

World Blind Union



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Our right to knowledge

**Legal reviews for the ratification of the Marrakesh Treaty for
persons with print disabilities in Asia and the Pacific**

Cambodia edition

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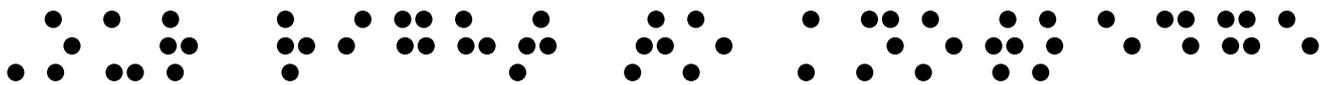
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Foreword

Access to knowledge is a human right. It is a prerequisite for achieving full human potential and inclusive development, as it opens the door to education, employment, improved health, and social and political participation.

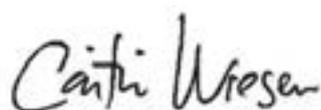
However, due to a lack of published works in accessible formats, the right to knowledge is often out of reach for the nearly 300 million people who are blind, visually impaired or have reading difficulties due to physical or learning disabilities. Ninety percent of these 'persons with print disabilities' are estimated to live in developing countries. The lack of equitable, timely and affordable access to written knowledge further exacerbates and perpetuates challenges and rights violations already faced by persons with disabilities. It ultimately hinders global efforts towards inclusive and equitable development.

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (the Marrakesh Treaty) was concluded in 2013. As of November 2015, it is yet to come into force due to the required number of ratifications or accessions not being met. Once in force, it will pave the way for removing legal barriers to accessible information and culture among print-disabled people across the world, while balancing the protection of authors' rights. It is the second international treaty specifically addressing rights of persons with disabilities, subsequent to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).

The Marrakesh Treaty will be a key contribution to the success of the UNCRPD, as well as the Incheon Strategy to "Make the Rights Real" for Persons with Disabilities in Asia and the Pacific, adopted at the High-Level Intergovernmental Meeting in 2012 on the Final Review of the Implementation of the Asia and Pacific Decade of Disabled Persons, 2003–2012.

The Marrakesh Treaty strongly resonates with the principle of "leaving no one behind" and the focus on "tackling exclusion and inequality", which have been advocated by the UN Secretary-General for the post-2015 development era.

This report is the result of partnerships between the United Nations Development Programme (UNDP) Bangkok Regional Hub and the World Blind Union - Asia Pacific. It is designed to provide practical guidance for governments, disability communities and development partners to facilitate policy discussions, community engagement and legal reforms for the Marrakesh Treaty. It is our collective hope that the report will contribute to bringing this historic treaty into force and to realizing the rights of persons with disabilities as a critical component of efforts in pursuit of the newly launched Sustainable Development Goals.



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Glossary

Accessible format copy – The Marrakesh Treaty defines an accessible format copy as one that is in a form “which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability.” This broad definition ensures that any format necessary can be created, which allows accommodations for multiple formats since some beneficiaries of the treaty are likely to require different formats than other beneficiaries. Accessible format copies can take different forms including braille, text-to-speech files, audio and others.

Authorized entity – The Marrakesh Treaty defines an authorized entity as “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.” The Treaty allows for-profit entities to qualify as an authorized entity, provided that they are providing education or information access to beneficiary persons on a non-profit basis. It “also includes a government institution or a non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations,” even if the organization is not specifically authorized or recognized by the government to do so.

Beneficiary person – The Marrakesh Treaty defines a beneficiary person as one who is a) blind; b) “has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works”; or c) “is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading.” This definition is broad and encompasses more than just those who are blind or visually impaired.

Berne Convention – The Berne Convention for the Protection of Literary and Artistic Works is an international agreement first adopted in 1886 (but subsequently revised multiple times) and provides international minimum standards on copyright. The majority of the provisions of the Berne Convention are incorporated in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Currently, 168 countries are members of the Berne Convention, with additional countries incorporating many of these standards as members of the World Trade Organization (WTO).

Convention on the Rights of Persons with Disabilities (CRPD) – The Convention on the Rights of Persons with Disabilities is a United Nations human rights treaty that requires parties to promote, protect and ensure the human rights of persons with disabilities. It opened for signature on 30 March 2007 and came into force on 3 May 2008. The CRPD has over 150 parties. Several sections of the CRPD support ensuring access to accessible format copies and the Marrakesh Treaty is a concrete way to implement these obligations of the CRPD and promote the rights of those who are blind, visually impaired or otherwise print disabled.

Digital Accessible Information System (DAISY) – DAISY is a format of digital talking books widely used by those who are blind, visually impaired or otherwise print disabled. It attempts to provide the same flexibilities that standard print readers enjoy, such as navigation by chapter or page, and the ability to read or skip footnotes and sidebars. DAISY is converging with the popular EPUB format to produce an accessible mainstream multimedia book format.

Print disability – A print disability is broadly defined as any disability that interferes with the effective reading of printed material. It includes those who are blind or visually impaired, but also applies to those who have a reading disability such as dyslexia, or those who have a physical disability that prevents the person from holding the book, turning the pages, or focusing their eyes on the page.

Technological Protection Measures (TPM) – Technological protection measures are a form of digital rights management, also known as a ‘digital lock’. TPMs can hinder access to accessible formats, such as a text-to-speech function on an electronic reader. Countries that have laws that prohibit circumvention of TPMs will need to ensure that their laws have an exception or other accommodation for beneficiaries of the Marrakesh Treaty.

Trans-Pacific Partnership Agreement (TPP) – The Trans-Pacific Partnership Agreement is a large regional trade agreement in the Asia-Pacific region. Currently, there are twelve negotiating parties: Australia, Brunei Darussalam,

Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Viet Nam. The agreement includes a comprehensive intellectual property chapter. On 5 October 2015, trade ministers from the twelve parties announced that an agreement had been reached. While the negotiating parties announced a conclusion to the agreement, the final text has not yet been released and no official release of the text was made available during the negotiations. However, various leaks of the intellectual property chapter have indicated that obligations regarding anti-circumvention of technological protection measures will be included.

Although Viet Nam is the only country in this report that is currently a negotiating party, the agreement may be expanded to include other countries in the region. Some reports indicate that the agreement is intended to eventually cover the entire Asia-Pacific region. As a result, countries that become party to the TPP must be aware of new obligations regarding anti-circumvention provisions and ensure that obligations under the Marrakesh Treaty are fulfilled even if it joins the TPP or other free trade agreements. While the negotiations have concluded, the agreement has not yet entered into force and must be approved by each country's domestic procedures.

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) – The TRIPS Agreement is a World Trade Organization agreement that sets forth minimum standards on intellectual property for members of the WTO. While the TRIPS Agreement includes minimum levels of protections, it also preserves a number of flexibilities in implementation. While the TRIPS Agreement provides minimum international standards, some countries have obligations to adhere to higher standards, also known as 'TRIPS-plus' standards, due to other treaties or trade agreements to which a country is a party. Countries that are considered 'least developed countries' (LDCs) have been granted several waivers, extending a grace period where their laws must comply with TRIPS. However, some LDCs have already implemented the minimum standards under TRIPS.

WIPO Copyright Treaty (WCT) – The WCT is an international treaty on copyright adopted by the World Intellectual Property Organization (WIPO) in 1996. It focuses on additional protections for copyright in the digital age. Among other issues, it requires parties to provide "adequate legal protection and effective legal remedies against the circumvention of technological measures that are used by authors in connection with the exercise of their rights..." Some parties have implemented this obligation by providing laws that prohibit the circumvention of technological protection measures. The Marrakesh Treaty requires that if a 'Contracting Party' is not a member of the WCT, authorized entities can export an accessible format copy only if it limits exceptions implementing the Treaty consistent with the three-step test within the copyright system.

Works – The Marrakesh Treaty defines works as published literary and artistic works in the form of text, notation and/or illustrations, whether published or otherwise made publicly available in any media. A footnote adds that the definition includes such works in audio form. While audiovisual works such as films do not fall within the definition of works, textual works embedded in audiovisual works (such as educational multimedia DVDs) would appear to fall within this definition.



Executive summary

This report is intended to facilitate policy dialogue, legal reforms and community engagement in the Asia-Pacific region with respect to efforts to ratify the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (the 'Marrakesh Treaty' or 'the Treaty') and ensure that those with disabilities can realize their rights guaranteed in international law. Promoting the rights of those with disabilities is important in achieving development goals and ensuring greater equity in terms of access to information, education and employment. This report will provide important background regarding access to information and individuals with disabilities; discuss development issues; provide case studies of three countries with advanced efforts in the implementation of the Marrakesh Treaty; survey six other countries in the Asia-Pacific region; and provide legal recommendations to implement the Treaty.

Access to information, including information commonly found in written texts, is fundamental to a number of recognized human rights including the rights to take part in society, participate in cultural life, enjoy the benefits of scientific progress, exercise freedom of opinion and expression, seek and impart information, and access education and employment opportunities. These rights are espoused in numerous human rights treaties, including the Convention on the Rights of Persons with Disabilities (CRPD) which provides concrete obligations in promoting the rights of persons with print disabilities. Those with disabilities often do not have necessary access to information, leading to serious development impacts including lower rates of education and employment and higher rates of poverty. Individuals with disabilities are also particularly susceptible in times of disaster.

The right to knowledge is critical in achieving the principle of "leaving no one behind", which depends on eliminating poverty and improving education and employment, including for those with disabilities. The Sustainable Development Goals (SDGs), adopted in September 2015, build on the Millennium Development Goals and establish a new 15-year plan for global development. The SDGs provide specific recognition for those with disabilities, including empowering and promoting the social, economic and political inclusion of all. In 2014, the World Blind Union - Asia Pacific (WBUAP) issued the Hong Kong Statement, calling upon governments to ratify the Marrakesh Treaty to promote access to works of literature, culture and to educational materials.

Addressing disabilities is an important development issue because of the link between disabilities and poverty. Those with disabilities are likely to face an adverse impact on education, employment and income. Developing countries are likely to see a growth of non-communicable diseases, such as diabetes, and an aging population, both of which increase the risk and prevalence of disabilities, including print disabilities. As a result, greater access to published works in accessible formats will become even more important.

This report discusses the challenges that those with print disabilities face, particularly with respect to the 'book famine', where the vast majority of published works are not made in an accessible format. It is estimated that less than 7 percent of all books are made in accessible formats, which can take various forms, including translation into braille, audio versions, and text-to-speech technology for works available electronically. This percentage is even smaller in low-income countries.

The report explains in depth the key features of the Marrakesh Treaty and the benefits these provisions would provide for those who are print disabled. The report conducts three case studies of countries in the Asia-Pacific region with advanced efforts in ratification of the Treaty. It then studies the context of six other countries and makes recommendations regarding legal reforms that are necessary in each country to comply with the Marrakesh Treaty.

Following many years of advocacy by the World Blind Union (WBU) and allied organizations, and extensive negotiations at the World Intellectual Property Organization culminating in a diplomatic conference, the international community adopted the Marrakesh Treaty in June 2013. The Marrakesh Treaty requires Contracting Parties (that is, the countries that have ratified it) to adopt copyright exceptions that allow the creation and distribution, including cross-border exchange, of accessible format works. The key benefits of the Treaty result from the obligations to provide, under certain conditions, limitations and exceptions to allow:

- 1) the making of accessible format copies;
- 2) the domestic distribution of accessible format copies;
- 3) the export of accessible format copies (including by digital transmission); and
- 4) the import of accessible format copies (including by digital download).

Providing an exception to allow the domestic creation and distribution of accessible format works without authorization of the copyright owner should promote a greater number of works in accessible formats. Ultimately, the Marrakesh Treaty should help address the book famine by alleviating the shortage of domestically created works, and also save resources by avoiding duplication, through the enjoyment of cross-border exchange, provided that countries ratify and implement the provisions of the Treaty. Countries with smaller collections will be able to greatly benefit from existing and growing collections in other countries, particularly where a common language exists. Because the publisher typically is not selling accessible format copies in the developing country, it would not lose any revenue by virtue of the operation of the Treaty.

In providing a limitation or exception to allow the creation of accessible format works, the Marrakesh Treaty does not require Contracting Parties to limit the exception to cases where there is not a commercially available accessible format. Additionally, the Marrakesh Treaty requires Contracting Parties to adopt an exception to a circumvention prohibition to permit the creation of an accessible format copy or ensure the ability to circumvent the prohibition through other mechanisms.

The Marrakesh Treaty does not dictate how these goals are to be achieved; rather, it provides Contracting Parties with great flexibility concerning the implementation of these obligations. This flexibility allows each country to tailor its limitations and exceptions to its domestic context, taking into account, for example, its own legal traditions and support for persons with print disabilities. While detailed and robust limitations and exceptions that directly replicate the language of the Marrakesh Treaty may be appropriate in some circumstances, for many countries the context of their laws suggest that less complex amendments may be sufficient and appropriate.

