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The Marrakesh Treaty for Persons with Visual Impairments:
the Intersection between Copyright and Human Rights

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Summary

The aim of this research paper is to explore how, and to what extent, the WIPO Marrakesh Treaty addresses the issue of restricted access to copyrighted materials by persons with visual impairments while securing legitimate interests and human rights of the central stakeholders; specifically, copyright rightholders and persons with visual impairments. In doing so, the focus centres on the compromises and flexibilities embedded in the Marrakesh Treaty, and on the function of these constructions in achieving the alleged goal of the Treaty – to facilitate access to copyrighted materials for persons with visual impairments while no harm is done to other interests.

The following discourse presents a demand of human rights law to secure rights of the authors and persons with visual impairments. It explores how the Marrakesh Treaty addresses this demand and how it interacts with selective human rights principles. In conclusion, the research paper finds that the Marrakesh Treaty is capable of fulfilling its modest goal and improve access to copyrighted materials for persons with visual impairments while securing legitimate interests and concerns of the copyright rightholders (including human rights of the authors); not to the extent, however, of eradicating all existing copyright-related uncertainties and concerns.

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List of Abbreviations

CRPD	Convention on the Rights of Persons with Disabilities
DRMs	Digital Rights Management Systems
DSB	World Trade Organization's Dispute Settlement Body
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESCR	Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFLA	International Federation of Library Associations
IPO	Intellectual Property Owners Association
MPAA	Motion Picture Association of America
NFB	National Federation of the Blind
SCCR	Standing Committee on Copyright and Related Rights
TMs	Technological Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific, and Cultural Organization
WBU	World Blind Union
WCT	World Intellectual Property Organization Copyright Treaty
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

1 Introduction

1.1 Problem Statement

Inspiration for this study was drawn from the campaign slogan of the Right to Read Alliance: “Everyone can read the same book, at the same time, and at the same price.”¹ Unfortunately, this slogan is not a present day reality and is yet to be realised. The limited statistics which are available on the matter reveal that in high-income countries, only 7 percent of printed materials are currently available to persons who are blind, visually impaired or otherwise print disabled (*‘persons with visual impairments’* or *‘visually impaired persons’*) and less than 1 percent in low- and middle-income countries.²

The challenge facing persons with visual impairments in the information environment, is that existing social and legal infrastructures do not allow them to access printed materials to the extent that they would like. Assistive technologies have been created to facilitate access to printed materials and to produce *accessible format copies*, such as Braille and audio books, books in large print or accessible electronic files. Transformation of print into accessible formats implicates acts controlled by the *copyright rightholders*³ and interferes with their exclusive rights⁴, such as, the *right of reproduction*, the *right of distribution* and the *right of making available to the public*. This implies that such acts must be authorised by the rightholders or by the *limitations and exceptions* to copyright.⁵

According to the Study on Copyright Limitations and Exceptions for the Visually Impaired, out of 186 Member States of the World Intellectual Property Organization

¹Royal National Institute of Blind People, ‘Right to Read Campaign’, 29 June 2012, <www.rnib.org.uk/getinvolved/campaign/accesstoinformation/righttoread/Pages/righttoread.aspx>, visited on 3 December 2013.

²Brook Baker, ‘Challenges Facing a Proposed WIPO Treaty for Persons Who are Blind or Print Disabled’, Paper presented at the Law and Society Association Annual Meeting, 2 June 2013, p.3, <keionline.org/node/1723>, visited on 3 December 2013.

³The expressions ‘copyright rightholders’ or ‘rightholders’ refer to owners of copyright. Usually, it is a natural person who created the work (the author), but could also be a business entity, for example, “an employer of the author who is employed for the purpose of creating that work” [World Intellectual Property Organization, *Understanding Copyright and Related Rights* (WIPO Publication No.909(E), Geneva) p. 13]. Such expressions were also used at the *Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities*, adopted in Marrakesh on 27 June 2013.

⁴ The term ‘exclusive rights’ refers to certain basic rights under copyright law, which provide the rightholders with “the exclusive right to use or authorize others to use the work on agreed terms” [World Intellectual Property Organization, *What is Intellectual Property?* (WIPO Publication No. 450(E), Geneva) p. 19].

⁵Nic Garnett, ‘Automated Rights Management Systems and Copyright Limitations and Exceptions’, World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, 27 April 2006, SCCR/14/5, p. 27.

(the “WIPO”)⁶ in 2006, only 57 nations had introduced specific exceptions to copyright to the benefit of visually impaired persons.⁷

An attempt to solve the issue of unsatisfactory access to copyrighted materials by visually impaired persons has been ongoing for more than 30 years, and has led to the adoption of the *Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities* on 27 June 2013 (the “Treaty” or the “Marrakesh Treaty”).⁸ In the words of Francis Gurry, the Director General of the WIPO, the Marrakesh Treaty “universalises an exception” and “addresses a problem of the cross-border transfer of works in accessible formats under certain exceptions”.⁹ The Marrakesh Treaty is an eleven page document, consisting of 22 articles and 13 footnotes, which has so far been signed by 60 WIPO Member States.¹⁰ As of now, the Marrakesh Treaty is not yet in force.

The demand for access to copyrighted materials is an inherently rational one – a claim from those excluded that they be included, that they be given something that others already enjoy.¹¹ On the one hand, persons with visual impairments are striving for a flow of information and knowledge contained in copyrighted materials to satisfy their reading interests, informational needs and human rights, while on the other hand, copyright rightholders express their legitimate interest to exercise exclusive rights protected under copyright law, as well as human rights.

1.2 Research Question

This research paper seeks to explore the Marrakesh Treaty as a redress to the problem of restricted access to copyrighted materials for persons with visual impairments. As such, the principal research question is how, and to what extent, the Marrakesh Treaty tackles the issue of restricted access to copyrighted materials by persons with visual impairments while securing the legitimate interests and human rights of the central stakeholders – copyright rightholders and visually impaired persons.

⁶World Intellectual Property Organization, ‘Member States’, <www.wipo.int/members/en/>, visited on 3 December 2013.

⁷Judith Sullivan, ‘Study on Copyright Limitations and Exceptions for the Visually Impaired’, World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, 20 February 2007, SCCR/15/7, p. 9.

⁸World Intellectual Property Organization, *Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities*, adopted in Marrakesh on 27 June 2013, VIP/DC/8 REV.

⁹Catherine Saez, ‘Interview with WIPO Director General Francis Gurry on New WIPO Treaty’, *Intellectual Property Watch*, 27 June 2013, <www.ip-watch.org/2013/06/27/interview-with-wipo-director-general-francis-gurry-on-new-wipo-treaty/>, visited on 3 December 2013.

¹⁰ World Intellectual Property Organization, ‘Contracting Parties_ Marrakesh VIP Treaty’, <http://www.wipo.int/treaties/en>ShowResults.jsp?lang=en&treaty_id=843>, visited on 15 February 2014.

¹¹Amy Kapczynski, ‘Access to Knowledge: A Conceptual Genealogy’, in Gaëlle Krikorian & Amy Kapczynski, *Access to Knowledge in the Age of Intellectual Property* (Zone Books, New York, 2010) p. 37.

The hypothesis underlying this research question is that the Marrakesh Treaty offers a viable legal framework with in-built flexibilities which would improve access to copyrighted materials for persons with visual impairments, but not to the extent of eradicating all existing copyright-related uncertainties and concerns.

Being a newly adopted treaty, and the first international instrument dedicated to limitations and exceptions to copyright, the Marrakesh Treaty is somewhat of a ‘wonder’ for scholars, governments and stakeholders. The research is, therefore, necessary in order to gain a comprehensive understanding of the Treaty. The framing of the research question addresses some relevant characteristics of the Marrakesh Treaty as a copyright instrument, but also explores its dedication to human rights. The research also seeks to provide an analysis of the Marrakesh Treaty from the perspective of the central stakeholders – a contribution that has not yet been addressed in contemporary literature.

1.3 Delimitations

It must be noted, that the problem of restricted access to information by visually impaired persons is triggered by a number of different factors, including social, economic, technological and legal. This research paper will focus, however, only on contributing legal factors, specifically international copyright norms.

It does not aim to provide a full interpretation of the Marrakesh Treaty, which it is done elsewhere.¹² Instead, this paper aims to interpret and analyse provisions of the Treaty to the extent necessary to answer the research question in focus.

1.4 Structure

Following this introduction, Chapter 2 provides background information on the debate that preceded the adoption of the Marrakesh Treaty. It situates a debate within international copyright *acquis*, and outlines concerns of the copyright rightholders and visually impaired persons raised within this debate.

In Chapter 3, particular characteristics of the Marrakesh Treaty are highlighted in order to situate the instrument within existing international copyright norms. This chapter continues to analyse selective provisions of the Marrakesh Treaty. It demonstrates that they were the result of extensive flexibilities and compromises. The flexibilities were intended to serve as tools offering national law-makers margin in complying with their own country's specific undertakings, as well as their economic, social and cultural needs. Chapter 3 also seeks to explore an application of the *three-step test* within the Treaty and reveals unresolved concerns of the stakeholders. It

¹²See, for example, Mihály J. Ficsor, ‘Commentary to the Marrakesh Treaty on Accessible Format Copies for the Visually Impaired’, *Copyright See-Saw*, 11 October 2013, <www.copyrightseesaw.net/archive/?sw_10_item=50>, visited on 3 December 2013 & Jonathan Band, ‘A User Guide to the Marrakesh Treaty’, *Association of Research Libraries*, 7 August 2013, <www.arl.org/news/arlnews/2856>, visited on 3 December 2013.

concludes with an evaluation of whether the compromises and flexibilities within the Treaty satisfy the goal of the Treaty: to *facilitate* access to copyrighted materials for persons with visual impairments *while doing no harm* to other legitimate interests.

Chapter 4 seeks to analyse whether the limitations and exceptions provided for in the Marrakesh Treaty are consistent with the demand of human rights law to secure authors,¹³ and visually impaired persons' rights. It seeks also to reveal influences of human rights principles and values upon the Treaty, and the potential contribution of these regarding the interpretation of the Treaty.

In the final chapter, a conclusion is made with respect to the initial hypothesis of how, and to what extent, the Marrakesh Treaty solves the issue of restricted access to copyrighted materials for persons with visual impairments.

1.5 Methodology

In order to situate a debate and identify problems that the Marrakesh Treaty seeks to solve, scholarly publications such as books and articles have been analysed. Due to the novelty of the instrument and the ongoing debate, online resources have also been used as sources of reference. The legal research method was used to analyse and interpret international copyright treaties, including the yet to be enforced Marrakesh Treaty, and human rights instruments. A comparative method was used to contrast provisions of different international instruments. In order to provide the interpretation of the treaties provisions, Articles 31 and 32 of the Vienna Convention on the Law of Treaties¹⁴ were taken into account, which read as follows:

Article 31 General rule of interpretation

1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
 - (a) *any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
 - (b) *any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
3. *There shall be taken into account, together with the context:*
 - (a) *any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*

¹³Key international human right instruments recognize that 'authors' – those responsible for creating works that are typically protected by intellectual property rights – are the beneficiaries of human rights [Laurence R. Helfer and Graeme W. Austin, *Human rights and intellectual property: mapping the global interface* (Cambridge University Press, Cambridge, 2011) p.171]; the expression 'copyright rightholders' is broader and includes as natural persons (authors) as well as business entities. Only in certain jurisdictions, such as the European Convention on Human Rights, the property right of business entities is recognized on the same footing with the property right of natural persons.

¹⁴United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, Treaty Series, vol. 1155, p. 331.

- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

2 Background on the WIPO Copyright-Exemption Treaty for Persons with Visual Impairments

2.1 Situating the Debate

In 1982, the WIPO and the United Nations Educational, Scientific and Cultural Organization (the “UNESCO”) convened the Working Group on Access by the Visually and Auditory Handicapped to Material Reproducing Works Protected by Copyright, which, in its report, emphasised that “a proper balance between the needs of handicapped persons and the legitimate interests of copyright owners” needs to be struck.¹⁵ Three years later, in 1985, Wanda Noel published a report, which emphasised problems with production and distribution of ‘special media materials’¹⁶ and suggested creating an entirely new international instrument addressing both matters.¹⁷ Despite strong conviction that copyright effects access to information, there were some who argued that restricted access to knowledge for [persons with visual impairments] is wrongly seen as a copyright issue.¹⁸ As one human rights commentator noted when speaking of both his nation’s and his continent’s priorities: “when most schools across Africa do not have anywhere near enough books or a photocopier or even a single computer, copyright is not really an issue”.¹⁹

There have been many attempts to find a solution to the issue of restricted access to information for persons with visual impairments, both within and without the existing copyright framework. Some claimed that a market-based solution will put publishing

¹⁵United Nations Educational, Scientific and Cultural Organization and World Intellectual Property Organization, *Report of the Working Group on Access by the Visually and Auditory Handicapped to Material Reproducing Works Protected by Copyright*, 3 January 1983, UNESCO/WIPO/WGH/I/3, para. 9.

¹⁶‘Special media materials’ is an analogue term to accessible format copies.

¹⁷Wanda Noel, ‘Problems Experienced by the Handicapped in Obtaining Access to Protected Works, Taking into Account, in Particular, the Different Categories of Handicapped Persons’, Annex II to the Executive Committee of the International Union for the Protection of Literary and Artistic Works (Berne Union) and Intergovernmental Committee of the Universal Copyright Convention, ‘Copyright Problems Raised by the Access by Handicapped Persons to Protected Works’, 12 March 1985, IGC(1971)/VI/11 - B/EC/XXIV/10, para. e.

¹⁸Tatiana Sinodinou, ‘On Copyright and Rights of Persons with Disabilities: WIPO Treaty for the Blind’, *Kluwer Copyright Blog*, 19 April 2013, <kluwercopyrightblog.com/2013/04/19/on-copyright-and-rights-of-persons-with-disabilities-wipo-treaty-for-the-blind/>, visited on 3 December 2013.

¹⁹Alan Story, ‘Study Paper 5: Study on Intellectual Property Rights, the Internet, and Copyright’ (Quoting Darch), *Commission on Intellectual Property Rights*, Kent Law School, University of Kent, p. 13, <www.iprcommission.org/papers/pdfs/study_papers/sp5_story_study.pdf>, visited on 11 December 2013.

accessible literature on an economically viable footing.²⁰ Others believed that licensing will adequately address the issue.²¹ Another proposal was to establish stakeholders' platforms similar to the Trusted Intermediary Global Accessible Resources Project. Concurrently, the idea of separate multilateral and global *copyright-exemption treaty for persons with visual impairments*²² prevailed at the WIPO.

Opposition to the copyright-exemption treaty was raised by some associations of rightholders, publishing and entertainment industry associations, and developed states, as well as by some human rights advocates, who claimed that this treaty is superfluous because the rights at issue already exist and efforts are better spent in creating compliance with existing agreements to respect these rights.²³ At the same time, the idea of multilateral treaty of copyright-exemption had many supporters, including a broad coalition of developing countries, consumers, libraries and non-governmental organizations working in the fields of development, public health, human rights, digital rights and free software.²⁴ The proponents claimed that the most valuable argument for the treaty was found not in the rights language, but in numbers. For decades, no national scheme, nor any international coalition of the willing, has been able to provide meaningful access to information for some 285 million visually impaired persons around the world.²⁵ The international copyright-exemption treaty would ideally do what national and regional programs do not; recognize an obligation by trade representatives and intellectual property experts to provide persons with visual impairments with access to currently unavailable materials.²⁶

2.2 Limitations and Exceptions to Copyright within the International Copyright Acquis

As the discussion at the WIPO has moved towards a binding treaty on limitations and exceptions to copyright for the benefits of persons with visual impairments, it had been commonly acknowledged that it "should be compatible with the standards set by

²⁰Guy Whitehouse, 'A New Clash Between Human Rights and Copyright: The Push for Enhanced Exceptions for the Print-Disabled', 25(4) *Publishing Research Quarterly* (2009), p.226.

²¹Digital Accessible Information System (DAISY) Consortium, 'Statement Issued by the DAISY Consortium in Response to the World Blind Union February 26, 2011 Statement', *DAISY Consortium*, 10 March 2011 <www.daisy.org/files/news/attachments/daisy_newsrelease_2011-03-10.html>, visited on 3 December 2013.

²²A 'treaty on copyright exemption' or 'copyright-exemption treaty' is a reference to a treaty mandating national copyright limitations and exceptions for persons with visual impairments discussed at the WIPO, which eventually became the Marrakesh Treaty.

²³Aaron Scheinwald, 'Who Could Possibly Be against a Treaty for the Blind', 2:445 *Fordham Intellectual Property, Media & Entertainment Law Journal* (2011) p. 480.

²⁴James Love, 'Background and Update on Negotiations for a WIPO Copyright Treaty for Persons who are Blind or Have Other Disabilities', *Knowledge Ecology International*, 7 April 2011, <www.keionline.org/node/1089>, visited on 3 December 2013.

²⁵See Scheinwald, *supra* note 23, p.507.

²⁶*Ibid.*, p. 475.

the international copyright *acquis*".²⁷ The international copyright *acquis* constitutes three main agreements: the *Berne Convention for the Protection of Literary and Artistic Works* (the "Berne Convention" or the "Berne"),²⁸ the *World Intellectual Property Organization Copyright Treaty* (the "WCT"),²⁹ and *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the "TRIPS").³⁰ One of the main minimum standards set by those agreements concerns the limitations and exceptions to copyright.

Limitations and exceptions to copyright is a mechanism of access, which limits the exclusive rights of righholders and allows consumers to use protected content without their permission.³¹ It was important, therefore, that the new WIPO copyright-exemption treaty was compatible with the provisions of already existing agreements, namely, Article 9(2) of the Berne Convention, Article 10 of the WCT, and Article 13 of the TRIPS, which read as follows:

- a) in accordance with Article 9(2) of the Berne Convention, a Contracting Party may permit the reproduction of works in certain special cases provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author;*
- b) in accordance with Article 10 (1) of the WCT, a Contracting Party may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in 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;*
- c) in accordance with Article 10 (2) of the WCT, a Contracting Party shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein 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;*
- d) in accordance with Article 13 of the TRIPS, a Contracting Party shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.*

²⁷Bernt Hugenholtz & Ruth L. Okediji, 'Conceiving an International Instrument on Limitations and Exceptions to Copyright', Study supported by the Open Society Institute (OSI), 6 March 2008, p.11, <ssrn.com/abstract=2017629>, visited on 3 December 2013.

