties the possibility to enact 'other' domestic exceptions or limitations in keeping with their own national legal tradition and without reference to the provisions of Art. 4(2) MT. Art. 4(3) MT obliges Contracting States, however, strictly to enact those 'other' exceptions or limitations in ways consistent with Articles 10 and 11 MT and the safeguarding conditions laid out there.

Articles 4(4) and 4(5) provide for yet more flexibility on how to enact a domestic copyright exception and limitation. Art. 4(4) preserves the ability of Contracting States to confine exceptions for beneficiaries to cases where born accessible publications or licensed AFCs are not readily available on reasonable terms and conditions. In that case, a Contracting State should declare by notification to the Director General of WIPO the presence of a commercial (un-)availability requirement either upon ratification or accession or later. During SCCR sessions preparing for the Diplomatic Conference a proposal was made to make such notification mandatory, but the consensus reached was that the notification has only declaratory effect, which is illustrated by the fact that the declaration may be made subsequently to ratification or notification.

Article 4(5) MT preserves the ability of Contracting States to provide for remuneration to rightsholders in conjunction with the enactment of any limitation (an 'exception' is mostly understood to create an exemption without any obligation to pay fair remuneration or

equitable compensation, while a 'limitation' is understood to denote a derogation from an exclusive right where additional terms are imposed or payment obligations are provided for—hence the term 'exceptions and limitations' used throughout the MT).

It follows from Art. 4 MT, reading together in particular sub-sections (1), (3), (4) and (5), that it would for instance be possible to provide in national law an exception or limitation that is subject to the absence of available licensing schemes. Equally, it would be possible to enact a mandatory collective license that enables a collective management organization solely to represent rightsholders in dealing with beneficiaries or organizations that represent or act for them. It would also be possible, for instance, to provide for a so-called Extended Collective Licensing (ECL) mechanism, the trade-mark collective licensing mechanism deployed in Nordic countries and now also available in principle in the UK. The beauty of an ECL would be that it brings all stakeholders together and could include provisions, for example, regarding the timely provision of final copies of publications prior to publication (high quality publication-ready electronic files), the payment of remuneration, and mechanisms that avoid the duplication of efforts between publishers offering or licensing the making of born-accessible original publications and the making of AFCs.

f. Cross-border Exchange (Art. 5 and Art. 6 MT)

Article 5 MT must be considered as the heart of the MT and represents the novelty introduced by the MT to the international copyright system. For the first time, a mainstream WIPO Treaty, other than the Berne Annex, contains a norm that speaks to a cross-border supply of a copyright-protected work between any Contracting Party. Up to this point, even parallel imports were purely a matter for national law, as is the question of national or international exhaustion of the distribution right. Articles 16(1) and (2) of the Berne Convention also only deal with infringing copies, not with the supply of a copy made under an exception or limitation, and the articles certainly do not positively permit or regulate a cross-border supply of copies. Art. 5(1) MT creates a basic obligation to permit the supply of AFCs across borders by AEs (not by individuals and not by organisations that may be permitted nationally to benefit from exceptions but do not meet the standards set for AEs, whether internationally or at the national level for international file exchange).

Rightsholders have an interest in keeping some control over the worldwide exploitation of copies through cross-border delivery, especially where the formats offer, on the basis of different display options, access to the works both to sighted and visually impaired persons (as is the case, for example, for born accessible works produced by publishers) or where

accessible format copies as defined by the MT could be easily re-transformed to be read by sighted people, and thus affect the mainstream market in unintended ways. These concerns are addressed in Art. 5(3) and Art. 5(4) MT and discussed further in para 2(f)(ii) below.

i. Import

Article 6 contains a provision closely mirroring Article 4 MT (domestic law) even though it represents the other side of the coin to Article 5 MT (export). Just as Article 5 MT obligates Contracting Parties to permit AEs to export accessible format copies to AEs or beneficiary persons in other Contracting Parties, Article 6 obligates Contracting Parties to allow AEs or beneficiary persons to import accessible format copies from other Contracting Parties if the AFCs legally could have been made and supplied domestically. Thus, Article 6 MT stipulates that this permission to import strictly applies to the extent that the national law of a Contracting Party would permit an AE or a beneficiary person to make an accessible format copy. Accordingly, if a Contracting Party's national law permitted AEs, but not beneficiary persons, to make accessible format copies only where born-accessible copies or licensed copies are not commercially available, under Article 6 that Contracting Party could only permit AEs to import accessible format copies in these very same circumstances.

The agreed statement concerning Article 6 states that '[i]t is understood that the Contracting Parties have the same flexibilities set out in Article 4 when implementing their obligations under Article 6.' This means that a Contracting Party has the discretion to impose on imports a commercial availability requirement as in Article 4(4) or a remuneration requirement as in Article 4(5).

ii. Export (Art. 5 MT)

The structure of Article 5 is the same as the structure of Art. 4 MT: Article 5(1) sets out the obligation created under the MT to provide for an exception or limitation, while Art. 5(2) provides an example of how this could be done consistent with international obligations (Art. 4, paragraph (1) provides for the obligation and paragraph (2) provides for an illustration of how to do so, without obliging countries to use the exact wording or mechanism).

