

The role of libraries in the implementation of the Marrakesh Treaty for persons with a print disability

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Abstract:

On 27 June 2013, the Diplomatic Conference to Conclude a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons With Print Disabilities adopted the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, with the aim to allow — without the authorization of the rightholder — the production and distribution to said beneficiaries of accessible format copies at a national level, as well as to permit the cross-border exchange of those accessible format copies. Seven years earlier, in 2006, the Convention on the Rights of Persons With Disabilities (UN CRPD) was adopted by the UN General Assembly. The former would not have been possible without the latter, and the latter needs the former – and as many other similar treaties and legal instruments as possible – to fulfil its objectives.

The UN CRPD obliges State Parties to take all appropriate measures to provide persons with disabilities with the same information, at the same time, and in the form of communication of their choice that their peers without a disability have access to. The Marrakesh Treaty was designed to make this true by providing signatory countries with the mechanisms required to allow for exceptions and limitations to the rights of production, distribution, and making available of information in accessible formats, at both domestic and international level.

This paper analyses the links and the close relationship between the UN CRPD and the WIPO Marrakesh Treaty insofar as their mutual dependency and their common objective.

Keywords: blind persons, visual impairment, print disability, access to information, WIPO.

Article 21

«State 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 [...], including by:

- (a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;
[...]
- (c) Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities» (UN CRPD, 2006).

Though the UN Convention on the Rights of Persons With Disabilities mentions *access to information* in various instances throughout the text, article 21 summarizes the needs of these persons to read, learn, and share information with others by whatever «means, modes and formats of communication» they may deem appropriate (UN CRPD, 2006). Libraries, on their side, «encourage social inclusion, by striving to serve all those in their user communities regardless of age, gender, economic or employment status, literacy or technical skills, cultural or ethnic origin, religious or political beliefs, sexual orientation, and physical or mental ability» (IFLA, 2003).

As for the Marrakesh Treaty, its link with – and its dependency on – the UN CRPD was left clear right from the start. Thus, we can read in the first paragraph of the Preamble of the Treaty: «*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...» (WIPO, 2013).

Now that we have identified the three actors required to carry out this task – the UN CRPD, the Marrakesh Treaty, and the library services – all we need to do is to devise an strategy that allow libraries to fulfil this part of their mission by making use of the Marrakesh Treaty and while giving flesh to article 21 of the UN CRPD.

The need

Persons with a print disability in general, and blind and visually impaired persons in particular, have the same need to have access to all kinds of information as everyone else and for the same good reasons – leisure, education, employment, etc. In a word, inclusion – the feeling of being an active part of the society we live in. Clearly, this is not only a need, but a right, a human right. And as such right, print-disabled persons demand legal instruments, *binding* legal instruments — both at domestic and international level — that guarantee that information in a format they can use can be produced, distributed, and freely exchanged legally and seamlessly.

IP (Intellectual Property) legislation is, by nature, territorial. This means that whatever rights, obligations, and limitations are expressed in your copyright law, these apply exclusively to the country where this law was enacted. Thus, by 2008,¹ a relatively high number of countries

¹ When the final draft of the future Marrakesh Treaty was presented to the WIPO Standing Committee on Copyright and Related Rights (SCCR).

had some provision in their IP legislation for the production and distribution of accessible format copies,² but this exception could only be used at a national level (Sullivan, 2006).

Books in Braille, audio, large print, etc., are hard and highly expensive to produce.³ In many cases, the books produced in any of these formats are used by one or maybe two persons with a print disability, which makes these production costs hard to justify and impossible to recover. Another consequence of the high production costs is that the size of the collections of accessible format copies in developing countries is usually very small, when they exist at all.

The territorial nature of IP legislation makes it impossible for institutions that produce materials for persons with a print disability to a) exchange their accessible format copies with other institutions abroad for the benefit of their users —especially with those in the same linguistic region—, b) have access to accessible format copies in other languages, and c) donate copies of these materials to those institutions that lack the infrastructure and/or the funding required to produce them by themselves.