²⁸*Berne Convention for the Protection of Literary and Artistic Works* of 9 September 1886, completed at Paris on 4 May 1896, revised at Berlin on 13 November 1908, completed at Berne on 20 March 1914, revised at Rome on 2 June 1928, at Brussels on 26 June 1948, at Stockholm on 14 July 1967, and at Paris on 24 July 1971, and amended on 28 September 1979.

²⁹World Intellectual Property Organization, *World Intellectual Property Organization Copyright Treaty*, adopted in Geneva on 20 December 1996.

³⁰*Agreement on Trade-Related Aspects of Intellectual Property Rights*, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments-Results of the Uruguay Round Vol. 31, 33 I.L.M. 81 (1994).

³¹Lesley, 'Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled', *Copyrightlaws.com*, 24 September 2013, <www.copyrightlaws.com/international/marrakesh-treaty-to-facilitate-access-to-published-works-for-persons-who-are-blind-visually-impaired-or-otherwise-print-disabled/>, visited on 3 December 2013.

All three agreements refer to the *three-step test* as a tool to evaluate whether or not the limitations and exceptions to copyright are justified. The first step demands the limitation and exception to be confined to '*certain special cases*', meaning that it should be narrow in a quantitative, as well as, qualitative sense.³² The second step is to establish that the limitation and exception '*does not conflict with normal exploitation of the work*'. In other words, the limitation and exception will fail the second step if the permitted usage of copyrighted work enters into economic competition with the ways that rightholders normally extract economic value from that copyright and thereby deprive them of significant or tangible commercial gains.³³ The third step seeks to establish that the limitation and exception '*does not unreasonably prejudice the legitimate interest of the rightholder*'. Failing the third test means that the limitation and exception causes or has the potential to cause an unreasonable loss of income to the copyright owner.³⁴

Certain deviations appear in the agreements as to the application of the three-step test, such as, for example, the Berne and the WCT focus on the interests of the 'author', while the TRIPS talks about the 'right holder'. Another difference is that the Berne's three-step test applies only to the *right of reproduction*, but under the WCT the test applies to all economic rights recognized by the Berne and the WCT, including the *right of distribution* and the *right of making available to the public*. Under the TRIPS the test applies to all economic rights guaranteed by the agreement.

The three-step test is a foundational aspect of the international copyright law, and is used to facilitate the balance between the interests of the authors and the interests of the public. Clearly, application of the three-step test towards limitations and exceptions is not at the discretion of the state, but it is an obligation under the international copyright *acquis*. That is why many states during the negotiation on the copyright-exemption treaty were concerned that the limitations and exceptions specified by the new multilateral treaty for the benefits of persons with visual impairments had to be compatible with the three-step test.

2.3 Stakeholders' Concerns

A debate about the new WIPO copyright-exemption treaty was not only about compatibility with the three-step test, even though it constituted one of the toughest discussions. The negotiators had to face many other challenges, such as the need to accommodate the many different concerns of the central stakeholders – copyright rightholders and persons with visual impairments. Some of those concerns are summarised below.

³²See Hugenholtz & Okediji, *supra* note 27, p. 22.

³³Ibid., p.23.

³⁴Ibid., p.24.

2.3.1 Rightholders' Concerns about the Limitations and Exceptions to Copyright

(i) Material interests of the rightholders

It was said that the limitations and exceptions for the benefit of persons with visual impairments will undermine existing respect for the current norms of global copyright law and infringe the rights of copyright rightholders to profit from their work.³⁵ Firstly, the rightholders pointed out that they will suffer economic harm where for-profit entities would be able to provide unauthorised accessible formats of works without incurring certain pricing limitations, especially where the copyright rightholders also provide such formats.³⁶ Secondly, the rightholders pointed out the risk of massive piracy if such an exception is made in this digital era.³⁷ Even if the piracy would not be driven by visually impaired persons themselves, the treaty exception would indirectly encourage certain individuals and entities to disregard copyright law altogether, in particular, those who believe that international copyright restricts consumers' rights too strongly.³⁸ Thirdly, establishment of internationally recognised exemptions would be counterproductive since it would reduce incentives for the copyright rightholders to offer accessible formats themselves.³⁹

(i) The harmony of the copyright system

It was claimed that the mandatory exemptions are categorically disruptive to the delicate balance between intellectual property protection and human rights.⁴⁰ This implies that the limitations and exceptions for the benefit of persons with visual impairments will establish a precedent for other exemptions to come, for instance, exemptions to patent protection. Also, it had been noticed that the [copyright-exemption treaty] could potentially expand an already existing broad and vague concept of 'fair use',⁴¹ which has strong potential to significantly undermine the rights of authors.⁴²

³⁵See Scheinwald, *supra* note 23, p. 487.

³⁶Iheanyi Samuel Nwankwo, 'Proposed WIPO Treaty for Improved Access for Blind, Visually Impaired, and Other Reading Disabled Persons', 3:203 *JIPITEC: Journal Of Intellectual Property, Information Technology And E-Commerce Law* (2011) para. 60.

³⁷*Ibid.*, para. 5.

³⁸See Scheinwald, *supra* note 23, p. 489.

³⁹See Sinodinou, *supra* note 18.

⁴⁰See Scheinwald, *supra* note 23, pp. 488-489.

⁴¹Fair use doctrines, which are codified in the Berne Convention and the new WIPO Treaties, [...] authoriz[es] certain limited uses of otherwise copyright-protected works, and allow[s] governments to authorize other limited uses [Frederick M.Abbott, Thomas Cottier & Francis Gurry, *The international intellectual property system: commentary and materials*, vol 1 (Kluwer Law International, The Hague, 1999) pp. 1861-1862].

⁴²Global Intellectual Property Center (GIPC), the U.S. Chamber of Commerce, Letter from David T.Hirschmann, President and CEO of the GIPC to Teresa Stanek Rea, Acting Director of the U.S. Patent and Trademark Office, 19 April 2013, as a part of the disclosure materials provided by the U.S. Patent and Trademark Office on the request of James Love, *Knowledge Ecology International*, 5 June 2013, p.44 <<http://keionline.org/node/1759>>, visited on 3 December 2013.

In order to secure their material interests and ensure harmony within the copyright system, the rightholders were insisting on incorporation of the three-step test in the new WIPO copyright-exemption treaty. It was claimed that the failure to embody this principle would unreasonably prejudice the [copyright rightholders] and set a profoundly negative precedent for future agreements.⁴³

Another important claim was that there is a need for an exemption to limitations and exceptions for situations where a copyrighted work is commercially available and accessible.⁴⁴ Also, the rightholders were in favour of a partnership with ‘trusted intermediaries’ [or ‘authorized entities’],⁴⁵ for example, libraries, collective management societies, etc.

2.3.2 Copyright-Related Concerns of Persons with Visual Impairments

(i) Permission of the rightholders

David Mann, on behalf of the World Blind Union (the “WBU”), claimed that one of the copyright-related barriers to access for visually impaired persons is a need to obtain the permission of the rightholder.⁴⁶ According to Article 9 of the Berne Convention, an exclusive right of authorising the reproduction of the work, in any manner or form, belongs to the author. Therefore, when a person with visual impairment is reproducing original work into accessible formats, this act contravenes the exclusive right of the copyright rightholder to reproduction. In order to avoid this, visually impaired persons have to request the permission of the rightholder to produce accessible format copies for each and every title published inside or outside the country, which requires time and money. This raises the question, “what if the author is unknown and it is impossible to establish the identity of the rightholder?” This is the case with many orphaned works⁴⁷ which are rarely transformed into accessible formats, simply because the permission of the rightholder is impossible to obtain.

⁴³*Ibid.*

⁴⁴Intellectual Property Owners Association (IPO), Letter from Richard Phillips, President of the IPO to Teresa Stanek Rea, Acting Director of the U.S. Patent and Trademark Office, 15 April 2013, as a part of the disclosure materials provided by the U.S. Patent and Trademark Office on the request of James Love, *Knowledge Ecology International*, 5 June 2013, p. 25 <<http://keionline.org/node/1759>>, visited on 3 December 2013.

⁴⁵See Nwankwo, *supra* note 36, para. 61.

⁴⁶David Mann, ‘WIPO – Advancing Access to Information for Print Disabled People’ (Libraries and Librarians: Making a Difference in the Knowledge Age: Council and General Conference, Boston, 16–25 August 2001) para. 2.3 <www.keionline.org/sites/default/files/david_manon_wipo.pdf>, visited on 3 December 2013.

⁴⁷Orphaned works are the works whose rights owners are unknown or untraceable [Denise Rosemary Nicholson, ‘Digital Rights Management and Access to Information: a developing country’s perspective’, 19(1) *LIBRES: Library & Information Science Research Electronic Journal* (2009), p.9].

(ii) Potential technological blocks of digital rights management systems

Today's information-driven society relies heavily on digital information and technology. Digital text is especially valuable for visually impaired persons because it is decidedly faster and cheaper to produce accessible formats by using electronic publications. When an electronic file is available it is usually protected by copy-protection measures, such as digital rights management systems ("DRMs"). DRMs imposed on electronic publications can prevent or inhibit assistive technologies from working. The reason for this is that DRMs interpret the assistive technology's attempts to render the text available as an attack, and so blocks access to the file.⁴⁸ DRMs even prevent persons with visual impairments from gaining access to materials they have legally purchased.⁴⁹ For example, Adobe PDF is a DRM system which invokes customer usage restrictions on the document, such as not allowing text to speech feature.⁵⁰

(iii) Lack of harmonization in a cross-border exchange

The World Blind Union estimated that only 7 percent of published books in the world's richest countries are ever made into accessible formats, and less than 1 percent in poorer ones.⁵¹ According to James Love, what [visually impaired persons] have access to depends entirely on the country in which they live.⁵² For example, Uruguay had 3,000 books on tape for the whole country, whereas Argentina, just across the border, had hundreds of thousands – but these neighbouring countries were prohibited from sharing these audio books because of copyright laws.⁵³ Moving such accessible materials across borders is complicated due to copyright legislation restrictions of both the importing and exporting countries.⁵⁴

(iv) Translations

It is not surprising that people want to read publications made available all over the world in their own language. Currently, there is a shortage of accessible materials in poorer countries. The situation is even more acute for visually impaired persons who are language minorities and who are learning to read in a non-dominant language.⁵⁵ Scarcity of accessible format copies in non-dominant languages can be attributed to copyright-related issues, since copyright law routinely disallows translation without the consent of the copyright rightholder.⁵⁶ Translation into another language

⁴⁸See Whitehouse, *supra* note 20, p.224.

⁴⁹*Ibid.*

⁵⁰Denise Rosemary Nicholson, 'Digital Rights Management and Access to Information: a developing country's perspective', 19(1) *LIBRES: Library & Information Science Research Electronic Journal* (2009) p. 10.

⁵¹International Federation of Library Associations (IFLA), 'IFLA Welcomes WIPO Treaty for Blind and Print Disabled People', 27 June 2013, <www.ifla.org/node/7811>, visited on 3 December 2013.

⁵²See Baker, *supra* note 2, p.3.

⁵³*Ibid.*

⁵⁴See Whitehouse, *supra* note 20, p. 223.

⁵⁵See Baker, *supra* note 2, pp. 3-4.

⁵⁶*Ibid.*

constitutes a derivative work, and copyright law grants the monopoly of all such derivative works to the original author.⁵⁷

(v) *Duplication of efforts in production of ‘transient’ files*

The electronic age has totally changed old ways of publishing. Nowadays, digital ‘transient’⁵⁸ files are created first, which can be used to make ‘hard’ alternative formats, such as Braille, large print, or digital audio books. Digital ‘transient’ files can be easily transmitted electronically directly from the rightholders to visually impaired persons or authorized entities, for example, libraries. This would reduce the need for duplication of efforts in creating ‘transient’ files and speed up production of accessible formats.⁵⁹

As of now, copyright law grants a monopoly to the rightholders to authorise the reproduction of the work into transient files, and ultimately into accessible format copies.⁶⁰ The fact is that conversion of published copyright works into ‘transient’ files, and then into accessible formats is an expensive affair. Such conversions and the subsequent reproduction of accessible copies are typically undertaken by non-profit organizations, which rely on limited funding from charities and from government support.⁶¹ It may be necessary to find ways of obliging the rightholders in making their material available in a form that can be manipulated sufficiently to allow equitable access by visually impaired persons.⁶² If copyright law would mainstream exchange of ‘transient’ files, there would be no further need to do the same work twice, and more titles would become available in accessible formats.

(vi) *Commercial availability requirement*

Reflecting on the rightholders’ claim to incorporate a commercial availability requirement, it has been said, that in practice, commercial availability restrictions require complex pricing evaluations, and the accessibility and interoperability of commercial formats.⁶³ These problems escalate dramatically when applied to multiple export markets.⁶⁴ For example, the Bookshare library in the US, with hundreds of thousands of accessible books, would have to go through such complex bureaucracy that they could not afford to serve people outside the US if they were forced to

⁵⁷Patrick Hely, ‘A Model Copyright Exemption to Serve the Visually Impaired: An Alternative to the Treaty Proposals Before WIPO’, 5 *Vanderbilt Journal Of Transnational Law* (2010) p. 1389.

⁵⁸See Mann, *supra* note 46, para. 2.5.

⁵⁹*Ibid.*, para. 2.6.

⁶⁰See Article 9 of the Berne Convention, *supra* note 28.

⁶¹Wee Loon Ng-Loy, ‘Visually Impaired Persons and Copyright’, 41(4) *Iic-International Review Of Intellectual Property And Competition Law* (2010) p. 377.

⁶²See Mann, *supra* note 46, para. 2.4.

⁶³James Love, ‘Knowledge Ecology International (KEI) Opening Statement at Marrakesh Diplomatic Conference’, *Knowledge Ecology International*, 19 June 2013 <keionline.org/node/1754>, visited on 3 December 2013.

⁶⁴*Ibid.*

comply with a commercial availability requirement.⁶⁵ Representatives of developing countries are concerned that standards for reasonable pricing of works would be inappropriate in the context of a developing country, where unemployment is widespread among blind persons, incomes are very low, and state subsidies are limited.⁶⁶

2.4 Four Drafts of the WIPO Copyright-Exemption Treaty

Since 1985, the ongoing discussion on the development of the WIPO copyright-exemption treaty has been how to accommodate the above mentioned concerns in one document. In 2009, at the 18th Session of the Standing Committee on Copyright and Related Rights (the “SCCR”), the “*Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union*”⁶⁷ (“Brazil *et al.* Proposal”) was recommended for discussion. Later, in 2010, at the 20th Session of the SCCR, the “*Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers*” was proposed by the African Group⁶⁸ (the “African Group Proposal”). The “*Draft Consensus Instrument*” was proposed by the United States of America (the “US Proposal”)⁶⁹. The “*Draft Joint Recommendation concerning the improved access to works protected by copyright for persons with a print disability*” was proposed by the European Union (the “EU Proposal”)⁷⁰.

⁶⁵Jim Fruchterman, ‘Poisoning the Treaty for the Blind’, *Accessibility News International*, 7 May 2013, <www.accessibilitynewsinternational.com/poisoning-the-treaty-for-the-blind/>, visited on 3 December 2013.

⁶⁶James Love, ‘Background and Update on Negotiations for a WIPO Copyright Treaty for Persons who are Blind or Have Other Disabilities’, *Knowledge Ecology International*, 7 April 2011, <www.keionline.org/node/1089>, visited on 3 December 2013.

⁶⁷World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, *Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU)*, 25 May 2009, SCCR/18/5.

⁶⁸World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, *Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers: Proposal by the African Group*, 15 June 2010, SCCR/20/11.

⁶⁹World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, *Draft Consensus Instrument: Proposal by the Delegation of the United States of America*, 10 June 2010, SCCR/20/10.

⁷⁰World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, *Draft Joint Recommendation concerning the improved access to works protected by copyright for persons with a print disability: Proposal by the Delegation of the European Union*, 17 June 2010, SCCR/20/12.

There is an abundance of literature providing comparisons of these four proposals;⁷¹ therefore it will not be repeated here. At this point of the discussion, it suffices to elucidate some of the patterns within the proposals.

Proposals of the Southern states, having the majority of visually impaired persons and scarce resources, supported a legally binding instrument and cross-border exchange of accessible format copies. Proposals of the Northern states, having the majority of copyright rightholders, were inclined towards a soft-law document, and focused on the benefits of visually impaired persons, rather than utilizing copyright exception to aid developing states.

2.5 Summary

The demand of persons with visual impairments to have access to copyrighted materials on the same footing as their sighted counterparts is rational and necessary. Unfortunately, this demand has been disregarded for a very long. As this chapter has demonstrated, the pre-Marrakesh copyright norms operated within the restrictive framework: everything is prohibited unless it is permitted. For many years, persons with visual impairments themselves, their assistants or libraries, had to comply with this rule: permission of the rightholders to produce accessible format copies had to be obtained on a title-by-title basis; circumvention of the DRMs or translation of works were commonly prohibited; cross-border exchange was almost impossible and efforts were duplicated in the production of works in accessible formats. The result was devastating: only 1 percent of printed materials are now made available in accessible formats in low- and middle-income countries.⁷²

For years, the question was asked whether copyright norms have anything whatsoever to do with the issue of restricted access to information. Some claimed that this access problem essentially originate from a lack of financial means and appropriate equipment,⁷³ but not in copyright; therefore a solution has to be found somewhere else, for example, in the promotion of new business models. Several authors proposed that copyright has internal mechanisms to address the issue of restricted access, such as national exceptions and limitations, licensing⁷⁴; and the involvement of international copyright law is, therefore, unnecessary. In contrast, many argued that a new international instrument on the limitations and exceptions to copyright for the benefits of persons with visual impairments is necessary, because this would secure an international consensus on the issue.

During the negotiations on the WIPO copyright-exemption treaty, different stakeholders raised various concerns. Copyright rightholders pushed towards re-establishing the three-step test and argued that rightholders shall not suffer any

⁷¹See Scheinwald, *supra* note 23 & Lida Ayoubi, ‘Human Rights Perspectives on Access of the Blind, Visually Impaired and Other Reading Disabled Persons to Copyrighted Materials’, 1 May 2011, <papers.ssrn.com/sol3/papers.cfm?abstract_id=1927825>, visited on 3 December 2013.

⁷²See Baker, *supra* note 2, p.3.

⁷³See Sinodinou, *supra* note 18.

⁷⁴See DAISY Consortium, *supra* note 21.

economic harm because of the copyright exemption. Persons with visual impairments called for a simple and workable treaty, which would allow production and distribution of accessible format copies to individuals, circumvention of DRMs, and cross-border exchange of accessible works regardless of format.

