

D. Ferri and K. Donnellan (2022) 'The implementation of the Marrakesh Directive: a comparative analysis across six EU Member States'. *European Intellectual Property Review*, 44 (5):257-266 (pre-print)

The Implementation of the Marrakesh Directive: A Comparative Analysis across Six EU Member States

Delia Ferri*, Katie Donnellan**

This article examines the implementation of the so called 'Marrakesh Directive', which transposes the Marrakesh Treaty into EU law and lays out rules on the use of accessible copies of published works, across six Member States – namely Germany, Hungary, Italy, Ireland, the Netherlands, and Sweden. It highlights convergences and divergences in the implementation and in the scope of access to copyrighted works guaranteed to persons with disabilities across the States considered. In that connection, this article also detects the extent to which the implementation of the Marrakesh Directive links to broader national disability policies and the implementation of the UN Convention on the Rights of Persons with Disabilities.

Introduction

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (Marrakesh Treaty) is the latest copyright treaty approved in the realm of the World Intellectual Property Organisation (WIPO). It was adopted on 27 June 2013 in Marrakesh, and entered into force three years later in September 2016. It obliges Contracting Parties to introduce a set of limitations and exceptions to copyright rules in order to permit reproduction, distribution and making available of published works in formats that are accessible to persons who are blind, visually impaired or otherwise print-disabled, and to permit exchange of these works across borders by organisations that serve those beneficiaries.

The Marrakesh Treaty tries to respond to the lack of access for people with disabilities, in particular people with visual impairments and blind people, to printed material.¹ In that regard, it is considered the first WIPO treaty that fully embeds a human rights approach to intellectual property (IP), and is said to chart 'a new path for human rights advocacy on intellectual property'.² Trimble notably contends that '[t]he Marrakesh Treaty is a different

* Professor of Law at Maynooth University Department of Law.

** Research Assistant at Maynooth University Department of Law.

This article has been written within the remit of the project *ReCreating Europe* – funded by the Horizon 2020 Framework Programme of the European Union for Research Innovation. Grant Agreement No. 870626. It has been completed as of 29 November 2021, and takes into account the legal developments that occurred up to that date. The authors are grateful to Péter Mezei, Giulia Priora, Caterina Sganga for their feedback and suggestions on earlier drafts of this article. The usual disclaimer applies.

¹ See Koklu, K. (2014). The Marrakesh treaty – time to end the book famine for visually impaired persons worldwide. *IIC - International Review of Intellectual Property and Competition Law*, 45(7), 737-739, available at: <<https://doi.org/10.1007/s40319-014-0266-z>> accessed 17 November 2021. This is also reported by Vleugels, C. (2021) The Marrakesh Treaty. *Journal of Disability Policy Studies*, 32(2), 76-82.

² Land, M K. (2018). The Marrakesh Treaty as 'Bottom Up' Lawmaking: Supporting Local Human Rights Action on IP Policies. *UC Irvine Law Review*, 8(3), 515. For a more recent discussion on the likely influence of the Marrakesh Treaty see Senftleben, M. (2021). A Copyright Limitations Treaty Based on the Marrakesh Model: Nightmare or Dream Come True? In

species of international IP treaty ‘because it opposes further strengthening of copyright protection and promotes greater emphasis on users’ interests’.³ In a similar vein, several scholars argue that the Marrakesh Treaty aligns with human rights norms by securing access, while concurrently achieving the goals of protection of creative outputs.⁴

The ratification of the Marrakesh Treaty was campaigned by several organisations of persons with disabilities. Noteworthy is the plea of the singer Stevie Wonder that urged ‘all governments and states to prioritize ratification of this treaty’.⁵ The Committee on the Rights of Persons with Disabilities (CRPD Committee), the treaty body set up by the UN Convention on the Rights of Persons with Disabilities (CRPD), also recommended State Parties to this Convention to ratify, as soon as possible, the Marrakesh Treaty.⁶ In that regard, the Marrakesh Treaty is somewhat viewed by the CRPD Committee as complementary to the CRPD in guaranteeing the accessibility of published works to persons with disabilities, and supporting the realization of the right to participate in cultural life affirmed by Article 30 CRPD.⁷ As yet, the Marrakesh Treaty has reached 84 ratifications globally. As it will be further discussed in this article, the European Union (EU) concluded the Marrakesh Treaty on 1 October 2018 on behalf of itself and its Member States,⁸ following the widely commented *Opinion 3/15* of the Court of Justice of the European Union (CJEU),⁹ and implemented it by means of a Directive (2017/1564/EU, Marrakesh Directive),¹⁰ and a Regulation (2017/1563/EU, Marrakesh Regulation).¹¹

S. Balganes, N. Wee Loon, & H. Sun (Eds.), *The Cambridge Handbook of Copyright Limitations and Exceptions*. (Cambridge Law Handbooks, pp. 74-90). Cambridge: Cambridge University Press.