As a result of all these factors, the number of books accessible for persons with a print disability in a format that they can use amounts to 5 per cent of the total of books published in a given country. This figure is much lower (between 1 to 2 per cent) in developing countries.

Countries can add provisions for cross-border interchange of accessible format copies in their national legislation, but this requires a similar provision in the law of the receiving country to work. As a consequence, the World Blind Union – an umbrella organization that represents more than 500 institutions of and for blind and visually impaired persons in more than 190 countries – envisaged an international copyright treaty as the only solution to this «book famine». And the World Intellectual Property Organization was the only international institution that could provide us with such an instrument.

The process

For obvious reasons, walking into WIPO with a proposal to «balance the international intellectual property system»⁴ by means of adding exceptions and limitations to existing copyright treaties and conventions was not seen as such a good idea by many WIPO member states. The subject of exceptions and limitations for blind and visually impaired persons was not a completely new thing at WIPO, though «exceptions and limitations» in general was one of those items that were never part of the Standing Committee on Copyright and Related Rights' (SCCR) agenda.

² Books – or any other type of document – in an accessible format, in «Treaty language».

³ The average price for the production of a standard book (both in terms of number of pages and of level of difficulty) into Braille is of 1,500 USD.

⁴ The World Intellectual Property Organization is a self-funding agency of the United Nations based in Geneva (Switzerland). They have 187 member states, and they aim at developing a «balanced and effective international intellectual property (IP) system that enables innovation and creativity for the benefit of all.» [From <http://www.wipo.int/about-wipo/en/>].

Actually, the matter was first raised in 1981, when the governing bodies of both WIPO and UNESCO agreed to set up a working group to study the problems that «visually and auditory handicapped» persons had in accessing printed material. Between 1981 and 2001 the subject emerged in various forms and shapes at WIPO, to no avail.

In 2001 the World Blind Union and the IFLA Libraries for the Blind Section (today's Libraries Serving Persons with Print Disabilities Section) presented a paper at the Boston 67th IFLA General Conference stressing the role that WIPO had in granting «visually impaired people's right to read» (Mann, 2001).

In 2002, the World Blind Union formally asked the SCCR to study the topic, and during the 10th session of the SCCR in November 2003 an Information Meeting on Digital Content for the Visually Impaired took place, in which papers from the World Blind Union (Mann, 2003), a representative from Colombia (Zapata, 2003), the DAISY Consortium (Martínez-Calvo, 2003), the International Publishers Association, the IFLA Libraries for the Blind Section (Van Bodengraven, 2003), and the Ministry of Culture from Denmark (Schønning, 2003) were presented in an attempt to introduce the subject into the SCCR agenda for further (and serious) consideration.

As a result, WIPO asked Judith Sullivan (a Copyright and Public Affairs prestigious consultant) to prepare a study on the global situation of limitations and exceptions for the visually impaired in IP legislation at that time (see above). This remains the most comprehensive study of its kind to date.

On 13 December that year, the United Nations Convention on the Rights of Persons with Disabilities was adopted, and everything changed. The UN CRPD gave our proposal the legal backup and the legitimacy that the World Blind Union needed to present a treaty proposal at the SCCR meeting in Geneva in May 2009. The rest – up to 27 June 2013 – is history,⁵ a history that started at IFLA (at the Libraries for the Blind Section), that was strongly supported and pushed forward by the adoption of the UN CRPD, and that was adopted in Marrakesh (Morocco) thirty-two years later.

The instrument

The *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* (WIPO, 2013) is **the only (copyright-related or otherwise) international treaty drafted by consumers, aimed at consumers, and driven by consumers.**

Historically, all IP-related legislation – including all WIPO treaties – has been driven by rightholders in search for further protection to both their legitimate rights and royalties. Articles expressing exceptions and limitations do exist on some of them, but more as the «exception» than as the rule. The Marrakesh Treaty is, to a certain extent, a treaty *on* limitations and exceptions, and the first of its kind.

⁵ For a comprehensive history of the entire negotiation process, complete with links to all relevant documents, see Knowledge Ecology International's [Background and update on negotiations for a WIPO copyright treaty for persons who are blind or have other disabilities](#) [web page].

