

Kluwer Copyright Blog

On copyright and rights of persons with disabilities: WIPO treaty for the blind

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“The road to Marrakesh is open but is not paved with roses and the outcome of the negotiations is awaited with both hope and reservations. “

While some statistics [demonstrate](#) that only about 5% of all published books are available in accessible formats for *print disabled people* globally, 2013 promises to be a landmark year in the combat against this scarcity of reading sources for visually impaired people. A scarcity that is often referred to as ‘book famine’.

On April, 20, 2013 the Informal Session and Special Session of the WIPO Standing Committee on Copyright and Related Rights ([SCCR](#)) is expected to have prepared a revised and maybe final version of the draft text of a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities. Subsequently, a Diplomatic Conference, the highest-level treaty negotiation, will be held in Marrakesh (June 17 to 28) to discuss and adopt such a [treaty](#).

This will be the culmination of a long procedure. Promoting access to knowledge for visually impaired people should theoretically and ideally have been an uncontroversial issue under the light of the principles of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in society, as proclaimed in the Universal Declaration of Human Rights. Nonetheless, since the question is intrinsically linked to the thorny issue of copyright exceptions and limitations, things have become more complex.

That might explain why it took almost 35 years from the first WIPO-Unesco report on this issue (Report of the Working Group on Access by the Visually and Auditory Handicapped to Material Reproducing Works Protected by Copyright, Paris, October 25 to 27, 1982) to fix a date for a Diplomatic Conference to adopt a “Treaty to facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities”.

Drafting an international binding legal instrument establishing copyright exceptions and limitations for the benefit of the blind was far from easy. In 2008, when the first proposal for a WIPO Treaty was formulated, copyright holders strongly opposed the idea of adopting an international mandatory copyright instrument and insisted, instead, on promoting voluntary measures or adopting soft law ‘instruments’, that would only offer guidelines and recommendations. This has also been the position of the EU and the USA, home of some of the world’s biggest publishing companies. On the other side, the adoption of a binding legal instrument has did receive the support of the European Parliament, that, in 2012, endorsed a resolution calling on the European Council and the Commission to support a binding WIPO [treaty](#).

In this context, the debate gained significant political, moral and economic dimensions, also accentuating the divide between developed and developing countries. The pros and the cons of the adoption of such a treaty have been intensively debated for years. While no one can doubt the immense significance of the treaty for blind people, copyright holders, albeit recognizing that the promotion of a treaty could contribute to an improvement of the public image of copyright, often feared that the establishment of internationally recognized exceptions would function as a ‘Trojan horse’, facilitating piracy and ending up to be counterproductive, since it would reduce incentives for the copyright holders to offer of accessible formats themselves.

Another view supported by the opponents of the adoption of a treaty, has been that access to knowledge for visually impaired is wrongly seen as a copyright issue, since the problems with access for visually impaired people essentially originate from a lack of financial means and appropriate equipment.

Technological developments intensified the tension between the interests at stake. On the one hand, the risk of massive piracy could be higher when a broad exception, that also covers the achievements of the digital era, should be adopted. On the other hand, imposing technological protection measures be could significantly hamper conversion to an accessible format. Since the conversion to accessible formats is an act of exploitation which is connected to a new market, copyright holders have a strong interest to control it tightly. An example of this controversy in the USA is a case in which the Authors Guild objected to the Kindle 2’s robotic text-to-speech feature, which can read Kindle books aloud in a synthesized voice, claiming that Amazon offered a product that was competitive to audio books, since it would cut into their sales. After the complaint, Apple gave publishers and authors the possibility to disable the text-to-speech function.

What is the treaty about? Blind people need to read books in accessible formats such as braille, formatted audio or large print books. In principle, conversion of works to these formats infringes the copyright of the author and the conversion to formats accessible for the visually impaired people therefore requires the authorization of the right holders. Unless there is a copyright exception. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society has included such an exception in the list of copyright exceptions and limitations (in article 5 (3)).