³ Trimble, M. (2014), The Marrakesh Puzzle, *IIC - International Review of Intellectual Property and Competition Law*, 45(7), 768-795.

⁴ Helfer, L R., Land, M K., Okediji, R L. and Reichman, J H. (2017). *The world blind union guide to the Marrakesh treaty—Facilitating access to books for print-disabled individuals*. New York: Oxford University Press. See also Ncube, C. B., Reid B.E., and Oriakhogba. D. O., (2020) Beyond the Marrakesh VIP Treaty: Typology of Copyright access-enabling Provisions for Persons with Disabilities, *The Journal of World Intellectual Property*, 23(3-4), 149-165.

⁵ Vleugels, C., cit. *supra* note 1.

⁶ See Leahy, A. and Ferri, D., (forthcoming 2022) The Right to participate in Cultural Life of Persons with Disabilities in Europe: Where is the Paradigm Shift?, *ALTER*.

⁷ Bantekas, I. et al. (2018). Participation in Cultural Life, Recreation, Leisure, and Sport. In Bantekas, I., Stein, M.A. & Anastasiou, D., (Eds.), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*. Oxford: OUP.

⁸ Council Decision (EU) 2018/254 of 15 February 2018 on the conclusion on behalf of the European Union of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled OJ L 48, 21.2.2018, 1–2.

⁹ Opinion 3/15/CJEU. *Opinion 3/15 of the Court pursuant to Article 218(11) TFEU*. Grand Chamber of the Court of Justice of the European Union. EU:C:2017:114; Kübek, G. (2018). Redefining the boundaries of the common commercial policy and the ERTA doctrine: Opinion 3/15, Marrakesh Treaty. *Common Market Law Review*, 55(3), 883-899. See also Acquah, D. (2017), CJEU Invokes ERTA Principle to Assert EU Competence to Ratify Marrakesh Treaty, *Journal of Intellectual Property Law & Practice*, 12(7), 548-550.

¹⁰ Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 242, 20.9.2017, p. 6–13.

¹¹ Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled OJ L 242, 20.9.2017, p. 1–5.

The debate surrounding the Marrakesh Treaty has been quite lively among copyright scholars¹² and disability law scholars.¹³ In 2017, the World Blind Union (WBU) supported the publication by Oxford University Press of a ‘Guide to the Marrakesh Treaty’ aimed at providing guidance to Contracting Parties in deciding how to incorporate the Treaty into their domestic systems.¹⁴ Academic scholarship has also discussed the implementation of the Marrakesh exception in selected jurisdictions from multiple perspectives.¹⁵ A compilation of implementing legislation globally has been released in November 2020 by the Association of Research Libraries (ARL).¹⁶ However, as yet limited attention has been paid to the implementation of the Marrakesh Treaty in the EU,¹⁷ and to the transposition of the Marrakesh Directive across EU Member States.¹⁸ This article tackles this gap of knowledge, by examining the implementation of the Marrakesh Directive across six Member States – namely Germany, Hungary, Italy, Ireland, the Netherlands, and Sweden. The jurisdictions selected maintain a balance between larger and smaller EU Member States, and between Nordic, Continental and Mediterranean countries.

On the whole, this article highlights convergences and divergences in the implementation of the Marrakesh Directive. Taking into account that the EU is a party to the CRPD,¹⁹ and given that the Marrakesh Treaty and the Directive explicitly link IP and human rights and explicitly refer to the CRPD as key source on the rights of persons with disabilities, this article also reflects on the extent to which the implementation of the Marrakesh Directive links to broader national disability policies and the implementation of the CRPD. In particular, it looks at the involvement of persons with disabilities in the implementation of the Marrakesh Directive. In fact, one of the seminal features of the CRPD is the emphasis on the participation of people with disabilities in the elaboration of disability law and policy.²⁰ Article 4(3) CRPD