3 **Reading the Marrakesh Treaty through the Stakeholders' Concerns**

3.1 Measure of success

The negotiations on the WIPO copyright-exemption treaty was finalised on 27 June 2013, when the Marrakesh Treaty was adopted. It was very hard to adopt, and one of the reasons for this was the challenge to accommodate very different, almost polar, concerns of the copyright rightholders and persons with visual impairments. Due to the fact that this treaty is the first copyright instrument to address limitations and exceptions, it is seen as revolutionary, as something that changes culture, and therefore, leads to resistance and cautiousness. All of a sudden, at the negotiation table, other concerns were raised, such as the limitations and exceptions to copyright becoming a precedent; also, the impact on other intellectual property rights, as well as complex relations between developed and developing countries. These concerns served to slow down and complicate the negotiation process.

As a result, the goal of the Marrakesh Treaty became rather modest: to *facilitate* access to copyrighted materials for persons with visual impairments *while no harm is done* to other interests: no harm to interests of the rightholders, no harm to international copyright systems or other intellectual property rights, and no harm to complex relationships between developed and developing countries, *etc.* The success of the Marrakesh Treaty, therefore, should be viewed not only from the standpoint of persons with visual impairments and measured in the amount of titles made accessible and available, but also should include the viewpoints of the rightholders; the Treaty shall ensure that no harm is done to their legitimate interests, including material interests.

3.2 Characteristics of the Marrakesh Treaty

It is necessary to establish a place of the Marrakesh Treaty within the international copyright *acquis*. The relations to new international copyright instruments are governed by Article 20 of the Berne Convention.⁷⁵ This provision reserves for the Contracting Parties the possibility to enter into special agreements among themselves on the condition that “such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this

⁷⁵Jørgen Blomqvist, ‘The Consistency of Mandatory Exceptions Treaties with International Conventions in the Field of Copyright and Related Rights’, *ALAI Dublin 2011*, p.4, <www.alaidublin2011.org/wp-content/uploads/2011/08/Jorgen-Blomqvist.pdf>, visited on 4 December 2013.

Convention".⁷⁶ The Marrakesh Treaty does not have an explicit reference to Article 20 of the Berne; nevertheless, Articles 1 and 11, of the Treaty reassure that it does not contain provisions contrary to any other treaties. Establishing that implicates that to fit into international copyright *acquis*, the Marrakesh Treaty cannot lessen protection of copyright that is already granted by other copyright agreements; but what it can do – is to establish alternative rules, as long as they do not contradict to the Berne Convention and to those norms which by reference are incorporated into the TRIPS⁷⁷ and the WCT.⁷⁸

One more distinctive characteristic of the Marrakesh Treaty is the linkage to a membership of the WIPO. The Member States of the WIPO, unlike members of the World Trade Organization (the "WTO"), do not have to accept a 'package' of agreements to become a member; therefore, the WIPO Member States may have different levels of undertakings. For example, out of 60 Contracting Parties to the Marrakesh Treaty, so far only 53 are Parties to the Berne Convention, 30 to the WCT and 50 to the TRIPS; while some are not bound by any (for example, Afghanistan, Ethiopia and Sao Tome and Principe). It is necessary to mention that there are certain developing countries, Parties to the Berne Convention, which are not yet in the position to fulfil some of the obligations. This has led to the adoption of the Appendix to the Berne Convention *Special Provisions Regarding Developing Countries*, which allows special transitional treatment for such developing countries (through translation and reprint compulsory licenses).⁷⁹

As a result, the level of obligations undertaken by those states is different. This problem was referred to as the 'Berne Gap'. In order to address that, certain flexibilities were required within the Marrakesh Treaty.

Similar to all WIPO treaties, the Marrakesh Treaty does not set out the law as it applies, rather, it sets out minimum standards that the Contracting Parties must adhere to and include in their own domestic copyright laws.⁸⁰ That is why some provisions are written in shall-, should- or may-language. For example, the first sentence of Article 4(1)(a) of the Treaty provides that Contracting Parties *shall* provide for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public; the second sentence of the same article indicates that national law *should* permit changes needed to make the work accessible in the alternative format; Article 4(2)(a) of the Treaty provides that contracting Parties *may* fulfil preceding article in certain ways. This means that the shall-provisions establish minimum standard for the Contracting Parties, while should- and may-provisions are seen as the flexible tools offering national law-makers sufficient space to satisfy their own level of international undertakings, as well as economic, social and cultural needs.

⁷⁶Ibid.

⁷⁷See Article 9(1) of the TRIPS, *supra* note 30.

⁷⁸See Article 1(4) of the WCT, *supra* note 29.

⁷⁹Ibid., p.78.

⁸⁰See Lesley, *supra* note 31.

Another particularity of the Marrakesh Treaty is an extensive use of referral provisions. Rules of referral allow to each state to deal with the matter in question in its own way, although the rule may stipulate certain limitations within which this discretion is to be exercised.⁸¹ Clear example is Article 4 of the Marrakesh Treaty, which says that the Contractual Parties shall have a limitation and exception for beneficiary persons, provided that this limitation and exception shall cover rights to reproduction, distribution, making available to the public. This norm leaves it to the legislation of each country to frame a limitation and exception in its own way, identifying rights and obligations of entities involved. However, at the same time it places a ‘minimum limitations and exceptions’ – limitation and exception shall be to the rights mentioned above; and ‘maximum limitations and exceptions’ – limitation and exception shall comply with the three-step test under the Berne, the WCT and the TRIPS (Article 11 of the Marrakesh Treaty).

Basing on the mentioned above, it is possible to establish that the Marrakesh Treaty, firstly, has necessary safeguards to ensure that it harmonically fits into the international copyright *acquis*; secondly, the Treaty provides space for flexibilities necessary to allow national law-makers to adapt the provisions of the Treaty to national circumstances.

3.3 Revealing Compromises and Flexibilities within the Marrakesh Treaty

3.3.1 Definition of ‘Beneficiary Persons’

The definition of the beneficiary persons was a strong concern of the rightholders. It was argued that if a broad definition of beneficiaries adopted, including deaf persons and persons with other disabilities, the limitations and exceptions will fail to comply with the first condition of the three-step test – *certain special cases*.

In contrast, the advocates for visually impaired persons were keen to include “persons with any other disabilities” (Brazil *et al.* Proposal)⁸² or any persons “suffering from visual impairment or a physical, mental, sensory, or cognitive incapacity, and persons with any other disability who, due to that disability, need an accessible format” (the African Group Proposal)⁸³. They were pressing towards ‘embracing’ definition of the beneficiaries, what would allow to include all kinds of visual impairments and print disabilities.

The decisions to exclude deaf persons [and persons with any other disabilities, except of visual impairment] played out between 2010 and 2011, in response to lobbying the

⁸¹Sam Ricketson & Jane C. Ginsburg, *International copyright and neighbouring rights: the Berne Convention and beyond*, vol 1 (2nd. edn, Oxford University Press, Oxford, 2006), p.182, para.5.06.

⁸²See Article 15(b) of Brazil *et al.* Proposal, *supra* note 67.

⁸³See Article 21 of the African Group Proposal, *supra* note 68.

Motion Picture Association of America (the “MPAA”).⁸⁴ The MPAA’s concern was that a loose definition of the ‘visual impairment’ may cover dyslexia and other disorders,⁸⁵ and eventually lead to unauthorised duplication and distribution of copyright works by any person who is self-defined as having any form of disability.⁸⁶ By 2010, the US delegation took a hard line in the WIPO negotiations, backed upon by the EU, to narrow the treaty, excluding deaf persons.⁸⁷ In November 2010, the negotiating parties at the WIPO agreed to separate the issues of visually impaired and reading disabilities from ‘other disabilities’.⁸⁸

As an outcome, Article 3 of the Marrakesh Treaty defines beneficiary persons as follows:

A beneficiary person is a person who:

(a) is blind;

(b) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or³

(c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading; regardless of any other disabilities.

3 Agreed statement concerning Article 3(b): *Nothing in this language implies that “cannot be improved” requires the use of all possible medical diagnostic procedures and treatments.*

This provision uses generic terms, such as ‘blindness’, ‘visual, perceptual or reading, and some physical disabilities’, and avoids reference to the specific disabilities, for example, dyslexia. Article 3 of the Treaty definitely served the rightholders’ concerns, by excluding deaf persons, and “listing in an exhaustive manner on the basis of what kinds of impairment a person may qualify as beneficiary”.⁸⁹ The WBU also expressed praises to this provision, saying that “this is a broad definition that includes just about any disability that interferes with the effective reading of printed material”.⁹⁰

⁸⁴Knowledge Ecology International, ‘Briefing Materials ‘The Evolution of Treaty Beneficiaries: Marrakesh Note 1’, June 2013, <keionline.org/r2r/marrakesh>, visited on 4 December 2013.

⁸⁵Brendan Kirwin, ‘Addressing the “Book Famine”: The WIPO and VIP Accessibility’, 15 August 2012, p. 15, <www.bkirwin.net/scholarship>, visited on 4 December 2013.

⁸⁶*Ibid.*

⁸⁷Fedro D. Tomassi, ‘Audiovisual Materials in the Classroom and the WIPO treaty for copyright exceptions for persons with disabilities’, *Knowledge Ecology International*, 8 June 2013, <www.keionline.org/node/1738>, visited on 4 December 2013.

⁸⁸*Ibid.*

⁸⁹Mihály J. Ficsor, ‘Commentary to the Marrakesh Treaty on Accessible Format Copies for the Visually Impaired’, *Copyright See-Saw*, 11 October 2013, p.19 <www.copyrightseesaw.net/archive/?sw_10_item=50>, visited on 3 December 2013.

⁹⁰World Blind Union, ‘The Treaty of Marrakesh explained’, 2013, <www.worldblindunion.org/English/news/Pages/The-Treaty-of-Marrakesh.aspx>, visited on 4 December 2013.

An exceptional value for the interests of persons with visual impairments has Agreed Statement to Article 3(b) of the Treaty. It explains that the phrase “visual impairment or disability [...] which cannot be improved” does not require “the use of all possible medical diagnostic procedures and treatments”. Thus, any disabling visual impairment that cannot be improved by the use of corrective lenses should be understood to qualify.⁹¹

Concurrently, Article 3 of the Marrakesh Treaty does not clarify what are qualifying indicators for ‘blindness’, ‘visual impairment’, etc. It may be appropriate to mention a debate around the definition of ‘blindness’. In many countries, medical approach applied in defining blindness and commonly accepted legal definition is “*visual acuity of not greater than 20/200 in the better eye with correction or a field not subtending an angle greater than 20 degrees*”.⁹² This definition, however, does not include a person who has normal visual acuity but cannot hold her eyes open because of her sensitivity to light. Dr. Kenneth Jernigan argues that this person shall be considered a blind.⁹³ He claims that blindness can best be defined not physically or medically but functionally or sociologically.⁹⁴ Similar approach is reflected in the Convention on the Rights of Persons with Disabilities⁹⁵ (the “CRPD”), which strongly supports the social model of disability. The CRPD does not contain a definition of disability, but only indicates “persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.⁹⁶ The social model of disability implies that a person is not disabled *per se*, rather disability results from an interaction between the individual and society.⁹⁷

As Marrakesh Treaty leaves to the Contracting Parties’ national law to specify spectrum of impairments and disabilities that are qualified under the Treaty, it is a hope that States would follow a social model of disability and include all those who are in real need.

3.3.2 Definition of ‘Works’

An important question for the stakeholders was what kind of works shall be qualified for use under the limitations and exceptions. Various proposals covered different spectrum of works. The most extensive range was proposed by the African Group, and included “artistic, literary, dramatic, musical or scientific type, regardless of the

⁹¹Jonathan Band, ‘A User Guide to the Marrakesh Treaty’, *Association of Research Libraries*, 7 August 2013, p.4 <www.arl.org/news/arlnews/2856>, visited on 3 December 2013.

⁹²Kenneth Jernigan, ‘A Definition of Blindness’, 24:3 *The National Federation of the Blind Magazine for Parents and Teachers of Blind Children: Special Issue: Low Vision and Blindness* (2005), <www.nfb.org/images/nfb/publications/fr/fr19/fr05si03.htm>, visited on 4 December 2013.

⁹³*Ibid.*

⁹⁴*Ibid.*

⁹⁵United Nations General Assembly, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 61/106.

⁹⁶*Ibid.*, Article 1 of the CRPD.

⁹⁷World Health Organization, *World Report on Disability* (2011), p.4.

mode, format or form of expression".⁹⁸ The proposal of Brazil *et al.* also included films,⁹⁹ and non-copyrighted elements of databases.¹⁰⁰

A hot spot debate was about the audiovisual works. Some argued that the audiovisual works, such as slide shows, films, videos are commonly used by visually impaired persons as educational materials, and, therefore, they shall be included.¹⁰¹ In contrast, the motion picture industry argued that the audiovisual works be excluded.¹⁰² The US delegation formally proposed exclusion in June 2012; in December 2012 there was a deal to eliminate the audiovisual works in order to get an agreement to hold a diplomatic conference in June 2013.¹⁰³

As a result, the Marrakesh Treaty defines ‘works’ as follows:

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

I Agreed statement concerning Article 2(a): *For the purposes of this Treaty, it is understood that this definition includes such works in audio form, such as audiobooks.*

“Literary and artistic works” as defined in Article 2(1) of the Berne Convention, include every production in the literary, scientific and artistic domain. Interestingly, that the Berne’s definition continued into the general formula: “whatever may be the mode or form of its expression”. The Marrakesh Treaty, in contrast, does not embrace this element, and chooses to specify “in the form of *text, notation and/or related illustrations*”. A long-standing consensus amongst the negotiators was that books and other publications consisting in texts shall be an object of the Treaty. The provision also talks about notations (normally include text), related illustrations (drawings and pictures that could be described), and works in audio form (included by Agreed Statement to Article 2(a) of the Treaty). The audiovisual works, films and databases, however, are not covered by the Treaty, and therefore, are not qualified for a use under the limitations and exceptions provided for in the Treaty.

One prominent commentator has observed that the Marrakesh Treaty had included only those works to which the application of the limitation and exception is truly justified, meaning only those works to which visually impaired persons may only get access if the works are produced in special format.¹⁰⁴ One may claim, however, that there is a world of difference between listening to a video made for the seeing and one that has an audio description.¹⁰⁵

⁹⁸See Article 1 of the African Group Proposal, *supra* note 68.

⁹⁹See Article 16 of Brazil *et al.* Proposal, *supra* note 67.

¹⁰⁰See Article 14 of Brazil *et al.* Proposal, *supra* note 67.

¹⁰¹See Tomassi, *supra* note 87.

¹⁰²See Love, *supra* note 63.

¹⁰³See Tomassi, *supra* note 87.

¹⁰⁴See Ficsor, *supra* note 89, p. 13.

¹⁰⁵See Tomassi, *supra* note 87.

Exclusion of the audiovisual works, films and databases was regarded by the persons with visual impairments as a very unfortunate step.

3.3.3 Definition of ‘Accessible Format Copy’

A definition of ‘accessible format copy’ did not raise any strong disagreement at the negotiating table. The proposals of Brazil *et al.* and the African Group included non-exhaustive definition with the explicit reference to a large print, Braille, audio recordings, digital copies, refreshable Braille, etc.¹⁰⁶ Simultaneously, the US Proposal included only a Braille, audio, or digital text.¹⁰⁷ The Marrakesh Treaty reads as follows:

Article 2 (b) “accessible format copy” means a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability. The accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons;

It is relevant to mention two interpretations of this provision. One is suggested by Ficsor, who explains that there are two categories of works: first category, due to their formats, can be equally accessible to visually impaired persons and sighted persons; and second category includes works that may only become accessible for persons with visual impairments through making specific *alternative* format copies.¹⁰⁸ According to Ficsor, ‘alternative’ form means a form other than any ‘regular’; while ‘regular’ is a form usable by sighted persons.¹⁰⁹ His interpretation might be extended to claim that the limitations and exceptions foreseen in the Treaty are meant to be applied to produce only ‘alternative’ format copies.¹¹⁰ Different interpretation is proposed by Band, who argues that the Marrakesh Treaty successfully avoids ambiguity that an accessible format copy is a format usable only by visually impaired person.¹¹¹ He implies that formats usable by both, visually impaired and sighted persons, shall be considered accessible format copies.

These two interpretations have substantial disparities with regards to the particular formats. Works in large print, accessible digital files and audio books are often used by persons with visual impairments, but also could potentially be used by a sighted person; within Ficsor’s interpretation these formats may be considered as ‘regular’ formats (because they are usable by sighted people). An application of this interpretation may lead to an exclusion of such formats as large print, accessible digital files and audio books from the spectrum of accessible format copies.

¹⁰⁶ See Article 16 of Brazil *et al.* Proposal, *supra* note 67 & Article 1 of the African Group Proposal, *supra* note 68.

¹⁰⁷ See Article 1 of the US Proposal, *supra* note 69.

¹⁰⁸ See Ficsor, *supra* note 89, p. 15.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ See Band, *supra* note 91, p. 5.

In the light of the existing consensus, which is expressed in the various draft-proposals of the Marrakesh Treaty, the large print, audio, or digital text have been always considered as accessible formats, despite their potential usability by sighted persons. It is possible to argue, therefore, that Band's interpretation suits the interests of the persons with visual impairments better, because it focuses on "who is actually using the copy, not who is capable of using it".¹¹²

3.3.4 Definition of 'Authorized Entities' or 'Trusted Intermediaries'

Some of the rightholders claimed that the limitations and exceptions to copyright expose them to a considerable risk of piracy, especially in the context of digital files, which can be easily made and shared.¹¹³ The rightholders, therefore, favoured mediation by authorized entities or trusted intermediaries, such as libraries or collective societies.¹¹⁴ At the same time, persons with visual impairments are relying on libraries and organizations of/for visually impaired persons in production and dissemination of accessible works. Thus, it was equally important for both stakeholders that those organizations receive necessary status and rights within the copyright-exemption treaty. During the negotiations there were few points to discuss: (1) which organization can become 'authorized entities', (2) non- or for-profit status of those entities, and (3) a right to distribute accessible format copies directly to beneficiaries.

