IFLA WLIC 2013
SINGAPORE

Submitted on: 06/08/2019

The miracle of Marrakesh: The WIPO Treaty for the Visually Impaired

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Abstract:

In May 2009, Brazil, Ecuador and Paraguay presented to the 18th Session of WIPO's Standing Committee on Copyright and Related Rights (SCCR) a proposal for a treaty drafted by the World Blind Union. The purpose of this treaty was to ensure that all countries in the world could benefit from an international exception to copyright law that would diminish the «book famine» that persons with print disabilities suffer due to copyright restrictions. On one hand, this exception would allow institutions and individuals to produce and distribute books in alternative formats. On the other hand, this treaty would provide the adequate legal framework needed to exchange existing materials in accessible format between authorised entities in the signatory countries.

Keywords: Print disability, accessible books, cross-border exchange, visually impaired, blind.

1 INTRODUCTION

In his opening speech, Mustapha Khalfi, president of the Marrakesh Diplomatic Conference, said: «We will have a treaty!» And then he said it again, and louder this time. Then, in his authority as Minister of Communications of the Kingdom of Morocco and with a half-smile on his face, he threatened to close the Marrakesh airport and even the Moroccan air space until the treaty was adopted. We all wanted that treaty, but it could not be just any treaty – a *trophy treaty*, as it was referred to by some delegates. It needed to be a treaty that solved a problem. For WBU (World Blind Union), it was either that kind of treaty or no treaty at all.

The road to Marrakesh was a long, winding, and tough one that took 4 years to travel and 26 more to pave. At first, asking WIPO (World Intellectual Property Organization) member states to work on a treaty on exceptions and limitations was seen as *unnatural* by most of them. They found it hard to understand why such a treaty was necessary, and they fail to understand that nothing in the proposed text would harm the international copyright regime. In the final stages of the negotiation, some wanted to see the treaty as an «incentive for publishers», while others humorously saw it as a «treaty to protect rights holders against persons with a print disability».

Dan Pescod, Vice Chair of the «Right to Read» Campaign and Campaigns Manager for the Royal National Institute of Blind People (RNIB), started one of his many useful briefing notes with a quotation from Mahatma Gandhi – «First they ignore you, then they laugh at you, then they fight you, then you win.» When I read this, we were in the «fight you» phase, and it was amazing to see how faithfully all the stages of a winning strategy of nonviolent activism were being reproduced in our own fight for the treaty. Thus, not only at that stage but even minutes before the treaty was adopted in Marrakesh, none of us were sure of winning in the end. It was not until we could hear the sound of the gavel certifying the adoption of the treaty that we could breathe a little easier.

The text itself underwent deep transformations during the entire process. If you take a look at both the initial draft and the final text and compare their contents, you will find very few sentences – if any – that are coincident. The original 9-page proposal muted into a 22-page monster full of bracketed text[1] and cryptic alternatives. A delegate from Nigeria[2] referred to this as «the Christmas Tree approach», where delegations hang their own last-minute proposals and alternatives on the various branches of the text hoping for their wishes to be granted. By June 18th, the date when the negotiations officially started in Marrakesh, there were more than 30 outstanding issues that needed thorough discussion before a final text could be agreed, and four of them were as dangerous to our interests as essential for some delegates to agree on a text. We were told that delegates had eleven days to finalise the treaty, and that it was an achievable task. But those eleven days were actually eight, as at least three days were needed to adopt, correct, and translate the text into all WIPO official languages, and to organize the signing ceremony that had to take place on June 28th. The deadline was, therefore, June 25th, 2013, Tuesday. And a few minutes before 11 in the evening on the 25th, the deadline was met. The text was stripped down to its bare essentials, the four «red lines» that neither side was willing to cross have been wiped out from the text, and – surprisingly enough – the spirit of the original treaty was still there. Everything that blind and visually impaired persons and those with other print disabilities had asked for in 2009 was there.

Maybe this is why the treaty was defined by many attendants at the Diplomatic Conference as «the miracle of Marrakesh».

2 CHRONOLOGY

WIPO is a UN agency «dedicated to the use of intellectual property (patents, copyright, trademarks, designs, etc.) as a means of stimulating innovation and creativity».[3] WIPO administers 25 international treaties, all of them devoted to the protection of copyright, patents, trademarks, and industrial designs. All copyright laws currently in force are based on at least one of these treaties. Though a number of them include clauses that deal with possible exceptions and/or limitations to the rights they protect, these two legal figures had never been so popular or so thoroughly defined as in WIPO's 25th treaty – the Marrakesh Treaty.

[1] Text that had not yet been adopted.

[2] Ruth Ojekidi, not only a bright lawyer and a professor at the University of Minnesota, but one of the many champions that made the treaty happen.

[3] See <http://www.wipo.int/about-wipo/en/>.