¹² *Inter alia* Sganga, C. (2015). Disability, Right to Culture and Copyright: Which Regulatory Option? *International Review of Law, Computers & Technology*, 29(2), 88-115; Koklu, K. (2014). The Marrakesh Treaty – time to end the book famine for visually impaired persons worldwide. *IIC - International Review of Intellectual Property and Competition Law*, 45(7), 737-739; Vezzoso, S. (2014). The Marrakesh spirit – A ghost in three steps? *IIC - International Review of Intellectual Property and Competition Law*, 45(7), 796-820; Ayoubi, L. (2015). The Marrakesh Treaty: Fixing international copyright law for the benefit of the visually impaired persons. *New Zealand Journal of Public and International Law*, 13(2), 255-276; Helfer et al, cit. *supra* note 4; Vleugels, C., cit. *supra* note 1.

¹³ *Inter alia* Vleugels, C., cit. *supra* note 1.

¹⁴ Helfer et al, cit. *supra* note 4.

¹⁵ Among others, Giannoumis, A. G., and Wondwossen B. M. (2020). Cultural Inclusion and Access to Technology: Bottom-Up Perspectives on Copyright Law and Policy in Norway, *Springer International Publishing 12189*, 341-355; Banasiuk, J. (2019). Poland transposes EU directive 2017/1564 on certain permitted uses of works for the benefit of persons who are blind, visually impaired or otherwise print disabled. *Journal of Intellectual Property Law & Practice*, 14(3), 178-180; Olwan, R. (2017) The ratification and implementation of the Marrakesh Treaty for visually impaired persons in the Arab Gulf States, *Journal of World Intellectual Property* 20(5-6), 178– 205; Li, J., and Selvadurai, N. (2019), Amending Chinese Copyright Law to Fulfil Obligations under the Marrakesh Treaty to Facilitate Access to Published Works for the Print Disabled. *The China Quarterly*, 240, 1066-1086.

¹⁶ Band, J. and Cox, K. (2020, November 3), *National Implementations of the Marrakesh Treaty By Countries That Have Ratified or Acceded to the Treaty*, Association of Research Libraries, available at: <<https://www.arl.org/wp-content/uploads/2020/11/2020.11.03-MarrakeshTreaty.pdf>> accessed 17 November 2021.

¹⁷ Sganga, C. (2020). Disability in EU Copyright Law. In Ferri, D. and Broderick, A. (Eds.). *Research Handbook on EU Disability Law* (pp. 201-220) Cambridge: Cambridge University Press.

¹⁸ Ramirez-Montes, C. (2016). *The Marrakesh Treaty*, Brussels: European Parliament, available at <[https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571387/IPOL_STU\(2016\)571387_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571387/IPOL_STU(2016)571387_EN.pdf)> accessed 20 November 2021.

¹⁹ Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ L 23/35.

²⁰ Lindqvist, B. (2015) ‘Background: Monitoring—A Key Element in Realizing Human Rights for All’, in Rioux, Pinto and Parekh (eds.), *Disability, Rights Monitoring, and Social Change*, *Disability, Rights Monitoring, and Social Change* Toronto: Canadian Scholars’ Press, p. 21.

requires close consultation with, and active involvement of, disabled people, through their representative organisations, in the development and implementation of legislation and policies and in all decision-making processes concerning issues relating to persons with disabilities.

After this introduction, this article discusses the core tenets of the Marrakesh Treaty, and then proceeds to outline scope of the disability copyright exception in EU law, with a focus on the Marrakesh Directive. The subsequent sections examine and critically discuss the transposition of the Directive in the sample jurisdictions. The final section reflects on the scope of the access to copyrighted works guaranteed to persons with disabilities across the States considered and on future developments.

The Core Tenets of the Marrakesh Treaty

As mentioned above in the introduction, the Marrakesh Treaty obliges Contracting Parties to set out exceptions to copyright rules in order to permit reproduction, distribution and making available of published works in accessible formats. In this respect, the Marrakesh Treaty is unique in that no WIPO treaty before had been based entirely on exceptions and limitations. As noted by Helfer *et al.* in this journal, ‘the Treaty demonstrates that mandatory exceptions to copyright can reasonably coexist with robust copyright protection’.²¹