Three countries studied in this report have advanced efforts in ratifying or acceding to the Marrakesh Treaty: India, Mongolia and Thailand. Other countries in the Asia-Pacific region that would like to ratify the Treaty can follow the leadership of these countries in their own efforts at implementation.

While eleven countries have ratified the Marrakesh Treaty as of 9 October 2015, the Treaty requires twenty parties before it will enter into force. It is therefore necessary for more countries to ratify and implement it. Furthermore, in order to effectively implement the Marrakesh Treaty, it is necessary to make full use of the benefits of the Treaty. Ratification of the Treaty and providing adequate implementing legislation is not enough. While this will create the necessary legal framework to address the book famine, governments and organizations must be prepared to support the creation and distribution of accessible format works, and ensure that cross-border exchange of these works takes place, particularly between countries that share a common language.

Cambodia has signed the Marrakesh Treaty. Its blind or visually impaired represent the largest share of those with disabilities in Cambodia. The current copyright law does not have any provisions for those with print disabilities. Thus, in order to comply with and take full advantage of the Marrakesh Treaty, Cambodia's copyright law should be amended to create an exception to allow for the creation and distribution of accessible format copies and to allow the cross-border exchange of these copies. While Cambodia does not currently have provisions prohibiting the

circumvention of technological protection measures, if its laws change to include anti-circumvention provisions, a new provision permitting beneficiaries to overcome these barriers would be required. Such a provision could take different forms, including a narrow provision addressing only compliance with the Marrakesh Treaty, or a broader provision allowing for circumvention in a wider range of cases.

Chapter

1

Background

A 2014 fact sheet by the World Health Organization estimated that 285 million people are visually impaired.¹ Approximately 90 percent of these visually impaired people live in developing countries.² Furthermore, as people age, many lose their vision and their rate of visual impairment increases: 82 percent of people with visual impairments are over the age of 50.³

These individuals are at a severe disadvantage compared to sighted people due to the fact the vast majority of works are not made available in an accessible format, such as braille, audio or large print. In addition to people with visual impairments, there are individuals with print disabilities who cannot effectively read because of physical, perceptual, developmental, cognitive or learning disabilities. These individuals are unable to receive information contained in most printed works.

The World Health Organization and World Bank's 2011 *World Report on Disability* noted the link between disability and poverty:

Disability is a development issue, because of its bidirectional link to poverty: disability may increase the risk of poverty, and poverty may increase the risk of disability. A growing body of empirical evidence from across the world indicates that people with disabilities and their families are more likely to experience economic and social disadvantage than those without disability.⁴

The report found that disability had an "adverse impact on education, employment [and] earnings" and that there were "increased expenditures related to disability".⁵ The decreased level of education leads to reduced employment opportunities, and even when they do find employment, people with disabilities generally earn less than those without disabilities.⁶ Thus, "[i]t is harder for people with disabilities to benefit from development and escape from poverty due to discrimination in employment, limited access to transport, and lack of access to resources to promote self-employment and livelihood activities."⁷ Additionally, people with disabilities "may have extra costs resulting from disability – such as costs associated with medical care or assistive devices..."⁸

The recent growth of aging populations and increased incidence of non-communicable diseases observed in many developing countries is expected to increase the rate of disabilities: "The increase in diabetes, cardiovascular diseases (heart disease and stroke), mental disorders, cancer, and respiratory illnesses, observed in all parts of the world, will have a profound effect on disability. They are estimated to account for 66.5% of all years lived with

1 World Health Organization, Fact Sheet No. 282, *Visual Impairment and Blindness* (August 2014), available from <http://www.who.int/mediacentre/factsheets/fs282/en/>. However, a 2011 joint report by WHO and World Bank estimated a higher number of people with visual impairments. The report estimated that 314 million people are visually impaired, with 45 million of these people completely blind (*World Report on Disability* (2011), p. 172). Some statistics and estimations may vary due to differences in methodologies.

2 Ibid.

3 Ibid.

4 World Health Organization and World Bank, *World Report on Disability* (2011), p. 10.

5 Ibid., p. 47.

6 Ibid.

7 Ibid.

8 Ibid.

disability in low-income and middle-income countries.⁹ Further, longer life expectancy means that the number of older people, and thus the number of people with age-related visual impairments, is likely to increase.

Governments should find ways to address the expected rise in the number of people with print disabilities and the challenges those with disabilities face with respect to poverty.

1.1 Development goals: Leave no one behind

Promoting access to knowledge is critical to achieve the principle of “leav[ing] no one behind” as advocated for by UN Secretary-General Ban Ki-moon in his report on the post-2015 development agenda.¹⁰ The Secretary-General noted that while there has been substantial progress in achieving the Millennium Development Goals, “More than a billion people still live in extreme poverty. Far too many people face serious deprivation in health and education, with progress hampered by significant inequality related to income, gender, ethnicity, disability, age and location.”¹¹

In order to achieve the goal of leaving no one behind, the report calls for, among other things, an “eradication of poverty”¹² and “tackl[ing] exclusion and inequality.”¹³ The report notes the importance of “quality education and lifelong learning”¹⁴ to achieving development goals, as well as “inclusive and sustainable growth and decent employment ... Labour market policies should focus in particular on young people, women, and people with disabilities.”¹⁵

The report also states, “Goals and targets should take into account cross-cutting issues such as ... disability ... and other factors leading to inequality, human rights, demographics, migration and partnerships. The new goals should embrace the emphasis on human well-being and include the use of metrics that go beyond standard income measures, such as surveys of subjective well-being and happiness...”¹⁶

The Secretary-General’s report concludes, “[W]e must continue to listen to and involve the peoples of the world... The world’s nations must unite behind a common programme to act on those aspirations. No one must be left behind. We must continue to build a future of justice and hope, a life of dignity for all.”¹⁷

The Sustainable Development Goals (SDGs) build on the Millennium Development Goals (MDGs) and support the post-2015 development agenda with a new fifteen-year plan for global development. A working group developed a number of SDGs which were adopted at the United Nations Sustainable Development Summit on 27 September 2015. The Sustainable Development Goals include specific recognition for those with disabilities. Goal 4.a, for example, calls for education facilities “that are child, disability and gender-sensitive.”¹⁸ With respect to Goal 10’s efforts to reduce inequality, the Sustainable Development Goals call to “empower and promote the social, economic and political inclusion of all irrespective of age, sex, disability, race, ethnicity, origin, religion or economic or other status” by 2030.¹⁹ Although the Millennium Development Goals did not include explicit mention of disability, the Sustainable Development Goals recognize the importance of advancing the rights of those with disabilities.

The report on the post-2015 development agenda and the SDGs recognizes the importance of education, employment and inclusiveness, noting that particular attention should be paid to, among other things, ensuring that persons with disabilities are afforded opportunities for development. Without accessible format works, however, persons with print disabilities are disadvantaged with respect to these opportunities.

9 Ibid.

10 Report of the Secretary-General: *A life of dignity for all: accelerating progress towards the Millennium Development Goals and advancing the United Nations development agenda beyond 2015*, 68th Session, A/68/202 (26 July 2013), available from <http://www.un.org/millenniumgoals/pdf/A%20Life%20of%20Dignity%20for%20All.pdf>

11 Ibid., ¶6.

12 Ibid., ¶83 (which “is aggravated by discrimination, insecurity, inequality and environmental and disaster risks”).

13 Ibid., ¶84 (“In order to leave no one behind and bring everyone forward, actions are needed to promote equality of opportunity. This implies inclusive economies ... as well as societies where all people can contribute and participate in national and local governance.”).

14 Ibid., ¶86.

15 Ibid., ¶90.

16 Ibid., ¶111.

17 Ibid., ¶120.

18 Sustainable Development Knowledge Platform, *Open Working Group Proposal for Sustainable Development Goals*, <https://sustainabledevelopment.un.org/sdgsproposal> (last visited 3 July 2015).

19 Ibid.

1.2 The right to knowledge and information

Access to knowledge, including information commonly found in written texts, is fundamental to the development goals noted above. The right to information underpins a number of recognized human rights including, among other things, the rights to take part in society, participate in cultural life, enjoy the benefits of scientific progress, exercise freedom of opinion and expression, seek and impart information, and access education and employment opportunities.²⁰

These rights have been recognized in numerous international instruments including the Universal Declaration on Human Rights; the International Convention on Economic, Social, and Cultural Rights (ICESCR); the International Convention on Civil and Political Rights (ICCPR); the Convention on the Rights of the Child (CRC); and, most recently, the Convention on the Rights of Persons with Disabilities (CRPD).

At its core, access to knowledge and information—and therefore to accessible format works for those with visual impairments or other disabilities—is a human right because such access is fundamental to attaining the numerous rights espoused in these treaties.

The right to knowledge is critical in the ability to realize fundamental rights including:

- **The right to information and to exercise freedom of opinion and expression²¹:** At their core, many of the human rights that would require persons with print disabilities to have works in accessible formats flow from this right. Without accessible format works, persons with disabilities may have difficulty in receiving or imparting information, particularly that which is found in text-based works, a necessity in exercising and expressing one's freedom of expression.
- **The right to take part in society²²:** This right includes the ability and opportunity to participate within one's community and in a political and public life. Accessible format works are necessary to ensure that people have the information—including access to laws, regulations, news and other materials—necessary to inform decision-making, ensure dignity and promote self-reliance.
- **The right to participate in cultural life²³:** This right inherently depends on access to works. Literature, news and media are fundamental aspects of culture and without accessible format works, persons with visual impairments or other disabilities may not be able to realize this right. By facilitating access to accessible format works, individuals with print disabilities are not only able to enjoy culture, but also to contribute to it, because new works often rely on the existence of old works.
- **The right to enjoy the benefits of scientific progress²⁴:** Similar to the right to participate in cultural life, the right to enjoy the benefits of scientific progress is dependent upon access to accessible format works. Often, scientific progress is discussed or published in print format and understanding such progress can only be achieved through access to information. Additionally, because of advances in technology, accessible works exist in numerous formats, including refreshable braille systems and text-to-speech formats on electronic readers.
- **The right to education²⁵:** Reliance on written materials places those with print disabilities at a disadvantage in realizing this right due to the fact that only a small fraction of works are available in an accessible format. Students with print disabilities may be unable to achieve the same level of education as other students because they lack equal access to course materials and are therefore unable to achieve full participation.
- **Right to employment opportunities²⁶:** Many employment opportunities rely on being able to access written materials. For example, employment opportunities may depend on job preparation: the ability to complete training programmes or participate in continuing education programmes requiring the use of information that may be found in texts. Moreover, one must be able to read job listings to know what jobs

20 For specific provisions guaranteeing these rights in various international human rights treaties, see Appendix 3.

21 See ICCPR, Article 18.1; ICCPR, Article 19; CRC Article 13.1; CRC Article 14.1; CRC Article 17; CRPD, Article 21.

22 See CRC, Article 23.1; CRPD, Article 29; CRPD, Article 9.

23 See ICESCR, Article 15.1; CRC, Article 31; CRPD, Article 30.

24 See ICESCR, Article 15.1.

25 See ICESCR, Article 13; CRC, Article 28.1; CRC, Article 29.1; CRPD, Article 24.

26 See ICESCR, Article 6; ICESCR, Article 1.1; CRPD, Article 27.

are available, and to read a job application in order to fill it out. Without access to information, persons with disabilities are denied equal opportunities to and an equal basis for employment.

In a recent report presented to the Human Rights Council in March 2015 by the UN Special Rapporteur in the field of cultural rights, Farida Shaheed recognized the importance of copyright limitations and exceptions to a human rights framework. The report stated, “A human rights perspective also requires that the potential of copyright exceptions and limitations to promote inclusion and access to cultural works, especially for disadvantaged groups, be fully explored.”²⁷

While access to information is a critical right that underpins many other fundamental rights, persons with disabilities often do not have such access, leading to serious human development impacts. A 2011 report by the World Health Organization found “significantly lower rates of primary school completion and fewer mean years of education than respondents without disability.”²⁸ In a 2004 study, it was estimated that in developing countries where the vast majority of persons who are blind or visually impaired live, only 2 percent of children with print disabilities receive education and no more than 5 percent will find employment.²⁹ As a result, poverty and visual impairments are closely linked. As the World Blind Union has noted:

Poverty is both a cause and a consequence of blindness. Poverty and blindness reinforce each other, contributing to increased vulnerability and exclusion. The majority of blind people find that their situation negatively affects their chances of going to school, obtaining work, and enjoying family and social life. Problematic attitudes in society and lack of opportunity are the determining factors, and not lack of ability.³⁰

Persons who are blind or visually impaired, like other persons with disabilities, are at particular risk during disaster and conflict situations because of lack of preparation, planning, access to information, and access to rescue services.³¹

The World Health Organization has noted, “disaster education materials, early warnings and information given to the public during a crisis are often not presented in formats that are accessible to people with disabilities, e.g. those with impaired vision or hearing” and that some “disaster management policies and practices may result in the exclusion of people with disabilities and older people unless specific efforts are made to include them.”³² Lack of access to information perpetuates cycles of poverty and prevents persons with disabilities from progressing and achieving the right to development.