In June 2003,[4] at the eighth session of the Standing Committee on Copyright and Related Rights (SCCR/8), delegates representing the various member states discussed a «WIPO Study on limitations and exceptions of copyright and related rights in the digital environment». One page of this 84-page report provided an overview of the copyright situation regarding persons with a visual or a hearing impairment. This was the first time that this Committee had ever thought of discussing about these matters in plenary. Exceptions and limitations in the copyright world have always been a thorny matter.

In November of the same year, prior to the tenth session of the SCCR, an Information Meeting on Digital Content for the Visually Impaired was organized at WIPO, in Geneva. I was invited – as a representative of the DAISY Consortium – to make a presentation to delegates of the SCCR on «Technological advances benefitting visually impaired people». Little did I know at that time that this would be «the beginning of a beautiful friendship», of a long and successful collective process that would take me, the World Blind Union, and a plethora of other NGOs to Marrakesh, near Casablanca.

A year later, in November 2004, at the SCCR/12 meeting, Chile requested that a new item would be added to the agenda under «other issues for review». Those issues were no other but «exceptions and limitations to copyright and related rights for the purposes of education, libraries and disabled persons».[5] This new item – alien as it was to the nature of these meetings – has never left the SCCR agenda since.

In April 2006, a new and interesting report was presented at SCCR/14 – «Automated Right Management Systems and copyright limitations and exceptions», in which its author, Nic Garnett, gave useful information about how exceptions and limitations – including those for blind and visually impaired persons – were being handled in each specific legislation.

But the *Mother of all reports* came in the next session of the SCCR, in September 2006. It was prepared by Judith Sullivan, and it was a 233 page «Study on copyright limitations and exceptions for the visually impaired». This is still the most exhaustive and comprehensive report available on the matter, and it not only provides an excellent overview of exceptions and limitations in existing international treaties, but also specific norms on the matter in more than fifty countries in all continents.

Further proposals from various Latin American countries and further reports followed, such as Kenneth Crews' excellent «Study on copyright limitations and exceptions for libraries and archives», presented at the 17th session of the SCCR in November 2008, and which heavily influenced the current «Treaty proposal on copyright limitations and exceptions for libraries and archives» presented by IFLA.

Earlier in that year, on July 24-25, the World Blind Union (WBU) and Knowledge Ecology International (KEI) had met in Washington to decide on the draft that some WIPO Member States would submit to the SCCR to put in black and white the needs of persons with a print

[4] The *history* of this treaty goes as back as 1981, when WIPO and UNESCO created a Working Group on Access by the Visually and Auditory Handicapped to Material Reproducing Works Produced by Copyright. See the chapter on «Early history of the WIPO negotiations on copyright exceptions» for more useful dates and links to the report(s) involved in this 32-year process. On a side note, this is only one of the many pages on the matter that you can find at Knowledge Ecology International's blog on the Right to Read for Persons with Reading Disabilities – the most comprehensive online archive available on this issue as of today.

[5] See «Proposal by Chile on the subject 'Exceptions and limitations to copyright and related rights'».

disability.[6] Judith Sullivan, Christopher Friend from the WBU, Jim Fruchterman from Benetech (Bookshare), George Kerscher from the DAISY Consortium, Winston Tabb from IFLA, and many others who have proved to be of capital importance in achieving the goal were there.

In October 2008, a first «WBU Proposal for WIPO Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons» was finally drafted. On May 2009, at the 18th session of the SCCR, Brazil, Ecuador, and Paraguay put forward the treaty proposal.[7]

3 RATIONALE

Why was all this necessary? Why so many reports, meetings, informative sessions, and consultations? And, most of all, how could another copyright treaty help blind and visually impaired persons and those with other print disabilities?

The problem was (is) twofold. On one hand, blind and visually impaired persons need standard printed books to be adapted – in one way or another – so that they are able to read them. On the other hand, these adapted books should be allowed to travel to wherever they are needed.

Books or other printed materials in accessible format are not sold in Amazon. Publishing houses have never seen producing Braille books or works in accessible audio for those with a visual disability as a profitable business. It is institutions providing services for these persons that produce these accessible materials for them, a process that usually takes months and a considerable amount of resources. ONCE, the National Organization of Spanish Blind persons, the institution that I represent here, has produced in its 75 years of history 43,000 titles in structured audio, and nearly 20,000 titles in Braille. Not bad for a library, until you realize that only last year, 60,000 new titles were published in Spain only. ONCE, like many other similar institutions in the developed world, can barely adapt between 3 and 5 per cent of

[6] Civil society can be represented at WIPO meetings, but it is the Member States that propose, study, and negotiate treaties. NGOs and other institutions can be invited to attend those meetings, and even to read short statements during plenary sessions, but they have no say in the discussions.