The content of the Marrakesh Treaty was deeply influenced by the CRPD,²² which is mentioned in the first recital of the Preamble. Notably, the CRPD is said to have ‘precipitated a dramatic sea change in the relative human rights empowerment of persons with disabilities by recognizing their equal dignity, autonomy, and worth, and by ensuring their equal enjoyment of all human rights and fundamental freedoms’.²³ It is a comprehensive human rights treaty as it encompasses civil, political as well as economic, social and cultural rights. In particular, Article 30 CRPD requires States Parties *inter alia* to take steps ‘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’. As mentioned above, Article 4(3) CRPD requires State Parties to effectively include and adhere to the voice of persons with disabilities in legislative development and policy design – this applies to domestic legislation implementing the Marrakesh Treaty and, in the EU, the Marrakesh Directive. The Special Rapporteur on the Rights of Persons with Disabilities recognises persons with disabilities ‘as the main interlocutors when it comes to the treaty’s implementation and States should always give priority to their opinions in matters affecting them’.²⁴ Thus, ‘[i]n their pursuit of genuine participation by persons with disabilities in decision-making processes, States need to ensure that the will and preferences of persons with disabilities themselves are given priority’.²⁵

²¹ Helfer et al. cit. *supra* note 4.

²² Saez, C., *Between Human Rights and IP: An Interview with Laurence Helfer, Co-Author of Guide to Marrakesh Treaty Implementation* (2017, August 31), Intellectual Property Watch, available at: <<https://www.ip-watch.org/2017/08/31/human-rights-ip-interview-laurence-helfer-co-author-guide-marrakesh-treaty-implementation/>> accessed 17 November 2021.

²³ Skarstad K. & Stein M.A. (2018). Mainstreaming disability in the United Nations treaty bodies, *Journal of Human Rights*, 17(1), 1-24.

²⁴ UN Human Rights Council (12 January 2016), *Report of the Special Rapporteur on the Rights of Persons with Disabilities*, A/HRC/31/62, para. 34, available at: <https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/31/62> accessed 18 November 2021. The Special Rapporteur also highlights the importance of States acknowledging the distinction between organisations for persons with disabilities, and those of persons with disabilities in the participation process, stating that the former may not necessarily always advocate for the ‘human rights-based or the preferred options of persons with disabilities.’ This point has been further elaborated by the CRPD Committee in its General Comment N. 7 on Article 4(3) (CRPD/C/GC/7, 9 November 2018).

²⁵ *Ibid.*

Interestingly, while the Marrakesh Treaty is primarily targeted at facilitating access to printed materials for blind persons or persons with visual impairments, it adopts a broader material and personal scope. In fact, the material scope of the Marrakesh Treaty covers all ‘literary and artistic works within the meaning of Article 2(1) of the Berne Convention for the Protection of Literary and Artistic Works, in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media’²⁶. Article 2 of the Marrakesh Treaty also defines an accessible format copy as ‘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’. When it comes to beneficiaries, Article 3 includes among the beneficiaries blind, visually impaired people but also all other persons with a perceptual or reading disability and those who are ‘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; that cannot access effectively printed material’. As noted by Helfer *et al.* ‘[i]ndividuals who experience temporary blindness or visual impairment, perceptual or reading disability, or a physical disability that interferes with reading, are entitled to benefit from the [Marrakesh Treaty] for as long as that condition persists’.²⁷ While the personal scope of the Marrakesh Treaty is undoubtedly broad, and while noting its human rights approach to copyright, its scope is narrower than the scope of the CRPD which applies to all persons with disabilities as including ‘those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’.²⁸ It is however noteworthy that the categories of print-disabled individuals covered by the Marrakesh Treaty represent only a minimum standard, and Contracting Parties can extend the exceptions and limitations beyond the scope of Article 3, and could potentially adopt the CRPD conceptualization of disability.

The Marrakesh Treaty requires Contracting Parties to ‘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’(Article 4(1)(a)). This limitation or exception ‘should permit changes needed to make the work accessible in the alternative format’. This entails that the ‘beneficiary persons’, a ‘primary caretaker or caregiver’ of such a person, anyone acting on behalf of a beneficiary person, as well as authorized entities or entities recognized by the government ‘to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis’(Article 2(c)) must be permitted, without the authorization of the copyright right-holder, ‘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

²⁶ Art. 2, World Intellectual Property Organisation Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (Marrakesh Treaty), July 31, 2013, available at: <<https://wipolex.wipo.int/en/text/301016>> accessed 29 November 2021.

²⁷ Helfer et al, cit. *supra* note 4.