Some rightholders supported a system of formal requirements to determine who can become such 'trusted intermediaries'.¹¹⁵ This position was reflected in the EU Proposal, which outlined specific conditions that non-profit organization should fulfil to become a trusted intermediary;¹¹⁶ as well as a prohibition of direct distribution to beneficiary outside the country.¹¹⁷ In contrast, the WBU, on behalf of persons with visual impairments, argued for a less formal system.¹¹⁸ It was reflected in Brazil *et al.* Proposal, which allowed for-profit entities to operate under the limitations and

¹¹²See Band, *supra* note 91, p. 5.

¹¹³See Nwankwo, *supra* note 36, para 61.

¹¹⁴Collective societies, also called collective management organizations, may be private, or public autonomous organizations or government offices, which in the field of printed works "undertake functions to grant the right of reprographic reproduction, in other words allowing protected materials to be photocopied by institutions such as libraries, public organizations, universities, schools and consumer associations...; and which also administer remuneration" [World Intellectual Property Organization, 'Collective Management of Copyright and Related Rights', <www.wipo.int/about-ip/en/about_collective_mngt.html>, visited on 2 February 2014].

¹¹⁵E-Access Bulletin Live, 'Prospects Brighten For Copyright Exception Treaty', 21 July 2011, <www.headstar.com/eablive/?p=615>, visited on 4 December 2013.

¹¹⁶See Article 1(iv) of the EU Proposal, *supra* note 70.

¹¹⁷*Ibid.*, Article 4.

¹¹⁸See E-Access Bulletin Live, *supra* note 115.

exceptions,¹¹⁹ and prescribed a direct distribution of accessible format copies to beneficiaries' regardless borders.¹²⁰

The Marrakesh Treaty is a compromise between those and reads as follows:

Article 2(c) "authorized entity" means an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations².

An authorized entity establishes and follows its own practices:

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

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

According to the Marrakesh Treaty, an authorized entity shall comply with the set of criteria: (1) to be authorized or recognized by the government, (2) to provide education, instructional training, adaptive reading or information access to beneficiary persons, and (3) to operate on a non-profit basis.¹²¹

The first criteria of the Marrakesh Treaty is that the organization shall be authorised or recognised by the government. The element of governmental *authorisation* is important for the sake of the rightholders, who does not wish the copies of their work be distributed without any limits and control. In some countries, particularly in Latvia, Malaysia, the US, bodies that are specifically and primarily assisting persons with visual impairments are specified as those that can undertake the activity permitted under the exceptions, but there does not appear to be any process by which they must be officially authorised.¹²² Therefore, an element of governmental *recognition* was introduced; and as Agreed Statement to Article 2(c) of the Treaty explains, this may include entities receiving financial support from the government. This diversity is important especially in the context of developing states, which might lack the sufficient resources to establish and finance authorized entities, but may have just enough to officially designate and authorize the creation of authorized entities which might operate basing its activities on donations or grants.

¹¹⁹See Article 4(c) of Brazil *et al.* Proposal, *supra* note 67.

¹²⁰See Article 8 of Brazil *et al.* Proposal, *supra* note 67.

¹²¹See Article 2(c) of the Marrakesh Treaty, *supra* note 8.

¹²²See Sullivan, *supra* note 7, p. 35.

The second element provides to ensure that authorized entities have on their purpose to serve beneficiaries, particularly, to provide education, instructional training, adaptive reading or information access. The second sentence of Article 2(c) of the Treaty specifies that this includes a “government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations”, even if the organization is not specifically authorised or recognised by the government to do so.¹²³ Thus, both, a specialized agency providing services to the blind and a general-service library with an institutional program to promote accessibility, would constitute an authorized entity.¹²⁴

Third element prescribes that an organization shall operate on a non-profit basis. The approach of Brazil *et al.* Proposal, which allowed the use of the limitation and exception by for-profit organization with a mandatory remuneration to the right holder,¹²⁵ was not adopted in the Marrakesh Treaty.

Article 2(c) of the Treaty determines that an authorized entity shall establish and follow its own practices, such as: to establish beneficiaries it serves, to discourage use of unauthorized copies, maintain due care of copies, *etc.* According to Band, this provision appears not to be an element of the definition, and its purpose and effect are somewhat unclear.¹²⁶ In any case, Band claims that it is important that authorized entity establishes its *own* practices; the Treaty does not contemplate rules being established for it by the government.¹²⁷

Expectations that had been laid upon authorized entities by the rightholders and persons with visual impairment seem feasible within the mandate and rights given to those organizations by the Treaty. The consensus was achieved by excluding specific conditions that organization should fulfil to become an authorized entity. In contrast, the Treaty provides for rather inclusive and broad indicators that necessary to fulfil in order to become an authorized entity within the meaning of the Marrakesh Treaty.

3.3.5 Use of Technological Measures

Technological measures (the “TMs”) were first introduced into the international copyright system with Article 11 of the WCT. This provision requires the Berne Members to provide “adequate and effective legal protection and effective legal remedies against circumvention of effective TMs”. TMs are implemented to prevent unauthorised uses, so make them a part of digital rights management systems (the

¹²³See Band, *supra* note 91, p. 6.

¹²⁴*Ibid.*

¹²⁵See Article 4(c) of Brazil *et al.* Proposal, *supra* note 67.

¹²⁶See Band, *supra* note 91, p.6.

¹²⁷See Band, *supra* note 91, pp.6-7.

“DRMs”) that permits to negotiate consumers’ rights with regards to use of copyrighted materials.¹²⁸

Persons with visual impairments make extensive and increasing use of advanced technologies such as electronic Braille, computer screen readers and text-to-speech synthesisers.¹²⁹ As had been previously discussed (see 2.3.2), one of the issues that visually impaired persons encounter is that TMs interpreting assistive technologies attempt to render the text as an attack, and therefore blocking access to the content. In the light of this issue, Brazil *et al.* Proposal offered “the right to circumvent the technological protection measure so as to render the work accessible”.¹³⁰ At the same time, the rightholders were resistant to give up anti-circumvention rules, which were their control tools within the digital environment. As such, the US was an active proponent to restrictive exemption to anti-circumvention rules and required that exemptions be justified by “credible evidence” in “transparent legislative or administrative proceeding.”¹³¹ Obviously, if adopted, such conditions would create an additional and, most likely, unbearable burden for the beneficiaries to prove that circumvention of TMs is justified.

Article 7 of the Marrakesh Treaty addresses the TMs and says:

Article 7 - Obligations Concerning Technological Measures

Contracting Parties shall take appropriate measures, as necessary, to ensure that when they provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures, this legal protection does not prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty¹¹.

11 Agreed statement concerning Article 7: *It is understood that authorized entities, in various circumstances, choose to apply technological measures in the making, distribution and making available of accessible format copies and nothing herein disturbs such practices when in accordance with national law.*

Article 7 of the Treaty applies to those Contracting Parties that provide for anti-circumvention provisions,¹³² and obliges to take appropriate measures to ensure that anti-circumvention provisions and practices do not prevent beneficiaries from enjoying the limitations and exceptions provided for in the Treaty. Article 7 of the Treaty provides for much flexibility within its implementation. It is necessary to mention that Article 7 of the Treaty is written in ‘shall’ language. It obliges Contracting Parties to balance anti-circumvention provisions with interests of visually

¹²⁸Jeffrey P. Cunard, Debevoise & Plimpton, ‘Technological Protection of Copyrighted Works and Copyright Management Systems: A Brief Survey of the Landscape’, in *Adjuncts and Alternatives to Copyright* (ALA Congress, New York, 13-17 June 2001) p. 1.

¹²⁹See Garnett, *supra* note 5, p. vii.

¹³⁰See Article 6 of Brazil *et al.* Proposal, *supra* note 67.

¹³¹Krista Cox, ‘Briefing Materials: Marrakesh Note 4: The 2012 U.S. Copyright Office decision regarding Technological Protection Measures, including discussion of Commercial Availability of accessible works’, *Knowledge Ecology International*, 7 June 2013, p. 7, <keionline.org/r2r/marrakesh>, visited on 4 December 2013.

¹³²Particularly those States who are Parties to the WCT and obliged by Article 11 of the WCT to “provide legal protection and effective legal remedies against the circumvention of effective technological measures”.

impaired persons in some way. Unlike the US proposal, which offers “credible evidence” in “transparent legislative or administrative proceeding”, Article 7 of the Treaty has no reference to any mechanisms how the Contracting Parties have to do that. The variations could be very different, as to: the procedure to obtain a permission to overcome anti-circumvention provisions (three years in the US);¹³³ who is allowed to circumvent (only beneficiaries, or authorized entities also); to what works circumvention measures could apply (e-books in the US, or literary works from information network in China);¹³⁴ what are the allowed circumventing techniques (circumventing devices and services); does the exemption to anti-circumvention rules applies only to formats that are not commercially available,¹³⁵ etc.

It is also important to mention that Agreed Statement to Article 7 of the Marrakesh Treaty addresses an obligation of the authorized entities to ensure that accessible format copies may only become available to beneficiary persons, by foreseeing that the authorized entities may apply TMs in accordance with national law.

Flexible way in which Article 7 of the Treaty had been drafted leads to important results: firstly, provision on circumvention of TMs is present in the Treaty, addresses the issues, and obliges those countries who has anti-circumvention rule to provide an exception for benefits of persons with visual impairments; secondly, there is no mandatory requirement that permission to circumvent TMs applies only to those works that are not commercially available; and thirdly, the Contracting Parties are granted sufficient space to choose suitable methods of compliance with this provision.

3.3.6 National Law Limitations and Exceptions

An important question during the negotiation was what rights shall be exempted under the limitations and exceptions. This was very important for persons with visual impairments, in the light of the fact that the obligation to obtain a permission of the rightholder was a substantial contributor to the scarcity of accessible works (see 2.3.2). For visually impaired persons, the crucial question was the right to make, supply and copy accessible format copies without the permission of the copyright rightholders. Concurrently, for the rightholders, it was important to keep exemptions as narrow as possible in order to ensure that their exclusive rights are not compromised without proper justification.

¹³³17 U.S.C. § 1201 (c) (1).

¹³⁴For the discussion on anti-circumvention rules, see Jia Wang, ‘Anti-circumvention Rules in the Information Network Environment in the US, UK and China: A Comparative Study’, 3(1) *Journal of International Commercial Law & Technology* (2008).

¹³⁵“The 2009 exemption granted as a result of the Digital Millennium Copyright Act (DMCA) rulemaking procedure under 17 U.S.C. §1201 applied only where there were no existing ebook editions of a work available in an accessible format”, while “the 2012 rulemaking procedure, proponents of the rule sought to eliminate the commercial availability provision” [See Cox, *supra* note 131, p. 2].

Article 4 of the Marrakesh Treaty deals with national law limitations and exceptions, and reads as follows:

Article 4 - National Law Limitations and Exceptions Regarding Accessible Format Copies

Article 4 (1) (a) Contracting Parties shall provide in their national copyright laws for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public as provided by the WIPO Copyright Treaty (WCT), to facilitate the availability of works in accessible format copies for beneficiary persons. The limitation or exception provided in national law should permit changes needed to make the work accessible in the alternative format.

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

Article 4(1)(a) of the Marrakesh Treaty provides for a mandatory national limitation and exception to the *right of reproduction*, the *right of distribution* and the *right of making available to the public* as provided by the WCT. Those are so-called '*minimum limitations and exceptions*' that are permitted by the Treaty. As additional flexibility, by Article 4(1)(b) of the Treaty does not oblige, but allows to provide a limitation and exception to the *right of public performance*.¹³⁶

Article 4(1) of the Treaty can be fulfilled, for example, by implementing the '*model limitations and exceptions*', outlined in Article 4(2) of the Treaty:

Article 4 (2) A Contracting Party may fulfill Article 4(1) for all rights identified therein by providing a limitation or exception in its national copyright law such that:

(a) Authorized entities shall be permitted, without the authorization of the copyright rightholder, to make an accessible format copy of a work, obtain from another authorized entity an accessible format copy, and supply those copies to beneficiary persons by any means, including by non-commercial lending or by electronic communication by wire or wireless means, and undertake any intermediate steps to achieve those objectives, when all of the following conditions are met:

- (i) the authorized entity wishing to undertake said activity has lawful access to that work or a copy of that work;*
- (ii) the work is converted to an accessible format copy, which may include any means needed to navigate information in the accessible format, but does not introduce changes other than those needed to make the work accessible to the beneficiary person;*
- (iii) such accessible format copies are supplied exclusively to be used by beneficiary persons; and*
- (iv) the activity is undertaken on a non-profit basis;*
- and*

¹³⁶The right of public performance within a meaning of Article 11 of the Berne Convention applies only to dramatic, dramatico-musical, and musical works and consists of the right to authorizing their performances. ‘Performance’, in its ordinary meaning, seems confined to presentation by human actors, performers, but later was extended to include “public performance by any means and process”. While the means of the performance may be electronic, but the audience experiencing the performance must still be at the place where the performance is rendered [See Ricketson & Ginsburg, *supra* note 81, p.715].

(b) A beneficiary person, or someone acting on his or her behalf including a primary caretaker or caregiver, may make an accessible format copy of a work for the personal use of the beneficiary person or otherwise may assist the beneficiary person to make and use accessible format copies where the beneficiary person has lawful access to that work or a copy of that work.

At the same time, Article 4(3) of the Treaty establishes '*maximum limitations and exceptions*':

Article 4(3) A Contracting Party may fulfill Article 4(1) by providing other limitations or exceptions in its national copyright law pursuant to Articles 10 and 11⁴.

4 Agreed statement concerning Article 4(3): *It is understood that this paragraph neither reduces nor extends the scope of applicability of limitations and exceptions permitted under the Berne Convention, as regards the right of translation, with respect to persons with visual impairments or with other print disabilities.*

Stated above needs a further explanation and discussion.

(i) *Definition of the right to reproduction, the right of distribution and the right of making available to the public*

Article 4(1)(a) of the Treaty obliges the Contracting Parties to have an exception to the right of reproduction, the right of distribution, and the right of making available to the public *as provided by the WCT*. Therefore, the definition and the scope of these rights have to be adopted in accordance with the WCT.

Article 9(1) of the Berne Convention provides a definition to the right of reproduction as "the exclusive right of authorizing the reproduction of the work in any manner or form". In comparison with the Berne, the WCT extends reproduction rights in the digital environment, and consequently, the limitations and exceptions as provided for in the Marrakesh Treaty applies to the right of reproduction in the digital environment as well.

The right of distribution is the right to authorize the making available to the public of the original and copies of a work through sale or other transfer of ownership.¹³⁷ Article 6 of the WCT clarifies that the right of distribution applies only to *tangible copies* of the literary and artistic works (digital transmissions are excluded from the scope of the distribution right within the meaning of Article 6 of the WCT¹³⁸). By adopting an exemption to the right of distribution, authorized entities and/or beneficiaries are allowed to distribute tangible accessible copies of works, produced under the limitations and exceptions provided for in the Treaty, without permission of the rightholders.

¹³⁷World Intellectual Property Organization, 'Summary of the WIPO Copyright Treaty', <www.wipo.int/treaties/en/ip/wct/summary_wct.html>, visited on 4 December 2013.

¹³⁸See Ricketson & Ginsburg, *supra* note 81, p. 697.

The reference to the WCT is especially important with regards to the right of making available to the public. The WCT's principal innovation is that the right of communication to the public (Article 8 of the WCT) includes a right of 'making available to the public of [literary and artistic] works in such a way that members of the public may access those works from a place and at a time individually chosen by them'.¹³⁹ The WCT's 'making available' right gives authors the exclusive right of allowing members of the public to access literary and artistic works 'from a place and a time individually chosen by them'.¹⁴⁰ Consequently, the limitation and exception to this right provided for in the Treaty implies that, for example, an authorized entity shall be able to upload digital accessible format copy of the work without asking a permission of the author, while the beneficiary could download this work at any time and at any place (home, library, café).

(ii) Flexibilities within 'minimum limitations and exceptions'

Even though article 4(1)(a) of the Treaty is written in 'shall' language and implies that right of reproduction, distribution and making available to the public has to be exempted, it does not actually say who shall be allowed to operate under the limitation and exception. It is a discretion of a Contracting Party to decide, whether or not the beneficiary persons, or someone acting on their behalf, or only authorized entities can operate under the limitation and exception provided for in the Treaty.

(iii) 'Maximum limitations and exceptions'

While discussing Article 4(3) of the Marrakesh Treaty, by which "other" limitations and exceptions can be established, it is necessary to emphasise two references. Firstly, those "other" limitations and exceptions shall be provided to fulfil Article 4(1) of the Treaty. Consequently, this limits the potential scope of the limitation and exception only to those rights that are mentioned in Article 4(1), specifically, the rights of reproduction, distribution and making available to the public. Expression "other" is used as a contrast to already mentioned limitations and exceptions in the model provision in Article 4(2) of the Treaty, which is discussed below. Secondly, "other" limitations and exceptions shall be pursuant to Articles 10 and 11, of the Treaty, meaning to be consistent with the Contracting Party's obligations under the Berne Convention and any other international treaty, including obligation to comply with the three-step test. This provision is drafted in the way to ensure that the Marrakesh Treaty does not create any new international copyright norms, but rather determines detailed norms and offers an appropriate legal and organizational framework for enhanced worldwide cooperation to achieve its objectives.¹⁴¹

(iv) Model national law limitation and exception

A model provision on national law limitation and exception can be found in Article 4(2) of the Treaty. It is relevant to the present discussion as an example of limitation

¹³⁹*Ibid.*, p. 746.

¹⁴⁰*Ibid.*, p. 748.

¹⁴¹See Ficsor, *supra* note 89, p.1.

and exception, which complies with the international copyrights norms, and corresponds to conditions of the three-step test.

A model limitation and exception extends to the authorized entities and beneficiary persons, or someone acting on his or her behalf. According to Article 4(2)(a) of the Marrakesh Treaty, when the authorized entities operate under the model limitation and exception, they have rights: (1) to make accessible format copies; (2) to obtain accessible format copy from another authorized entity; (3) to supply those copies to beneficiaries by any means; and (4) undertake any intermediate steps to achieve those objectives. Further four conditions must be met: (1) the authorized entity shall have lawful access to the work or a copy of that work; (2) only changes necessary to make work accessible shall be introduced to the work; (3) accessible format copies supplied only for the use of beneficiaries; (4) non-profit basis of this activities. These four conditions are necessary to minimize a risk of the misuse of the limitations and exceptions.