[7] The word «treaty» became a subject of heated debate for many months and various SCCR sessions. WBU always wanted a treaty, a binding legal instrument that would guarantee its implementation in the largest number of countries possible. Besides, WBU demanded its proposal to be taken as seriously as rights holders take the protection of their rights. On one hand, that WIPO would, in time, adopt a «treaty on exceptions and limitations» was seen as a serious weakness in an institution devoted to enhance and enlarge copyright protection, not to limit it. On the other hand, becoming responsible for spreading the «book famine» by limited the right to read of persons with a print disability was not a label that delegations wanted to wear. The solution was to propose and support a non-binding instrument that would, in time (3 to 5 years), lead us to a real treaty, but only if – after extensive revision – this recommendation had proved to have failed miserably in ending with the book famine. Actually, we ended up with two of these soft-law alternatives. At SCCR/20 (June, 2010) the US delegation proposed a «Draft Consensus Instrument» and the EU delegation distributed a proposal called «Draft Joint Recommendation Concerning the Improved Access to Works Protected by Copyright for Persons with a Print Disability». Both documents were of a non-binding nature, and both were clear, short, and to the point. The former had only three articles, one for definitions, and two others for exportation and importation of accessible copies. The latter was a bit longer (a preamble and 9 articles), with an article dealing with production of accessible format copies at a national level, and other articles setting up rules and procedures on how to follow this recommendation without threatening rights holders' guarantees. A «YOU WILL NEVER GET A TREATY» sign, written all over them in big red letters, couldn't have spoken louder to us. It took WBU two years and four SCCR sessions to get rid of these non-binding documents and convince most delegations of embracing the idea of a useful, workable treaty.

all books published in a given year. ONCE prioritizes the production of accessible educational materials against all other types of works, resulting in a high number of books that are left unpublished in an accessible format.

These books are mostly published in Spanish, the second language in the world in term of native speakers, a language that we share with more than 400 million speakers. Most of these speakers are located in countries where production of accessible materials is scarce, if any. All the books that ONCE adapts could be of use to the millions of blind and visually impaired native speakers of Spanish in other parts of the globe, if only copyright regimes would allow us to send our books abroad.

So, the treaty was designed to tackle this twofold problem – the local production of accessible books, and its sharing across borders. This problem was rightly addressed to as the «book famine».[8] Many countries already have an exception or limitation in their national copyright law that allows institutions in those countries to adapt published works – into a format that a person with a print disability can use – without asking for permission to rights holders. But many more do not. No country is allowed – or disallowed, for that matter – to send the materials produced under that exception to a person with a print disability in another country. That is why the World Blind Union decided that an international legal framework that would put an end to this absurd situation was required.

4 DEFINITIONS

What types of books can we adapt and share? Any publicly available literary or artistic work in the form of text, notation, related illustration, and audiobooks.[9]

To what extent can we adapt that book? To the extent necessary for a print disabled person to have access as feasibly and comfortably as a person without a print disability,[10] while respecting the integrity of the work.

[8] «The Book Famine» was the title of an article published in 1944 in *The Spectator*, a London newspaper. The author of this article referred the worries of the Publishers' Association about «the restricted allowance of paper for books, and especially with the position of some of the smaller publishers», which resulted in a shortage of «books about Britain or by English authors [for sale] in liberated Europe».

[9] This includes all types of textual and audio information, including commercial audiobooks, which were not part of the WBU's scope and were introduced as a compensation for leaving audiovisual works out of the treaty. The American movie industry lobbied heavily on excluding visual materials from the definition of «work».

Article 2(1) of the Berne Convention – mentioned in this definition – defines «protected works» as «The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.» However, the definition here makes clear reference to works «in the form of text, notation and/or related illustrations», which leaves out many of the works defined in Berne.

[10] Which actually means: in whatever format and using whatever adaptation techniques required to make the work usable for the beneficiary person. DAISY books, Braille books, large print books, and any other past or future accessible format, fall under this definition.

What is an «authorized entity»?[11]

- An entity authorized, recognized, or supported financially by a government that provides services for print disabled persons on a non-profit basis, and
- a government institution or non-profit organization that provides those services as one of their primary activities or obligations.[12]

Authorized entities also need to follow certain practices in order to guarantee the peace of mind of rights holders:

- The persons they serve are beneficiary persons,
- the conversion processes they perform do not introduce more changes in the work than those necessary to make it accessible,
- accessible format copies are distributed exclusively to beneficiary persons, and
- the activity is undertaken on a non-profit basis.