Article 5(1) MT provides that a Contracting Party must permit an AE to distribute an accessible format copy made under an exception to a beneficiary person or an AE in another Contracting Party. In other words, the domestic copyright law of a Contracting Party must allow an AE to export an accessible format copy to a beneficiary person or an AE in another

Contracting Party. As with Article 4, Article 5 provides Contracting Parties with flexibility on how to implement this obligation. Also as in Article 4, Article 5 sets forth one approach for a Contracting Party to fulfil its Article 5(1) obligation. Under Article 5(2), a Contracting Party may adopt an exception in its national copyright law that permits an AE to distribute an accessible format copy to an AE or a beneficiary person in another Contracting Party, if prior to the distribution ‘the originating AE did not know or have reasonable grounds to know that the accessible format copy would be used for purposes other than by beneficiary persons.’

The agreed statement concerning Article 5(2) adds that it is understood that when an AE distributes an accessible format copy directly to a beneficiary person in another Contracting Party, ‘it may be appropriate for an AE 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’. As worded, this agreed statement indicates that it would be optional for AEs to decide whether ‘to apply further measures’ in addition to those it employs in the domestic context to confirm the beneficiary status of a person it is serving in another country. Therefore, an AE’s decision not to apply further measures should not constitute reasonable grounds for it to know that AFCs would be used by non-beneficiaries, *provided* the ‘measures’ the AE is using domestically are already providing adequate and effective assurance that the copies are not ending up with people who are not entitled to receive them.

One specific challenge for AEs wishing to serve VIPs/PWPD resident abroad (assuming they are not nationals of the Contracting Party temporarily abroad) may of course be identification of the beneficiaries and ascertaining that they are indeed in need of and qualify to receive an AFC. One thing is clear: an AE needs only to (but also must) follow ‘its own’ practices. Arguably, this means it must follow its own definition and understanding of who may qualify as a VIP/PWPD and not substitute the practices or the law in the country of destination for its own.

Moreover, the practical difficulty of ensuring compliance with the requirement to limit supply to persons without knowing whether recipients are or are not eligible persons, may actually turn out to be a reason for AEs to register with WIPO or to agree to abide by a common or standard code of conduct. In the future this can be facilitated or agreed by AEs and other stakeholders under the auspices of WIPO. Where an AE follows any voluntary agreed future standard or code of conduct, it would shelter itself from not having acted in a reasonable and proportionate way to meet its obligations under the MT and/or national law responsibilities.

Art. 5(2) MT also implicitly makes clear that it is only AEs—for the very reason that they ‘establish and follow’ verifiable and assessable practices—who should be permitted to export files to either other AEs or, in appropriate circumstances, VIPs/PWPDs. Individuals or non-AEs may not rely on the MT for any export, at least not for any systematic activity.

Art. 5(4)(a) MT addresses the so-called ‘Berne Convention Gap’, while Art. 5(4)(b) MT addresses the ‘WCT Gap’. Art. 5.4 (a) MT makes clear that a Contracting Party to the MT that has not (yet) ratified the Berne Convention or is otherwise not bound to observe its provisions—for example, certain so-called Least Developed Countries(LDCs) under the TRIPS agreement—may receive AFCs but are prevented from exporting them to MT countries or, indeed, to third party countries.

Art. 5(4)(b) MT provides that an AE, whether as a supplier or recipient of an export of an AFC, may only supply an AE or VIP/PWPD in its own jurisdiction, unless the country is party to the WCT or enacts co-extensive exclusive rights and protections as are provided for in the WCT. Art. 5(4) MT was one of the most negotiated provisions of the MT during the Diplomatic Conference in Marrakesh and provides the essential agreement reached: to be a full participant in the cross-border exchange, a country is either obliged to be a party to the WCT or to enact co-extensive protection of copyright-protected works. Where a country does not provide for the said protection, it is limited in supplying AFCs internally and to receiving AFCs from Contracting Parties, but without itself being able to act as a ‘hub’ to exchange AFCs (be these either AFCs received from others or locally made AFCs).

For export from Contracting Parties that do not recognise a ‘commercial availability’ requirement (Art. 5 MT) domestically, an argument may still be made to require a limitation and exception not to take effect where an authorised entity knew or had reasonable grounds to know that a work was commercially available in the importing country and where the Contracting Party to which an AFC is imported does in fact recognise the commercial (non-)availability requirement (this narrow interpretation flows from obligations of Contracting Parties permitted to allow exports to respect the Three-Step Test, based on Art. 11 MT, and based on principles of international mutual respect well established in international public and private law).

g. Technological Protection Measures (Art. 7 MT)

'Technological Protection Measures' (TPMs) include software and hardware devices or technology to protect copyright-protected content from unauthorized or unlawful access. TPMs may be applied by rightsholders or by authorized agents in the distribution chain (e.g. e-book sellers or device manufacturers, libraries that protect their secure electronic network and sometimes also organizations that assist the VIPs/PWPDs, i.e. AEs themselves). TPMs are used in conjunction with online accessible or downloadable copies of literary works (e.g. e-book services and files) in the form of copy-control mechanisms or access-control mechanisms or a combination of these.