Article 4(2)(b) of the Treaty described the model limitation and exception if used by the beneficiaries themselves or someone on their behalf. This provision grants a right to make accessible format copies for the personal use of the beneficiaries where a person has lawful access to that work or a copy of that work. Two elements are followed from a previous provision: lawful access and personal use by a beneficiary. Interestingly, beneficiary persons are granted only a right to make and use accessible format copies (an exception to the right of reproduction). According to the model limitation and exception, the beneficiaries themselves cannot operate under limitation and exception to the rights of distribution and making available to the public. So to say, if a beneficiary person produces accessible format copy under the limitation and exception provided for in the Treaty, most likely she is not allowed to ‘distribute’ this copy (print a large print copy of the work and give it to a friend), or ‘make [this copy] available’ to the public (record a digital audio file and send it to a friend).

Article 4 of the Marrakesh Treaty requires Contracting Parties to enact a domestic limitations and exceptions to the right of reproduction, the right of distribution, and the right of making available to the public. This provision was drafted in the way to satisfy the rightholders demand not to compromise the three-step test (see 2.3.1), and it was achieved by establishing ‘maximum limitations and exceptions’ in Article 4(3) of the Treaty. Positive impact of this provision to persons with visual impairments is that it provides for limitations and exceptions to those rights that had been identified as the most valuable in the context of production and dissemination of accessible format copies. At the same time, the provision allows substantial space for Contracting Parties to decide on details, such as who is allowed to operate under which rights and on what conditions. If this provision to be understood narrowly, for example, limiting permission to operate under the limitations and exceptions only to the authorized entities and excluding beneficiaries or *vice versa*, the positive effect of the Treaty may be compromised.

3.3.7 Commercial availability requirement

A commercial availability requirement exists in several countries and restricts the use of the limitations and exemptions where a commercial version of the work is available in accessible format.¹⁴² The opposition to include this provision in the WIPO copyright-exemption treaty was run by some organizations of visually impaired persons. It was said that it will be a ‘poison pill’ in the instrument, which would forbid production and dissemination of accessible format copy by the library to visually impaired person, if such format already exists commercially¹⁴³ (see 2.3.2). At the same time, for the rightholders it was important to include a commercial availability requirement and to ensure a limit to limitations and exceptions¹⁴⁴ (see 2.3.1). A need to find a solution to this conflict of interests was one of the biggest challenges during the negotiations, and success to that was determined by a flexible approach that was used by the negotiating parties.

Article 4(4) of the Marrakesh Treaty reads as follows:

A Contracting Party may confine limitations or exceptions under this Article to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market. Any Contracting Party availing itself of this possibility shall so declare in a notification deposited with the Director General of WIPO at the time of ratification of, acceptance of or accession to this Treaty or at any time thereafter⁵.

5 Agreed statement concerning Article 4(4): *It is understood that a commercial availability requirement does not prejudge whether or not a limitation or exception under this Article is consistent with the three-step test.*

Article 4(4) of the Marrakesh Treaty provides that a Contracting Party may confine limitations and exceptions to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiaries in that market. Those Contracting Parties that decide to embrace this provision will limit application of the limitations and exceptions only to those works that are not commercially available at the market in particular accessible formats. This provision was well greeted by the rightholders.

Despite the fact that the commercial availability requirement was included in the Treaty, it foresees certain safeguards for the beneficiaries’ interests: firstly, this provision is written in ‘may’ language and does not impose any direct obligations on the Contracting Parties unless they directly indicate thereof at the time of ratification; secondly, a commercial availability requirement applied only on a format-by-format basis,¹⁴⁵ meaning that even if accessible audio file available commercially, the limitation and exception could be used to produce the same work in another accessible format, for example, in Braille; thirdly, commercially available accessible

¹⁴²Knowledge Ecology International, ‘KEI Position on Commercial Availability: Marrakesh Note 5’, 17 June 2013, <keionline.org/node/1751>, visited on 4 December 2013.

¹⁴³See Fruchterman, *supra* note 65.

¹⁴⁴See IPO, *supra* note 44, p.25.

¹⁴⁵See Band, *supra* note 91, p. 8.

format copies shall be available under reasonable terms for beneficiary persons in that market.

Presumption is that the requirement of commercial availability is not applicable nor recommended in the general framework of the Marrakesh Treaty. Those Contracting Parties that are silent on this matter at the time of ratification, agree to disregard it and will allow limitations and exceptions to operate regardless of already commercially existing accessible format copies. One may say that this is an undermining provision, which can potentially conflict with the rightholders material interests, and fail to pass the three-step test. Agreed Statement to Article 4(4) of the Treaty, however, establishes that a commercial availability requirement does not prejudice whether or not limitations and exceptions are consistent with the three-step test. In the light of this, it is possible to argue that if other safeguards are provided, the national limitations and exceptions may be consistent with the three-step test regardless of presence or absence of the commercial availability requirement. As to the material interest of the rightholders, it might be argued that accessible format copies produced by the authorized entities are not likely to compete with theirs. One of the reasons is that making an accessible format copy is a time and money consuming process, and therefore, if accessible format copy of the work already exists in the market, the authorized entities would not invest their limited resources on duplicating efforts and producing the same accessible work.

While the Marrakesh Treaty found a solution to the commercial availability requirement for now, it might lead, however, to many questions in the future. Such as, what does constitute “reasonable terms”; who is to establish that; how will this requirement work if applied to importation of accessible format copies, and many other questions which are revealed elsewhere.¹⁴⁶

3.3.8 Remuneration

Material interests of the rightholders pushed negotiations towards a right to remuneration for works created under the limitations and exceptions, even by non-profit entities.¹⁴⁷ As a result, a right to remuneration was included in Article 4(5) of the Marrakesh Treaty as a ‘may’ provision, and reads as follows:

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

The use of the word ‘exception’ in this article is rather confusing. According to the WIPO Glossary of Copyright and Related Rights Terms,¹⁴⁸ an ‘exception’ means that, in the given special case, the right concerned is not applicable (the use is free; no

¹⁴⁶By reference in Article 6 of the Marrakesh Treaty, the commercial availability requirement provided for in Article 4(4) of the Treaty may be attributed to importation as well.

¹⁴⁷See Baker, *supra* note 2, p. 7.

¹⁴⁸*Guide to the Copyright and Related Rights Treaties Administered by WIPO – Glossary of Copyright and Related Rights Terms* (World Intellectual Property Organization, Geneva, W A3 891E, 2003) pp. 286-287.

authorization is needed and no remuneration has to be paid).¹⁴⁹ If the remuneration provision is applied, an exempted use will constitute a limitation to the rights, for example, in a form of a statutory license.

This provision means to ensure that the rightholders are motivated to produce works in accessible formats (see 2.3.1). According to Marc Maurer, the President of the National Federation of the Blind (the “NFB”), a remuneration requirement is beneficial for visually impaired persons as well. He says: “If we have one group that is the one for which charity is a model, and other for which there is another system that expects productivity and responsibility, one is always at the disadvantage; I do not want to be in a charity group”.¹⁵⁰ He concludes that in a long run we have to expect from a disabled community the same responsibility that we expect from any other community; meaning that rightholders shall get paid for their intellectual efforts.¹⁵¹

Concerns, however, remain as to the persons with visual impairments who live in developing countries and may not have enough resources to purchase accessible format copies. The safeguard for them might lay in the interpretation of the provision. Band’s interpretation suggests that the amount of remuneration provided by such a license would necessarily have to be appropriate to local market conditions,¹⁵² meaning that the remuneration shall be reasonable in that particular market.

Article 4(5) of the Treaty leaves many questions unanswered. Such as, how the remuneration shall be calculated? If the limitations and exceptions prescribed for in the Treaty are limited to non-profit uses, the question is raised who will pay remuneration to the rightholders: the government, the authorized entities, or the beneficiaries themselves. Should it go thorough collective management organizations, whose primary function is to monitor a use of the work, collect and distribute remuneration to the rightholder? How would this provision apply for importation of accessible format copies, which by reference in Article 6 of the Treaty has to correspond to the extent of the national limitations and exceptions? For example, if importing country introduces remuneration provision, but exporting country does not provide for remuneration and does not have a routine and infrastructure for collecting remunerations; in this situation an exchange of accessible format copies across borders will be definitely complicated.

3.3.9 Cross-border Exchange of Accessible Format Copies (Export)

A cross-border exchange was a key concern of persons with visual impairments (see 2.3.2). Article 5 of the Marrakesh Treaty deals with an exportation of accessible format copies:

¹⁴⁹See Ficsor, *supra* note 89, p. 21.

¹⁵⁰Marc Maurer, Interview presented at the American University Washington College of Law ‘The 2013 Marrakesh Treaty: Providing Access to Copyrighted Works for the Blind and Print Disabled’, 12 September 2013, 2:47 – 2:50 <www.pijip-impact.org/events/marrakesh/>, visited on 29 January 2014.

¹⁵¹*Ibid.*

¹⁵²See Band, *supra* note 91, p. 9.

Article 5 - Cross-Border Exchange of Accessible Format Copies

1. Contracting Parties shall provide that if an accessible format copy is made under a limitation or exception or pursuant to operation of law, that accessible format copy may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party⁶.

2. A Contracting Party may fulfill Article 5(1) by providing a limitation or exception in its national copyright law such that:

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

(b) authorized entities shall be permitted, without the authorization of the rightholder and pursuant to Article 2(c), to distribute or make available accessible format copies to a beneficiary person in another Contracting Party;

provided that prior to the distribution or making available the originating authorized entity did not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons⁷.

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

6 Agreed statement concerning Article 5(1): *It is further understood that nothing in this Treaty reduces or extends the scope of exclusive rights under any other treaty.*

7 Agreed statement concerning Article 5(2): *It is understood that, to distribute or make available accessible format copies directly to a beneficiary person in another Contracting Party, it may be appropriate for an authorized entity to apply further measures to confirm that the person it is serving is a beneficiary person and to follow its own practices as described in Article 2(c).*

Similar to Article 4 of the Treaty on the national limitations and exceptions, Article 5 of the Treaty uses 'shall' and 'should' language. Article 5(1) of the Treaty provides an obligatory norm, which prescribes that if accessible format copy is made under limitation and exception or pursuant to operation of law, that accessible format copy may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party. It is necessary to draw attention that exportation provision can be used only by authorized entities, beneficiaries themselves cannot operate under this provision.

During the early discussions on the exportation rule, the prevailing notion was to allow cross-border exchange only from an authorized entity in one Contracting Party to an authorized entity in another Contracting Party.¹⁵³ Direct distribution of accessible format copies to beneficiaries across borders was introduced later, and as an outcome, was allowed by the Treaty. It is considered to be a good way to give immediate benefit for those countries, which have not established authorised entities yet.¹⁵⁴

¹⁵³World Intellectual Property Organization, *Draft Text of an International Instrument/Treaty on Limitations and Exceptions for Visually Impaired Persons/Persons with Print Disabilities*, 20 April 2013, VIP/DC/3 Rev., Articles D.1 and 2(A).

¹⁵⁴See Saez, *supra* note 9.

The authorized entities can supply accessible format copies directly to beneficiaries abroad. In order to reach this agreement it was necessary to provide additional safeguards to ensure that direct distribution is not misused. For example, Article 5(2) of the Treaty is written in ‘may’ language, provides for a model provision on a cross-border exchange, and prescribes that prior to the distribution and making available an authorized entity shall not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiaries. Additionally, Agreed Statement to Article 5(2) of the Treaty states that the authorized entities may apply *further* measures to confirm that the person it is serving is a beneficiary. Almost identical to Article 4(3) of the Treaty, Article 5(3) of the Treaty provides ‘maximum limitations and exception’ to exportation provision, allowing Contracting Parties introduce other limitations and exceptions in its national law pursuant to Articles 5(4), 10 and 11, of the Treaty, by which Article 5(1) may be further fulfilled.

Articles 5(4) of the Treaty deals with the Berne Gap:

Article 5 (4) (a) When an authorized entity in a Contracting Party receives accessible format copies pursuant to Article 5(1) and that Contracting Party does not have obligations under Article 9 of the Berne Convention, it will ensure, consistent with its own legal system and practices, that the accessible format copies are only reproduced, distributed or made available for the benefit of beneficiary persons in that Contracting Party's jurisdiction.

(b) The distribution and making available of accessible format copies by an authorized entity pursuant to Article 5(1) shall be limited to that jurisdiction unless the Contracting Party is a Party to the WIPO Copyright Treaty or otherwise limits limitations and exceptions implementing this Treaty to the right of distribution and the right of making available to the public to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder^{8,9}.

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

8 Agreed statement concerning Article 5(4)(b): *It is understood that nothing in this Treaty requires or implies that a Contracting Party adopt or apply the three-step test beyond its obligations under this instrument or under other international treaties.*

9 Agreed statement concerning Article 5(4)(b): *It is understood that nothing in this Treaty creates any obligations for a Contracting Party to ratify or accede to the WCT or to comply with any of its provisions and nothing in this Treaty prejudices any rights, limitations and exceptions contained in the WCT.*

The differences in the Contracting Parties' undertakings became a hot issue in the context of the cross-border exchange. Three signatories to the Marrakesh treaty¹⁵⁵ are not bound by any of the three major international copyright agreements. It means that those countries do not have any international obligation to comply with the three-step test while operating under the limitations and exceptions to copyright. The rightholders feared that once an accessible format copy reaches the jurisdiction of one of those countries, there are no guarantees that the accessible work would be disseminated in compliance with the three-step test. That is why Article 5(4)(a) of the

¹⁵⁵Afghanistan, Ethiopia and Sao Tome and Principe, as of 15 February 2014.

Treaty establishes following condition for these states: firstly, a Contracting Party has to ensure, consistent within its legal system and practice, that the accessible format copies are only *reproduced, distributed and made available* for the *beneficiary persons* in that Contracting Party's jurisdiction; and secondly, accessible format copies exported under this article, *cannot be re-exported further*.

A different situation is addressed in Article 5(4)(b) of the Treaty and deals with the states which are not bound by the Berne Convention, but parties to the WCT or in any other way limit a limitation and exception to the right of distribution and the right of making available to the public to *de facto* the three-step test. Only in these circumstances, the prohibition on re-exportation is lifted.

As mentioned previously (see 2.3.1), it was important for the rightholders not to compromise existing copyright regime. Therefore, such controversial topic as an issue of exhaustion of rights,¹⁵⁶ which traditionally was a matter of national jurisdiction, was not addressed by the Treaty. Similarly to Article 6 of the TRIPS and Article 6(2) of the WCT, Article 5(5) of the Marrakesh Treaty states that “nothing in this Treaty shall be used to address the issue of exhaustion of rights”.

Article 5 of the Marrakesh Treaty addressed the cross-border exchange of accessible format copies, and in this way recognised that, by avoiding duplication of investments in the making of accessible format copies of the same works in the same language in various countries, the objective to be served by the Treaty – facilitating availability of copies in such format – may be more efficiently fulfilled.¹⁵⁷ This provision successfully secures rightholders’ concerns and re-establishes the three-step test: firstly, by outlining ‘maximum limitations and exceptions’ in Article 5(3) of the Treaty and secondly, by dealing with the Berne Gap in Article 5(4) of the Treaty. Also, Article 5(5) of the Treaty ensures compliance to the international copyright *acquis* by avoiding the issue of exhaustion of rights. As to the interest of persons with visual impairments to harmonize cross-border exchange, the Marrakesh Treaty allows the distribution and making available to the public of accessible format copies across borders only by authorized entities and permits direct distribution to beneficiaries, which could be regarded as successful measure towards resolution of the issue of restricted access to copyrighted materials.

3.3.10 Importation of Accessible Format Copies

Article 6 of the Marrakesh Treaty deals with the importation of accessible format copies.

Article 6 - Importation of Accessible Format Copies

To the extent that the national law of a Contracting Party would permit a beneficiary

¹⁵⁶Exhaustion relates to one specific aspect of intellectual property rights: the right of sale after first sale or, to be more precise, the right to control the resale of the protected product after first sale by means of intellectual property [Frederick M.Abbott, Thomas Cottier & Francis Gurry, *The international intellectual property system: commentary and materials*, vol 1 (Kluwer Law International, The Hague, 1999) p. 607].

¹⁵⁷See Ficsor, *supra* note 89, p.28.

person, someone acting on his or her behalf, or an authorized entity, to make an accessible format copy of a work, the national law of that Contracting Party shall also permit them to import an accessible format copy for the benefit of beneficiary persons, without the authorization of the rightholder¹⁰.

10 Agreed statement concerning Article 6: *It is understood that the Contracting Parties have the same flexibilities set out in Article 4 when implementing their obligations under Article 6.*

Article 6 of the Marrakesh Treaty mirrors Article 4 of the Treaty. In order to secure unity of the limitations and exceptions within one country, the Treaty created a formula that would allow ensuring that the same rules apply to accessible format copies produced within the country, and those that are imported.

Agreed Statement to Article 6 of the Marrakesh Treaty provides that the Contracting Parties have the same flexibilities set out in Article 4 of the Treaty when implementing their obligations under Article 6. Under Article 4 of the Treaty Contracting Parties have certain flexibilities, such as to determine who is allowed to make accessible format copies, or whether the right of public performance should to be exempted, or, most importantly for the present discussion, whether the commercial availability and remuneration requirements are applied. Applying flexibility regarding commercial availability in respect to importation would mean that a Contracting Party may decide not to import a work in particular accessible format where, on its market, the same accessible format of the work is already available under reasonable terms. The flexibility regarding remuneration means that a Contracting Party may require payment of a royalty to the rightholder for the use of his/her work in the accessible format on its territory.

An important achievement of the negotiations is that the importation provision is drafted in ‘shall’ language, and has to be adopted by Contracting Parties in domestic copyright law. This provision secures equal treatment of the rightholders and allows avoiding a situation when, for example, a Contracting Party provides for national limitation and exception with remuneration, but does not remunerate rightholders of the imported accessible works. As to the interests of visually impaired persons, similar safeguards to Article 4 of the Treaty are applied, particularly, format-by-format basis of the commercial availability requirements, and “reasonable terms in that market” of commercial availability and remuneration.