[11] In other fora – see WIPO's Stakeholders Platform – these «authorized entities» are referred to as «Trusted Intermediaries». The word *authorized* created great havoc among the NGOs and some Contracting Parties when it was first introduced in the treaty text. Who authorizes these entities? Which are the requirements an institution needs to fulfil to gain authorization? When does an authorized entity lose this status? Rights holders have always wanted to be part of the authorization process. By definition, a «Trusted Intermediary» is an entity that rights holders can trust. Well-established entities (such as ONCE in Spain, RNIB in the United Kingdom, or the Library of Congress in the USA) are easy to trust. The *problem* arises when small organizations in remote countries claim also to be trustworthy entities. They may not be so well known internationally, but surely the services they provide are – at their own scale – of an excellent quality. But the type of services they provide is only one of the elements of the equation. Rights holders also want to make sure that those services are provided in a secure environment, with sophisticated technical protection measures that guarantee zero piracy. Besides, they want to know – and they have a right to ask you – who you are sending *their* books to, how many copies, in which country, which titles, in what formats, when, etc. They want to control the entire distribution process. Well, that is not an exception to copyright law, but what we all know as a *licence*.

In the WIPO's Stakeholders Platform, admission as a TI takes place at a national level – an institution applies to become part of the Platform, and once you have proved to be an institution rights holders can trust, «continued participation in the TI network depends on conformance to the agreed upon guidelines which specify monitoring, reporting and, if necessary, the taking of corrective action.» A year after these guidelines were published (October 2010), European institutions and rights holders adopted this term once more to draft an «EU Stakeholders Dialogue Memorandum of Understanding (MoU) on access to works by people with print disabilities». This other platform – intended to work only at a European level – also aimed at bringing together TIs and rights holders to promote cross-border distribution of works in accessible formats. And, again, what started as a means to grant the free movement of these goods within the boundaries of the European Union ended as a bulk licence that TIs had to sign with rights holders. The definition of TI in this document is even narrower than that in the WIPO's Stakeholders Platform, and a «Steps towards accreditation» document was written that described the various rules that an institution, after close inspection by a VIP European Accessible Content Observatory, needed to follow to be considered a TI. The seventh of these conditions said: «The TI enters into a licence with rights holders' representatives concerning the for cross-border distribution of accessible works legally created». So much for trust!

[12] In real life, this definition includes any entity, non- or for-profit, that provides services to beneficiary persons «on a non-profit basis». To fit into the description, the services provided by for-profits need to be government-funded. During the negotiation of the treaty, some delegations wanted to constrain this definition to institutions or organizations of/for blind persons, pushing for «as its primary activity», instead of the final «as one of its primary activities». This would have left out of the scope of the treaty most schools and universities, among others. Besides, these entities needed to be «non-profit», which was substituted for the more open «on a non-profit basis». This, in practice, will allow commercial companies – like Google – to provide services for beneficiary persons under the treaty on a non-profit basis (even if all the other activities they carry out are of a commercial nature) as long as they do it with public funds.

The way these practices are established and maintained is the sole decision of the authorized entity.[13]

And who benefits from this treaty?

- Any person who – regardless of any other disabilities – is blind,
- has a visual impairment,
- a perceptual or reading disability,
- or a physical disability that makes it impossible for them to read a printed book.[14]

5 EXCEPTIONS AND LIMITATIONS AT NATIONAL LEVEL

Any country adopting this treaty is required to provide (when not in place already) an exception in their national law to the rights of reproduction, distribution, and of making available to the public accessible format copies *by any means*,[15] so that authorized entities, beneficiary persons, and anyone acting on his or her behalf, can (re)produce – or obtain from another authorized entity – and distribute to beneficiary persons or other authorized entities such copies without the authorization of the copyright right holder. Additionally, this exception may be extended to the right of public performance.[16]

[13] A very important point. The current text «establishes and follows its own practices» evolved slowly and painfully from the stiffer wording «establishes and follows rules and procedures».

[14] To sum up, anyone with a disability that prevents him or her from reading a printed book, including persons with dyslexia. At SCCR/22 the African Group (member states from the African countries) proposed a «Draft WIPO treaty on exceptions and limitations for the persons with disabilities, educational and research institutions, libraries and archives» as an alternative to the WBU text. This caused great concern in all parties involved. One of the reasons why our treaty proposal was being considered by the SCCR was the fact that the beneficiaries of the proposed text were clearly defined and delimited – persons with a print disability. The «holistic approach» of the African Group's proposal put in danger the entire process, as it widened not only the definition of beneficiaries to include nearly everyone, but also the exceptions and limitations that the treaty would cover, which was a much greater concern. This shocking turn of events, however, paved the way to the current IFLA treaty proposal and the «Provisional working document towards an appropriate international legal instrument (in whatever form) on limitations and exceptions for educational, teaching and research institutions and persons with other disabilities». [Note the elegant use of «legal instrument (in whatever form)» instead of the taboo word *treaty*.]