²⁸ Art. 1, United Nations Convention on the Rights of Persons with Disabilities (CRPD), January 24, 2007, available at: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en#EndDec> accessed 18 November 2021.

wireless means, and undertake any intermediate steps to achieve those objectives’(Article 4(2)(a)), on a non-profit basis. Furthermore, Contracting Parties ‘may also provide a limitation or exception to the right of public performance to facilitate access to works’ for persons with disabilities’ (Article 4(1)(b)). As noted by Helfer *et al.*, this exception would ‘permit public recital of literary works for the benefit of the print disabled’.²⁹ Furthermore, the Marrakesh Treaty obliges State Parties to allow the import and export of accessible format copies under certain conditions (Article 5).

The Marrakesh Treaty incorporates the three-step test (Article 11), which requires that national provisions that implement Article 4(1) are limited to ‘special cases’, do not conflict with a normal exploitation of the work, and ‘do not unreasonably prejudice the legitimate interests of the rights holder’. It also leaves some room for manoeuvre to Contracting Parties allowing them to take into account their own legal systems and practices, under Article 10(2), including determinations on ‘fair practices, dealings or uses’, provided they comply with their three-step test obligations under other relevant international treaties.

On the whole, the Marrakesh Treaty is ‘a watershed development in human rights and intellectual property law’, and requires that intellectual property and human rights constituencies ‘engage with one another’.³⁰

The Implementation of the Marrakesh Treaty and the ‘Disability Exception’ in EU Copyright Law

The Conclusion of the Marrakesh Treaty by the EU

As noted in the introduction, the Marrakesh Treaty was concluded by the EU in 2018, following *Opinion 3/15* of the CJEU.³¹ The initial Commission proposal for the conclusion of the agreement, based on Article 207 TFEU, was rejected by some Member States, which claimed that the competence to ratify the Marrakesh Treaty was shared, giving rise to a mixed agreement. The Italian and German resistance to the EU’s exclusive conclusion of the Marrakesh Treaty stemmed from pressure from right-holders groups who did not want to see the weakening of their rights.³² The background socio-political context of Euro-scepticism, the looming Brexit, and the fact that the UK legal system already had in place a copyright regime more favourable to end-users underpinned the UK’s resistance.³³ The CJEU however confirmed that the EU had exclusive competence to conclude the Marrakesh Treaty.³⁴

²⁹ Helfer *et al.*, *cit. supra* note 4, 43.

³⁰ Land, *cit. supra* note 2, 553.

³¹ *Cit. supra* note 9.

³² See From Marrakesh to Brussels: The Long Arm of the EU Copyright Lobby. (2017, March 21). *Corporate Europe Observatory*. Available at <<https://corporateeurope.org/en/power-lobbies/2017/03/marrakesh-brussels-long-arm-eu-copyright-lobby>> accessed 29 November 2021.

³³ Oppenheim, C., (2017) The Marrakesh Copyright Treaty for those with visual disabilities and its implications in the European Union and in the United Kingdom, *Alexandria: The Journal of National and International Library and Information Issues* 27(1), 7.

³⁴ Kübek, *cit. supra* note 9, 887.

The Marrakesh Treaty was implemented by the EU legislator by means of a Directive³⁵ as well as a Regulation.³⁶ Cumulatively, the two instruments amended the existing framework, ensuring its compliance with the EU's international obligations arising from the Marrakesh Treaty. The Regulation provides for a copyright exception allowing for the cross-border exchange of accessible format copies of certain works that are ordinarily protected by copyright between EU Member States and Non-EU Member States who are party to the Marrakesh Treaty. Being directly applicable, the Regulation took immediate effect in all Member States, without requiring domestic implementing legislation. The Directive introduced a mandatory exception to the harmonised rights of creators and authors,³⁷ empowering beneficiaries and authorised entities to undertake the necessary steps to transform a work into an accessible format for their own benefit.³⁸ This exception and its scope will be further discussed in the subsection below.

The 'Disability Exception' in current EU Copyright Law

The current EU copyright law landscape is complex and quite fragmented, but the 2001 InfoSoc Directive³⁹ still remains at the heart of copyright protection. The InfoSoc Directive was adopted over twenty years ago as a means of compliance with the EU's international obligations under the WIPO and WTO treaties, with the view of modernising and harmonising Member State responses to the 'digital revolution'⁴⁰ by strengthening the protection of right-holders' interests. This Directive has been amended in the last few years by means of the Marrakesh Directive and of the recent Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (DSM Directive).⁴¹

The original text of the InfoSoc Directive included in Article 5(3) an optional copyright exception for persons with disabilities.⁴² That provision, as noted by Sganga, failed to redress the right-holder/end-user rights imbalance and represented a missed opportunity to equally harmonise Member States' approaches to copyright exceptions.⁴³ In fact, it fostered a fragmented legislative response by Member States as 'the content of the disability exception

³⁵ Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 242, 20.9.2017, p. 6–13 (Marrakesh Directive).