1.3 Convention on the Rights of Persons with Disabilities

In addition to being a critical component of achieving the broad rights discussed above, the right to accessible format works is a concrete obligation under the Convention on the Rights of Persons with Disabilities. Specifically, it requires that parties ensure intellectual property does not create unreasonable barriers to access to information.

The CRPD provides concrete obligations in promoting these rights for persons with print disabilities. The CRPD had 82 signatories when it opened for signatures on 30 March 2007, earning this convention the recognition of the largest number of signatories to a UN convention on its opening day. It entered into force on 3 May 2008. The high number of signatures and quick ratification emphasized the international community’s increasing recognition of the importance of recognizing and advancing the rights of persons with disabilities.

In addition, the CRPD supports the creation and distribution of accessible format works for persons who are print disabled by explicitly recognizing intellectual property barriers. Article 21, for example, mandates:

States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas

27 Shaheed, Farida. UN Special Rapporteur in the field of cultural rights, *Copyright policy and the right to science and culture*, A/HRC/28/57 (24 December 2014) ¶166.

28 World Health Organization, *World Report on Disability* (2011) at Figure 7.1, available from http://whqlibdoc.who.int/publications/2011/9789240685215_eng.pdf?ua=1

29 Rowland, William. *Blindness, Poverty and Development*, World Blind Union (December 2004).

30 Ibid.

31 See, e.g., United Nations, *Disability-Inclusive Disaster Risk Reduction and Situations of Risk* (13 October 2014), <http://www.un.org/disabilities/default.asp?id=1546>.

32 World Health Organization, *Disaster Risk Management Fact Sheet, Disaster Risk Management for Health: People with Disabilities and Older People*, WHO Global Platform (May 2011), http://www.who.int/hac/events/drm_fact_sheet_disabilities.pdf.

on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, 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;
- b. Accepting and facilitating the use of sign languages, braille, augmentative and alternative communication and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions...³³

Article 30.3 specifically references intellectual property barriers and obligates parties to:

take all appropriate steps in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.³⁴

Like other human rights instruments, the CRPD recognizes the importance of international cooperation.³⁵

The CRPD also provides for an optional protocol that recognizes the competence of the Committee on the Rights of Persons with Disabilities and creates an individual complaint mechanism for violations of the Convention.

1.4. Disability rights in Asia and the Pacific: The Decade of Persons with Disabilities and the Incheon Strategy

In November 2012, governments in the Asia-Pacific region launched a ten-year regional strategy to promote inclusiveness of persons with disabilities in society, entitled the Decade of Persons with Disabilities 2013–2022. In creating the Decade of Persons with Disabilities, governments in the region “aim... to accelerate realization of the rights of the estimated 650 million persons with disabilities in the region, the majority of them poor, disadvantaged and discriminated against.”³⁶

Soon after declaring this strategy, these governments adopted a specific framework for promoting the rights of persons with disabilities. Known as the Incheon Strategy to “Make the Right Real” for Persons with Disabilities in Asia and the Pacific, this framework is based on the principles found in the CRPD including, for example, respect for inherent dignity, individual autonomy, non-discrimination, full and effective participation and inclusion in society, equality of opportunity, and accessibility.³⁷

The Incheon Strategy contains 10 goals, 27 targets and 62 indicators with the objective of achieving these goals by 2022.³⁸ Several of the goals are highly relevant to ensuring that persons who are print disabled have access to accessible format works:

- Goal 1: Reduce poverty and enhance work and employment prospects
- Goal 2: Promote participation in political processes and in decision-making
- Goal 3: Enhance access to the physical environment, public transportation, knowledge, information and communication
- Goal 5: Expand early intervention and education of children with disabilities
- Goal 9: Accelerate the ratification and implementation of the Convention on the Rights of Persons with Disabilities and harmonization of national legislation with the Convention

33 Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, 76th plen. mtg., U.N. Doc A/RES/61/106 (Dec. 13, 2006) [hereinafter CRPD], Art. 21.

34 Ibid., Article 30.3.

35 Ibid., Article 32.

36 United Nations Economic and Social Commission for Asia and the Pacific, *Asia-Pacific governments launch new Decade of disability-inclusive development*, G/58/12, (1 Nov 2012), available from <http://www.unescap.org/news/asia-pacific-governments-launch-new-decade-disability-inclusive-development>

37 Incheon Strategy, p. 15.

38 Ibid., p. 8–9.

■ Goal 10: Advance subregional, regional and interregional cooperation.³⁹

As discussed above, employment opportunities, participation in the political process, access to knowledge and communication, and education are all critical rights dependent on the availability of accessible format works to persons with print disabilities.

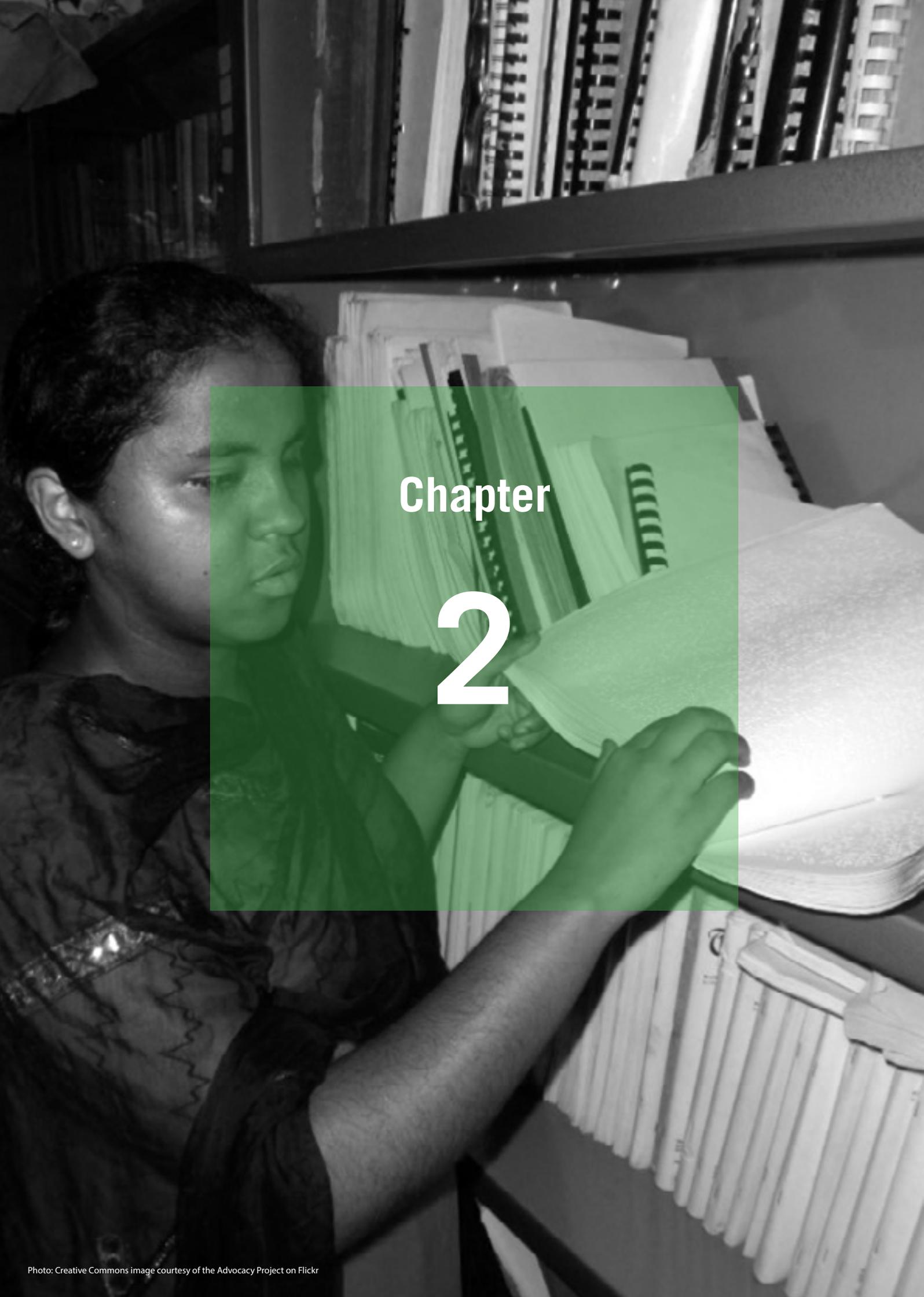
In achieving these goals and ensuring that the rights of persons with disabilities are realized, the Incheon Strategy calls on governments to, for example, adopt and implement legislative and administrative measures and ensure “[p]ersons with disabilities have access to... knowledge, information and communication, in a usable manner, through universal design and assistive technologies with reasonable accommodation provided.”⁴⁰

Ratification of the Marrakesh Treaty would support the goals of the Incheon Strategy. In 2014, the World Blind Union - Asia Pacific (WBUAP) issued the Hong Kong Statement which “[c]all[s] upon governments throughout the Asia-Pacific region to ratify the Marrakesh Treaty at the earliest opportunity so that persons who are blind or partially sighted or who have other print disability, have full access to works of literature, culture and to educational materials.”⁴¹

39 Ibid.

40 Ibid., p. 7.

41 World Blind Union - Asia Pacific (WBUAP), Hong Kong Statement (24 November 2014), available from <http://www.wbuapga2014.org/upload/editor/WBUAP%20Hong%20Kong%20Statement.pdf>.



Chapter

2

The Marrakesh Treaty

Key points:

- Those who are blind, visually impaired or otherwise print disabled face a serious shortage of accessible format works known as a 'book famine'. It is estimated that less than 7 percent of all books are made in accessible formats, which can take various forms, including transcription into braille, audio versions, or text-to speech technology for works available electronically. This percentage is even smaller in low-income countries.
- After extensive negotiations at the World Intellectual Property Organization (WIPO), culminating in a diplomatic conference, the international community adopted the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (the Marrakesh Treaty or 'Treaty') in June 2013.⁴² (See Appendix 1 for the text of the Marrakesh Treaty)
- The Marrakesh Treaty requires Contracting Parties (that is, the countries that have ratified or acceded to it) to adopt copyright exceptions that allow the creation and distribution, including cross-border exchange, of accessible format works. The key benefits of the Treaty result from the obligations to allow under certain conditions, limitations and exceptions: 1) the making of accessible format copies; 2) the domestic distribution of accessible format copies; 3) the export of accessible format copies (including by digital transmission); and 4) the import of accessible format copies (including by digital download).
- Providing an exception to allow the domestic creation and distribution of accessible format works without authorization of the copyright owner should lead to a greater number of works in accessible formats. Ultimately, the Marrakesh Treaty should help address the book famine by alleviating the shortage of domestically created works and also save resources by avoiding duplication through the enjoyment of cross-border exchange, provided that countries ratify and implement the provisions of the Treaty. Countries with smaller collections will be able to greatly benefit from existing and growing collections in other countries, particularly where a common language exists. Because the publisher typically is not selling accessible format copies in the developing country, it would not lose any revenue by virtue of the operation of the Treaty.
- In providing a limitation or exception to allow the creation of accessible format works, the Marrakesh Treaty does not require Contracting Parties to limit the exception to cases where there are no commercially available accessible formats. Additionally, the Marrakesh Treaty requires Contracting Parties to adopt an exception to a circumvention prohibition to permit the creation of an accessible format copy or ensure the ability to circumvent the prohibition through other mechanisms.
- The Marrakesh Treaty does not dictate how these goals are to be achieved; rather, it provides Contracting Parties with great flexibility concerning the implementation of these obligations. This flexibility allows each country to tailor its limitations and exceptions to its domestic context, taking into account, for example, its

⁴² Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, adopted 27 June 2013, WIPO Doc. VIP/DC/8 Rev.

own legal traditions and support for persons with print disabilities. While detailed and robust limitations and exceptions that directly replicate the language of the Marrakesh Treaty may be appropriate in some circumstances, for many countries the context of their laws suggest that limited amendments may be sufficient and appropriate.

2.1 Background: Addressing the book famine

In order to promote access to knowledge and protect the fundamental human rights discussed above, it is essential to address barriers to accessible format works. Accessible formats can take various forms, including transcription into braille, an audio version, or text-to-speech technology for works available electronically. While these formats are necessary for the print disabled, only a small fraction of published books—estimated at less than 7 percent—are made in accessible formats.⁴³ This percentage is even smaller in low-income countries, resulting in a ‘book famine’ where persons who are print disabled have no access to the vast majority of works.⁴⁴

For those works that are distributed electronically, technological protection measures may be applied that prohibit the enablement of the text-to-speech function on an electronic reader.

This lack of accessible format works is largely a function of market forces. Publishers are not willing to bear the additional cost of creating accessible format copies for the relatively small and low-income market of people with print disabilities.