The treaty requires 20 ratifications to entry into force. At the time of writing, 67 member states had signed the treaty, but none of them has ratified it yet. The World Blind Union launched in February 2014 in London a «ratification campaign» whose aim is to push governments all around the world to a speedy ratification, with the objective of having a fully-functional treaty by the end of 2015. Ratification processes are not the most straightforward, and they vary greatly from country to country. We know of a number of member states whose ratification process is in its final stages, so we expect to see the first ratifications of the Marrakech Treaty any time soon.

The benefit

To make a long story short, and trying to explain the core principles of the treaty in layman's terms, we can summarize the benefits that the Marrakesh Treaty offers as follows:

- a. Though labelled by WIPO (and others) as the Marrakech VIP Treaty, the «beneficiary persons» of this treaty are not only blind and «Visually Impaired Persons», but any person with a perceptual, reading, or physical disability that prevents them from reading standard print.⁶ This includes persons with dyslexia, a group of beneficiaries that many institutions that provide services to visually impaired persons have already taken on board in big numbers.
- b. Member states that ratify the treaty need to include in their national IP legislation – if it does not exist already – an exception that allows institutions and individuals (including their caretakers) to produce and distribute accessible format copies for and to beneficiary persons, always on a non-profit basis. This is a *conditio sine qua non* to benefit from the rest of the provisions of the treaty.
- c. «Authorized entities» – in treaty language, an entity that provides services to beneficiary persons as one of its primary activities or obligations – will be allowed to distribute accessible format copies to both other institutions or authorized entities and beneficiary persons in another country, as long as both are Contracting Parties, i.e. both have ratified the treaty.
- d. Likewise, authorized entities *and* beneficiary persons will be allowed to import accessible format copies if both their country and the exporting country are Contracting Parties of the treaty.
- e. Technical Protection Measures (TPMs) cannot «prevent beneficiary persons from enjoying the limitations and exceptions provided for» in the treaty.

I do not have the intention of analyzing in detail in this paper neither each and every provision of the treaty nor the best way of implementing it into national IP law.⁷ Suffice it to say that the text of the treaty covers all the requests made by the World Blind Union in its first draft (and more!), but also that some potentially-dangerous clauses were introduced during the negotiation process, and that these might be used to restrict its application. Thus, it

⁶ As opposed to «large print», i.e. documents printed with a typeface or font at least 16 points in size. This is one of the most popular adaptive technologies that persons with low vision use to access printed text.

⁷ For more detailed analyses – whether in layman's or more legalistic terms – see ASIC (2013), Band (2013), Band and Jaszi (2013), Ficsor (2013), Martínez-Calvo (2013), Trimble (2014), and WBU (2013).

is advised that – whenever possible – interested parties cooperate closely with their government when transposing the treaty into their national legislation in order to avoid any unpleasant surprises.

The overall benefit, though, is clear. Persons with a print disability living in a country that has become a Contracting Party of the treaty will be allowed to have access not only to the accessible format copies produced in their own country, but also to those collections produced in other Contracting Parties. This means access to works in other languages as well as to works in their own language that could not be produced locally for a variety of reasons. Institutions that produce accessible format copies and/or distribute them to persons with a print disability will be allowed to share their collections with other institutions abroad, as well as to devise agreements on «who produces what» in order to avoid double production. Thus, instead of using their scarce resources to produce the same costly accessible book that has been produced already in a different country and in the same language – as it is common practice today due to the above-mentioned territorial nature of copyright laws –, authorized entities will have the opportunity to rationalize their production flows so as not to step on each other's book.

The role of libraries

Article 2(c) of the treaty (WIPO, 2013) says:

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

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.»

This definition of the entities that are authorized to provide services under the scope of the treaty – including the juicy agreed statement in footnote 2 – is of the utmost importance for its success. Though initially intended – by some Member States – to be an instrument that only widely-known and highly-recognized organizations of and for the blind could make use of,⁸ WBU bravely fought for a wider definition that would include, among other types of institutions, libraries. And not only specialized libraries, but *any* library that does or intend to provide accessible format copies to persons with a print disability. The current definition covers public libraries, university libraries, national libraries, and pretty much all types of libraries that serve their patrons on a non-profit basis.