Article 7 MT provides that when a Contracting Party prohibits the circumvention of technological protection measures, which as a Contracting Party to the WCT it is obliged to do (for instance, in its general copyright legislation), it '*shall take appropriate measures, as necessary, to ensure that this legal protection does not prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty.*'

Thus, the Contracting Party must adopt a mechanism such as an exception to the circumvention prohibition to permit an AE to make an accessible format copy. Other mechanisms—for example, requiring the rightsholder to provide alternative access or to provide an AE with a key to open a digital lock for a legitimate purpose envisaged under the MT—would also appear to satisfy this Article.

The agreed statement concerning Article 7 MT observes that an AE might apply a technological measure to an accessible format copy, perhaps to restrict its distribution beyond the circle or network of authorized beneficiary persons, but nothing in the Article requires this practice.

Article 7 MT thus provides an obligation on Contracting Parties to ensure mechanisms, absent voluntary mechanisms by rightsholders, to avoid TPMs getting in the way of making AFCs. A software block of 'read-aloud' software that allows turning an e-book into a non-dramatic audio-book would only be permitted to be maintained by a bookseller or publisher if other suitable access mechanisms are offered to AEs and beneficiary persons.

3.2 The Marrakesh Treaty and the International Copyright System

a. General Position

There is no requirement to be a member of any other international copyright treaty to join the MT; membership is open to Member States of WIPO and to the European Union as an entity. However, Contracting Parties that receive accessible format copies and do not have obligations to comply with the Three-Step Test under Article 9 of the Berne Convention must ensure that accessible format copies are not redistributed outside their jurisdictions (Art. 5(4)(a) MT).

Also, cross-border transfer by an AE (whether maker, supplier or recipient of an AFC) is not permitted unless the Contracting Party—wherein the AE in question is situated—is a party to the WCT or otherwise applies the Three-Step Test to limitations and exceptions implementing the MT (Art. 5(4)(b) MT).

b. Reservations/Declarations

The MT is silent on the possibility of reservations, unlike other Copyright Treaties. According to the Vienna Convention, this means that reservations and unilateral declarations are possible on accession and/or ratification, as long as these do not frustrate the inherent objectives of the MT.

An example of a reservation that a Contracting Party may make is the one Australia deposited regarding their domestic legal requirement of ‘commercial availability’. AEs must first take the initiative to purchase the accessible material before making use of copyright exceptions and limitations under Article 4 MT. Another example would be a reservation of rights considering the MT as creating only ‘soft law’ obligations for implementing exceptions and limitations. Such a unilateral declaration could be made in view of interpreting MT consistent with Articles 19 and 20 of the Berne Convention which, on a strict reading, require the MT to remain a ‘soft’ or voluntary obligation.

c. Rescinding the MT

There remains the possibility of rescinding the Treaty, according to Article 20 MT.

3.3 The Marrakesh Treaty and Publishers

a. Access before the Marrakesh Treaty: the past, transitory and ongoing role of licensing

'Before' the Marrakesh Treaty denotes two time periods: (i) the time before June 2013, i.e. before the treaty was negotiated, and (ii) the time for each national state, whether a member of WIPO or not, before it becomes a 'Contracting Party' to the MT. Both time periods are briefly discussed below.

i. Historical Efforts before the Marrakesh Treaty (before June 2013)

The time before June 2013 concerns the period when the entire issue of copyright and accessibility was a subject of national law and national copyright exceptions. In many countries, publishers and organizations representing or assisting the visually impaired have entertained collaborative schemes and maintained good relations. UNESCO adopted some model provisions in 1982, many of which were carried forward and inspired provisions of the MT. Previously, Brazil, one of the main countries driving the adoption of the MT, had already advocated the need for an international instrument. However, before 2013 all efforts remained collaborative and national in outlook. Certainly, among the more global initiatives were those spearheaded by the World Blind Union and the DAISY Consortium.

The International Publishers Association, some national trade associations and IFRRO had already issued statements, model clauses, model agreements and Memoranda of Understanding facilitating co-operation among organizations for the visually impaired and publishers. These efforts fostered the WIPO Stakeholder Dialogue of Trusted Intermediaries, which adopted Trusted Intermediary Guidelines, a version of which remains accessible here: http://ec.europa.eu/internal_market/copyright/initiatives/access/index_en.htm. In the EU a Memorandum of Understanding between Federation of European Publishers (FEP) and the European Blind Union mirrored, within the specificity of the EU, these developments.

ii. Access mechanisms prior to all countries joining Marrakesh: the transitory role of licensing

The question of access mechanisms clearly comes into play both for Accessible Mainstream Publications (born-accessible e-books) that are produced as an increasing proportion of new titles by publishers themselves, and for the 'legacy' content, i.e. books and other written works that are not accessible but are in demand in countries that have not (yet) joined Marrakesh.

Napoleon is credited with having said: 'it is the provisional arrangements that prove to be the lasting ones' (*c'est le provisoire qui dure*). For a considerable time, the international community will live in a world where the Contracting Parties to the MT will exist side by side with many countries that have not acceded to the MT. This raises the question of how the two systems are to interact.

Licensing of copyrights, whether collectively or individually, will remain the pragmatic answer in these situations for some time to come. The Accessible Books Consortium should, in the authors' opinion, not close its doors to countries that are not parties to MT and should offer collaboration between MT countries and countries that for whatever reason have not (yet) chosen to implement and accede to the MT. The answer thus is that for a good many countries and a good many VIPs, PWDs, for AEs, and for Trusted Intermediaries (existing as quasi-AEs outside the territories of application of the MT) the time 'before the MT' is now and the immediate future. Neither publishers nor AEs should turn their backs on this situation and they should offer pragmatic solutions, including through providers such as Benetech, a California-based technology company that converts publisher-grade and other versions of books into AFCs.