While there is an obvious market failure, copyright law may prevent entities that serve the print disabled from addressing this need. The works are covered by copyright, meaning that the entities that serve the print disabled may not adapt texts into accessible formats, unless they receive permission from the copyright owner (typically the publisher) or the copyright law in their country contains an exception that permits the creation of accessible format copies.⁴⁵

Even in countries with limitations and exceptions that allow entities to create and distribute copies in accessible formats, only a small fraction of existing works are adapted into accessible formats due to high production costs. In the United States, for example, the National Federation of the Blind estimates that no more than 5 percent of published works are available to the blind and print disabled.⁴⁶

Moreover, even where a work exists in a particular accessible format, it may not be available in the format a particular person with a print disability needs. For example, a work may be available in an audio format, but an individual who is deaf and blind may need a braille version.

Alternatively, a work may be available as text-to-speech on a particular electronic reader, but that reader may lack general accessibility features or the individual may own a different reader where the work is not available because the file is not interoperable between readers.

Because the creation of accessible format copies requires time, effort and cost, the creation and distribution of such copies should be done as efficiently as possible so as to maximize the number of accessible works. However, countries that share a common language generally do not share accessible formats that have been created.

Again, copyright law acts as an obstacle. Even if the copyright laws of two countries contain exceptions that permit the creation of accessible copies—for example, those of Australia and the United Kingdom—those exceptions might not permit the export or import of those copies. Thus, the cost of creating an accessible format of a work must be incurred in each country where the print disabled desire to read that work. Cross-border sharing would greatly increase efficiency and allow developing countries, which may have an even smaller percentage of accessible works available nationally, to benefit from the existing formats in other countries.

43 See, World Blind Union, *Press Release – WIPO Negotiations Treaty for Blind People* (17 June 2013), available from <http://www.worldblindunion.org/English/news/Pages/JUne-17-Press-Release-for-WIPO-Book-Treaty.aspx>.

44 See, e.g., LaBarrem, Scott C., “Literacy Without Borders: The Road to Marrakesh”, *Braille Monitor* (August 2014), available from <https://nfb.org/images/nfb/publications/bm/bm13/bm1308/bm130811.htm>.

45 See, e.g., Shaheed, Farida. *Copyright policy and the right to science and culture*. (see footnote 27) ¶67 (“Disability advocates have long expressed concern that copyright law can impede the adaptation of works into format functional for people with disabilities when copyright holders fail to publish works in accessible formats, such as Braille, or allow others to do so.”)

46 National Federation for the Blind, *2015 Marrakesh Fact Sheet* (2015), <https://nfb.org/books-without-borders>.

The market failure represented by the book famine can be remedied by creating limitations and exceptions to copyright to allow the creation and distribution (including across borders) of accessible format works for persons who are print disabled. However, a 2007 World Intellectual Property Organization study found that only about one-third of countries had national copyright exceptions to this end, the majority of which were found in the developed world.⁴⁷

The absence of copyright exceptions for the print disabled in two-thirds of countries led many to conclude that the most effective way to promote the adoption of exceptions in all countries, and thereby to end the book famine, was the adoption of a binding international treaty on minimum exceptions to copyright to permit the creation and distribution of accessible format works and to facilitate cross-border sharing of these formats. In 2011, the Special Rapporteur on the Right to Freedom of Expression and Opinion, Frank LaRue, urged WIPO Member States to agree to a binding treaty for persons with disabilities noting:

The digital age we now live in provides technology which could allow blind, partially sighted and other reading disabled people across the world to both receive and impart information regardless of frontiers, and therefore enjoy this human right fully.

This should be a wonderfully empowering development, helping reading disabled people to access information on an equal basis with others for the first time in history. However, the reality is starkly different. Blind and partially sighted people face a “book famine” in which the vast majority of books are never made into accessible formats like braille, audio or large print.⁴⁸

After extensive negotiations at WIPO, culminating in a diplomatic conference, the international community adopted the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.⁴⁹ The Treaty harmonizes limitations and exceptions for the print disabled, obligating members to the Treaty to create minimum levels of exceptions to allow the creation and distribution of accessible format copies.

Fifty-one countries signed the Marrakesh Treaty on 28 June 2013, the day it opened for signature, a record number of signatures during a WIPO signing ceremony.⁵⁰ This signaled the commitment of the international community to overcoming the book famine and promoting the rights of the print disabled. The Marrakesh Treaty needs twenty ratifications or accessions in order to enter into force; while eighty countries have signed the treaty, eleven have ratified or acceded to it as of 9 October 2015. These countries are Argentina, El Salvador, India, Mali, Mexico, Mongolia, Paraguay, the Republic of Korea, Singapore, the United Arab Emirates and Uruguay.⁵¹ Continued ratifications and accessions by other countries worldwide is critical, both in ensuring that the Marrakesh Treaty will come into force and to address barriers to accessible formats.

The UN Special Rapporteur in the field of cultural rights has recommended that states “ratify the Marrakesh Treaty... and ensure that their copyright laws contain adequate exceptions to facilitate the availability of works in formats accessible to persons with visual impairments and other disabilities, such as deafness.”⁵²

2.2 Key provisions and expected benefits

The Marrakesh Treaty requires Contracting Parties (that is, the countries that have ratified it) to adopt copyright exceptions that allow the creation and distribution, including cross-border exchange, of accessible format works. The key benefits of the Treaty result from the obligations to provide, under certain conditions, limitations and exceptions to allow:

47 Sullivan, Judith. *WIPO Standing Committee on Copyright and Related Rights Study on Copyright Limitations and Exceptions for the Visually Impaired*, SCCR/15/7 (20 Feb 2007).

48 LaRue, Frank. *WIPO Standing Committee on Copyright and Related Rights Declaration from the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (16 November 2011), available from <http://tacd-ip.org/archives/480>.

49 Marrakesh Treaty (see footnote 42)

50 Balasubramaniam, Thiru. “28 June 2013: 51 Signatories to the Marrakesh Treaty, *Knowledge Ecology International*”. 28 June 2013. <http://keionline.org/node/1769> (Last visited 2 July 2013)

51 Other countries are also moving toward ratification. For example, it has been reported that the Honduran parliament has ratified the Marrakesh Treaty, though it has not yet deposited its instrument of ratification with WIPO. For the current list of signatories to the Marrakesh Treaty as well as ratifications and accessions, see WIPO, *WIPO-Administered Treaties: Contracting Parties > Marrakesh VIP Treaty*, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=843

52 Shaheed, Farida. UN Special Rapporteur in the field of cultural rights, *Copyright policy and the right to science and culture*, A/HRC/28/57 (24 December 2014) ¶116.

- 1) the making of accessible format copies;
- 2) the domestic distribution of accessible format copies;
- 3) the export of accessible format copies (including by digital transmission); and
- 4) the import of accessible format copies (including by digital download).

Significantly, the Marrakesh Treaty does not dictate how these goals are to be achieved; rather, it provides Contracting Parties with great flexibility concerning the implementation of these obligations. 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...”⁵³ This flexibility allows each country to tailor its limitations and exceptions to its domestic context, taking into account, for example, its own legal traditions and support for persons with print disabilities.

2.2.1 Definitions

As with any legal instrument, understanding the Marrakesh Treaty’s definitions are critical to understanding the Treaty’s scope. The most basic term is “**beneficiary person**”, the type of person the Treaty is intended to benefit.

Article 3 defines a beneficiary person as a person who is: a) blind; b) “has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works;” or c) “is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading.”

Thus, the scope of who is a beneficiary person is significantly broader than blind people or even people with visual impairments. Footnote 3 further explains that the phrase “visual impairment or disability ... which cannot be improved” in Article 3(b) does not require “the use of all possible medical diagnostic procedures and treatments.” Thus, for example, any disabling visual impairment that cannot be improved by the use of corrective lenses should be understood to qualify.

The Treaty defines the type of works to which it applies. For purposes of the Treaty, “**works**” means published literary and artistic works in the form of text, notation and/or illustrations, whether published or otherwise made publicly available in any media.⁵⁴ Footnote 1 of the Treaty adds that this definition includes such works in audio form, such as audiobooks. Significantly, audiovisual works such as films do not fall within the definition of works, although textual works embedded in audiovisual works (such as educational multimedia DVDs) would appear to fall within the definition.

The Treaty then defines the formats into which these works can be converted. “**Accessible format copy**”⁵⁵ means a copy of a work in a form “which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability.”⁵⁶ It further defines an accessible format copy as one “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...”⁵⁷

The wording of the Marrakesh Treaty successfully avoids the ambiguity of whether an accessible format copy is a format *usable only* by a print-disabled person; “the accessible format copy is used exclusively by beneficiary persons” clearly refers to who is actually using the copy, not who is capable of using it. In this respect, the second sentence of Article 2(b) is not part of the definition of an accessible format copy, but rather a limitation on the uses of such a copy that are permitted under the Treaty. That is, the Treaty allows a Contracting Party to limit permissible distribution only to beneficiary persons or to prohibit editing or abridgment in ways beyond what the process of creating the accessible format copy requires, thereby ensuring that an author’s rights and interests are protected.

⁵³ Marrakesh Treaty (see footnote 42), Art. 10(3).

⁵⁴ Ibid. Art. 2(a).

⁵⁵ Accessible format copies can take a variety of forms including, but not limited to, DAISY format, braille, audio (such as works being read on a cassette tape, CD or digital format), or text-to-speech on an electronic reader.

⁵⁶ Marrakesh Treaty (see footnote 42), Art. 2(b).

⁵⁷ Ibid.

Finally, the Treaty defines the organization that will be making and distributing the accessible format copies as the “**authorized entity**”. An authorized entity is “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.”⁵⁸ This definition permits a for-profit entity that is providing such education or information access to beneficiary persons to use the exceptions under the Marrakesh Treaty, provided that it is doing so on a non-profit basis. Footnote 2 elaborates that the phrase “entities recognized by the government” may include entities that receive financial support from the government for the purpose of providing services to beneficiary persons.

Furthermore, Article 2(c) provides that the term authorized entity “also includes a government institution or a non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations”, even if the organization is not specifically authorized or recognized by the government to do so. Thus, for example, both a specialized agency providing services to the blind and a general-service library with an institutional programme to promote accessibility would constitute authorized entities.⁵⁹

2.2.2 Making of accessible format copies

*The Marrakesh Treaty requires an exception to allow for the creation of accessible format copies for those who are blind, visually impaired or otherwise print disabled. No permission from the rightholder is necessary. The Marrakesh Treaty **does not** require that the limitation be restricted to cases where there is no commercially available accessible format.*

Article 4(1) of the Marrakesh Treaty requires Contracting Parties to provide in their national law an exception to the right of reproduction “to facilitate the availability of works in accessible format copies for beneficiary persons.”⁶⁰ Allowing the creation of accessible format works without requiring permission from the rightholder will promote a greater number and range of works available for persons who are print disabled.

Contracting Parties have significant flexibility in how they meet this obligation. Article 4(2) sets forth one way a Contracting Party can comply with Article 4(1), but Article 4(3) provides that Contracting Parties “may fulfill Article 4(1) by providing other limitations or exceptions in its national law.”⁶¹ Thus, while a country may use Article 4(2) as a model for drafting legislation, a country may choose other language that is better suited to its legal traditions and context.

The Article 4(2) method of compliance has two subparts. First, consistent with Article 4(2)(a), an authorized entity would be permitted to make an accessible format copy, or obtain an accessible format copy from another authorized entity, and supply the copy to a beneficiary by any means, including non-commercial lending or electronic communication.⁶² Second, consistent with Article 4(2)(b), the beneficiary person or someone acting on their behalf may make an accessible format copy for the use of the beneficiary person.⁶³

In providing a limitation or exception to allow the creation of accessible format works, the Marrakesh Treaty does not require Contracting Parties to limit the exception to cases where there is no commercially available accessible format.⁶⁴ This fact is significant. Even where an accessible format is available commercially, the work may not be

58 Ibid., Art. 2(c).

59 Article 2(c) specifies that an authorized entity “establishes and follows its own practices” to establish that the people it is serving are beneficiary persons; to limit its distribution of accessible format copies to beneficiary persons or authorized entities; to discourage the reproduction and distribution of unauthorized copies; and to maintain due care in, and records of, its handling of copies of works. This provision concerning the establishment of practices appears not to be an element of the definition of “authorized entity,” but serves rather as a descriptive statement: authorized entities *generally* establish and follow these types of practices. Importantly, the authorized entity establishes its *own* practices; the Treaty does not contemplate rules being established for it by the government.

60 Marrakesh Treaty (see footnote 42), Art. 4(1).

61 Ibid., Art. 4(3).

62 Four conditions would apply to this activity: (i) the authorized entity that is the source of the copy had lawful access to the work; (ii) the work is converted to an accessible format copy, which includes any means needed to navigate information in the copy, but does not introduce changes other than those needed to make the work accessible; (iii) the accessible format copy is supplied exclusively to be used by the beneficiary persons; and (iv) the activity is undertaken on a non-profit basis.