[15] When the treaty was first discussed, this was, for many months, a very controversial issue. Some member states wanted to limit the right of distribution to physical copies of the works in accessible format, leaving online distribution out of the treaty. Many institutions providing services to persons with a print disability rely on technology to make book distribution a more efficient and cost-effective service. Sending bulky Braille books or stacks of CDs by mail to the most remote cities of the world is something that we all want to avoid at all costs. It is slow, unsafe, and costly. ONCE's online library distributes thousands of DAISY books and Braille-ready text files every month in a secure and fast way. Even so, cross-border distribution of files out of the rights holders' control was seen by some of them as a bold invitation to piracy. The idea of hundreds of hackers and cyber-pirates waiting for the treaty to kick in so that they could – finally! – put their hands on our DAISY and Braille books was one of those thoughts that always put our smile on our incredulous faces.

[16] The right of translation was one of the issues that put the treaty in a difficult position during the Diplomatic Conference of Marrakesh. This right was included in article 4 for some member states, not by WBU. These member states saw the lack of translations into languages that persons with a print disability could read as a barrier to access. The adoption of this right would have allowed entities to translate a book into a given language as a means to make the work *accessible*, even in cases when that book has not been published for the rest of the population in the language in question. This was a very controversial issue, which was finally removed from article 4 to be included in an agreed statement as an optional extension to the exception. WBU never had a strong position neither for nor against this issue.

On condition that:

- the authorized entity has lawful access to the original work,
- the work is changed only to the extent needed to make it accessible,
- the recipients of the accessible format copy are no other than beneficiary persons, and
- the activity is undertaken on a non-profit basis.

Contracting parties are free to expand the scope of this article with other limitations and exceptions, as well as to narrow its application by introducing some extra conditions. One of them is remuneration to rights holders, and the other one was known – for a long time – as the «commercial availability» clause.[17] «Commercial availability» of mainstream accessible format copies can be used by member states as a pre-condition to allow authorized entities to produce and distribute works in accessible formats. This means that if some beneficiary person needs a book in Braille or in DAISY format and it happens to be already available for purchase in bookshops, this book cannot be produced and distributed by authorized entities under this exception. This limit to the exception needs to meet two conditions – that the book is commercially available «in the particular accessible format», and that it can be obtained commercially «under reasonable terms [...] in that market».[18]

6 EXPORTATION AND IMPORTATION OF ACCESSIBLE FORMAT COPIES

Article 5 was always considered to be the heart of the matter. Local production and distribution of accessible format copies under an exception had been common practice in

[17] Red Line #1. «Commercial availability» became one of the most fought after issues right to the last minute of the treaty negotiations. Though the text in article 4 is not something that the WBU delegation was happy with, it was recognized that some countries already have a similar clause in their national exception, and that the treaty needs to respect domestic and international laws already in place. Either way, those contracting parties wishing to include this clause in their laws are required to «so declare in a notification deposited with the Director General of WIPO» when ratifying the treaty. WBU recommends contracting parties with no «commercial availability» clause in their national exceptions not to limit the limitation further with this voluntary clause when implementing the treaty. It was, however, the inclusion of clauses on commercial availability in articles 5 and 6 that WBU would have never accepted. Though you will not find a trace of «commercial availability» in these articles now, this pre-condition for importing and exporting works in accessible formats was dealt with extensively for years. Even in the last draft, prior to the final text of the treaty, commercial availability for cross-border exchange of accessible format copies was seen as a must for the treaty to see the light – member states just had to decide which of the five alternatives provided in the text would prevail. For the WBU delegation the inclusion of any of those alternatives would have seriously harmed not only the spirit of the treaty but its usability. The various alternatives defined in slightly different ways the procedures that authorized entities needed to go through to make sure that the book was not commercially available in that particular format in the country of importation. It was not clear if the burden of all this bureaucracy should be put on the importer or the exporter, hence all the different alternatives. For WBU, any of these would have effectively killed the treaty.

[18] «Under reasonable terms» was more accurately defined by the Royal National Institute for the Blind as «the same book, at the same time, and at the same price» in its «Overdue» report of 2003, and widely used during their «Right to Read» campaign. The fact that a book may be commercially available in an accessible format is not enough to invalidate the treaty – the beneficiary person needs to be able to buy the exact same book, in the format of their choice, and without paying a higher retail price for it. Right until the final text of the treaty was made public, «under reasonable terms» was part of the definitions. Due to the obvious difficulties of defining what are «reasonable terms» in countries with different economic realities, it was split in the treaty draft into «reasonable price for developed countries» and «reasonable price for developing countries». These definitions underwent innumerable changes over the years, and various alternatives were offered to define the indefinable, just to be deleted from article 2 hours before the presentation of the final draft.

many member states for decades. Expanding the benefits of this exception to an international level was a very different matter.[19]

Where and whom can authorized entities send their accessible format copies to? As long as they have been produced in a lawful manner (i.e., making use of the national exception), authorized entities can distribute and make available those copies to any other authorized entity or to a beneficiary person[20] in another Contracting Party.