Preferably, publishers that are thinking about their legacy content and are not willing or able to finance the reformatting into accessible formats should consider working with organizations such as Vision Australia or Benetech. In any case, publishers and Collective Management Organizations around the world should not call off or reduce licensing schemes authorizing the production and supply of AFCs through licensing.

b. Access after the Marrakesh Treaty: the continued role of licensing

After MT, among countries that have implemented the MT, which are countries that may fully participate in cross-border exchange of AFCs, the practical mechanisms and arrangements between publishers and organizations, such as AEs, remain of critical importance for the following reasons:

- Pre-publication Licensing: it may appear obvious, but for true Equal Access (same book, same time, same price) publishers need to provide publisher-grade files of inaccessible works to AEs for conversion under license. The alternative is that the MT leads to the foreseeable outcome that VIPs/PWDs are always served later—an unjust but rational outcome;

- Post-publication Licensing of Supplementary Materials: while not licensing the making of AFCs of published works, publishers may still be called upon to license the making of AFCs (for works not available and not produced from the start as born-accessible works), especially for works containing video tutorials or learning software interactive tools;
- Licensing of AEs for activities in non-MT Countries or MT Countries not Members of Berne or WCT: many of the most able AEs will have a global reach. Publishers should consider entering into licensing and partnership arrangements with AEs and licensing their activity as a 'belt and braces' approach for territories where the AE may be active from time to time prior to the MT being applicable. This should be the order of the day where the AEs are establishing reliable practices;
- Licensing for uses not covered in MT: while the MT and national implementations will be very broad, there may also be uses of copyright works that are not authorized, e.g. producing abridgment, easy readers, or making files for specialized needs that are not truly for VIPs/PWPDs but similar enough to be licensed, especially where there is no risk of a negative effect on the primary market of the publisher.

c. Access beyond the Marrakesh Treaty

Similar to the issues outlined above is the notion that accessibility and what constitutes a literary work are both dynamic concepts. Thus, in the future many elements in a book may in fact increasingly capture audio-visual and software content that is not subject to the MT—a video tutorial, for instance, of how to produce a born-accessible book would not fall under the MT, and given the increasing role of video in education and communication, where for persons now at school the ability to produce a video is as fundamental as any debating, presentation and computer literacy skill, it is necessary for publishers to keep interacting with the community of VIPs/PWPDs to ensure that Equal Access is not gained only for there to arise a new accessibility gap due to technological change.

4. General Recommendations for Ratification/Accession and National Implementation of the Marrakesh Treaty

4.1 Countries acceding to or ratifying the MT should actively consider also ratifying the Berne Convention, WCT or TRIPs

Efforts to weaken the copyright system, or to pass national legislation implementing the MT in ways open to misuse or abuse would introduce nothing but harm to both sighted and visually impaired and print disabled readers (and authors), because copyright is the life-blood of authorship and publishing, an incentive to the creation and dissemination of new original works.

4.2 Countries should be clear to insist on lawful access to source copies from which AFCs may only be made

The MT is clear that lawful access is a pre-condition for the legitimate exercise of the exceptions provided in the MT. Thus, countries should be clear in implementing the MT that the following are not suitable source copies for making AFCs, let alone to supply such AFCs from contaminated sources, nationally or cross-border: making an AFC from a copy obtained illegally or from a source copy that itself is an infringing article either by virtue of its production or by virtue of the supply of or other dealings in the source copy; or a copy that has been obtained through online mechanisms for circumventing access or copy control mechanisms; or by gaining access to a secure computer network illegally; or by virtue of password fraud or abuse.

National legislation should oblige AEs to observe reasonable and proportionate security standards in line with international or national best practices to guard against inadvertent use of illegal copies or the making of AFCs other than by lawful access.

4.3 Countries should consider the growing proportion and development of BAPs and the need to carve-out works that are 'commercially available' in accessible formats

Already in 2013, RNIB, the UK organization for the blind, estimated that 76% of the top 1000 bestsellers in the UK are available in accessible formats, published in EPUB 3 or comparable accessible formats by or with the authority of the publisher.

It is reasonable to assume that for trade books (fiction and non-fiction) as opposed to school and academic textbooks or works of science, the proportion of born-accessible books among newly published titles will continuously rise. To the extent that this is the case, efforts to facilitate or increase accessibility of literary works may concentrate on other titles and also on other parts of the book-value chain, such as accessibility of metadata and information about accessible books, and the accessibility of transactions, especially web-based transactions, such as the purchase of BAPs.

4.4 Countries should create a national RoundTable or forum on accessibility

In the 21st Century collaboration is fundamental. The single-most important and effective action for any country considering joining the MT is to invigorate its stakeholders to work together and devise appropriate action plans, and then to link up with engaged international NGOs and respective stakeholders.