³⁶ Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled OJ L 242, 20.9.2017, p. 1–5 (Marrakesh Regulation).

³⁷ Marrakesh Directive, Art. 3(1); Art. 3(3) outlines the three-step test against which the legitimacy of exceptions are to be measured: '*The exception provided for in paragraph 1 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.*'

³⁸ Marrakesh Directive, Art. 3.

³⁹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive) OJ L 167, 22.6.2001, p. 10–19.

⁴⁰ Sganga, cit. *supra* note 17, 203.

⁴¹ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC OJ L 130, 17.5.2019, p. 92–125.

⁴² Art. 5 on Exceptions and limitations states in para. (3) '*Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases... (b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability.*'

⁴³ Sganga, cit. *supra* note 17, 204. She describes how the Directive merely offered a list of copyright exceptions to be implemented at the discretion of Member States, 'thus declining to harmonise across the Union, in clear opposition to the pervasive harmonisation of exclusive rights.'

across the EU became everything but consistent and streamlined'.⁴⁴ The detrimental effects on the rights of persons with disabilities of these optional exceptions were exacerbated by the fact that exchange of accessible works in the EU was marred by high costs and low efficiency, resulting in a reduced 'range and variety of accessible works for disabled EU citizens'.⁴⁵ In spite of those drawbacks, the InfoSoc Directive manifested the EU's recognition of the intersection between copyright law and the right of persons with disabilities to access culture, which was solidified by the EU's subsequent ratification of the CRPD in 2010⁴⁶ and further consolidated by the ratification of the Marrakesh Treaty.⁴⁷ The amended version of Article 5(3)(b) of the consolidated text of the InfoSoc Directive introduced a direct reference to the Marrakesh Directive. It still affirms that Member States 'may provide' for exceptions or limitations to the rights of reproduction and communication to the public for the 'uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability', but notably 'without prejudice to the obligations of Member States under Directive (EU) 2017/1564' [Marrakesh Directive], which instead introduced a mandatory exception.

The Marrakesh Directive substantially provides for a mandatory disability exception 'to all of the exclusive rights harmonised by EU directives in the field of copyright'.⁴⁸ Its material and personal scope fully comply with those of the Marrakesh Treaty. The Directive, however, somewhat narrows the discretion afforded by the Marrakesh Treaty to its Contracting Parties, obliging Member States to directly transpose the definitions of covered works, accessible format copies, beneficiary persons, and authorised entities into their domestic laws.⁴⁹ A list of authorised entities, i.e. entities that are authorised or recognised by a Member State to provide education, instructional training, adaptive reading, information access and services to beneficiary persons and can provide and distribute accessible copies, has been published on the Commission website.⁵⁰ Furthermore, it does not allow Member States to impose additional requirements for the application of the exception, such as the prior verification of the commercial availability of works in accessible formats. Significantly, the provision of the InfoSoc Directive concerning the non-obstruction of the enjoyment of copyright exceptions by Technical Protection Measures (TPMs) applies *mutatis mutandis* in the context of the Marrakesh Directive.⁵¹ This means that right-holders cannot invoke TPMs to prevent beneficiary persons from enjoying their rights provided for in the Directive.⁵² However, authorised copies must respect the integrity of the original work as far as possible.⁵³

Notably, Article 3(6) of the Marrakesh Directive enables Member States to provide that uses permitted under the Directive, if undertaken by authorised entities established in their

⁴⁴ Ibid.

⁴⁵ Ibid, 205.

⁴⁶ See *supra* note 19.

⁴⁷ Council Decision (EU) 2018/254 of 15 February 2018 on the conclusion on behalf of the European Union of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled OJ L 48, 21.2.2018, p. 1–2.

⁴⁸ Sganga, cit. *supra* note 17, 214.

⁴⁹ Helfer et al, cite *supra* note 4, 336.

⁵⁰ Implementation of the Marrakesh Treaty in EU Law. (2021, 4 August) *European Commission: Shaping Europe's Digital Future*. Available at: <<https://digital-strategy.ec.europa.eu/en/policies/marrakesh-treaty>> accessed 18 November 2021.