63 Marrakesh Treaty (see footnote 42), Art. 4(2)(b).

64 The Marrakesh Treaty does not require a commercial availability standard. Article 4(4) uses permissive language stating that a party *may* confine exceptions to works where an accessible format cannot be obtained commercially under reasonable terms. Where a country

in the particular format necessary for a specific individual. Additionally, a work may be available on one particular electronic reader, but the file may not be interoperable between readers. If there were a requirement involving commercial availability, it could make it harder to use the exceptions that allow the creation and distribution of accessible formats, given that searches for a commercially available copy could consume time and resources.

2.2.3 Domestic distribution of accessible format copies

The Marrakesh Treaty requires an exception to allow distribution of accessible formats for the blind, visually impaired or otherwise print disabled. Such distribution includes digital transmissions.

Article 4(1) also requires Contracting Parties to provide an exception to the right of distribution and making available to the public with respect to accessible format copies for beneficiary persons.⁶⁵ The phrase “making available” is understood to encompass digital transmission. The exception regarding domestic distribution of accessible format copies is subject to the same flexibilities noted above.

2.2.4 Export of accessible format copies

The Marrakesh Treaty requires a provision to allow authorized entities to export accessible format copies to a beneficiary person or another authorized entity. This Marrakesh Treaty does not require that export be limited to cases where there is no commercially available accessible format.

A key objective of the Marrakesh Treaty is to permit the cross-border distribution of accessible format copies. Because of the high cost of producing accessible format copies and the relatively low demand for many individual titles, the ability to share accessible format copies across borders would benefit the print disabled in both developed and developing countries.

Persons with print disabilities can benefit from the import of existing accessible format works in other countries, greatly increasing the number of works available. For cross-border distribution to occur, it must be lawful for an accessible format copy to be exported from the country in which it is made; and it must be lawful for that copy to be imported into the country in which it will be read by a print-disabled person.

Article 5(1) provides that a Contracting Party must permit an authorized entity to distribute (or make available by digital transmission) an accessible format copy made under an exception to a beneficiary person or an authorized entity in another Contracting Party.⁶⁶ In other words, the domestic copyright law of a Contracting Party must allow an authorized entity to export an accessible format copy to a beneficiary person or authorized entity in another Contracting Party.

Exporting accessible format works will help solve the book famine worldwide, allowing those works that have already been adapted to an accessible format to be accessed by persons with print disabilities in other countries. Authorized entities creating accessible formats will not need to waste resources through duplication of accessible formats that already exist.

The Marrakesh Treaty provides Contracting Parties with flexibility on how to implement this obligation, including setting forth one approach. Under Article 5(2), a Contracting Party may adopt an exception in its national copyright

does implement a commercial availability standard, Article 4(4) provides that the accessible copy must be available under terms that are reasonable for beneficiary persons in that market. Thus, in a developing country, the accessible format copy must be available at a reasonable price for a beneficiary person in that country. In addition, the Marrakesh Treaty leaves it to “national law to determine whether limitations or exceptions under this Article are subject to remuneration.” A Contracting Party may therefore choose to implement this section by adopting a statutory license or through an absolute exception.

⁶⁵ Marrakesh Treaty (see footnote 42), Art 4(1).

⁶⁶ Ibid., Art. 5(1).

law that permits an authorized entity to distribute an accessible format copy to an authorized entity or a beneficiary person in another Contracting Party.⁶⁷

During the Marrakesh Treaty negotiations, some delegations proposed the inclusion of a provision in Article 5 concerning commercial availability, which would have restricted the exportation of accessible format works to cases where no accessible format were offered commercially. This provision was ultimately not included in the Treaty, allowing countries to export accessible format works regardless.

Article 5(4)(b) of the Marrakesh Treaty provides that if a Contracting Party is not a member of the WIPO Copyright Treaty (WCT), it can permit an authorized entity to export an accessible format copy only if it limits exceptions implementing the Treaty 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”, known as the “three-step test”. The agreed statement regarding this article confirms that the provision does not impose a three-step test obligation beyond the scope of the Treaty’s provisions concerning exceptions for beneficiaries.

2.2.5 Import of accessible format copies

The Marrakesh Treaty requires a provision to allow authorized entities or beneficiary persons to import accessible format copies. This provision will allow those who share a common language to benefit from existing accessible format copies in other countries.

Article 6 of the Marrakesh Treaty contains a provision that is the matching bookend to Article 5. Just as Article 5 obligates Contracting Parties to permit authorized entities to export accessible format copies to authorized entities or beneficiary persons in other Contracting Parties, Article 6 obligates Contracting Parties to allow authorized entities or beneficiary persons to import accessible copies from other Contracting Parties.⁶⁸

Allowing the import of accessible format copies is a critical component in improving domestic access to accessible formats. Countries can take advantage of accessible formats that already exist in other countries, provided that a common language is shared or for those with print disabilities who are learning a new language.

2.2.6 Relationship with technological protection measures

The Marrakesh Treaty requires an exception to anti-circumvention provisions. This exception must permit authorized entities to make an accessible format copy or ensure the ability to circumvent a digital lock through other mechanisms. The Marrakesh Treaty does not require authorized entities to place a technological protection measure on an accessible format copy.

Article 7 of the Marrakesh Treaty provides that when a Contracting Party prohibits circumvention of technological protection measures in its general copyright legislation, it “shall take appropriate measures, as necessary, to ensure that ... this legal protection does not prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty.”⁶⁹ Thus, a Contracting Party must adopt an exception to a circumvention prohibition to permit an authorized entity to make an accessible format copy or ensure the ability to circumvent the prohibition through other mechanisms, for example, by requiring the rightholder to provide the authorized entity with a key to open the digital lock.

The agreed statement to Article 7 notes that an authorized entity may choose to apply a technical protection measure to an accessible format copy, but the **Treaty does not require this practice.**

⁶⁷ This may occur only if “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.”

⁶⁸ Marrakesh Treaty (see footnote 42), Art. 6.

⁶⁹ Ibid., Art. 7.

2.2.7 Additional provisions

Article 8 of the Marrakesh Treaty provides that Contracting Parties “shall endeavor to protect the privacy of beneficiary persons on an equal basis with others.”⁷⁰ This provision should be viewed as a floor and not a ceiling. Even in countries with few privacy protections, authorized entities should be encouraged to protect the privacy of the reading habits of the beneficiaries of the Treaty.

Article 10 of the Marrakesh Treaty underscores the flexibilities Contracting Parties have in how they implement the treaty.⁷¹ Article 11, however, stresses that the flexibility to implement the Marrakesh Treaty is limited by existing treaty obligations. Particularly relevant for most countries is the Berne “three-step test”⁷² and the formulations of the test found in the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) and the WIPO Copyright Treaty.

It is understood that if a Contracting Party’s implementation closely follows the provisions of the Treaty, for example its definitions and the provisions of Article 4(2), the implementation would satisfy the requirements of the three-step test.

Article 12(1) states that Contracting Parties may adopt additional copyright exceptions for the benefit of beneficiary persons “having regard to that Contracting Party’s economic situation, and its social and cultural needs, in conformity with that Contracting Party’s international rights and obligations, and in the case of a least developed country taking into account its special needs and its particular international rights and obligations and flexibilities thereof.”⁷³ This provision provides benefits, for example, to least developed countries that have been granted waivers of compliance with TRIPS provisions or to developing countries that may make use of the Berne Appendix.⁷⁴

Article 12(2) provides that the Treaty is without prejudice to other limitations and exceptions for those with disabilities.

2.2.8 Key overall benefits of the Marrakesh Treaty

Providing an exception to allow the domestic creation and distribution of accessible format works without authorization of the copyright owner should promote a greater number of works being made available to persons with print disabilities. By not requiring remuneration to the copyright owner, the Marrakesh Treaty envisions the possibility of lower costs as licence fees will not need to be paid. Furthermore, by removing any requirement that permission be sought from the copyright owner, a significant transactional cost is eliminated.

Additionally, allowing for the import and export of accessible formats, without copyright owner permission, can help avoid the duplication of time and resources in different countries. Countries with smaller collections will be able to greatly benefit from existing and growing collections in other countries, particularly where a common language exists. For example, in the Asia-Pacific region, many residents of different countries share languages such as English, Chinese, Bengali, Bahasa and Malay; works created in these languages can be shared with beneficiary persons in the countries where these languages are used. Additionally, some specialized schools for the blind and visually impaired place an emphasis on teaching English to its students; beneficiaries of the Treaty would benefit from the ability to import works from countries with large existing collections in English, such as the United States and other countries.

Ultimately, the Marrakesh Treaty should help address the book famine by alleviating the shortage of domestically created works and also save resources by avoiding duplication through the enjoyment of cross-border exchange provided that countries ratify and implement the provisions of the Treaty.

⁷⁰ Ibid., Art. 8.

⁷¹ Article 10(2) states that “[n]othing shall prevent Contracting Parties from determining the appropriate method of implementing the provisions of the Treaty within their own legal system and practice.” Furthermore, Article 10(3) provides that “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, within their national legal system and practice.” Article 10(3) adds that these exceptions or limitations “may include judicial, administrative, or regulatory determinations for the benefit of beneficiary persons as to fair practices, dealings or uses to meet their needs...”

⁷² Berne Convention, Article 9(2) provides, “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”

⁷³ Marrakesh Treaty (see footnote 42), Art. 12.

⁷⁴ Cambodia and Nepal qualify as least developed countries.

Significantly, the Treaty's approach of making an exception to copyright law is the least costly means of addressing the book famine from the perspective of governments and copyright owners. Governments could enact laws requiring publishers to produce accessible format copies of the works they publish. This obviously would impose significant costs on the publishers. Alternatively, a government could undertake to create accessible format copies themselves, which would be costly for the government.

Instead, the Marrakesh Treaty simply allows authorized entities to make and distribute accessible format copies at their own expense. It further allows authorized entities and print-disabled individuals to import, including by digital download, accessible format copies created in other countries. Thus, the Marrakesh Treaty would allow an authorized entity, or a print-disabled person, in a developing country to download an accessible format copy produced by an authorized entity in a developed country. And because publishers typically do not sell accessible format copies in developing countries, they would not lose any revenue by virtue of the operation of the Treaty.

It is acknowledged that if the authorized entities in a developing country lacked funds, they would not be able to take full advantage of the Treaty because they would not have the resources to produce accessible format copies of domestically published books in local languages. Nonetheless, they would be able to assist print-disabled people to obtain accessible format copies from better-resourced authorized entities in other countries. This would represent a significant improvement over the status quo.

2.3 Necessary conditions for ratification and implementation

To successfully address the book famine, governments, libraries, educational institutions, and other organizations will need to take advantage of domestic provisions to deliver accessible format works to persons with disabilities. Doing so will require the development of capacity. Institutions serving the print disabled will need to be created and funded, technology purchased, and personnel trained. Such developments obviously will take time.