4.5 Countries should provide for legal mechanisms to correct inappropriate uses or unintended systematic supply of AFCs, especially cross-border

Whether at the point of reception by an AE or at the point of import or—especially—at the point of export, national legislation should provide for the possibility of legal redress where an AE has actual, circumstantial or constructive knowledge of abuse and fails to take appropriate corrective measures. Pragmatically, it will most often be easier to stop the supply of AFCs than to stop the re-export or export to third countries of AFCs after their reception. For this reason, stakeholders and their representative trade bodies should be empowered to apply to an administrative supervisory body or a court to stop the supply by an AE generally or to particular destinations and recipients, e.g. AEs in a specific country or specific AEs whose practices are not consistent with the obligations established in the MT or in national legislation.

Countries should also provide for a minimum transparency obligation on AEs to provide basic up-to-date information on their websites or at their offices. In addition, government should provide and ensure that freedom of information legislation applies to AEs on a par with requirements for public or governmental agencies. Moreover, rightsholders and other interested stakeholders should be entitled to request information from AEs concerning the nature and frequency of uses of their published works, and get information about the number of AFCs received and sent to and from particular AEs situated in the same country or other MT countries.

4.6 Countries should seek transparency from AEs generally regarding their compliance with MT and from AEs that benefit from state or donor funds

Compliance with the conditions of the MT and national legislation should, as a matter of course, be a factor in granting or withdrawing AE status to an AE or aspirant AE. Legislation should provide for obligations of compliance and transparency regarding the 'practices' an

AE 'establishes and follows' in order to comply. Compliance should, however, also be a factor in considering subsidies, application for state funding or contributions, or as part of fiduciary duties of foundations pursuing a public or charitable interest and for which state supervision is frequently the norm.

4.7 Countries should guard against extraneous issues advanced to weaken copyright and irrelevant to facilitating greater access

During the negotiation of the MT, several NGOs skeptical of copyright and the very concept of protecting intellectual property as a mechanism to fuel innovation, progress and culture tried to include in the MT provisions designed to undermine copyright, but with little or no connection to advancing the justified cause of equal access for the VIPs/PWPDs. It must be expected that at the national level, as well, such movements will try to use the implementation of the MT as a vehicle to abolish checks and balances. Sometimes these actors may seek to erode or avoid safeguards against the abuse or over-extensive interpretation of exceptions and limitations ostensibly designed for the exclusive accessibility of beneficiary persons. It should be well noted that countries and AEs adhering to their own sound practices to ensure the use of AFCs strictly by persons properly identified to be the intended beneficiary persons would be the most disadvantaged if trust in the system is lost and less collaboration thus takes place between rightsholders and other stakeholders. Much the same may be said regarding the deployment of TPMs by rightsholders and AEs alike: these are suitable mechanisms to increase trust, if and only if properly used TPMs enjoy the protection of the law.

4.8 Countries should guard against the temptation to go beyond equal access to unwarranted free access

Equal access, and the imperative of providing greater access at the same time, for the same price, and of the same content should not be allowed to result in publishers not getting paid by VIPs/PWPDs at all for their books, or not getting a remuneration as compensation for their collaboration; this is particularly the case where rightsholders supply good quality electronic source files for the making of AFCs.

5. Recommendations for the International Publishers Association

5.1 IPA should continue to coordinate at the international level the efforts of stakeholders in the publishing industry and in the value chain from author to reader on issues of accessibility.

5.2 IPA should regularly inform its members about accessibility trends and implementation and application of the MT. IPA should assemble and promote accessibility guidelines such as those of its member trade associations (e.g. <http://publishers.org.uk/campaigns/accessibility/publisher-guidelines/>)

5.3 IPA should promote and ensure through the ABC that catalogues of a national nature of accessible books are widely discoverable and searchable.

5.4 IPA should remain the natural stakeholder to liaise with WIPO and the World Blind Union and the ABC to improve accessibility, and to support efforts that improve possibilities for collaboration.

5.5 IPA should disseminate information on standards and technology and the evolving publishing best practice landscape in the field of accessibility.

5.6 IPA should monitor the correct implementation and application of the MT provisions as part of the overall international copyright system.

6. Recommendations for National Publisher Associations

6.1 Regional, national and local publisher associations are encouraged to work closely with local organizations representing visually impaired/print disabled persons and to discuss whether and how the MT should be implemented. Demonstrating willingness to collaborate is the best recipe to avoid unbalanced national implementations and for the MT to have an overall positive effect on increasing the accessibility of literary works.

6.2 Publisher Associations should ensure that when the copyright exceptions are implemented, the stipulations and flexibilities of the MT are implemented in such a way that a balanced solution is achieved. These include:

- a) Clear and concise definitions of *beneficiaries*, including an appropriate procedure for verification and compliance;
- b) Clear and concise definition of *Authorised Entities* to ensure that they can be identified and that collaboration is possible;
- c) Clear and concise obligations for Authorised Entities, including compliance procedures, transparency, and IT security, nationally and especially for cross-border supply and exchange;
- d) Exceptions and limitations should be limited to works that are *commercially unavailable in the required accessible formats*, both nationally and internationally. Where a Contracting Party does not include the requirement of commercial non-availability, the Contracting Party should still insist that its AEs recognise and respect the legal requirement present in any country where AFCs may be exported to or imported from as part of the criterion of 'lawful access' or as part of an AE's established practices;
- e) The exceptions or limitations should be framed in such a way that they can be flexibly revisited and adjusted over time;
- f) Collective Management Organisations and other licensing solutions, where established, should be considered as mechanisms of implementation and as complementary mechanisms;
- g) Reference to the Three-Step Test should be made explicit, at least for delivery across borders and for importation.