⁵¹ Art. 3(4) Marrakesh Directive, with reference to the first, third and fifth sub-paragraphs of Art. 6(4) InfoSoc Directive.

⁵² Oppenheim, cit. *supra* note 31, 6.

⁵³ Art. 3(2) Marrakesh Directive.

territory, be subject to compensation schemes. The Commission's original proposal had firmly ruled out this 'loophole', but the EU legislator (in particular the Council) sought to reintroduce it to accommodate requests of certain Member States that already included compensation mechanisms in their own legislation. While the Marrakesh Treaty leaves to national law to determine whether limitations or exceptions can be subject to remuneration (Article 4(5)), compensation schemes are likely to negatively affect the availability of accessible copies. Both the European Bureau of Library Information and Documentation Associations (EBLIDA) and IFLA underlined that:

'the decision to allow governments the option to implement 'compensation' schemes that impose additional costs on libraries and charities is a major mistake. [...]Such schemes will reduce the ability of libraries and charities to serve print disabled people, despite the conditions in place. In addition to the costs of creating and storing a variety of accessible format publications so that visually impaired people can for the first time read all publications, such schemes will now force libraries and charities to make additional payments to publishers'.⁵⁴

In line with the Marrakesh Treaty, the Directive recognises the important role of both governmental and non-governmental organisations in securing accessible alternative formats for beneficiaries, through 'authorised entities', for the benefit of the exclusive use of the beneficiary person or another authorised entity.⁵⁵ Finally, it is worth noting that Article 4 enshrines the principle of free circulation of 'accessible format copies in the internal market' to facilitate cross-border exchange of accessible works within the EU.

The Directive provides that, by 11 October 2020, the Commission should have presented a report to the European Parliament, the Council and the European Economic and Social Committee on the availability, in accessible formats, of works which are not covered by the Directive.⁵⁶ However, at the time of writing this article, the report has not been released. The Commission also plans to carry out an evaluation of the Directive by 2023. This evaluation will be extremely important to understand the extent to which the Directive has been efficiently transposed by the Member States and has ensured the availability of accessible copies to persons with disabilities. This comprehensive review will also assess the impact of compensation schemes on commercial availability of works at the national level and the cross-border exchange of accessible format copies. Member States who consider that the implementation of the Directive has had a 'significant negative impact on the commercial availability of works... may bring the matter to the attention of the Commission providing all relevant evidence'⁵⁷. However, it seems unlikely that major restrictions to the exception or further flexibilities for the Member States will be introduced.

⁵⁴ IFLA and EBLIDA (2017, May 15), *EU Compromise on Marrakesh Treaty Directive Comes with a Sting in The Tail*. Available at: https://www.ifla.org/wp-content/uploads/2019/05/assets/clm/statements/ifla-ebilda_statement_on_marrakesh.pdf accessed 18 November 2021.

⁵⁵ Art. 3(1)(b), Marrakesh Directive.

⁵⁶ Art. 9, Marrakesh Directive.

⁵⁷ Art. 10(3), Marrakesh Directive.

The Implementation of the EU Directive Implementing the Marrakesh Treaty in Six Member States

Before conducting a comparative analysis, this section will briefly outline how the disability exception has been transposed in all countries under consideration.

Germany

Germany (alongside Italy) was among the States against which the Commission initiated infringement proceedings for failure to implement the Marrakesh Directive within the designated timeframe.⁵⁸ However, new provisions were finally introduced at the end of 2018.⁵⁹ Namely, Germany amended its existing copyright framework to allow for an exception to the exclusive right of reproduction, communication and making available to the public of published works, for the benefit of persons with disabilities.⁶⁰ Beneficiaries of this exception are broadly defined as those ‘persons who are unable, as a result of a physical or mental impairment or of a perceptual disability, to read literary works, even with the assistance of a visual aid, to substantially the same degree as persons without such an impairment or disability’.⁶¹ The type of works subject to the exception are not defined in the legislation.⁶² Authorised entities are defined in line with the Directive as ‘any establishment providing education or accessible reading or information access on a non-profit basis to people with a visual impairment or reading disability’.⁶³ Notably, Germany requires authorised entities to register with the Trademark and Patent Office in order to be placed on an approved list. It also requires for equitable remuneration to be paid to the author for reproduction and distribution of accessible works, although the reproduction solely of individual copies is exempted from this requirement. In that regard, the German legislation implements the discretionary compensation scheme provided for under Article 3(6) of the Marrakesh Directive.⁶⁴