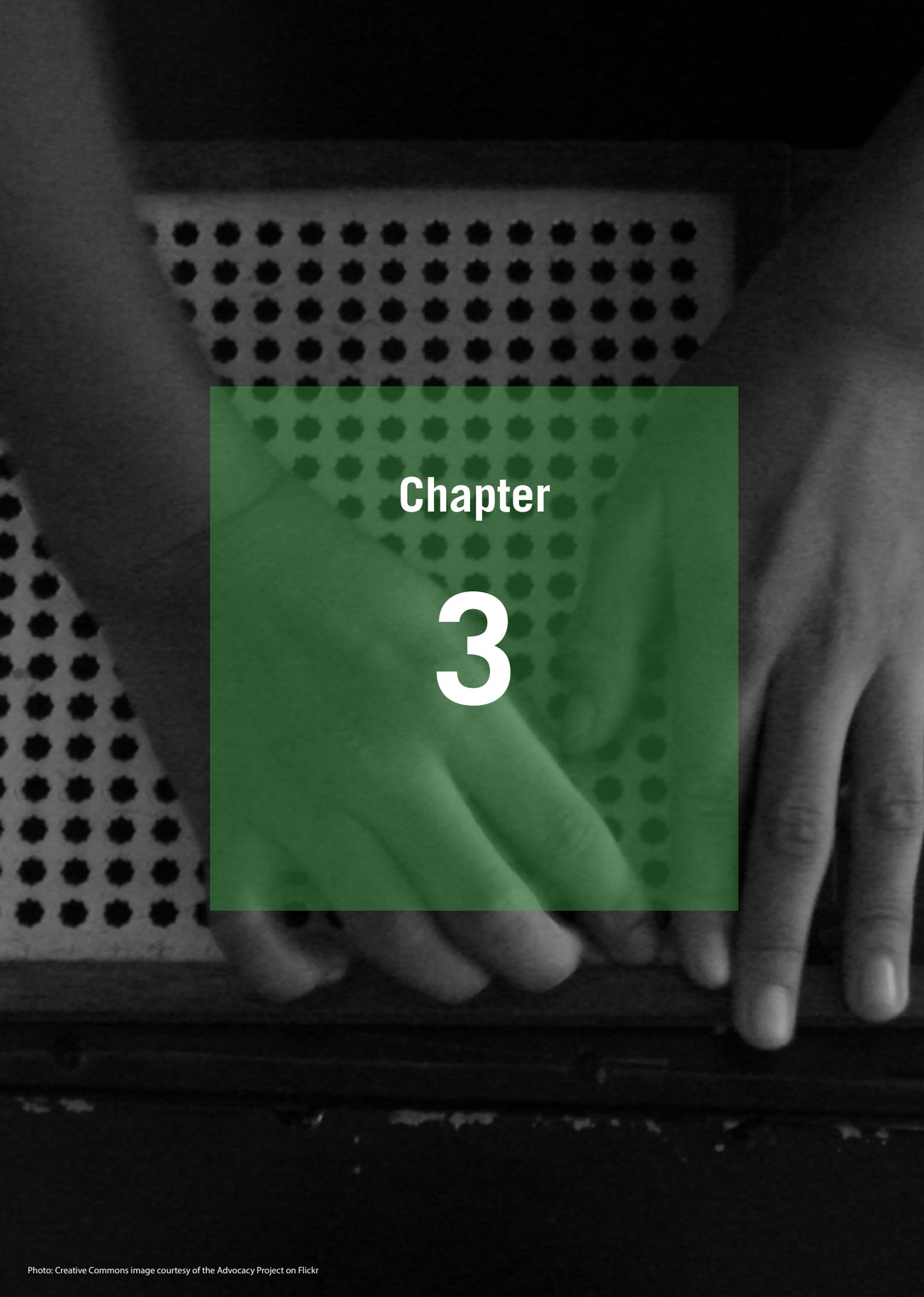
However, from a technical and legal point of view, there are no impediments to the immediate ratification and implementation of the Treaty. All the countries in this study are already part of the international copyright treaty system. They are already members of the Berne Convention or of the World Trade Organization (WTO), which means they are covered by the TRIPS Agreement. They already have copyright laws, and means of enforcing them, that comply with those international obligations.

The Marrakesh Treaty simply requires the adoption of an appropriate exception to these domestic copyright laws. While those working at institutions that currently serve the print disabled would need to be educated about the new exception's provisions, they would be able to begin making and distributing accessible format copies the day the exception takes effect.

Implementing legislation can take different forms. Appendix 2 to this document contains one method of implementation, which involves robust language that largely replicates language from the Marrakesh Treaty itself.

However, many countries already have some form of a copyright limitation or exception addressing those who are blind, visually impaired or otherwise print disabled. While these limitations and exceptions may not currently be sufficient to satisfy the requirements of the Marrakesh Treaty, they can form the basis for appropriate limitations and exceptions.

The context and structure of the current copyright law of each country reviewed in this document is taken into account and reflected in the recommended amendments to the laws of each country. While detailed and robust limitations and exceptions that directly replicate the language of the Marrakesh Treaty may be appropriate in some circumstances, for many countries the context of their laws suggest that less complex amendments may be sufficient and appropriate.



Chapter

3

Legal reviews for the ratification of the Marrakesh Treaty

3.1 Cambodia

Key points:

- Cambodia has ratified the Convention on the Rights of Persons with Disabilities and is a signatory to the Marrakesh Treaty. Those who are blind or visually impaired represent the largest share of those with disabilities in Cambodia.
- Specialized schools for the blind and visually impaired in Cambodia focus on teaching English. Thus, students attending these schools would greatly benefit from the ability to import works from English-speaking countries, such as the United States that have larger existing collections.
- In order to comply with and take full advantage of the Marrakesh Treaty, Cambodia's copyright law should be amended to create an exception to allow for the creation and distribution of accessible format copies and to allow cross-border exchange for accessible copies. While Cambodia does not currently have provisions prohibiting the circumvention of technological protection measures, if its laws change to include anti-circumvention provisions, a new provision permitting beneficiaries to overcome the barriers of technological protection measures would be required. Such a provision could take different forms, including a narrow provision addressing only compliance with the Marrakesh Treaty or a broad provision allowing circumvention for existing limitations and exceptions.

3.1.1 Background

Disability rights and laws in Cambodia

Cambodia has demonstrated its commitment to people with disabilities through its signatures and ratifications of various treaties. Cambodia ratified the Convention on the Rights of Persons with Disabilities on 20 December 2012 and has signed, but not yet ratified, the Optional Protocol. Cambodia signed the Marrakesh Treaty when it opened for signature on 28 June 2013.

A Disability Action Committee, later renamed the Disability Action Council, was established by Cambodia in 1996 and is a governmental entity that is the "national coordination and advisory mechanism"⁷⁵ on issues of disabilities.⁷⁶ In 2009, after thirteen years of discussion and work on legislation, Cambodia adopted its Law on the Protection and

⁷⁵ Law on the Protection and the Promotion of the Rights of Persons with Disabilities, Kingdom of Cambodia (2009), Art. 6.

⁷⁶ *Disability Rights Initiative Cambodia: Joint Programme Document*, available from http://www.unicef.org/cambodia/1-DRIC_ProDoc_Final_Eng%281%29.pdf.

the Promotion of the Rights of Persons with Disabilities (“Disability Law”). Article 46 of Cambodia’s Disability Law established the Persons with Disabilities Fund responsible for funding services including education.⁷⁷

Cambodia’s Disability Law provides for the right of all students with disabilities to education.⁷⁸ It directs the government to develop policies and strategies including “inclusive education ... to the utmost extent possible” as well as “establishing special classes.”⁷⁹ The law provides that the Ministry of Education shall “provide accessible facilities for pupils and students with disabilities with regard to the following: [...] sign language and Braille⁸⁰; [...] study materials or other equipment to assist pupils and students with disabilities.”⁸¹

These regulations demonstrate a commitment to providing education for students with disabilities, including specifically for those who are visually impaired. Article 49 of the Disability Law also provides “All provisions of international treaties relating to the laws on the protection and the promotion of the rights of persons with disabilities to which the Kingdom of Cambodia is a party shall be implemented together with this national law. In the case of any provisions that contradict the provision of this law, the provisions of those international treaties shall be considered as the principle provisions.”⁸² Thus, where the CRPD conflicts with Cambodia’s Disability Law, it seems that this provision requires the CRPD to take precedence.

People with print disabilities in Cambodia

A 2013 study of Cambodia’s population found that approximately 2 percent of the population was disabled.⁸³ Those with visual disabilities comprised the largest share of the population with disabilities, making up approximately 35 percent of those with disabilities.⁸⁴ The literacy rates of those with disabilities are lower than those without disabilities. Additionally, Cambodia has an aging population, which will contribute to a higher rate of visual impairments in the future.⁸⁵

Organizations and entities providing assistance to people with disabilities

A 2002 report of disability-related organizations in Cambodia found that there are several entities to serve those who are blind or visually impaired.⁸⁶ The Association of Blind Cambodia, a member of the World Blind Union, was established in 2000 and serves all individuals with visual impairments. Its objectives include: establishing a library, training and meeting facility in Cambodia; supporting blind schools with English instruction; and educating and training individuals who are blind in new technological developments.⁸⁷ It has capacity for Khmer braille translation and planned to establish a National Resource Center.⁸⁸ Additionally, in 2002, it facilitated the creation of the Blind Women’s Committee.⁸⁹

A 2001 survey found that Cambodia had “two schools for blind children, including Kampot Traditional Music School.”⁹⁰ However, this survey found that out of all the specialized schools for students with disabilities in Cambodia, “these eight schools and programmes provide services for just 500 children per year, which is a small

77 Law on the Protection and the Promotion of the Rights of Persons with Disabilities, Kingdom of Cambodia (2009), Art. 46.

78 Ibid., Art. 27.

79 Ibid., Art. 28.

80 The word ‘braille’ is generally not capitalized but when included as a quotation from another source, its original spelling is maintained.

81 Ibid., Art. 29.

82 Ibid., Art. 49.

83 National Institute of Statistics. *Cambodia Inter-Censal Population Survey 2013: Analysis of CIPS Results: Report 5: Disability*, Phnom Penh, Cambodia (December 2013), p. 12.

84 Ibid., p. 13

85 National Institute of Statistics. *Demographics of Population Ageing in Cambodia (2012)*, Phnom Penh, Cambodia (“In Cambodia, the proportion of population aged 60 years and above was 6.34 per cent in 2008 (848,911) and expected to increase to 11.01 per cent (2,024,171) by year 2030.”).

86 Japan International Cooperation Agency, Planning and Evaluation Department, *Country Profile on Disability: Kingdom of Cambodia* (March 2002), Annex 1.

87 Ibid.

88 International Labour Office, *Training and Employment of People with Disabilities: Cambodia 2002*, Ability Asia Country Study Series (2002), p. 9–10.

89 Ibid.

90 Ibid., p. 20.

fraction of children with disabilities.⁹¹ In 2002, Krousar Thmey, a school for children who are deaf or blind, reported just 54 students aged 6–14.⁹²

3.1.2 Copyright law in Cambodia and recommended changes

Cambodia is not a party to the WIPO Copyright Treaty and therefore does not currently have any obligations under this treaty, including the provision of legal protection and remedies against the circumvention of technological measures used to protect rights under the WCT or Berne Convention. Cambodia is also not a party to the Berne Convention.

Cambodia is a member of the World Trade Organization and all members of the WTO are bound by the TRIPS Agreement. However, because of its status as a least developed country, it is afforded an extension of waiver with respect to most articles of the TRIPS Agreement.⁹³ The latest extension was granted in 2013 and extends until 1 July 2021, or when a particular country ceases to be a least developed country, whichever is earlier.⁹⁴

While this extension may be further extended at some future date, eventually, Cambodia will be required to ensure that its laws are TRIPS compliant. Significantly, its current copyright law, implemented in 2003, is designed to comply with the TRIPS Agreement.

Creation and distribution of accessible formats

Article 21 of Cambodia's copyright law gives authors a number of exclusive rights, including the right to reproduction and creation of derivative works.⁹⁵ Article 21 explicitly provides authors the right to translation of works into a foreign language, and the "adaptation and simplification or [to] undertake any modifications."⁹⁶ Article 8 further provides that "Derivative works including translations, adaptations, arrangements and modification or other improvements of works, or compilations of databases, whether in machine readable or other form shall be also protected by this law."⁹⁷

Cambodia's copyright law provides for a number of limitations and exceptions, including among others, "the use of work for the purposes of education, which is not for financial gain" and "translation of works from Khmer language into the languages of the ethnic minorities or vice versa." However, it does not have any provisions regarding the creation or distribution of accessible format works. In order to comply with the Marrakesh Treaty, it will therefore be necessary for Cambodia to amend its copyright law to include a provision to permit such creation and distribution.

Importation and exportation

Article 21 of Cambodia's copyright law gives authors the economic right to distribution and importation, subject to limitations and exceptions. However, Article 23 provides for an exception to Article 21(e) and allows for importation for personal use.⁹⁸ Individuals who are blind, visually impaired or otherwise print disabled could therefore use this personal importation provision to import accessible format works from other countries.

While beneficiary individuals can import accessible format copies for personal use, this exception does not appear broad enough to permit authorized entities to import works. Cambodia's copyright law also does not allow an authorized entity to export an accessible format copy to authorized entities or beneficiaries in other countries. The

91 Ibid.

92 Ibid., p. 154.

93 Least developed countries have an extension with respect to implementation of the TRIPS Agreement, with the exceptions of Articles 3, 4 and 5. Cambodia and other least developed countries must still comply with TRIPS obligations regarding national treatment and most-favoured nation status. Additionally, least developed countries must comply with any commitments and obligations they have made through joining WIPO-administered treaties.

94 Decision of the Council for TRIPS of 11 June 2013: Extension of the Transition Period Under Article 66.1 for Least Developed Country Members, World Trade Organization, IP/C/64 (12 June 2013).

95 Law on Copyrights and Related Rights, Kingdom of Cambodia (*Adopted by the National Assembly on January 21, 2003 and ratified by the Senate on February 13, 2003.*) Art. 21.

96 Ibid.

97 Ibid., Art. 8.

98 Ibid., Art. 23 ("The importation of a copy of a work by any natural person, for his/her personal use, can be done without the consent of the author of that work or the right-holder").

law should therefore be amended, broadening the importation provision and providing for an exception to permit export in order to comply with the Marrakesh Treaty.⁹⁹

Given that some of the specialized schools for the blind and visually impaired place an emphasis on teaching English to its students, beneficiary individuals of the Marrakesh Treaty would benefit greatly from the ability to import accessible formats that exist in the United States and many other English-speaking countries.