Traditionally, the concept of «library for the blind» refers to both production and library services provided by institutions and organizations devoted to the welfare of blind and visually impaired persons. The institution I represent here, ONCE (Organización Nacional de Ciegos Españoles), has been producing and distributing books and other materials in accessible formats for more than 75 years. Our libraries produce and hold thousands of

⁸ Known in SCCR jargon as «trusted intermediaries».

Braille and audio DAISY books,⁹ as well as tactile graphics and other accessible products, placing great emphasis on those educational materials that our students require and demand from us.

But Spain – just like France, Germany, Japan, the United Kingdom, or the United States – are privileged countries that can boast of having efficient and well-organized institutions of and for the blind that cater for their users’ needs in more ways than just providing them with books. What about those many countries that have no such institutions? What about those countries where blind and visually impaired persons – whether organized or not – lack all kinds of services, let alone books that they can read? If you think these countries are maybe just a minority, think again, as according to the World Health Organization, 90% of the 285 million persons with a visual impairment live in developing countries. These more than 255 million people can only rely on their local library, if any, to provide them with books in formats they can use; books that these libraries – not being producers themselves – will need to import from producing libraries in their country or elsewhere.

«Specialized libraries» have existed for decades, and they exist simply because someone had to do the job. It is not that libraries serving persons with print disabilities have the monopoly on books in accessible formats – they have just been left alone in fulfilling this gap. Specialized libraries are, in most cases, also specialized publishers, and the materials they produce and distribute are costly, require specific skills, and are of no use to anybody else. Or so it was.

Copyright laws have been generous enough to provide (some) traditional *libraries for the blind* with the exception needed for them to exist and to provide the services their users required and demanded. But, on the other hand, they have been restrictive enough to leave them alone in this enormous task. These specialized libraries cannot keep on being the only access point to accessible materials that persons with a print disability have. As seen, no matter how hard they try, these libraries can only provide a symbolic percentage of all published books. Public libraries, universities, all types of cultural institutions are now eager – and, in some cases, obliged by international conventions and domestic laws – to serve those patrons with specific requirements and special needs. And the Marrakesh Treaty provides them with the legal framework required to achieve this mission.

Libraries have now been given a new opportunity to serve this community effectively. The new legal framework that the Marrakesh Treaty will provide allows any library fitting the above description to help specialized libraries in providing these services. Being a *library for the blind* is no longer a requirement, and they will be allowed to distribute materials produced by other institutions. Article 2 of the Marrakesh Treaty defines the type of works that can be turned into accessible format copies, as well as the use that libraries and other institutions can make of them.

«For the purposes of this Treaty:

- (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;
- (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

⁹ See the [DAISYpedia](#) for more information about the DAISY standard.

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» (WIPO, 2013).

Thus, by signing and ratifying — or by adhering to — the Marrakech Treaty, a Contracting Party is providing their libraries and other «authorized entities» with the possibility to increase their impact on their area of influence by incorporating patrons with a print disability; join search-and-discovery networks and other online resources originally devised for specialized libraries only; contribute to these networks by adding their own collections of accessible format copies, regardless of where they were produced and by whom; serve their multicultural print-disabled population by *importing* accessible format books in other languages; fulfil their mission of encouraging «social inclusion, by striving to serve all those in their user communities regardless of [...] physical or mental ability » (IFLA, 2003); carry out UN CRPD's compromise to ensure persons with disabilities' «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» (UN CRPD, 2006), and comply with article 10 of IFLA's draft treaty on exceptions and limitations for libraries and archives on the «Right to use of works and materials protected by related rights for the benefit of persons with disabilities» (IFLA, 2013).

The Marrakesh Treaty is not only a treaty by and for persons with print disabilities – it is also a treaty for libraries, for societies, to help them become more inclusive and fair; it is the first international legal instrument, sanctioned by a UN agency, that can help the UN Convention on the Rights of Persons with Disabilities to carry out part of its purpose, to promote respect for the inherent dignity of persons with a print disability.

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