3.4 Locating the Three-Step Test within the Marrakesh Treaty

The US proposal was the only proposal to refer specifically to Article 9(2) of the Berne and the three-step test.¹⁵⁸ The US claimed that failure to embody the three-step test into the copyright-exemption treaty would unreasonably prejudice the interests of copyright rightholders, would contradict the US policy in its trade agreements, and

¹⁵⁸See Kirwin, *supra* note 85, p.18.

would set a profoundly negative precedent for future agreements.¹⁵⁹ The EU feared that developing countries were trying to use the WIPO copyright-exemption treaty to undermine the three-step test.¹⁶⁰ In contrast, developing states have expressed fears that the application of the three-step test, which served as a powerful legal weapon for the safeguard of the interests of the rightholders, could significantly limit the ambit of the exception.¹⁶¹ Brazil *et al.* and African proposals, therefore, carefully mentioned the three-step test while defining operability of the for-profit entities.¹⁶²

First move towards a consensus was to agree that the Berne Convention itself allows the limitations and exceptions for benefits of visually impaired persons. Already in 1982, the WIPO-UNESCO Model Provisions clarified that the Berne Convention allows the introduction of limitations (in the form of compulsory licenses) and exceptions (in the form of free uses) to facilitate access to works for persons with visual impairments in special formats on the basis of the three-step test provided in Article 9(2) of the Berne Convention.¹⁶³ On the basis of the three-step test, some Berne Members introduced national limitations and exceptions long time before the Marrakesh Treaty. It is established, therefore, that there should be no obstacles to introduce mandatory limitations and exceptions if conditions of the three-step test are satisfied.

3.4.1 First Step – Certain Special Cases

According to the first step, the limitation and exception has to apply to certain special cases, and the Marrakesh Treaty uses various elements to establish that.

Firstly, as outlined in Article 3 of the Treaty, the limitation and exception provided for in the Treaty applies to certain beneficiaries. Certainty was established by a quantitative approach – there are about 285 million persons with visual impairments, which is approximately 4 percent of the world's population.¹⁶⁴ Additionally, the vision of persons with visual impairments makes them to fall within a special category of persons whose interests shall be protected.¹⁶⁵ Exclusion of deaf persons, education and research institutions, libraries and archives¹⁶⁶ was necessary to satisfy a condition of the first step.

Secondly, the Marrakesh Treaty allows a use of the limitation and exception by authorized entities and outlines a set of criteria those organizations has to comply with (see 3.3.4). This measure was necessary to ensure that a use of the limitations and exceptions is restrained to limited and defined organizations.

¹⁵⁹See GIPC, *supra* note 42, p. 44.

¹⁶⁰See Band, *supra* note 91, p. 13.

¹⁶¹See Sinodinou, *supra* note 18.

¹⁶²See Article 4(c)(1) of Brazil *et al.* Proposal, *supra* note 67 & Article 5(c)(1) of the African Group Proposal, *supra* note 68.

¹⁶³See Ficsor, *supra* note 89, p. 4.

¹⁶⁴See Nwankwo, *supra* note 36, para. 33.

¹⁶⁵*Ibid.*

¹⁶⁶Inclusion of deaf persons as beneficiaries and education and research institutions, libraries and archives was proposed by Article 2 of the African Group Proposal, *supra* note 68.

Thirdly, the Marrakesh Treaty provides for mandatory limitations and exception only to certain rights, such as the right of reproduction, the right of distribution, and the right of making available to the public.¹⁶⁷

Fourthly, the Marrakesh Treaty covers limitations and exceptions to copyright only in a narrow category of works, such as literary and artistic works in certain forms (text, notation, illustration).¹⁶⁸ An exclusion of the audiovisual works, databases, films was a substantial condition in order to fulfil the first step.

Fifthly, as established by Ricketson, a limitation and exception is justifiable if it is for a quite specific purpose and the purpose should be ‘special’ in the sense of being justified by some clear reason of public policy or other exceptional circumstance.¹⁶⁹ The Marrakesh Treaty’s special purpose was to maintain a balance between the effective protection of the rights of the author and the larger public interest (particularly, education, research and access to information), and eliminate barriers to fulfilment of various human rights and principles.

3.4.2 Second Step – Does not Conflict with a Normal Exploitation of the Work

The second step of the three-step test demands that the limitations and exceptions shall not contravene with the normal exploitation of the work, in the meaning that uses allowed under the Treaty shall not enter into economic competition with the ways in which the rightholders normally extract economic value from that right and thereby deprive them of significant or tangible commercial gains.¹⁷⁰

One of the qualifying words here is ‘normally’. In order to qualify uses as ‘normal’, it is crucial to establish what uses fall within the range of activities from which the copyright owner would usually expect to receive compensation.¹⁷¹ It was argued by Nwankwo, that the rightholders did not exploit any gain from producing accessible format copies in the past, and confirmation to that is only 5 percent of works are available in accessible formats and most of them are produced by organizations for visually impaired persons.¹⁷² Some commentators were convinced that the limitations and exceptions provided for in the Treaty do not conflict with a ‘normal’ exploitation of the work. It was necessary, nevertheless, to postulate in the Marrakesh Treaty that the rightholders have the opportunity to exercise their rights in full, without being threatened by the presence of the limitations and exceptions. Therefore, the Marrakesh Treaty has nothing to preclude the rightholders from producing and disseminating accessible format copies for profit. Instead, the Marrakesh Treaty provides for an optional commercial availability requirement, which ensures that accessible works, produced by the rightholders for profit, do not compete with

¹⁶⁷See Article 4(1)(a) of the Marrakesh Treaty, *supra* note 8.

¹⁶⁸*Ibid.*, Article 2(a).

¹⁶⁹See Nwankwo, *supra* note 36, para. 37.

¹⁷⁰*Ibid.*, para. 43.

¹⁷¹See Ricketson & Ginsburg, *supra* note 81, p. 769.

¹⁷²See Nwankwo, *supra* note 36, para. 43.

accessible works produced under the limitations and exceptions on a non-profit basis.

Another dimension of ‘normal’ is the extent to which this term covers so-called “non-economic normative considerations”.¹⁷³ Article 9(2) of the Berne does not give indications what are those non-economic normative considerations are, however, in the light of the first step it might be argued that such justifications have a clear public-interest character that goes beyond the purely individual interests of copyright users.¹⁷⁴ The Preamble of the Marrakesh Treaty outlines some non-economic normative considerations, for example, larger public interests, including education, research and access to information and human rights and principles. Due to the great social value of these interests, a production and dissemination of accessible information should not be a market that only the rightholders exploit.

3.4.3 Third Step – Does not Unreasonably Prejudice the Legitimate Interests of the Author (Rightholder)

The third step challenges a copyright limitation and exception as to whether it constitutes an unreasonable prejudice to the legitimate interests of the author (rightholder).¹⁷⁵ The rights of the author are protected under the Berne Convention and include both economic (material) and non-economic (moral) rights; the third step under the Berne clearly covers both. The third step, therefore, goes further than the second step, and covers consideration of non-material and future character as well.

Linguistic analysis will help to further understand the demand of the third step. The term ‘prejudice’ connotes ‘harm, damage or injury’; ‘unreasonable’ connotes not being ‘proportionate’ or ‘within the limits of reason’.¹⁷⁶ It could be stated that any limitation and exception to the author’s rights would inevitably prejudice to his or her interests. The third step, however, does not qualify any prejudice, but only unreasonable. The classic examples of unreasonable prejudice to the legitimate interests of the author are unremunerated free uses of the work, uses that distort works or failed to attribute the author, *etc.*

One way to overcome a concern of unremunerated free uses was to introduce a remuneration requirement in the Marrakesh Treaty (see 3.3.8). Brazil *et al.* Proposal included a provision that makes payment of adequate compensation a condition when these works are adapted on a for-profit basis.¹⁷⁷ This was seen as an appropriate solution in order to provide a compensation for commercial uses of works. In contrast, the Marrakesh Treaty does not provide for a use of limitations and exceptions on a for-profit basis. As a compromise, a remuneration requirement

¹⁷³See Ricketson & Ginsburg, *supra* note 81, p. 771.

¹⁷⁴*Ibid.*, p. 773.

¹⁷⁵ Article 9(2) of the Berne Convention and Article 10 of the WCT refer to the ‘author’, while Article 13 of the TRIPS talks about the ‘right holder’.

¹⁷⁶*Ibid.*, p. 776.

¹⁷⁷See Nwankwo, *supra* note 36, para. 47.

became an optional provision, rather than a mandatory. The Marrakesh Treaty provides an optional remuneration for national limitations and exceptions (Article 4(5) of the Treaty), and to importation (by reference in Article 6 of the Treaty).

Saying that implies that the Marrakesh Treaty allows unremunerated uses. Unremunerated uses *per se*, however, do not constitute unreasonable prejudice to legitimate interests of the author.¹⁷⁸ The weight has to be given to non-economic normative considerations, and as was established in the previous sections, the limitations and exceptions for visually impaired persons are definitely justified by strong non-economic normative considerations. That is why the Treaty is compatible with the third step even without remuneration requirement being mandatory.

Another provision of the Marrakesh Treaty that has been mentioned as a safeguard to the third step is included in Article 2(b) of the Treaty. It states that accessible format copies must be made in the way to respect the integrity of the original work, taking due considerations of changes needed to be made. This provision addresses moral right of the author to protect the integrity of his/her work.

3.5 Unresolved Concerns

3.5.1 Limitations and Exceptions to Related Rights

Related rights is a term used to refer not to the author's rights, but to the rights of performers, phonogram producer, broadcast organizations. Agreed Statement to Article 10 (2) of the Marrakesh Treaty talks about related rights as follows:

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

This provision is important in those countries, where, for example, sound recordings, such as audio books, are protected not by a copyright, but by related rights.¹⁷⁹ Therefore, by including this provision, the Treaty extends its application to the limitations and exceptions to related rights.¹⁸⁰ According to Ficsor it is a “new substantive provision” and it is surprising that it appears just in the agreed statement.¹⁸¹ Agreed Statement to Article 10 (2) of the Treaty raises more questions than it gives answers. Some of them are: what sort of the related rights are concerned, should they be exempted fully or only to the extent necessary to comply with Article 4(1) of the Treaty, etc.¹⁸²

¹⁷⁸Sam Ricketson, *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions* (Centre for Copyright Studies Ltd, Strawberry Hills, 2002), p. 113.

¹⁷⁹See Band, *supra* note 91, p. 17.

¹⁸⁰*Ibid.*

¹⁸¹See Ficsor, *supra* note 89, p. 43.

¹⁸²For the discussion on the issues raising with the *mutatis mutandis* application of limitations of and exceptions to related rights, see Ficsor, *supra* note 89, p. 47.

3.5.2 Relations to Contracts

Proposal of Brazil *et al.* mentiones that any contractual provisions contrary to the exception provided in the [treaty] shall be null and void.¹⁸³ It was within interests of persons with visual impairments that contracts should not be used to eliminate their rights provided under the copyright-exemption treaty. The provision on relations with contracts was weakened with each draft of the WIPO treaty, and as a result was eliminated. Dan Pescod, the Vice Chair of the WBU, expressed that they wanted something that made it very clear that contract law could not undermine copyright exceptions, but instead the Marrakesh Treaty leaves it to Contracting Parties to decide how this issue is to be addressed.¹⁸⁴ One can only hope that the rightholders would not draft contracts which would eliminate benefits of the limitations and exceptions provided for in the Treaty.

3.5.3 Orphaned works

A need to address an issue of orphaned works was indicated by organizations of persons with visual impairments at the early stage of negotiations. Brazil *at al.* Proposal offered to include a provision, which would oblige national law to determine “if certain commercial use of works for which the author or copyright owner cannot be identified or who do not respond to notices require payment of remuneration”.¹⁸⁵ The provision, explaining the use of orphaned works under the limitations and exceptions, meant to avoid the tedious process of copyright clearances, remove uncertainties and facilitate the use of these works. Unfortunately, despite a strong lobbying from persons with visual impairments, the Marrakesh Treaty did not address this issue.

3.6 Summary

Chapter 3 was written on the premise that the goal of the Marrakesh Treaty is to facilitate access to copyrighted materials for persons with visual impairments while doing no harm to legitimate interests of the rightholders. Therefore, the conclusion to follow will focus on two questions: firstly, how does the Treaty intent to facilitate access for persons with visual impairments, and, secondly, how does the Treaty ensure that no harm is done to the legitimate interests of the rightholders.

The most paramount response to both questions is that extensive compromises and flexibilities are provided by the Treaty. It was established that the Treaty is not to contravene any existing copyright agreements. This explains the extensive use of rules of referral, which gives a broader flexibility to the Contractual Parties to accommodate the limitations and exceptions to their own levels of undertakings, economic situation and stakeholders' interests.

¹⁸³ See Article 7 of Brazil *et al.* Proposal, *supra* note 67.

¹⁸⁴ See E-Access Bulletin Live, *supra* note 115.

¹⁸⁵ See Article 12 of Brazil *et al.* Proposal, *supra* note 67.

As for the first question about visually impaired persons' access, the Treaty provides an inclusive definition of the beneficiaries, which would allow the inclusion of different interpretations of visual impairments that exist across borders. Authorized entities are allowed to produce and distribute accessible format copies to beneficiaries both domestically and across borders. It is also important that the Treaty provides an exemption to anti-circumvention rules in order to produce accessible format copies for an exclusive use of beneficiaries.

A positive impact of the Treaty is that there shall be mandatory limitations and exceptions to the right of reproduction, the right of distribution, and the right of making available to the public; as well as to the related rights, even though some issues of interpretation are beginning to arise. An optional limitation and exception is possible with respect to the right of public performance and the right of translation. Mandatory provisions on cross-border exchange and the importation of accessible format copies are provided by the Treaty, which is vitally important for persons with visual impairments. It is also relevant to mention that commercial availability and remuneration requirements are optional and based on the notion of the "reasonable terms at the market".

Unfortunately, the Marrakesh Treaty does not include copyrighted audiovisual works, databases or films, as copyrighted works that can be made accessible under the limitations and exceptions provided for in the Treaty.

Certain ambiguity is detected in the definition of the accessible format copies, as to whether accessible format is one that can be used exclusively by persons with visual impairments, and not by sighted persons; or accessible format copy is the format that can be used by both visually impaired and sighted persons.

The flexibilities provided by the Treaty may hinder uniform implementation of limitations and exceptions in different national copyright laws, such as, in providing different exemptions to copyright under limitations and exceptions (for example, limiting permission to operate under limitations and exceptions to the beneficiaries only, or to the authorized entities alone); or with respect to flexibility in commercial availability and remuneration requirements.

Furthermore, important provisions outlining relationships between exemptions to copyright and contracts were not included in the Treaty; leaving it to Contracting Parties to decide how they would address this relationship. One can only hope that the rightholders would not draft contracts which would eliminate benefits of the limitation and exception provided for in the Treaty.

The exclusion of for-profit entities was a necessity, but in the opinion of the organizations of visually impaired persons, it was an unfortunate compromise. Commercial entities, such as Google, play a considerable role in the digitization of copyrighted works and in providing them in accessible formats to visually impaired persons, especially orphaned works. The Treaty is, however, silent on the issue of orphaned works.

In addressing the second question about legitimate interests of the rightholders, the Marrakesh Treaty did not compromise the existing copyright system. Instead, the Treaty built towards specifying how already existing copyright norms should be interpreted in order to provide limitations and exceptions for the benefit of visually impaired persons.

The limitations and exceptions provided for in the Treaty are drafted in compliance with the three-step test and certain safeguards are in place, such as, defined beneficiaries, extensive engagement of the authorized entities, narrow categories of works included, and the Treaty limits exportation rights only to those jurisdictions which, in one way or another, apply the three-step test.

The Treaty also guarantees a uniform application of the importation rules to national and foreign rightholders. As to the material interests of the rightholders, the Treaty provides for optional commercial availability and remuneration requirements, which are designed not to discourage commercial production of accessible format copies. Furthermore, for-profit uses are not covered by the limitations and exceptions provided for in the Treaty. Additionally, the Treaty does not expand the fair use doctrine nor intervenes with controversial topics such as the issue of exhaustion of rights.

Based on the above mentioned, it is possible to conclude that the Marrakesh Treaty contains detailed provisions and offers a legal framework capable of improving access to copyrighted materials for visually impaired persons. However, in the light of these previously discussed compromises and flexibilities, it would be stretching it a bit too far to claim that the Treaty has solved the issue of restricted access to copyrighted materials for persons with visual impairments.

4 The Interplay of Human Rights and the Marrakesh Treaty

4.1 Human Rights Relevance

The Marrakesh Treaty is a copyright treaty; no one has doubts about that. But it is also true that the key objectives of the Treaty are to respect and serve the human rights of persons with visual impairments.¹⁸⁶ The language of the preamble demonstrates this persuasively. Direct references are made to the principles of non-discrimination, equal opportunity, accessibility, and full and effective participation and inclusion in society, as proclaimed in the Universal Declaration of Human Rights (the “UDHR”)¹⁸⁷ and the CRPD; as well as references to the freedom to seek, receive and impart information and ideas, the right to education and research, the right to participate in cultural life, the right to enjoy the arts and to share scientific progress and its benefits.

The Marrakesh Treaty makes direct references to the human rights of persons with visual impairments, but does not mention the human rights of the authors. Debates about the foundation of intellectual property rights in the doctrine of human rights are ongoing, nevertheless, it is impossible to deny that the ‘authors’ are recognized as beneficiaries of human rights by Article 27(2) of the UDHR and Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (the “ICESCR”).¹⁸⁸ And even though intellectual property rights might be not equivalent to human rights, this research paper is based on the premise that the protection of human creativity and the fruits of one’s labour are closely related to author’s human rights.¹⁸⁹

The Marrakesh Treaty confirmed that human rights considerations played an important role in structuring limitations and exceptions to copyright. The following chapter, therefore, is intended to reveal whether or not the provisions of the Treaty are consistent with the human rights of the authors and persons with visual impairments.

¹⁸⁶See Ficsor, *supra* note 89, p. 6.

¹⁸⁷United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217A (III).

¹⁸⁸United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 2200A (XXI).

¹⁸⁹Frederick M. Abbott, Thomas Cottier & Francis Gurry, *The international intellectual property system: commentary and materials*, vol 1 (Kluwer Law International, The Hague, 1999), p. 502.

4.2 Identifying Relevant Human Rights of the Author

As has been stated before, the major international human rights instruments recognise the ‘author’ as a beneficiary of human rights.¹⁹⁰ Article 27(2) of the UDHR and Article 15(1)(c) of the ICESCR provide for *the right to benefit from the protection of the moral and material interests resulting from any scientific, literary and artistic production of which he is the author*. In some regional human rights instruments intellectual property rights are protected within *the right of property*,¹⁹¹ such as in Article 1 of the First Protocol to the European Convention on Human Rights (the “ECHR’s First Protocol”)¹⁹².