7. Recommendations for Publishing Houses

Individual publishers who are concerned about potential security leaks or commercial losses on digital copies of works should be advised to work with one or several trusted national or international charities and enter into collaborative agreements based on standard licences. Such licences have multiple advantages for both sides.

8. Conclusion

The Marrakesh Treaty is an important milestone to facilitate access to literary works for blind and visually impaired persons and persons with a print disability in the form of so-called 'Accessible Format Copies'—copies that are produced after the fact from books and other written manifestations of literary works.

The Marrakesh Treaty is thus an important piece in the puzzle leading to greater accessibility, nationally and across borders, but it is not the entire puzzle. For this, technology and the networked capability of collaboration in the 21st Century must be harnessed throughout the entire book value chain from author to reader.

Publishers have important contributions to make, not least by publishing from the start in accordance with accessibility standards that ensure the first publication of literary works as 'Accessible Mainstream Publications' (AMPs) or 'Born-Accessible Publications' (BAPs). Publishers also have an important role to play as they constitute a demand and a/the market for suppliers of document definition standard providers, device manufacturers, providers and cataloguers of 'meta-information', information about published works, and how such works may be acquired or accessed online, and how information about works can be discovered.

Lastly, publishers should not neglect the licensing of making accessible format editions of books and of AFCs. Licensing should be considered especially where unpublished works are concerned or where high quality electronic files are supplied to AEs. Licensing should also be considered wherever the legislative environment does not permit making AFCs under exceptions or where the supply of AFCs is not permitted.

ANNEX 1

Frequently Asked Questions (FAQs)

a. What is the Marrakesh Treaty?

The Marrakesh Treaty (MT) creates four obligations for Member States that sign up to it:

- A national exception or limitation in copyright law for print disabled persons;
- An importation clause for ‘Accessible Format Copies’ (AFCs) that mirrors the national exception;
- An exception for so-called ‘Authorized Entities’ (‘AEs’, e.g. accredited, designated, approved, eligible non-profit organizations) to distribute and make available accessible format copies across borders, including to eligible print disabled persons;
- Absent voluntary measures by rightsholders, an obligation to ensure that TPM protection does not prevent authorized entities and print disabled persons, who have lawful access to literary works, from making required accessible format copies.

Thus, Contracting Parties are required to have a limitation or exception to domestic copyright law for VIPs. The rights subject to such limitation or exception are the right of reproduction, the right of distribution, and the right of making available to the public.

The Contracting Parties are further required to allow the import and export of accessible format copies under certain conditions. Regarding importation, when an accessible format copy may be made pursuant to national law, a copy may also be imported without rightsholder authorization.

b. What is the ABC?

A new multi-stakeholder entity that is working on practical ways to make more accessible books available. The Accessible Books Consortium (ABC) is an alliance that comprises WIPO, organizations that serve persons with print disabilities and organizations that represent authors and publishers, including the following international umbrella organizations: the World Blind Union, the DAISY Consortium, the International Federation of Library Associations and Institutions, the International Publishers Association, the International Federation of Reproduction Rights Organizations and the International Authors’ Forum. ABC supports the goal of ‘born accessible’ publishing and encourages the adoption of an industry-wide accessibility standard.

c. What is TIGAR?

Knowing which publications have been converted into accessible formats will also have a critical impact. The ABC is building an international database and book exchange of accessible books called the TIGAR Service. It includes approximately 500,000 titles in 55 languages from the catalogues of libraries from around the world. The goal is to make this international book exchange service the premier repository of accessible titles in the world. Currently, rights must be granted by copyright holders for books to be shared across borders. Once the Marrakesh VIP/PWPD Treaty is effective, this will no longer be needed in those countries that have ratified the treaty. The Accessible Books Consortium secretariat is located at WIPO's headquarters in Geneva, Switzerland, and is audited by the WIPO External Auditor. Its board includes representatives from WIPO, organizations serving persons with print disabilities, including the World Blind Union, organizations representing publishers, including the IPA, and major donors.

d. Where can I get the full text of the Treaty?

Full text is available in all UN languages. All language versions are equally valid. http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=241683

e. What are the practical consequences of the conclusion of the Marrakesh Treaty?

The Marrakesh Treaty (MT), a new international treaty, was finalised and signed by 51 Member States in 2013, including Denmark, Luxembourg, Switzerland and the UK. The signatures create per se no obligation, except to consider ratification and to not act contrary to the purpose of the treaty in the meantime. MT entered into force on 30 September, 2016. Once in force, only the ratifying states have an obligation in international public law towards other contracting states to fulfil the treaty's obligations, which at the time of writing comprise some 25 Contracting Parties. http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=843

As more countries ratify or accede to the MT, it may be expected that the repository of AFCs available to beneficiaries among the Contracting Parties grows and that more AFCs may be made also for works where a purely national demand for AFCs would not justify the cost incurred in making a work accessible. Likewise, a predominantly national repository will increase significantly by the availability of foreign titles. Provided co-ordination and collaboration among all stakeholders can be worked out, duplicative efforts in rendering the same work accessible through multiple AEs may be avoided. This would necessitate co-ordinated practices, and the efficiency and effectiveness of efforts to avoid duplication may be further increased if BAPs and AMPs are discovered at the same time as AFCs under preparation.

f. What is the objective and purpose of the Treaty?