Authorized entities carrying out this service need to make sure that the person receiving the materials falls into the definition of beneficiary person. This can be done either through the authorized entity they belong to or, failing that, by asking the beneficiary person to produce some «proof of disability». Nothing that institutions serving persons with print disabilities have not being doing for decades.

Article 5(4) wants to make sure that this exception is used wisely, and that the distribution to persons with a print disability in other countries is made according to some of the most widely used international copyright norms (the Berne Convention, the WIPO Copyright Treaty, and the three-step test).

Article 6 is the necessary complement to the right of exportation – it allows beneficiary persons and authorized entities in a Contracting Party to import works in accessible formats. To be able to do this, however, that Contracting Party needs to have in its national law an exception that allows for the production of accessible format copies. This is a way of reminding countries without that exception in their norms not to *forget* to make it part of their copyright law when transposing the treaty.

7 TECHNOLOGICAL PROTECTION MEASURES (TPMs)

TPMs are technological safeguards or locks that prevent any person from making an unlawful use of a lawfully acquired product. In other words, these measures prevent users of a product to make unauthorised copies of it, distribute it to users who did not buy the key to unlock the product, etc. This is all very sensible and fair, until these TPMs prevent screen readers or

[19] Import and export rights; member states that are or are not signatories to the Berne Convention and/or the WIPO Copyright Treaty; contracting parties that apply or do not apply the three-step test in their copyright laws... All these elements suddenly became part of the equation, seriously endangering the entire treaty. «The Berne Gap» was one of the four last big problems that negotiators had to tackle in Marrakesh. I must admit that, not being a copyright expert, the implications of all these other WIPO norms with the Marrakesh Treaty escape me. Eventually, the Berne Gap controversy – which had paralyzed two previous SCCR sessions – was solved by limiting the cross-border distribution of this works in accessible format to beneficiary persons (!) in the receiving Contracting Party's jurisdiction (to avoid re-distribution), except if the Contracting Party is a member of the WCT, or if it applies the three-step test, but not beyond its obligations under other international treaties, and without prejudicing any rights, limitations and... and it goes on and on in this fashion *ad nauseam*. The aim behind the design of this legal language labyrinth was to reassure Contracting Parties that nothing in this treaty reduces or extends whatever other international obligations a country is bound to.

[20] Red Line #2. The article referring to the direct cross-border distribution of works in accessible format «to a beneficiary person» remained bracketed until the last minute. This was another of our red lines. Had the treaty not allowed such direct distribution, many persons with a print disability living in countries with no authorized entity to belong to (the majority of persons with a print disability in developing countries), would never benefit from the treaty. Trusted and prestigious online libraries like Bookshare, which distributes millions of copies of their accessible books every year to individuals around the world – thanks to current agreements and licenses between Benetech and some renown publishers –, would never be allowed to use the treaty to expand their services.

other adaptive devices to access the content they are protecting, thus rendering them useless for persons with a print disability who paid for the product.[21]

Article 7 reminds Contracting Parties that they cannot allow for this technical protection measures to make this treaty unusable by beneficiary persons. It does not say how or in what manner this can be achieved, but it states very clearly that using TPMs to block the contents of the work and limit its distribution – and thus the reach of the treaty – is not allowed. The agreed statement associated with this article mentions technological protection measures applied by authorized entities to the works they produce and distribute. These measures – different in nature and scope to those applied by rights holders – can still be applied when necessary, though this treaty will render them redundant in many cases once ratified.[22]

8 COOPERATION TO FACILITATE CROSS-BORDER EXCHANGE

Article 9[23] offers a series of guidelines that Contracting Parties shall or may follow (some are mandatory, some are not) in order to foster, assist, help, and promote cross-border exchange

[21] Red Line #3. This was another very sensitive area. WBU was not against the use of TPMs *per se*, but allowing content-blocking TPMs to be applied freely in all kinds of e-books and other digital content was a very simple way of weakening the benefits of the treaty. We could not accept to lose this battle, a battle that the European Blind Union (EBU) had already won in Europe when advocating for exceptions in the EU «Directive 2000/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society». According to this directive, circumvention of said TPMs is not allowed, but Member States need to «take appropriate measures to ensure that rights holders make available to the beneficiary of an exception or limitation [...] the means of benefiting from that exception or limitation». The problem here is that the exception or limitation that it refers to is only one of the many voluntary exceptions that the directive offered Member States for implementation. This is one of the values that the treaty may add to the current situation – those countries that ratify the treaty will be forced to include that exception in their copyright law (if they do not have it already) together with the provision on TPMs that goes with it.