4.2.1 The Right to Benefit from the Protection of the Moral and Material Interests

The right to benefit from the protection of the moral and material interests of the author is recognised in a number of international instruments. Article 27 (2) of the UDHR and article 15(1)(c) of the ICESCR use identical language. According to the ICESCR General Comment No.17, the scope of protection of the moral and material interests of the author provided for by Article 15(1)(c) of the ICESCR, does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements.¹⁹³ It does, however, overlap to some extent. According to the ICESCR General Comment No.17, the 'moral interests' in Article 15(1)(c) of the ICESCR, include the right of authors to be recognized as the creators of their scientific, literary and artistic productions and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, such productions, which would be prejudicial to their honour and reputation.¹⁹⁴ The scope of the moral right in the ICESCR corresponds to the moral right of the author in Article 6bis of the Berne.¹⁹⁵ In order to protect the 'material interest' of the author within the meaning of article 15(1)(c) of the ICESCR, State parties must prevent the unauthorised use of author’s productions, *inter alia*, by adopting a legislation that requires users to inform authors of any use made of their productions

¹⁹⁰ For a distinction between ‘author’ and ‘copyright rightholder’, *see supra* note 13.

¹⁹¹ The ECHR explains: “By recognizing that everyone has the right to the peaceful enjoyment of his possessions, Article 1 is in substance guaranteeing the right of property.”[*Marckx v. Belgium*, Council of Europe: European Court of Human Rights, Application no.6833/74, Judgement of 13 June 1979, para. 63]. The expression 'right of property', therefore, is used to refer to the right guaranteed in Article 1 of the ECHR’s First Protocol.

¹⁹²Council of Europe, *The Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14*, (European Convention on Human Rights) 4 November 1950, ETS 5.

¹⁹³United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, *General Comment No.17 The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of which He or She is the Author (Article 15, paragraph 1 (c), of the Covenant)*, 12 January 2006, E/C.12/GC/17, para. 2.

¹⁹⁴*Ibid.*, para. 13.

¹⁹⁵*Ibid.*

and to remunerate them adequately.¹⁹⁶

The Marrakesh Treaty provides for an exemption to both requirements: copyrighted works can be used without permission and notification of the author, and remuneration need not be provided. This disjunction is analysed later in this chapter, but for now, suffice to say that limitations to economic, social and cultural rights are possible if it is justified by the cumulative conditions provided for in Article 4 of the ICESCR.

4.2.2 The Right of Property

In the European context, there is also another basis for the protection of intellectual property rights – *the right of property*, guaranteed in Article 1 of the ECHR's First Protocol, which reads as follows:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

In *Anheuser-Busch Inc. v. Portugal*, the European Court of Human Rights (the “ECtHR”) stated that Article 1 of the ECHR's First Protocol is applicable to intellectual property as such,¹⁹⁷ and, in this particular case, it was established that it also applies in the context of proprietary rights – linked to application for the registration of a trade mark.¹⁹⁸ In *Balan v. Moldova*, the ECtHR elaborated that the concept of ‘possessions’ has an autonomous meaning which is not limited to ownership of physical goods and stated that unauthorised use of the applicant's photograph by the government constituted interference with the applicant's property rights,¹⁹⁹ which in domestic law, had been regulated by copyright.

It is necessary to draw attention to Article 1 of the ECHR's First Protocol, under which legal persons are also entitled to protection. The question was raised by some prominent commentators whether protecting the property rights of business entities was consistent with the protection of other human rights.²⁰⁰ This research paper will not answer this question, but will rather emphasise that while discussing the right to property within the European context, reference is made to all rightholders; including business entities.

In the light of the fact that the Marrakesh Treaty can be seen to interfere with the exclusive rights of the author and other copyright rightholders, it can, potentially, be argued that it constitutes an interference to their property rights, within the meaning

¹⁹⁶*Ibid.*, para. 31.

¹⁹⁷*Anheuser-Busch Inc. v. Portugal*, Council of Europe: European Court of Human Rights, Application no. 73049/01, Judgement of 11 January 2007, para. 72.

¹⁹⁸*Ibid.*, para 78.

¹⁹⁹*Balan v. Moldova*, Council of Europe: European Court of Human Rights, Application no. 19247/03, Judgement of 29 January 2008, paras. 39-40.

²⁰⁰Laurence R. Helfer & Graeme W. Austin, *Human rights and intellectual property: mapping the global interface* (Cambridge University Press, Cambridge, 2011) p. 218.

of Article 1 of the ECHR's First Protocol. The following discussion will analyse the situation where such an interference may occur, and whether or not it should be considered as one that is justified under the balancing mechanism provided for in Article 1 of the ECHR's First Protocol.

4.2.3 Limitations of the Human Rights of the Author

This section seeks to explore whether balancing mechanisms within human rights instruments justify limitations of the human rights of the author. It should be noted that the right to benefit from the protection of the moral and material interests of the author and the right of property are subject to balancing and limitations under the ICESCR and the ECHR. Article 4 of the ICESCR prescribes that the limitations must be *determined by law* only in so far as they are compatible with the *nature of these rights* and solely for the purpose of promoting the *general welfare in a democratic society*. Article 1 of the ECHR's First Protocol says that the right of property is subject to limitations in the *public interest* under conditions *provided for by law* and by the *general principles of international law*.

- (i) *Determined by law (provided for by law and by general principles of international law)*

Article 4 of the ICESCR requires that limitations on economic, social and cultural rights are ‘determined by law’, and Article 1 of the ECHR's First Protocol uses the expression ‘provided for by law and by general principles of international law’. The Committee on Economic, Social and Cultural Rights (the “ESCR Committee”) never specifically addressed the meaning of this phrase, however, for example, the ICESCR General Comment No.7 referred extensively to the Human Rights Committee’s understanding of ‘law’.²⁰¹ By this reference, it is possible to conclude that the requirement ‘determined by law’ is fulfilled when the limitation is defined in any form of national law (usually enacted by an elected parliament) which conforms with international human rights standards and is generally accessible, foreseeable and sufficiently clear.²⁰²

The ECtHR further clarified the conditions a national rule must fulfil in order to be considered as ‘law’: it must be publicly available (‘adequately accessible’), and must be ‘formulated with sufficient precision to enable the citizen to regulate his conduct (sufficiently precise)’.²⁰³ Additionally, the ECHR does not limit requirement of lawfulness only to the conformity of a measure with the provisions of domestic law, but also as to whether the quality of the law is compatible with [general principles, such as] the rule of law.²⁰⁴ By incorporating the limitations and exceptions provided

²⁰¹Amrei Müller, ‘Limitations to and derogations from economic, social and cultural rights’, 9(4) *Human Rights Law Review* (2009), p.578.

²⁰²*Ibid.*

²⁰³*Ibid.*

²⁰⁴Mark W Janis, Richard S Kay & Anthony Wilfred Bradley, *European human rights law: text and materials* (3rd edn, Oxford University Press, Oxford, 2008) p.540.

for in the Marrakesh Treaty into national laws, the requirement ‘determined by law’ will be fulfilled.

(ii) *Compatible with the nature of rights*

Another requirement set by Article 4 of the ICESCR is that limitation to economic, social and cultural rights must be compatible with the nature of these rights. This requirement is absent in Article 1 of the ECHR’s First Protocol. This requirement will be applied, therefore, only to the right to benefit from the protection of the moral and material interests.

According to the ICESCR General Comment No.17, the nature of the rights protected in Article 15(1)(c) of the ICESCR (*the right to benefit from the protection of the moral and material interests*) lies in the protection of the personal link between the author and his/her creation and of the means by which it is necessary to enable authors to enjoy an adequate standard of living.²⁰⁵

In addressing the first statement, *personal link between the author and creation*, the Marrakesh Treaty in no way contravenes this link. It establishes, instead, the necessary grounds for protecting an author’s moral rights; including: attribution, no derogation from obligations under any other treaty (Article 1 of the Marrakesh Treat), as well as respecting the integrity of the original work (Article 2(b) of the Treaty).

The second statement *provide means necessary to enjoy an adequate standard of living*, the ICESCR General Comment No.17 elaborates that this can be achieved by one-time payments, or by vesting an author for a limited period of time with the exclusive right to exploit his productions.²⁰⁶ This is not an exhaustive list of measures, and therefore, it could be suggested that it is possible that there are other means of ensuring that authors can enjoy an adequate standard of living.

The Marrakesh Treaty, thus, ensures that the authors are not exempted from the production of accessible format copies. It also, secures their material interests by providing for optional commercial availability and remuneration requirements. It should also be noted that in the situation of scarce amounts of accessible format copies, the production of accessible format copies has never constituted a major source of income for the authors. The limitations and exceptions to the exclusive rights, therefore, would not undermine the income of the authors to the extent that they would be denied an adequate standard of living.

(iii) *Promoting welfare in a democratic society (public interest)*

Article 4 of the ICESCR and Article 1 of the ECHR’s First Protocol reflect the desire to give Member States certain flexibilities as to the balance between individual rights and public interests.²⁰⁷ The difference between the two provisions, is that the

²⁰⁵See ICESCR General Comment No.17, *supra* note 193, para. 23.

²⁰⁶Ibid., para. 16.

²⁰⁷See Müller, *supra* note 201, p. 570.

ICESCR allows limitations to the rights for just one reason – ‘promoting general welfare’ (rejecting such reasons as public order, public morality and the respect for rights and freedoms of others);²⁰⁸ while the ECHR uses a broad formula ‘in the public interest’. This makes limitations under Article 4 of the ICESCR narrower than those of other human rights treaties.²⁰⁹

In the context of the ICESCR, ‘general welfare’ is understood as referring primarily to the economic and social well-being of the people and the community.²¹⁰ Another important element is that a limitation under Article 4 of the ICESCR must be acceptable ‘in a democratic society’. The ESCR Committee never directly interpreted this clause. The interpretation that is available indicates that the decision to limit economic, social and cultural rights should be based on a consultation process (as inclusive as possible), and should not be ordered unilaterally, rather, subject to popular control.²¹¹

Contrasting the Marrakesh Treaty with the above mentioned, it is possible to establish that limitation to the *right of the author to benefit from the protection of the moral and material interests* and the *right of property* was necessary to ensure the inclusion and participation of persons with visual impairments in the information society, at the same time as their opportunities for education, research, work, and participation in social and cultural life are expanded. It can be claimed that such argumentation satisfies the criteria of ‘promoting general welfare’ and ‘public interest’.

From the above discussion, it can be concluded that the limitations and exceptions to copyright provided for in the Marrakesh Treaty interfere with the human rights of the author. However, as was argued above, such limitations are justified under the balancing mechanism, and are necessary to promote and protect the full range of other human rights.

4.3 Identifying Relevant Human Rights of Persons with Visual Impairments

4.3.1 CRPD Standard

The Marrakesh Treaty contains an explicit reference to the UDHR and the CRPD, as well as recalling various human rights of persons with visual impairments. Article 4 of the CRPD sets out the general obligation of the State Parties “to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention.” As the prominent commentator Quinn has concisely stated “this article converts the convention into a trigger for

²⁰⁸Ibid., p. 573.

²⁰⁹Ibid., p. 570.

²¹⁰Ibid., p. 573.

²¹¹Ibid., p. 577.

worldwide disability law reform".²¹² This implies that parties to the CRPD are obliged to undertake appropriate measures, including necessary adjustments to the intellectual property law, in order to implement rights recognized in the CRPD. The CRPD standard is that any government respecting the human rights of persons with visual impairments should have such national copyright laws that would be in no way an obstacle to implementation of rights recognized in the CRPD. Following below seeks to uncover what are the relevant human rights of persons with visual impairments, how they have been addressed in the Marrakesh Treaty and how the Treaty complies with the mentioned above CRPD standard.

4.3.2 Freedom of Expression and Access to Information

According to Article 19 of the UDHR, everyone has the right to freedom of opinion and expression, which includes the right to "seek, receive and impart information and ideas through any media and regardless of frontiers." A similar right is established in Article 19 of the International Covenant on Civil and Political Rights (the "ICCPR")²¹³. According to the ICCPR General Comment No. 34 "this right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others".²¹⁴ Article 21 of the CRPD proclaims this right as follows:

States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice [...].

It is necessary to clarify the term 'information'. Using the definition of the right to freedom of expression in ICCPR General Comment No.34, it is possible to conclude that 'information' means "communications of every form of idea and opinion capable of transmission to others".²¹⁵ There is no distinction made as to the purpose of communication, or its form. At the same time, the correspondence between the term 'information' in human rights instruments and the term 'copyrighted works' is not undisputed. Some scholars claim that 'access to information', identified in human rights instruments, does not necessarily include 'access to all copyrighted works'; the latter are often made simply to entertain and not to inform.²¹⁶ Other commentators

²¹²Lisa Waddington, 'Breaking New Ground: The Implications of Ratification of the UN Convention on the Rights of Persons with Disabilities for the European Community', in Oddný Mjöll Arnardóttir & Gerard Quinn (eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Martinus Nijhoff, Leiden, 2009) p. 117.

²¹³United Nations General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, 2200A (XXI).

²¹⁴United Nations, Human Rights Committee, *General Comment No. 34 Article 19 of the International Covenant on Civil and Political Rights: Freedom of Opinion and Expression*, 12 September 2011, CCPR/C/GC/34, para. 11.

²¹⁵*Ibid.*

²¹⁶Marcella Favale, 'The Right of Access in Digital Copyright: Right of the Owner or Right of the User?', 15:1 *Journal of World Intellectual Property* (2012) p.14.

intend the term ‘information’ in its broadest sense, including all creations of the human mind.²¹⁷

The latter definition of ‘information’ was reflected in Brazil *et al.* Proposal, which included “any works of a type in which copyright could subsist, includes literary, dramatic, musical and artistic works, databases and films”.²¹⁸ In contrast, the Marrakesh Treaty uses former ‘narrow’ approach and includes only certain copyrighted works, such as “in the form of text, notation and/or related illustrations”,²¹⁹ and consequently, excludes other copyrighted works (such as audiovisual works, databases, films) from the scope of the Treaty.

So, if one adopts narrow interpretation of ‘information’, a selective inclusion of certain forms of copyrighted works in the Marrakesh Treaty is justified by *per se* definition of ‘information’ and does not cause any disparity with human right to freedom of expression and access to information. However, those scholars who support broad interpretation of ‘information’, may claim that the Marrakesh Treaty fails to ensure that all ‘information’ intended for the general public is also available in accessible formats; and, therefore, the Treaty is inconsistent with the right to freedom of expression and access to information and fails to comply with the CRPD standard.

4.3.3 Rights to Education, Participation in Cultural Life and to Enjoy the Benefits of Scientific Progress and its Applications

Availability of accessible format copies is definitely a human rights consideration. It has a fundamental outcome on the implementation of various human rights, such as *access to educational materials, access to cultural materials and access to scientific progress and its benefits*, enshrined into the CRPD and the ICESCR.

Unfortunately, the CRPD Committee did not, as of yet, elaborate on the meaning of all rights enshrined in the CRPD, it is appropriate, therefore, to rely on the interpretation of the ESCR Committee. Thus, to fulfil the right to education (Article 24 of the CRPD), the States have to actively provide teaching materials,²²⁰ which in this context means accessible teaching materials. In order to comply with the right to participate in cultural life (Article 30 of the CRPD), access to written literature shall be provided,²²¹ as well it shall be ensured that intellectual property does not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to

²¹⁷Ibid., p. 14.

²¹⁸See Article 16 of Brazil *et al.* Proposal, *supra* note 67.

²¹⁹See Article 2(a) of the Marrakesh Treaty, *supra* note 8.

²²⁰United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, *General Comment No. 13 The Right to Education (Article 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10, para. 50.

²²¹United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, *General Comment No. 21 Right of Everyone to Take Part in Cultural Life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21, para. 13.

cultural materials.²²² The legal content of the right to enjoy the benefits of scientific progress and its applications (Article 15(1)(b) of the ICESCR) is not clarified yet. According to Farida Shaheed, the Special Rapporteur in the field of cultural rights, however, the normative scope of this right includes access to the benefits of science without discrimination; opportunities to contribute to the scientific enterprise and freedom indispensable for scientific research; participation in decision-making; and an enabling environment fostering the conservation, development and diffusion of science and technology.²²³ The implementation of this right for persons with visual impairment means, that necessary steps have to be taken to address disparities existing in access to scientific advances, including the need to facilitate universal design and accessibility features of information technologies and systems.

4.3.4 The Marrakesh Treaty's Impact on Progressive Realisation and Immediate Implementation of Human Rights of Persons with Visual Impairments

A common perception in traditional thinking about human rights is a divide between the two sets of rights – ‘civil and political’ and ‘economic, social and cultural’ rights. Koch puts it like this:

The implementation based reasons relate to the perception of the two sets of rights as fundamentally different in their normative character as civil and political rights are considered 'negative', precise and cost free rights subjects to immediate implementations whereas economic, social and cultural rights are regarded as 'positive', vague and resource demanding rights subjects to progressive realization..²²⁴

The right to education, right to participation in cultural life, and right to enjoy the benefits of scientific progress are economic, social and cultural rights. Article 4(2) of the CRPD reads as follows:

With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

The so-called ‘positive’ economic, social and cultural rights are subject to progressive realisation, according to Article 4(2) of the CRPD and Article 2 of the ICESCR. The ICESCR General Comment No.13 explains that ‘progressive realisation’ implies that

²²²See Article 30(3) of the CRPD, *supra* note 95.

²²³United Nations General Assembly, Human Rights Council, *The Right to Enjoy the Benefits of Scientific Progress and Its Applications*, Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, 14 May 2012, A/HRC/20/26, para. 25.

²²⁴ Ida Elisabeth Koch, ‘From Invisibility to Indivisibility: The International Convention on the Rights of Persons with Disabilities’, in Oddný Mjöll Arnardóttir & Gerard Quinn (eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Martinus Nijhoff, Leiden, 2009) p.69.

States parties have a specific and continuing obligation “to move as expeditiously and effectively as possible” towards the full realisation of [rights].²²⁵ This provision is justified by the fact that implementing rights have costs, and the right of persons with disabilities have additional costs.²²⁶

The right to freedom of opinion and expression is a civil and political right. It is commonly defined as a 'negative' right and is subject to immediate realisation. A State is not required to enable anyone to do anything, but has only to ensure that no one interferes with the freedom of opinion and expression of its citizens.²²⁷ For persons with visual impairments to be able to enjoy this right on an equal footing with sighted persons, however, it is necessary to take certain measures in order to facilitate the implementation of this right. Article 21 of the CRPD transforms this 'negative' right into a positive state obligation. This provision ensures that information intended for the general public is also available in accessible formats, and, therefore, the state must actively enable persons with disabilities to exercise their right to freedom of expression, and access to information,²²⁸ by, *inter alia*, providing public information in accessible formats and accepting and facilitating the use of Braille.