The objective is not expressly formulated, but referenced in Art. 9.4 MT. It can be deduced from elements such as obligations, model law clauses, the treaty title and recitals. The objectives are to:

- facilitate access for persons with print disabilities;
- provide equal access for person with print disabilities;
- avoid duplication of the considerable effort that making Accessible Format Copies (AFCs) requires.

The recitals expressly recognise the role of publishers in making works accessible and the need for balance in copyright law.

g. What are the obligations of countries that become Contracting Parties?

1. Contracting states must fulfil four obligations: Art.4: Create a national copyright exception or limitation in copyright law 'to the right of reproduction, the right of distribution, and the right of making available to the public... for the purpose of facilitating access for beneficiaries';
2. Art: 5: Allow the distribution and making available of accessible format copies by an authorised entity to Authorised Entities and to eligible print disabled persons in other Contracting Parties;
3. Art, 6: Allow the importation of Accessible Format Copies where these could have been made under national law. This provision also means that if the country of importation has a commercial non-availability requirement, importation is *not* possible;
4. Art. 7: Ensure that TPMs do not hinder the enjoyment of aforementioned exceptions and limitations.

WIPO must create a treaty bureau to manage the parties to the Treaty and an information access point (Article 12).

The MT implies the recognition of the right of distribution and the right of making available. The text explicitly does not require a distribution right or making available right outside of the obligations of this Treaty, but it creates an inconsistency which can most easily be resolved by a full acknowledgement of the distribution and making available rights.

h. What is the impact of the Three-Step Test on the Treaty obligations?

All copyright exceptions, whether national copyright exceptions, or the cross-border sending or receiving of accessible format copies, are subject to the Three-Step Test. Special rules apply to countries that are not members of the Berne Convention, which must follow stricter rules nationally and cannot export Accessible Format Copies (AFCs). This applies only to a small group of countries.

All other exceptions and limitations are limited to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author/rightsholder. This, together with certain flexibility clauses in the Treaty, creates policy space for national implementation.

i. What policy space do Contracting Parties (countries adopting the MT) retain when implementing the MT?

The Treaty clearly requires the introduction of exceptions and limitations in national copyright law and for importation and distribution/making available across borders. There is, however, considerable policy space with respect to the details of the implementation:

- Article 10 specifically gives policy space with respect to the method of implementing and refers both to 'legal system and practice'. Existing or special exceptions or limitations may be deemed sufficient.
- Article 12 permits broader, more generous copyright exceptions for persons with print disabilities. This indicates that the exceptions are minimum exceptions and *may* be interpreted more broadly.
- At the same time, the exceptions and limitations are (for virtually all cases) subject to the Three-Step Test. Where there is a risk that the conditions of the Three-Step Test are not met, the implementation regulations must be adapted. In that sense, they may not be interpreted too broadly.
- Article 4 includes 'may' clauses, with respect to commercial availability and remuneration.
- Articles 4 .2 and 5.2 include criteria that illustrate the exception and limitation beyond an abstract or general obligation. These are 'may' clauses but which show that there is further policy space.

j. May the publisher argue that all exceptions and limitations should be limited to works that are not commercially available in an appropriate accessible format?

Yes. For national exceptions, and therefore also for importation, there is an explicit option in Article 4.4 to carve out works that are commercially available in the accessible format needed by a beneficiary. For exportation (Art. 5 MT) an argument may still be made to

require a limitation and exception not to take effect where an Authorised Entity knew or had reasonable grounds to know that a work was commercially available in the importing country (based on Art. 11 MT).

- Commercial availability of a work is a clear indicator that a use would conflict with 'normal exploitation', i.e. step 2 of the Three-Step Test. Agreed statement No. 5 confirms this *e contrario* for the obligations under Article 5 MT (Agreed Statement on 4.4 MT states '*under this Article [4]*', i.e. 4.4 MT).
- The definition of 'Accessible Format Copy' in Article 2 requires an 'alternative' format. If a format is commercially available, converting a work into that format would not make it an 'alternative' format. One could argue that this applies only to formats that require a substantial investment.
- One objective of the Treaty is to promote equal access. This is already achieved where works are available on equal terms to persons with print disabilities.

Much argument has been made on how someone should know whether a work is commercially available. It is very likely that global databases will be developed to signal commercial availability. The wording used in the model clause of Article 5.2 'know or have reasonable grounds to know' is used in a different context, but can be taken up as an example for appropriate wording. For publishers, it should be sufficient if works are excluded where an Authorised Entity 'knows or has reasonable grounds to know' that a work is commercially available.

k. May publishers ask for a reference to the Three-Step Test in the cross-border regulations?

Doing so would be fully in line with the obligations under the Treaty. In practice, more specific clauses with clearer criteria would be easier to observe and to implement.

l. What works are covered by the Treaty?