[22] It was precisely due to the current lack of exceptions and limitations for persons with a print disability in a number of countries, and due also to a high level of uncertainty when it comes to the distribution of digital works in accessible format, that some authorized entities decided to *protect* their digital books against unlawful use through various means. Some publishers required that some kind of protection had to be applied to their works as a pre-requisite to the distribution of copies in accessible format. Sometimes, these TPMs were applied simply as a precaution, in order to avoid possible recrimination by wary rights holders. In all cases, the aim was to avoid beneficiary persons from sharing those works with persons without a print disability. These protection measures range from audio watermarking to file scrambling, and from specific playback devices to PIN-protected books. These TPMs are costly and cumbersome to monitor, and they have added nothing but extra work and costs to the efficiency provided by the protection system already in place in authorized entities that do not apply TPMs to their works – controlled distribution. Making sure that the person you send the work to is a beneficiary person, and providing controlled digital environments for online distribution – i.e., a password-protected virtual library – has proved to be just as effective as the most sophisticated TPM. This – controlled distribution – is the only level of protection required by the treaty.

Just before this agreed statement was rewritten into its final form, some delegations wanted to introduce in article 7 an agreed statement stating that this TPMs applied by authorized entities could not be circumvented in any way. They seemed to oversee the fact that most of this protection measures were a direct consequence of the lack of clear exceptions and limitations on the matter, a lack that the adoption of this treaty will put an end to.

[23] And Red Line #4. The benign wording of current article 9 does not resemble the aggressive tone of previous drafts, and that is why it became the fourth and last red line the WBU could not cross. It came into the treaty as late as July 2012, and it became Article J, Registry of Authorized Entities. It mentioned a «voluntary registry» of such entities, so that they could identify one another. It then quickly evolved into an access point established by the International Bureau of WIPO, which would «collect [...] anonymous and aggregated data relating to the cross-border exchange of accessible format copies for the evaluation of the functioning of this instrument/Treaty» (see SCCR/25/2 REV). WBU feared – not without reason – that, in time, this apparently harmless voluntary registry might well become the only entrance to the treaty for some institutions, and a way to

of accessible format copies. According to this, the following initiatives are proposed to Contracting Parties:

- An information access point, established by the International Bureau of WIPO for voluntary sharing of information to assist authorized entities in identifying one another.
- Assist authorized entities in sharing information among them.
- Assist in making information available about authorized entities' own policies and practices (related also to cross-border exchange) to «interested parties» and «members of the public».[24]

9 OTHER PROVISIONS

Article 8 is a brief but important one, and is somehow related to article 9 (see footnote 24). Protecting the privacy of beneficiary persons is relevant to this treaty in two main issues –the type and degree of that person's disability, and the books that persons read. The former is so evident that requires no further explanation, and the latter may have a direct implication in the «information» that might be made available to «interested parties» and «members of the public».

Articles 10, 11, and 12 are not easy to fathom for the untrained eye. They repeat, again and again, and in more detail some basic principles:[25]

- That nothing in the treaty harms any other obligations a Contracting Party may have with other treaties and international norms,
- that Contracting Parties may fulfil the rights and obligations under this treaty in whatever way is consistent with their legal tradition,

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monitor which books, how many copies, and to whom were being sent from a given country to another. The treaty still includes much of the language used for old article J and more, but in a completely different tone. Besides, the agreed statement that goes with it, clearly states that it does not «imply mandatory registration [...] nor constitutes a precondition [...] to engage in activities recognized under this Treaty».

[24] WBU and some Member States followed different reasoning when dealing with this treaty. WBU identified a problem: there are not enough books for persons with a print disability because publishers refuse to produce them, as they are costly to produce and they do not see a market for them; hence, we need a treaty to help us share what we have and produce ourselves, regardless of what titles in accessible formats publishers may put in the market in time. Some Member States identified a different problem (or saw the same problem from a different light): there is a «market failure» that we need to address; publishers need to produce accessible format copies or (even better) books that everyone can buy and use so that this treaty become unnecessary; until this happens, we can adopt this treaty to prevent persons with a print disability from being discriminated against and to boost up mainstream production of accessible books. To help publishers in this new adventure, they need information. Information on how many books are sent from one country to another (in what languages, on what subjects, in what formats) in order to develop a market strategy. They would also like to know which books are sent where, to have some way of tracing possible copyright infringements.

[25] These articles and recitals are the heirs of a so-called «Cluster Package», which *embellished* the treaty draft with its legal jargon for a series of SCCR sessions. Actually, this package virtually paralyzed the negotiations during two consecutive sessions of the SCCR (see note 19). For many NGOs, and certainly for the WBU, all this controversy had already been addressed and dealt with – in a more elegant manner – in Article 1, which says that "Nothing in this treaty shall derogate from any obligations that Contracting Parties have to each other under any other treaties, nor shall it prejudice any rights that a Contracting Party has under any other treaties."