Technological protection measures

Cambodia is not a member to the WCT and is therefore not obligated to provide legal protection and remedies against circumvention of technological protection measures. As such, it does not currently have any provisions in its copyright law regarding technological protection measures. Article 7 of the Marrakesh Treaty requires contracting parties to take appropriate measures to ensure that when a country applies anti-circumvention measures, such provisions do not prevent beneficiaries of the Treaty from enjoying the limitations and exceptions. Cambodia is not obligated to amend its laws with regard to technological protection measures due to the absence of any rules regarding anti-circumvention.

While Cambodia does not have provisions prohibiting the circumvention of technological protection measures, if it later does become a party to the WCT or other treaty or free trade agreements such as the currently negotiated Trans-Pacific Partnership Agreement, it may be required to amend its laws to include anti-circumvention rules. If its copyright laws are amended to prohibit circumvention, a provision would be required for compliance with the Marrakesh Treaty that would permit beneficiaries to overcome the barriers that technological protection measures can place in the creation or access to accessible format works. It may be advisable to adopt such a technological protection measure exception now, as part of implementing the Treaty, so that this battle will not have to be fought in the future.

3.1.3 Conclusions and recommendations

In order to comply with the Marrakesh Treaty, Cambodia will need several amendments to its copyright law as it does not currently have any provision permitting the creation or distribution of accessible format works. A new subparagraph under Article 25, which lays out other copyright limitations and exceptions, should be added to allow for the creation and distribution of accessible formats. Cambodia will also need to add a provision allowing authorized entities to import and export accessible format copies.

While Cambodia does not currently provide for anti-circumvention of technological protection measures and therefore does not need an amendment to explicitly allow circumvention, if Cambodia does adopt such a provision in the future—whether as a result of joining the WCT, free trade agreements, or for other reasons—it must also ensure that such a law would not prohibit beneficiaries to enjoy the limitations and exceptions of the Marrakesh Treaty. It may therefore be advisable for Cambodia to introduce an exception that allows for the circumvention of technological protection measures. This would ensure future compliance with the Marrakesh Treaty in the event that its laws later incorporate anti-circumvention provisions.

While Cambodia does not have a large number of organizations and entities serving individuals who are blind, visually impaired or otherwise print disabled, the Association of the Blind for Cambodia does report that it has Khmer braille production capabilities. Additionally, Cambodia would be able to greatly benefit from the importation of works from English-speaking countries due to the fact that a number of its specialized schools teach English. Cambodia is a member of the Organisation Internationale de la Francophonie (OIF)¹⁰⁰ as it has a French-speaking population, and would also benefit from the importation of works from French-speaking countries.

⁹⁹ Cambodia is not a member of the WCT and therefore must comply with Article (5)(4)(b) of the Marrakesh Treaty. The recommended amendment to the Cambodian copyright law is sufficiently narrow to meet the three-step test obligation under Article 5(4)(b).

¹⁰⁰ Organisation Internationale de la Francophonie, *About Us*, <http://www.francophonie.org/Welcome-to-the-International.html> (last visited 19 April 2015).



In the following tables in Chapter 5, the left column contains the current language of the copyright law while the right column contains recommended amendments to the current law. Text that is underlined represents new text, while text that is crossed out represents language that should be removed. Only suggested amendments to the current law are included in the right column.

Creation and distribution of accessible format works

Current law	Recommended amendments
No provisions.	<p>Article 25 The author cannot prohibit the following acts:</p> <p>[...] <u>—The creation and distribution of accessible format copies for people who are blind, visually impaired or otherwise print disabled.</u></p>
Comment	
<p>Article 25 provides for a number of limitations and exceptions and could be amended to include another subparagraph permitting the creation and distribution of accessible format works. The term “accessible format copies” is taken directly from the Marrakesh Treaty and the suggested provision would apply to people who are blind, visually impaired or otherwise print disabled. There are a number of ways Cambodia could amend its laws to permit the creation and distribution of accessible formats for people who are blind, visually impaired or otherwise print disabled; the above recommended addition is a relatively short and simple method for implementing the Marrakesh Treaty.</p>	

Importation and exportation

Current law	Recommended amendments
<p>Article 21 Economic right is the exclusive right of the author to exploit his/her own work through the authorization of reproduction, communication to the public, and creation of derivative work. Unless otherwise specified in the provisions of articles 24, 25, 26, 27, 28 and 29, the author has exclusive right to act by him/herself or authorize someone to do the followings:</p> <p>[...]</p> <p>e. Importation into the country, the reproduction copies of his/her work.</p> <p>Article 23 The importation of a copy of work by any natural person, for his/her personal use, can be done without the consent of the author of that work or the right-holder.</p>	<p>Article 21 Economic right is the exclusive right of the author to exploit his/her own work through the authorization of reproduction, communication to the public, and creation of derivative work. Unless otherwise specified in the provisions of articles <u>23, 24, 25, 26, 27, 28 and 29</u>, the author has exclusive right to act by him/herself or authorize someone to do the followings:</p> <p>[...]</p> <p>e. Importation into the country, the reproduction copies of his/her work.</p> <p>Article 23 <u>a. The importation of a copy of work by any natural person, for his/her personal use can be done without the consent of the author of that work or the right-holder.</u></p> <p><u>b. Importation or exportation of copies of accessible format copies by an entity recognized by the government that provides services to the blind, visually impaired or otherwise print disabled, can be done without the consent of the author of that work or the right-holder.</u></p>

Comment

Cross-border exchange of works is a critical feature of the Marrakesh Treaty that will help address the book famine. Article 21 provides for the economic rights of the author, subject to the articles listed which provide limitations and exceptions. Article 21 should be amended to include Article 23, which currently provides for an exception for personal use importation, in its list of exceptions.

While Article 23 provides for an exception to allow the importation of works for personal use, this provision is limited to a natural person and authorized entities would not be included under Cambodia's current law. Additionally, Cambodia's copyright law does not have any provision regarding the exportation of works. Thus, Article 23 could be amended to add a subparagraph (b), allowing authorized entities to import and export accessible format copies for the purpose of serving those who are blind, visually impaired or otherwise print disabled.

Technological protection measures

Current law	Recommended amendments
No provisions.	<p>Article X <u>Technological protection measures may be circumvented to create accessible format copies for the blind, visually impaired or otherwise print disabled.</u></p>
<h3>Comment</h3>	
<p>Because Cambodia's copyright law does not prohibit the circumvention of technological protection measures, no provision is currently needed to provide an exception or otherwise to ensure that beneficiaries of the Marrakesh Treaty can enjoy the exceptions laid out under the Treaty.</p> <p>However, it should be noted that Cambodia may choose to become a party to the WCT at some point and would then be obligated to provide adequate protection against circumvention of technological protection measures used by authors in connection with their rights under the Berne Convention and the WCT. Alternatively, Cambodia may become party to an agreement such as the TPP, which provides for obligations regarding anti-circumvention provision, or Cambodia may change its laws for other reasons.</p> <p>Should Cambodia amend its laws to prohibit the circumvention of technological protection measures, it will need to ensure that its laws do not prevent beneficiaries of the Marrakesh Treaty from enjoying its limitations and exceptions. It may be advisable to adopt the technological protection measures exception as part of the Marrakesh Treaty implementation so that this battle will not have to be fought in the future.</p>	

Appendices

Appendix 1: Marrakesh Treaty to Facilitate Access to Published Works for the Blind, Visually Impaired, or Otherwise Print Disabled*

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Preamble

The Contracting Parties,

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,

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

Emphasizing the importance of copyright protection as an incentive and reward for literary and artistic creations and of enhancing opportunities for everyone, including persons with visual impairments or with other print disabilities, to participate in the cultural life of the community, to enjoy the arts and to share scientific progress and its benefits,

Aware of the barriers of persons with visual impairments or with other print disabilities to access published works in achieving equal opportunities in society, and the need to both expand the number of works in accessible formats and to improve the circulation of such works,

Taking into account that the majority of persons with visual impairments or with other print disabilities live in developing and least developed countries,

Recognizing that, despite the differences in national copyright laws, the positive impact of new information and communication technologies on the lives of persons with visual impairments or with other print disabilities may be reinforced by an enhanced legal framework at the international level,

Recognizing that many Member States have established limitations and exceptions in their national copyright laws for persons with visual impairments or with other print disabilities, yet there is a continuing shortage of available works in accessible format copies for such persons, and that considerable resources are required for their effort of making works accessible to these persons, and that the lack of possibilities of cross-border exchange of accessible format copies has necessitated duplication of these efforts,

Recognizing both the importance of rightholders' role in making their works accessible to persons with visual impairments or with other print disabilities and the importance of appropriate limitations and exceptions to make works accessible to these persons, particularly when the market is unable to provide such access,

Recognizing the need to maintain a balance between the effective protection of the rights of authors and the larger public interest, particularly education, research and access to information, and that such a balance must facilitate effective and timely access to works for the benefit of persons with visual impairments or with other print disabilities,

Reaffirming the obligations of Contracting Parties under the existing international treaties on the protection of copyright and the importance and flexibility of the three-step test for limitations and exceptions established in Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works and other international instruments,

Recalling the importance of the Development Agenda recommendations, adopted in 2007 by the General Assembly of the World Intellectual Property Organization (WIPO), which aim to ensure that development considerations form an integral part of the Organization's work,

Recognizing the importance of the international copyright system and desiring to harmonize limitations and exceptions with a view to facilitating access to and use of works by persons with visual impairments or with other print disabilities,

Have agreed as follows:

Article 1

Relation to Other Conventions and Treaties

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.

Article 2

Definitions

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 media¹;

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

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

An authorized entity establishes and follows its own practices:

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

Article 3

Beneficiary Persons

A beneficiary person is a person who:

- (a) is blind;
- (b) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or³
- (c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading;

regardless of any other disabilities.

1 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.

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.

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

Article 4

National Law Limitations and Exceptions Regarding 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) Authorized entities shall be permitted, without the authorization of the copyright rightholder, to make an accessible format copy of a work, obtain from another authorized entity an accessible format copy, and supply those copies to beneficiary persons by any means, including by non-commercial lending or by electronic communication by wire or wireless means, and undertake any intermediate steps to achieve those objectives, when all of the following conditions are met:
 - (i) the authorized entity wishing to undertake said activity has lawful access to that work or a copy of that work;
 - (ii) the work is converted to an accessible format copy, which may include any means needed to navigate information in the accessible format, but does not introduce changes other than those needed to make the work accessible to the beneficiary person;
 - (iii) such accessible format copies are supplied exclusively to be used by beneficiary persons; and
 - (iv) the activity is undertaken on a non-profit basis;

and

(b) A beneficiary person, or someone acting on his or her behalf including a primary caretaker or caregiver, may make an accessible format copy of a work for the personal use of the beneficiary person or otherwise may assist the beneficiary person to make and use accessible format copies where the beneficiary person has lawful access to that work or a copy of that work.
3. A Contracting Party may fulfill Article 4(1) by providing other limitations or exceptions in its national copyright law pursuant to Articles 10 and 11⁴.
4. A Contracting Party may confine limitations or exceptions under this Article to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market. Any Contracting Party availing itself of this possibility shall so declare in a notification deposited with the Director General of WIPO at the time of ratification of, acceptance of or accession to this Treaty or at any time thereafter⁵.
5. It shall be a matter for national law to determine whether limitations or exceptions under this Article are subject to remuneration.

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.

Article 5

Cross-Border Exchange of Accessible Format Copies

1. Contracting Parties shall provide that if an accessible format copy is made under a limitation or exception or pursuant to operation of law, that accessible format copy may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party⁶.
2. A Contracting Party may fulfill Article 5(1) by providing a limitation or exception in its national copyright law such that:
 - (a) authorized entities shall be permitted, without the authorization of the rightholder, to distribute or make available for the exclusive use of beneficiary persons accessible format copies to an authorized entity in another Contracting Party; and
 - (b) authorized entities shall be permitted, without the authorization of the rightholder and pursuant to Article 2(c), to distribute or make available accessible format copies to a beneficiary person in another Contracting Party;

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

3. A Contracting Party may fulfill Article 5(1) by providing other limitations or exceptions in its national copyright law pursuant to Articles 5(4), 10 and 11.
4. (a) When an authorized entity in a Contracting Party receives accessible format copies pursuant to Article 5(1) and that Contracting Party does not have obligations under Article 9 of the Berne Convention, it will ensure, consistent with its own legal system and practices, that the accessible format copies are only reproduced, distributed or made available for the benefit of beneficiary persons in that Contracting Party's jurisdiction.
 - (b) The distribution and making available of accessible format copies by an authorized entity pursuant to Article 5(1) shall be limited to that jurisdiction unless the Contracting Party is a Party to the WIPO Copyright Treaty or otherwise limits limitations and exceptions implementing this Treaty to the right of distribution and the right of making available to the public to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder^{8,9}.
 - (c) Nothing in this Article affects the determination of what constitutes an act of distribution or an act of making available to the public.
5. Nothing in this Treaty shall be used to address the issue of exhaustion of rights.