Nevertheless, national approaches in Europe and and other countries on this issue are very divergent. According to a [WIPO study](#) published in 2006, 60 countries, just one third of all countries, have introduced exceptions for the benefit of the blind and these exceptions also differ significantly at various points, such as whether right holders are entitled to remuneration for the permitted uses.

Books in accessible formats cannot legally cross borders, since exceptions provided in national legislations do not justify the exchange, the import and the export of adapted works between different countries. Therefore, under the current legislative framework, if a work is converted to an accessible format, for example in Greece on the basis of the relevant copyright exception (article 28 A of Law 2121/1993), it cannot legally be imported in another country, e.g. Cyprus, without the authorization of the right holders. It will therefore be necessary to convert the same work to an accessible format for visually impaired people in Cyprus as well.

The proposed treaty aims at the international harmonization of exceptions to facilitate the global sharing of resources for the production of accessible formats. One of the main aims of the proposed treaty is to facilitate the cross-border transfer of copyrighted works that have been adapted for the benefit of visually impaired people. The [draft text](#) of the treaty provides that authorized entities shall be permitted, without the authorization of the copyright rights holder, to make an accessible format copy of a work, obtain a work in accessible format from another authorized entity, and supply those copies to a beneficiary person (the visually impaired) by any means, including by non-commercial lending or by electronic communication by wire or wireless means on a non-profit basis, while it is also possible that making an accessible format copy of a work is effectuated by the beneficiary himself or by another person acting on his behalf, e.g. a caretaker, for the personal use of the beneficiary.

The draft in its current form leaves it to national law to determine whether these exceptions or limitations are subject for remuneration. The cross-border exchange of accessible formats is provided for in article D of the draft text, under the terms of which, if an accessible format copy of a work is made, that accessible format copy may be distributed or made available to a beneficiary person or an authorized entity in another Member State/Contracting Party by an authorized entity. This is crucial because will globally increase the number of titles of works available in accessible formats and means that repetitive work can be avoided. For example, the great volume of books in accessible forms hold by Spanish authorized entities could be sent to Latin American countries, where the scarcity of sources for blind people is huge (libraries in five Latin American countries, Colombia, Nicaragua, Mexico, Uruguay and Chile, have fewer than 9,000 accessible books between them, [according](#) to Dan Pescod of the British Royal National Institute of Blind People). The obligation to enable beneficiaries to enjoy the limitations and exceptions regardless of the application of technological protection measures is another key point which has also been introduced in the draft text of the treaty (article F).

Consequently, it seems that the path for adopting the treaty is now open. Nonetheless, drafting the final text still requires some significant compromises in a series of weighty questions, such as the issue of the commercial availability of the work in an accessible format in the market and the application of a ‘respect of copyright provision’, alias the three step test.

The issue of whether the exception shall not apply in case an accessible format copy of a published work can be obtained commercially in a reasonable price in the market indeed remains a bone of contention, since a balance has to be found between the publisher’s right to invest in accessible formats of works and the right of the visually impaired to have equal access to knowledge through a variety of sources.

Moreover, developing countries have expressed fears that the application of the three-step-test, which served the last years as a powerful legal weapon for the safeguard of the interests of the copyright holders, could [significantly limit](#) the ambit of the exception. So, the road to Marrakesh is

open but is not paved with roses and the outcome of the negotiations is awaited with both hope and reservations.

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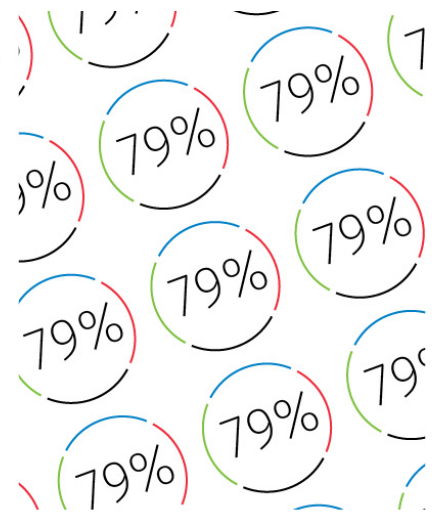
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