- that a Contracting Party may decide to include in their national laws additional exceptions and limitations for persons with disabilities,
- and that we all must kneel and adore The God of the Three-Step Test forever.[26]

There is a very important footnote in article 10 that will surely pass unnoticed, lost in the plethora of agreed statements surrounding it. Footnote 13 of the treaty says that when a work qualifies as a *work* as per the treaty's definition, whatever exception or limitation applies to it, applies also to its related rights. To put it simply, related (or neighbouring) rights in a book are, for instance, all those rights that refer to the work of others than the author – photographers, illustrators, translators, editors, etc.[27]

There are only two other important items in the treaty between article 14 and the end of the document:

- The treaty will be open for signature for one year after its adoption (that is, until June 28th, 2014).[28]
- The treaty will enter into force after 20 countries[29] have ratified it.

The remaining articles deal with procedural matters – Assembly, International Bureau, denunciation of the treaty, languages, etc. – that are usually replicated in all WIPO treaties.

10 CONCLUSION

Having an instrument like the Marrakesh Treaty was nothing but a dream only four years ago. A dream that not many believed it would come true one day. It is an international, legally binding instrument, but it is just that – an instrument. It cannot be considered the solution to the «book famine» either, but part of the solution. And now it is time to make this partial solution work.

[26] The three-step test is a must in all EU copyright-related legislation whenever exceptions and limitations are considered. Exceptions and limitations can be granted only if they pass the three-step test. As soon as this legal figure was first included in the text of the treaty, other countries with different legal traditions regarding exceptions and limitations rushed to hang them on the Christmas tree. Thus, previous versions of the text included explicit references not only to the three-step test but also to «fair use» and «fair dealing». Article 11 mentions the three principles of the three-step test four times («[1] certain special cases that [2] do not conflict with a normal exploitation of the work and [3] do not unreasonably prejudice the legitimate interests of the author»), each time related to a different international norm, so that everyone knows that when everything else fails, the God of the Three-Step Test is there to deliver us from evil.

[27] Drafted in various ways, this footnote had a bigger presence in the text than the one it has now. Right before being relegated to the footnote status, it was a paragraph on its own placed right after the definition of «accessible format copy», and it looked like this: «References to "copyright" include copyright and any rights related to copyright recognized by Member States/Contracting Parties in accordance with national law.» Its implications on the exceptions and limitations under this treaty have not diminished an iota, however.

[28] After this date, non-signatory states wishing to adhere to the treaty need to do it through an instrument of accession, with which they sign and ratify the treaty in a single step.

[29] The mean for international industrial property agreements is 8 ratifications. The figure of 20 countries is slightly high, but achievable, unlike the 30 countries proposed by the EU delegation when dealing with this article. Luckily, no other delegation followed this initiative.

It may seem absurd to remind people of a very basic truth – that the treaty can only be used by those countries that become Contracting Parties. Only when 20 countries ratify the treaty, this will enter into force. And then, only these 20 Contracting Parties will have the international legal status required to share copies in accessible format with other Contracting Parties, and to produce and distribute them locally where necessary. Persons with a print disability in a country that decides not to ratify the treaty will remain just as deprived as they were before Marrakesh. It does not matter if Spain ratifies the treaty tomorrow – if we cannot find another 19 countries willing to ratify it, nothing will change. It does not matter if Spain becomes the 20th country in ratifying the treaty – if no other Spanish-speaking countries ever do it, we will have lost a one-in-a-lifetime opportunity of sharing our extensive collection of works in accessible formats with them.

We need twenty willing governments to run and ratify the Marrakesh Treaty. The 51 countries[30] that signed it just before the closing ceremony of the Diplomatic Conference are better positioned than the all the others for quick ratification, but we cannot just sit and wait for 20 of them to do the hard work for the rest of us. Any country can sign and ratify the treaty at any time. All it takes is political will. And if we want the persons with a print disability in our country to benefit from this instrument fully, we need to stop staring at others and urge our governments to take the first step.

[30] Afghanistan, Bosnia and Herzegovina, Brazil, Burkina Faso, Burundi, Cambodia, Cameroon, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Costa Rica, Côte d'Ivoire, Cyprus, Democratic People's Republic of Korea, Denmark, Djibouti, Dominican Republic, Ethiopia, Ghana, Guinea, Haiti, Holy See, Jordan, Kenya, Lebanon, Luxembourg, Mali, Mauritania, Mauritius, Mongolia, Morocco, Nepal, Nigeria, Panama, Paraguay, Peru, Republic of Moldova, Sao Tome and Principe, Senegal, Sierra Leone, Sudan, Switzerland, Togo, Tunisia, Uganda, United Kingdom, and Uruguay.