

MODEL STATUTE FOR IMPLEMENTATION OF THE MARRAKESH TREATY TO FACILITATE ACCESS TO PUBLISHED WORKS FOR PERSONS WHO ARE BLIND, VISUALLY IMPAIRED, OR OTHERWISE PRINT DISABLED

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The Marrakesh Treaty provides Contracting Parties with great flexibility concerning the implementation of its obligations.¹ As Article 10(3) provides, “Contracting Parties may fulfill their rights and obligations under this treaty through limitations or exceptions specifically for the benefit of beneficiary persons, other limitations or exceptions, or a combination thereof...” Article 4(2) sets forth one way a Contracting Party may meet its obligation under Article 4(1) to permit the making and distribution of accessible format copies domestically. Likewise, Article 5(2) sets forth one way a Contracting Party may meet its obligation under Article 5(1) to permit the cross-border exchange of accessible format copies. Below is a model statute for implementing the framework of Articles 4(2) and 5(2) in domestic law. (The appendix contains the model statute with the changes to the Marrakesh Treaty highlighted.) We are not suggesting that this necessarily is the best approach for achieving the Treaty’s objective of increasing the availability of accessible format copies to the print disabled. Rather, this approach may be the most politically feasible for countries that do not already have an exception for the print disabled in domestic law because it hews so closely to the Treaty text.

SECTION X -- EXCEPTION FOR THE MAKING AND DISTRIBUTION OF ACCESSIBLE FORMAT COPIES

X.1 Definitions

For the purposes of this Section:

- (a) “works” means literary and artistic works in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media, including such works in audio form;
- (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 navigate and have access as feasibly and comfortably as a person without visual impairment or other print disability, and which respects 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;
- (c) “authorized entity” means

¹ The text of the Marrakesh Treaty is at http://www.wipo.int/edocs/mdocs/copyright/en/vip_dc/vip_dc_8_rev.pdf. For an explanation of Treaty, see Jonathan Band, “A User Guide to the Marrakesh Treaty,” <http://www.librarycopyrightalliance.org/bm~doc/user-guide-marrakesh-treaty-0913final.pdf>.

- (i) an entity that is authorized or recognized by [the government], or receives financial support from [the government], to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis, or
 - (ii) a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations.
- (d) A “beneficiary person” means a person who:
- (i) is blind;
 - (ii) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or
 - (iii) 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.

X.2 The Making and Distribution of Accessible Format Copies

- (a) An authorized entity is 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;
 - (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.
- (b) An authorized entity meets requirements of subsection (a)(iii) when it 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; and
 - (iii) to maintain due care in, and records of, its handling of copies of works.
- (c) A beneficiary person, or someone acting on his or her behalf (including a primary caretaker or caregiver), is permitted to make an accessible format copy of a work

for the personal use of the beneficiary person or otherwise to 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.

X.3 Cross-Border Exchange of Accessible Format Copies

- (a) An authorized entity is permitted, without the authorization of the rightholder,
- (i) to distribute or make available for the exclusive use of beneficiary persons accessible format copies to an authorized entity in another country; and
 - (ii) to distribute or make available accessible format copies to a beneficiary person in another country;

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

- (b) An authorized entity, a beneficiary person, or someone acting on his or her behalf (including a primary caretaker or caregiver), is permitted, without the authorization of the rightholder, to import an accessible format copy, including by electronic communication by wire or wireless means.

X.4 Technological Measures [if circumvention of technological measures is prohibited]

An authorized entity, a beneficiary person, or someone acting on his or her behalf, is permitted, without the authorization of the rightholder, to circumvent effective technological measures exclusively for the purpose of enjoying the exceptions provided for in this Section.

X.5 Respect for Privacy

An authorized entity shall respect the privacy of beneficiary persons when providing services under this Section.