The CRPD challenges traditional thinking about human rights. According to Mégret, “persons with disabilities provide an interesting example of a particular condition that requires both immediate implementation and progressive realisation, and the CRPD thoroughly mixes those normative discourses”.²²⁹ The CRPD contains both types of obligations and often for the same rights.²³⁰

Bringing the Marrakesh Treaty into this discussion, it is appropriate to consider how certain provisions of the Treaty contribute to immediate implementation and progressive realisation of the human rights of persons with visual impairments. For example, Article 4 (1) of the Marrakesh Treaty says that Contracting Parties shall provide for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public. One may argue that by introducing a mandatory limitation and exception into national copyright law, a barrier to the enjoyment of the right to participation in cultural life is removed, as proclaimed in Article 30 of the CRPD; the Contracting Party, thereby securing an immediate implementation of this human right.

The mandatory limitations and exceptions, provided for in the Marrakesh Treaty have, however, their internal limits. One of them, for example, is that the Treaty

²²⁵See ESCR Committee’s General Comment No. 13, *supra* note 220, para. 43.

²²⁶See Koch, *supra* note 224, p. 72.

²²⁷Caroline Harnacke & Sigrid Graumann, ‘Core Principles of the UN Convention on the Rights of Persons with Disabilities: An Overview’, in Joel Anderson & Jos Philips (eds.), *Disability and Universal Human Rights: Legal, Ethical, and Conceptual Implications of the Convention on the Rights of Persons with Disabilities* (Netherlands Institute of Human Rights (SIM), Utrecht, 2012) p. 40.

²²⁸*Ibid.*

²²⁹Frédéric Mégret, ‘The Disability Convention: Towards a Holistic Concept of Rights’, 12:2 *The International Journal of Human Rights*, p. 269.

²³⁰*Ibid.*, p. 270.

restricts forms of works that are allowed to be made accessible “to text, notation and/or related illustrations”,²³¹ and excludes such form as films. So, when Article 30 (1)(b) of the CRPD calls for States to ensure access to films in accessible formats, unfortunately, the Marrakesh Treaty does not address this demand. It may be said, therefore, that the mandatory limitation and exception under the Marrakesh Treaty is only one of the measures towards the full realisation of the human right to participation in cultural life and shall be considered as a step towards the progressive realisation of this human right.

This implies that there is much more that needs to be done in order to ensure that “laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials”.²³² A lack of resources cannot justify inaction or indefinite postponement of measures to implement [human] rights. And States must demonstrate that they are making every effort to improve on the implementation of human rights; even when resources are scarce.²³³

In saying that, this may lead to an argument that the Marrakesh Treaty should be followed by further measures “with a view to achieving progressively the full realisation of [human] rights”.²³⁴ What form may these future measures take? Out of the many initiatives pending at the WIPO SCCR, two of them have direct relevance to the present discussion: the first one being the limitations and exceptions for libraries and archives; and the second, the limitations and exceptions for educational and research institutions, as well as for persons with other disabilities. Even though these matters were on the agenda of the WIPO for a while, it seems unlikely that Member States will prioritise proceeding with these initiatives in the near future.

What then is the Marrakesh Treaty? Is it a ‘measure’ directed at the immediate implementation or the progressive realisation of human rights? Similar to the CRPD, which mixes and merges these normative discourses, the Marrakesh Treaty also mixes elements of progressive realisation and immediate implementation. The Marrakesh Treaty, indeed, spells out legal and organisational frameworks to improve access to some accessible teaching materials and written literature, as well as to facilitate the accessibility of digital files, information technologies, and systems.

The Preamble of the Marrakesh Treaty says:

The Contracting Parties,

Mindful of the challenges that are prejudicial to the complete development of persons with visual impairments or with other print disabilities, which limit their freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds on an equal basis with others, including through all forms of communication

²³¹ See Article 2(a) of the Marrakesh Treaty, *supra* note 8.

²³² See Article 30(3) of the Marrakesh Treaty, *supra* note 8.

²³³ United Nations, Office of the UN High Commissioner for Human Rights, *Fact Sheet No. 33: Frequently Asked Questions on Economic, Social and Cultural Rights* (Geneva, 2008) p. 14.

²³⁴ See Article 4(2) of the CRPD, *supra* note 95.

of their choice, their enjoyment of the right to education, and the opportunity to conduct research.

The Marrakesh Treaty is ‘mindful’ of these ‘challenges’ and human rights, but only to a certain extent. This extent is limited by distinct constraints, such as: restricted forms of works that are permitted to be made accessible by the Treaty, a vague agreement on who can operate under the limitations and exceptions, as well as commercial availability and remuneration requirements. It is possible, therefore, to claim that the Marrakesh Treaty positively contributes to the implementation of human rights of persons with visual impairments, but not to the extent, however, of removing all copyright-related uncertainties and concerns, which still stands in the way of full information access.

4.4 Pertinent Principles of the CRPD that may Influence how the Marrakesh Treaty is Interpreted

4.4.1 The Principles of Full and Effective Participation and Inclusion in Society and Accessibility

The concepts of *full and effective participation and inclusion* and *accessibility* mean that society both, in its public and in its private dimensions, is organized to enable all people to take part fully.²³⁵ Both concepts are reflected in Article 3 of the CRPD as its main principles, and have important meaning to implementation of other human rights of persons with visual impairments. Article 9 of the CRPD requires Member States “to enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others [...] to information and communications.” The Draft of General Comment to Article 9 of the CRPD calls the Marrakesh Treaty “to ensure the access to cultural material without unreasonable or discriminatory barriers for persons with disabilities, especially those facing challenges accessing classical print materials”²³⁶

The Marrakesh Treaty has an explicit reference to accessibility and full and effective participation and inclusion principles in the Preamble:

The Contracting Parties,

²³⁵United Nations, *Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors* (New York, 2010) p. 22.

²³⁶United Nations, Committee on the Rights of Persons with Disabilities, ‘*Draft General Comment on Article 9 of the Convention – Accessibility*’, Advanced Unedited Version, para.39, <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx>>, visited on 6 December 2013.

Recalling the principles of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in society, proclaimed in the Universal Declaration of Human Rights and the United Nations Convention on the Rights of Persons with Disabilities.

The Treaty fully embraces the spirit of both principles by specifying a set of measures that could eradicate severe disparities within information access. Some measures might be named: production and dissemination of accessible format copies, their export and import, an exception to anti-circumvention rules, etc.

One of the areas where principles of accessibility and full and effective inclusion in society can resolve an interpretation issue within the Marrakesh Treaty is a definition of accessible format copies. Within the CRPD, an accessible, barrier free information environment means that persons with visual impairments are recognized and valued as equal participants. Their needs are understood as integral to the social and economic order and not identified as ‘special’.²³⁷ As was discussed previously (see 3.3.3), according to Ficsor’s interpretation of accessible format copies, ‘alternative’ means a form other than any ‘regular’,²³⁸ a form that is not usable by sighted person, but only by persons with visual impairment, such as Braille, for example. In contrast, Band interprets accessible format copy as potentially used by both, visually impaired and sighted persons. Within the CRPD’s meaning of accessibility, there is no distinction of ‘alternative’, ‘special’ or ‘regular’ shall be made. The Marrakesh Treaty itself focuses on feasible and comfortable access. Therefore, as long as persons with visual impairment feasibly and comfortably accesses works, regardless manner or form, the format this person is using shall be considered accessible format copy within the Treaty, without reference whether that format is usable by sighted persons or not.

4.4.2 The Principles of Non-Discrimination and Equality

The principles of non-discrimination and equality are governing for both instruments, the CRPD and the Marrakesh Treaty. The provision on equality and non-discrimination is provided for in Articles 2, 3 and 5, of the CPRD. Being a foundation of the CRPD, these principles animate other principles, such as dignity, individual autonomy, accessibility. As was demonstrated above, the Marrakesh Treaty refers to principles of non-discrimination and equality in the Preamble. This section seeks to detect the use of these principles or potential value that they may have regarding interpretation of the Marrakesh Treaty.

(i) Justification of ‘certain special cases’ within the three-step test

One prominent commentator argued that a referral to principles of non-discrimination and equality was necessary as a legal-political justification.²³⁹ He claimed that these principles help to establish which cases constitute ‘certain special cases’ and,

²³⁷Ibid.

²³⁸See Ficsor, *supra* note 89, p. 15.

²³⁹See Ficsor, *supra* note 89, p. 9.

therefore, shall be covered by the Treaty. Under the first step of the three-step test, mentioned above principles were revoked to justify a ‘special purpose’ of limitations and exceptions (see 3.4.1), and under the second and the third step – non-economic normative considerations (see 3.4.2 and 3.4.3).

(i) *Accessible format copies*

The principles of non-discrimination and equality found their application in a definition of ‘accessible format copies’. Article 2 (b) of the Marrakesh Treaty maintains that accessible format copies give beneficiaries access to the work “as feasibly and comfortably as a person without visual impairment or other print disability.” Element of comparison was necessary to nullify any discriminatory distinction in the quality of access. When using accessible format copies, person with visual impairment shall be able to enjoy the same level of comfort as a sighted person while reading a printed book.

(ii) *Reasonable terms of commercial availability*

The condition of reasonable terms in commercial availability requirement (Article 4(4) of the Treaty) stands from the principles of non-discrimination and equality. This condition is necessary to ensure that beneficiary persons with lower income in poorer economies would have relatively equal means to obtain accessible format copies, compare to beneficiary persons with higher income in richer countries.

(iii) *Cross-border exchange and importation*

Cross-border exchange and importation was one of the most important issues that the Marrakesh Treaty tackled. For persons with visual impairments it was about removing barriers between borders, and getting one step closer to an ultimate goal – to ensure that everyone can read the same book, at the same time, regardless the place of residence. By introducing export-import provision, the Treaty tackled the issue of the discriminatory effect that national copyright law usually has or potentially might have to residents in different countries.

(iv) *Respect for privacy*

Respect for privacy was explicitly mentioned in the Treaty in order to encourage authorized entities to protect the privacy of the reading habits of beneficiaries of the Treaty.²⁴⁰ This provision follows from the principle of non-discrimination and equal opportunity. There is no reason for which respect for privacy might not be equally applicable concerning persons with visual impairments, when the protection of privacy is guaranteed to anybody else.

(v) *Translations*

²⁴⁰See Band, *supra* note 91, p.16.

Principles of non-discrimination and equality reveal themselves in the provision regarding translations. Agreed Statement to Article 4(3) of the Treaty provides that the Marrakesh Treaty neither reduces nor extends the scope of applicability of limitations and exceptions permitted under the Berne Convention, as regards the right of translation. According to Fiscor's interpretation, it means that if a translation is available, it should also be available for the beneficiary persons.²⁴¹ In contrast, if no translation exists in a given language and, therefore, none is available for visually impaired person, it would not seem to be in accordance with the above-mentioned principles to claim that a translation should be made available just for persons with visual impairment through a specific limitation or exception.²⁴²

(vi) *Boundaries to Limitations and Exceptions to Copyright*

The principles of non-discrimination and equal opportunity are also used to outline the boundaries of limitations and exceptions. The limitations and exceptions provided for in the Treaty shall not be used in those cases where there is no need to eliminate discrimination or unequal treatment. Specifically, those principles are applied with regards to the forms of copyrighted works and commercially availability requirement.

- *Forms of works*

The Treaty limits application of the limitations and exceptions only to those forms of works (text, notation, illustrations), that are necessary to convert into accessible format copies in order to ensure access by visually impaired persons and demolish discriminatory barrier to access information. At the same time, the Treaty excludes certain forms of presentation, such as live public performances, since this form *per se* accessible to visually impaired persons and sighted persons. Fiscor argues that it is difficult to justify limitations and exception for live public performances,²⁴³ because the discriminatory effect is absent here.

- *Commercial availability*

In the countries where commercial availability requirement is applied, the limitations and exceptions are justified only in those cases where absolute absence of accessible format copies in particular formats compromises principle of non-discrimination and equality. Otherwise, if rightholders make available accessible work on reasonable terms, this makes the application of the limitations and exceptions unjustified.²⁴⁴

4.5 Summary

The purpose of Chapter 4 was to reveal whether or not the provisions of the Marrakesh Treaty are consistent with the human rights of the authors and persons

²⁴¹Ibid., p. 26.

²⁴²Ibid., p. 26.

²⁴³Ibid., p. 23.

²⁴⁴Ibid., p. 15.

with visual impairments; as well as to highlight the influence of human rights values and principles on the Treaty.

It is clear that the limitations and exceptions provided for in the Marrakesh Treaty interfere with the exclusive rights of copyright rightholders. In addition to this, the research paper argues that provisions of the Treaty may potentially constitute interference to *the right to benefit from the protection of the moral and material interests* and *the right of property*. If such interference occurs, it is argued that the Treaty has included enough safeguards to establish that such interference was justified by the balancing mechanism inherent in human rights instruments.

With respect to the human rights of persons with visual impairments, the Marrakesh Treaty foresees legal and organisational frameworks capable of contributing to implementation of the following rights: the right to freedom of expression, access to information, education, participation in cultural life and enjoy the benefits of scientific progress and its applications. This positive contribution is, however, limited by certain constraints, which may limit the positive effects of the Marrakesh Treaty and certain copyright provisions may still be an obstacle to the full implementation of the human rights of persons with visual impairments.

As to the influence of human rights principles, it has been established that the principles of non-discrimination and equality are extensively referred to in the Marrakesh Treaty. Within the Treaty these principles deal with accessibility (definition of accessible format copies), availability (export and import), and affordability (reasonable pricing) of accessible format copies, at the same time as they establish boundaries for the limitations and exceptions provided by the Treaty.

Additional human rights principles, such as the principles of full and effective participation and inclusion in society and accessibility, can be used to solve the interpretation issue.

5 Conclusion

The first international treaty on limitations and exceptions to copyright has been adopted. The task was anything but easy, and one of the reasons for this, was the very different interests and concerns of the stakeholders. The Marrakesh Treaty was, nevertheless, adopted by consensus and has, so far, been signed by 60 States.

The consensus came at a price. As argued by this paper, the Marrakesh Treaty came into existence due to two factors: firstly, the extensive compromises and flexibilities that were embedded in the Treaty; and, secondly, the three-step test – a fundamental principle of international copyright law.

The compromises in the Treaty were viewed differently by the central stakeholders. The exclusion of audiovisual works, databases, films, for-profit organisations, and provisions on contracts and orphaned works, as well as the exclusion of deaf persons as beneficiaries were regarded by persons with visual impairments as unfortunate measures. For the rightholders, however, to ensure their interests, the exclusion of these matters was an essential condition. The following provisions may be examples of compromises that successfully enshrine the bottom-line interests of both stakeholders: the circumvention of technological measures; commercial availability and remuneration requirements; permission given to the authorized entities to distribute accessible format copies directly to the beneficiaries across borders.

The flexibilities in the Marrakesh Treaty were necessary in order to embrace differences within the stakeholders' interests, economic situations, and legal undertakings of different Contractual Parties. The common approach of the Treaty is to rely on the rules of referral. The Treaty leaves it up to Contractual Parties to decide whether commercial availability and remuneration requirements will constrain limitations and exceptions to copyright. Simultaneously, the Treaty introduces a very important notion of "reasonable terms at the market", without, however, defining it. The Treaty also leaves space for optional limitations and exception with respect to the right of public performance, the right of translation, and to the related rights; some of these provisions, however, already raise substantial interpretation issues.

As with the interpretation concerns, it is seen as an important achievement of the Marrakesh Treaty to include inclusive definitions of beneficiaries and authorized entities, which are then open to a broad interpretation by Contractual Parties. This research paper seeks to draw attention to certain ambiguities with regard to the definition of accessible format copies; as to whether accessible format is one that can be used exclusively by persons with visual impairments, or whether it is a format that can be used by both visually impaired and sighted persons. It is also relevant to mention the provision for national law limitations and exceptions, and as to whether or not the beneficiary person, or someone acting on their behalf, or only authorized entities, can operate under the limitations and exceptions provided for in the Treaty.

The three-step test is a fundamental principle that is used in international copyright law. It was not compromised in the Marrakesh Treaty; it was actually re-established. In fact, the Treaty repeatedly mentions the obligations of the Contractual Parties and that they must comply with the three-step test. Furthermore, it places safeguards on such matters as: defined beneficiaries, extensive engagement of authorized entities, narrow categories of works (text, notation, illustrations), and limited exportation rights for those jurisdictions which, in one way or another, apply the three-step test.

The Treaty allowed for the establishing of ‘minimum limitations and exceptions’ to the rights of reproduction, distribution and making available to the public, while securing further ‘maximum limitations and exceptions’, which are also subject to the three-step test. It has been argued in this paper, that between the ‘minimum’ and ‘maximum’ margins of the limitations and exceptions to copyright, not only the legitimate concerns and interests of the rightholders have been addressed, but also, the Marrakesh Treaty demonstrated consistency with the human rights of the authors and persons with visual impairments. The Marrakesh Treaty has been characterised by this paper as a measure, directed at both, the progressive realisation and the immediate implementation of human rights of persons with visual impairments. It has also been established that the Marrakesh Treaty refers extensively to the human rights principles, which may be used for interpretation purposes.

There is no doubt that the Marrakesh Treaty has the potential to positively influence the lives of persons with visual impairments around the world. It is capable of fulfilling its modest goal of facilitating or improving access to copyrighted materials for persons with visual impairments. It is unfortunate, however, that the Marrakesh Treaty does not resolve some copyright-related uncertainties and concerns, such as the definition of ‘reasonable terms’, relations with contracts, and the use of orphaned works. Also, it should be acknowledged, that the flexibilities and constraints imbedded in the Marrakesh Treaty may compromise the uniform application of the Treaty and thereby jeopardise the full implementation of human rights of persons with visual impairments.

The concluding statement of this paper brings us back to the slogan of the Right to Read Alliance: “Everyone can read the same book, at the same time, and at the same price”. Transforming this slogan into a question: “Does the Marrakesh Treaty ensure that all persons with visual impairments can read the same book, at the same time and for the same price?” Regrettably, the answer is still “No”. So, in posing another question: “Does the Marrakesh Treaty move us any closer to this goal?” The answer is: “It depends”. It depends on whether or not the Member States are willing to interpret and implement the flexibilities of the Treaty in a unified manner. And with respect to this one day becoming a reality, there is still a long way to go.

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