Article 6

Importation of Accessible Format Copies

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

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

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

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.

Contracting Party shall also permit them to import an accessible format copy for the benefit of beneficiary persons, without the authorization of the rightholder¹⁰.

Article 7

Obligations Concerning Technological Measures

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

Article 8

Respect for Privacy

In the implementation of the limitations and exceptions provided for in this Treaty, Contracting Parties shall endeavor to protect the privacy of beneficiary persons on an equal basis with others.

Article 9

Cooperation to Facilitate Cross-Border Exchange

1. Contracting Parties shall endeavor to foster the cross-border exchange of accessible format copies by encouraging the voluntary sharing of information to assist authorized entities in identifying one another. The International Bureau of WIPO shall establish an information access point for this purpose.
2. Contracting Parties undertake to assist their authorized entities engaged in activities under Article 5 to make information available regarding their practices pursuant to Article 2(c), both through the sharing of information among authorized entities, and through making available information on their policies and practices, including related to cross-border exchange of accessible format copies, to interested parties and members of the public as appropriate.
3. The International Bureau of WIPO is invited to share information, where available, about the functioning of this Treaty.
4. Contracting Parties recognize the importance of international cooperation and its promotion, in support of national efforts for realization of the purpose and objectives of this Treaty¹².

Article 10

General Principles on Implementation

1. Contracting Parties undertake to adopt the measures necessary to ensure the application of this Treaty.
2. Nothing shall prevent Contracting Parties from determining the appropriate method of implementing the provisions of this Treaty within their own legal system and practice¹³.
3. 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, within their national legal system and practice. These may include judicial, administrative or regulatory determinations for the benefit of beneficiary persons as to fair practices,

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.

¹² Agreed statement concerning Article 9: It is understood that Article 9 does not imply mandatory registration for authorized entities nor does it constitute a precondition for authorized entities to engage in activities recognized under this Treaty; but it provides for a possibility for sharing information to facilitate the cross-border exchange of accessible format copies.

¹³ Agreed statement concerning Article 10(2): It is understood that when a work qualifies as a work under Article 2(a), including such works in audio form, the limitations and exceptions provided for by this Treaty apply *mutatis mutandis* to related rights as necessary to make the accessible format copy, to distribute it and to make it available to beneficiary persons.

dealings or uses to meet their needs consistent with the Contracting Parties' rights and obligations under the Berne Convention, other international treaties, and Article 11.

Article 11

General Obligations on Limitations and Exceptions

In adopting measures necessary to ensure the application of this Treaty, a Contracting Party may exercise the rights and shall comply with the obligations that that Contracting Party has under the Berne Convention, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WIPO Copyright Treaty, including their interpretative agreements so that:

- (a) in accordance with Article 9(2) of the Berne Convention, a Contracting Party may permit the reproduction of works in certain special cases provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author;
- (b) in accordance with Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, a Contracting Party shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder;
- (c) in accordance with Article 10(1) of the WIPO Copyright Treaty, a Contracting Party may provide for limitations of or exceptions to the rights granted to authors under the WCT in certain special cases, that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author;
- (d) in accordance with Article 10(2) of the WIPO Copyright Treaty, a Contracting Party shall confine, when applying the Berne Convention, any limitations of or exceptions to rights to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

Article 12

Other Limitations and Exceptions

1. Contracting Parties recognize that a Contracting Party may implement in its national law other copyright limitations and exceptions for the benefit of beneficiary persons than are provided by this Treaty having regard to that Contracting Party's economic situation, and its social and cultural needs, in conformity with that Contracting Party's international rights and obligations, and in the case of a least-developed country taking into account its special needs and its particular international rights and obligations and flexibilities thereof.
2. This Treaty is without prejudice to other limitations and exceptions for persons with disabilities provided by national law.

Article 13

Assembly

1. (a) The Contracting Parties shall have an Assembly.

(b) Each Contracting Party shall be represented in the Assembly by one delegate who may be assisted by alternate delegates, advisors and experts.

(c) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation. The Assembly may ask WIPO to grant financial assistance to facilitate the participation of delegations of Contracting Parties that are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations or that are countries in transition to a market economy.
2. (a) The Assembly shall deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty.

(b) The Assembly shall perform the function allocated to it under Article 15 in respect of the admission of certain intergovernmental organizations to become party to this Treaty.

(c) The Assembly shall decide the convocation of any diplomatic conference for the revision of this Treaty and give the necessary instructions to the Director General of WIPO for the preparation of such diplomatic conference.

3. (a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

(b) Any Contracting Party that is an intergovernmental organization may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty. No such intergovernmental organization shall participate in the vote if any one of its Member States exercises its right to vote and vice versa.
4. The Assembly shall meet upon convocation by the Director General and, in the absence of exceptional circumstances, during the same period and at the same place as the General Assembly of WIPO.
5. The Assembly shall endeavor to take its decisions by consensus and shall establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions.

Article 14

International Bureau

The International Bureau of WIPO shall perform the administrative tasks concerning this Treaty.

Article 15

Eligibility for Becoming Party to the Treaty

1. Any Member State of WIPO may become party to this Treaty.
2. The Assembly may decide to admit any intergovernmental organization to become party to this Treaty which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to this Treaty.
3. The European Union, having made the declaration referred to in the preceding paragraph at the Diplomatic Conference that has adopted this Treaty, may become party to this Treaty.

Article 16

Rights and Obligations Under the Treaty

Subject to any specific provisions to the contrary in this Treaty, each Contracting Party shall enjoy all of the rights and assume all of the obligations under this Treaty.

Article 17

Signature of the Treaty

This Treaty shall be open for signature at the Diplomatic Conference in Marrakesh, and thereafter at the headquarters of WIPO by any eligible party for one year after its adoption.

Article 18

Entry into Force of the Treaty

This Treaty shall enter into force three months after 20 eligible parties referred to in Article 15 have deposited their instruments of ratification or accession.

Article 19

Effective Date of Becoming Party to the Treaty

This Treaty shall bind:

- (a) the 20 eligible parties referred to in Article 18, from the date on which this Treaty has entered into force;
- (b) each other eligible party referred to in Article 15, from the expiration of three months from the date on which it has deposited its instrument of ratification or accession with the Director General of WIPO.

Article 20

Denunciation of the Treaty

This Treaty may be denounced by any Contracting Party by notification addressed to the Director General of WIPO. Any denunciation shall take effect one year from the date on which the Director General of WIPO received the notification.

Article 21

Languages of the Treaty

1. This Treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic.
2. An official text in any language other than those referred to in Article 21(1) shall be established by the Director General of WIPO on the request of an interested party, after consultation with all the interested parties. For the purposes of this paragraph, "interested party" means any Member State of WIPO whose official language, or one of whose official languages, is involved and the European Union, and any other intergovernmental organization that may become party to this Treaty, if one of its official languages is involved.

Article 22

Depositary

The Director General of WIPO is the depositary of this Treaty.

Done in Marrakesh on the 27th day of June, 2013.

Appendix 2: 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

Jonathan Band and Peter Jaszi

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. 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
 - (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.

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>.

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 3: Human Rights Treaty Provisions Supporting the Right to Knowledge

The following provisions are found in various human rights treaties and support a number of human rights that rely on the right to knowledge or information.

Right to information and to exercise freedom of opinion and expression

- International Covenant on Civil and Political Rights (ICCPR), Article 18.1 (“Everyone shall have the right to freedom of thought . . .”)
- ICCPR, Article 19 (“1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”)
- Convention on the Rights of the Child (CRC), Article 12.1 (“States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child...”)
- CRC Article 13.1 (“The child shall have the right to freedom of expression; this right shall include freedom to seek, receive or impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice.”)
- CRC Article 14.1 (“States Parties shall respect the right of the child to freedom of thought, conscience and religion.”)
- CRC Article 17 (“States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, State Parties shall: (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29; (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources; (c) Encourage the production and dissemination of children’s books”).
- Convention on the Rights of Persons with Disabilities (CRPD), Article 21 (“States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, 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; (b) Accepting and facilitating the use of sign languages, braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions; (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; (d) Encouraging the mass media, including providers of information through the Internet to make their services accessible to persons with disabilities.”)

Right to take part in society:

- CRC, Article 23.1 (“States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community.”)
- CRPD, Article 29 (“States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to: (a) Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with

disabilities to vote and be elected... (b) Promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs...")

- CRPD, Article 9 ("1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, *inter alia*: ... (b) information, communications and other services, including electronic services and emergency services. 2. States Parties shall also take appropriate measures to: ... (f) Promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information; (g) Promote access for persons with disabilities to new information and communications technologies and systems, including the Internet; (h) Promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.")

Right to participate in cultural life:

- International Covenant on Economic Social and Cultural Rights (ICESCR), Article 15.1 ("The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life.")
- CRC, Article 31 ("1. States Parties recognize the right of the child to rest and leisure ... and to participate freely in cultural life and the arts. 2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity. 3. States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.")
- CRPD, Article 30 ("1. States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities: (a) Enjoy access to cultural materials in accessible formats; (b) Enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats; (c) Enjoy access to places for cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services, and, as far as possible, enjoy access to monuments and sites of national cultural importance. 2. States Parties shall take appropriate measures to enable persons with disabilities to have the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society. 3. States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.")

Right to enjoy the benefits of scientific progress:

- ICESCR, Article 15.1 ("The States Parties to the present Covenant recognize the right of everyone: ... (b) To enjoy the benefits of scientific progress and its applications.")

Right to education:

- ICESCR, Article 6 ("1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right. 2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.")
- ICESCR, Article 1.1 ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic social and cultural development.")

- CRPD, Article 27 (“1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment by taking appropriate steps, including through legislation, to, *inter alia*: (a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, continuance of employment, career advancement and safe and healthy working conditions; (b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances ... (d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training; (e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment.”)

Right to employment opportunities:

- ICESCR, Article 6 (“1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right. 2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.”)
- ICESCR, Article 1.1 (“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic social and cultural development.”)
- CRPD, Article 27 (“1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment by taking appropriate steps, including through legislation, to, *inter alia*: (a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, continuance of employment, career advancement and safe and healthy working conditions; (b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances ... (d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training; (e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment.”)

Appendix 4: World Blind Union – Asia Pacific (WBUAP) Hong Kong Statement

We the participants at the WBUAP Mid-Term Regional General Assembly (Assembly) in Hong Kong, 24th November, 2014,

1. Call upon all governments throughout the Asia-Pacific region (region) to ratify the Marrakesh Treaty at the earliest opportunity so that persons who are blind or partially sighted (blind) or who have other print disability, have full access to works of literature, culture and to educational materials.
2. Welcome the opportunity to co-operate with the United Nations (UN) Development Programme to build capacity across the region so that persons who are blind or who have print disability are able to advocate for greater access to information.
3. Encourage development organisations to work with governments to support data collection, develop disability inclusive policies and strategies to progress the action plan of the Incheon Strategy.
4. Urge all governments and relevant bodies throughout the region to make all efforts toward the speedy ratification and effective implementation of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). In particular, prioritize to ensure the full and effective participation of persons with disabilities and their representative organizations in strengthening independent monitoring mechanisms, given that fewer than half of the countries in the world who have ratified the UNCRPD have presented country and shadow reports to the UN.
5. Being moved by the enthusiasm and strong determination, expressed by women who are blind through the Women's Forum, campaign for the acceleration of women with disabilities' empowerment programmes, in accordance with the Asian and Pacific inter-government Ministerial Declaration on Gender Equality and Women's Empowerment (UNESCAP, 2014).
6. In recognition of challenges and opportunities faced by youth who are blind in this region, and the tremendous success of the Youth Forum held during this Assembly in stimulating innovation and social entrepreneurship among youth of the region, it is recommended that:
 - a youth forum be held at future regional assemblies, and
 - the World Blind Union (WBU) be requested to hold an international youth summit.
7. Call upon all governments, businesses and other global partners to take the necessary steps to ensure that essential technologies are available, accessible and affordable to persons who are blind in the region, as it is through such technology that real inclusion can be advanced and social isolation eliminated.
8. Initiate and implement a web accessibility campaign at the regional level to promote the adoption of internationally recognised accessibility standards in web design, APPs, e-learning and other ICT products and services; in consultation with organizations of the blind.
9. Undertake to actively share best practice initiatives and programmes in areas of fundraising and capacity development.
10. Noting the high levels of unemployment and under employment of persons who are blind in the region, task all governments to implement programs that enable full participation in open employment including education programs for employers and the community, transition to employment programs and the provision of specialist equipment schemes by the government.
11. In recognising that social enterprises have demonstrated their impact in creating employment for persons who are blind, in changing public attitudes and in generating funds to further the cause of the movement for people who are blind, the Assembly urges the WBUAP and WBU to establish a task force to investigate how social enterprises can be promoted and advanced.



*Empowered lives.
Resilient nations.*

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