In addition to this statutory text, it may be appropriate for the legislature or an appropriate government agency to adopt findings or issue a statement stressing that the Section is intended to promote the making and distribution of accessible format copies, including across borders. Furthermore, authorized entities acting pursuant to the provisions of this Section could be encouraged to share information, solely on a voluntary basis, with the World Intellectual Property Organization International Bureau in an effort to assist authorized entities in identifying one another and thereby creating greater international exchange of accessible format copies.

September 25, 2013

APPENDIX: CHANGES TO MARRAKESH TREATY HIGHLIGHTED

SECTION X -- EXCEPTION FOR THE MAKING AND DISTRIBUTION OF ACCESSIBLE FORMAT COPIES

X.1 Definitions

For the purposes of this Section:

- (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, including such works in audio form;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 navigate and have access as feasibly and comfortably as a person without visual impairment or other print disability, ~~and which~~ The accessible format copy is used exclusively by beneficiary persons and it must respects 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;
- (c) “authorized entity” means
- (i) an entity that is authorized or recognized by ~~[the government],~~ or receives financial support from [the government], to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis, ~~or. It also includes~~
- (ii) a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations.³
- ~~An authorized entity establishes and follows its own practices: to establish that the persons it serves are beneficiary persons; to limit to beneficiary persons and/or authorized entities its distribution and making available of accessible format copies; to discourage the reproduction, distribution and making available of unauthorized copies; and 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.~~
- (d) A “beneficiary person” ~~is~~ means a person who:

² ~~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.~~

³ ~~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.~~

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

X.2 The Making and Distribution of Accessible Format Copies

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

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

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

- (a) ~~An~~ authorized entity ~~ies is 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.

- (b) An authorized entity meets requirements of subsection (a)(iii) when it 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; and
~~(ii)(iii) to maintain due care in, and records of, its handling of copies of works.~~

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

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

~~4. A Contracting Party may confine limitations or exceptions under this Article to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market. Any Contracting Party availing itself of this possibility shall so declare in a notification deposited with the Director General of WIPO at the time of ratification of, acceptance of or accession to this Treaty or at any time thereafter.~~⁵

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

X.3 Cross-Border Exchange of Accessible Format Copies

~~1. Contracting Parties shall provide that if an accessible format copy is made under a limitation or exception or pursuant to operation of law, that accessible format copy may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party.~~⁶

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

- (a) ~~An a~~authorized ~~entitentity isies_ shall be~~ permitted, without the authorization of the rightholder,
- (i) to distribute or make available for the exclusive use of beneficiary persons accessible format copies to an authorized entity in another countryContracting Party; and
 - (ii) to distribute or make available accessible format copies to a beneficiary person in another countryContracting Party;

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.~~

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

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.~~

provided that prior to the distribution or making available the originating authorized entity did not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons.⁷

~~(b)~~

~~(c) 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.~~

~~(d)~~

~~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.~~

~~(e) (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.⁸⁹~~

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

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

~~Article 6~~

~~(g) Importation of Accessible Format Copies~~

~~(h)~~

~~(i)(b) To the extent that the national law of a Contracting Party would permit a beneficiary person, someone acting on his or her behalf, or an authorized entity, to make an accessible format copy of a work, the national law of that Contracting Party shall also permit them An authorized entity, a beneficiary person, or someone acting on his or her behalf (including a primary caretaker or caregiver), is permitted, without the authorization of the rightholder, to import an accessible format copy, including by electronic communication by wire or~~

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.

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.

~~wireless means for the benefit of beneficiary persons, without the authorization of the rightholder.¹⁰~~

X.4 Technological Measures ~~[if circumvention of technological measures is prohibited]~~

~~An authorized entity, a beneficiary person, or someone acting on his or her behalf, is permitted, without the authorization of the rightholder, to circumvent effective technological measures exclusively for the purpose of 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 Section Treaty.¹¹~~

X.5 Respect for Privacy

~~In the implementation of the limitations and exceptions provided for in this Treaty, Contracting Parties shall endeavor to~~ An authorized entity shall respect ~~protect the~~ privacy of beneficiary persons when providing services under this Section. ~~on an equal basis with others.~~

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.~~

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.~~