The types of works that are covered are clearly described, i.e. literary works including e-books and audio recordings, but not audio-visual works. The Treaty makes, however, no express provisions regarding the 'nationality' of the works. Article 5 makes it clear that the obligation to distribute across borders only extends to 'Contracting Parties'. Technically the treaty can only allow the exchange of works from other Contracting Parties, i.e. states that have signed up to the MT. Third party works would be excluded. Because this is impossible to implement in practice, it is a critical weakness of the Treaty and shows that it will only be effective if all countries with a significant repository of works ratify the Treaty. Taking the definition of domestic works from Article 3 of the Berne Convention would limit this even

further: for example, even translations of works remain works owned under the copyright of the author's nationality.

m. Who are beneficiary persons?

A beneficiary person must not include persons with a learning disability or an insufficient command of language or literary ability or literacy. According to Article 3 Beneficiaries include not only blind and visually impaired persons, but also dyslexic persons and persons with a 'perceptual or reading disability'. These are not medical definitions and there is no existing legal definition. It is unclear whether in the light of the Three-Step Test Contracting Parties could limit the implementation to some, but not all, categories of beneficiaries mentioned in this Article. A clear, ideally medical, definition of beneficiary persons is highly desirable to safeguard against abuse.

n. Is the treaty a precedent for future treaties?

No. The MT is an equal access facilitation treaty, not a mandatory exceptions treaty (otherwise the treaty may arguably violate Art. 19 and/or Art. 20 of the Berne Convention, which, the MT makes clear, is not intended). The treaty seeks to promote equal access by some harmonisation of exceptions for print disabled people.

From a publisher perspective there are three reasons for why this treaty is unique:

- The treaty deals with a specific humanitarian concern, not just any public interest;
- The solution through Authorised Entities and Accessible Format Copies is a solution that is only possible in the particular case where beneficiaries make use of such specialised entities and formats;
- The specific circumstances are unique: these involve special format copies, high costs of creating AFCs, unnecessary duplication of efforts, promotion of born-accessible publications and of accessible mainstream publications.

o. In what ways does the Treaty reinforce positive practice?

There are some ways in which this treaty reinforces good practice:

- The repeated invocation of the Three-Step Test makes it clear that international transfer is subject to this test;
- The pivotal role of Authorised Entities in international exchange highlights the exceptional nature of cross-border transfers of copyright protected works;
- Commercial availability is mentioned in the national copyright law clause, and is referenced in the importation clause. Furthermore, it is, of course, part of the Three-Step Test;

- Translations have been pushed out of the treaty remit;

There are some less positive elements as well:

- IPA would have preferred a mandatory reference to commercially available accessible works throughout, and still thinks that incentivising publishers is the best accessibility policy;
- IPA would have preferred to see more clearly spelt out safeguards where cross-border delivery to individuals is concerned. At least the MT makes it clear that the supplying AE must itself assess whether it is supplying an eligible print disabled person (and bear the consequences for insufficiently establishing eligibility).

p. How will the Marrakesh Treaty work in practice?

Now that the text of the treaty is fixed, all stakeholders are considering how it will work in practice. The adaptation of national laws and the ratification of the treaty are likely to take some time, perhaps many years. Once these are in force, there are a small number of VIP libraries, mainly in richer, developed countries, such as US, UK, Spain and France, which can exchange accessible files and serve customers abroad. India and other developing countries may also become global sources of accessible copies of e-books, in the same way as they have cheaply digitised books for publishers. International competitiveness to offer and supply such services may develop that could drive changes similar to those in the publishing and library world.

However, a very large proportion of persons with print disabilities in the world will not benefit from this treaty alone: there may be few or no accessible copies in their languages, there may be few or no charities to provide these, and there may be little or no capacity to create accessible copies. Such capacity to produce and exchange files requires capacity building both on the publisher and on the VIP sides in developing countries. All parties would also welcome a simple set of rules that can easily be followed when implementing the treaty and exchanging files at an international level.

This is why IPA continues to support ABC and TIGAR: in the end, these projects have the potential to solve many of the problems related to accessibility. With its work on supporting 'born accessible' publishing and capacity building the ABC has great potential if all stakeholders continue to support it.

Literature/Citations

Dr. Mihály Ficsor: Commentary To The Marrakesh Treaty On Accessible Format Copies For The Visually Impaired,

(available at http://www.copyrightseesaw.net/archive/?sw_10_item=51, to be published in updated form with Oxford University Press in 2017/2018)

Anita Huss, General Counsel and Deputy Secretary General, IFRRO: Analysis Of WIPO Marrakesh Treaty, IFRRO Memorandum, 2013

Silke von Lewinski: Part V, Chapter 18, The Marrakesh Treaty, in: *The WIPO Treaties on Copyright, A Commentary on the WCT, the WPPT, and the BTAP,* Jörg Reinbothe and Silke Von Lewinski, Oxford University Press, Oxford, UK, 2015

Margaret Williams, Director, Content and Access, Centre for Equitable Library Access (CELA), and **Margaret McGroary,** Vice President, Canadian National Institute for the Blind (CNIB), Toronto, Canada: Exchanging accessible books across borders – as easy as ABC

WIPO/ABC: Best Practice Guidelines For Publishers,
http://www.accessiblebooksconsortium.org/inclusive_publishing/en/accessible_best_practice_guidelines_for_publishers.html

Note: there are numerous other sources, including on the web, on all aspects connected to the Marrakesh Treaty, including legal aspects, and there is a wealth of information available from WIPO on the Marrakesh Treaty, the ABC and TIGAR. The list above provides the primary sources drawn on in preparing this Guide for the IPA.