It is unclear the extent to which organisations of persons with disabilities have been involved in the legislative process, as per CRPD Article 4(3). In 2018 a submission by an alliance of disability representative organisations for an updated review of Germany’s CRPD implementation⁶⁵ highlighted, in respect of the then-pending legislation to implement the Marrakesh Directive, the lack of ‘concrete measures foreseen for future tangible improvement to actively support the availability of barrier-free accessible works for blind, sight impaired

⁵⁸ See Marrakesh Directive, Art. 11. See also Pavis, M. (2018, November 28), *Marrakesh Treaty is no paper tiger: EU Commission sues 17 countries for non-compliance*, TheIPKat, available at: <<https://ipkitten.blogspot.com/2018/11/marrakesh-treaty-is-no-paper-tiger-eu.html>> accessed 18 November 2021.

⁵⁹ Law implementing the Marrakesh Directive on improved access to copyrighted works for the benefit of people with a visual or print impairment Official publication: *Bundesgesetzblatt Teil 1 (BGB 1)* ; Number: 40 ; Publication date: 2018-12-04, available at: <<https://wipolex.wipo.int/en/text/474263>> accessed 15 September 2021; Ordinance on authorized bodies under the Copyright Act (UrhGBefStV) Official publication: *Bundesgesetzblatt Teil 1 (BGB 1)* ; Number: 45; Publication date: 2018-12-14 p.02423-02423.

⁶⁰ Section 45a, 45b Act on Copyright and Related Rights (Copyright Act of 9 September 1965 as last amended by Article 1 of the Act of the 28 November 2018).

⁶¹ See Section 45b(2) of the Act on Copyright and Related Rights.

⁶² Reid, B. E. and Ncube, C. B. (2019), *Revised Scoping Study on Access to Copyright Protected Works by Persons with Disabilities*, WIPO SCCR/38/3, 11, available at: <https://www.wipo.int/edocs/mdocs/copyright/en/sccr_38/sccr_38_3.pdf> accessed 18 November 2021.

⁶³ Section 45c(3) of the Act on Copyright and Related Rights.

⁶⁴ See Section 45a(2) of the Act on Copyright and Related Rights.

⁶⁵ German Disability Council, Federal Association of Non-Statutory Welfare, Professional Associations for People with Disabilities and German League of Disabled Person’s Organisations (2018) *Update for the 2nd Federal review of Germany for the UN committee for the UN Convention on the Rights of Persons with Disabilities*, available at: <<https://t.co/BSG9YBzo3a?amp=1>> accessed 21 September 2021.

and otherwise reading impaired persons (e.g. through financial support for libraries for the blind and other authorised agencies).⁶⁶ The fact that in the end Germany opted for a compensation scheme is telling, as civil society specifically advocated against this particular approach.⁶⁷

Hungary

Hungary amended its existing copyright framework, inserting a number of provisions to align the existing framework with the Marrakesh Directive.⁶⁸ The legislation identifies beneficiaries simply as ‘persons with reading disabilities’.⁶⁹ The legislation also enunciates the role of authorised entities, in line with Article 3(1)(b) of the Directive, however fails to provide any definition for such entities, beyond their being established in Hungary.⁷⁰ Nor are the type of works covered by the exception specified, although arguably the scope of this exception is dictated by the definition included in the Directive. The lawful invocation of this exception is conditioned upon the modification being directly related to the disability, proportionate, not for profit and lawfully disclosed to the right-holder.⁷¹ Hungary did not implement a compensation scheme.

Even in the case of Hungary the extent to which the transposition and implementation of the Marrakesh Directive involved organisations of persons with disabilities is unclear. In general, as noted in the report to the CRPD Committee, civil society and organisations representative of persons with disabilities are said to be involved in the implementation of the CRPD and in disability policies through the National Council on Disability (NCD), a ‘forum of political and professional dialogues between the Government and disability interest protection organs’ comprised of 27 members, of which 14 belong to civil society.⁷² When it comes to accessibility, the ‘involvement of interest protection organs’ such as the Hungarian Federation of the Blind and the Partially Sighted, in the development of legislation is considered ‘best practice’.⁷³ Indeed, the latter organisation also ‘participates in the textbook provision to partially sighted students/pupils on the basis of statutory provisions’.⁷⁴ However, a 2017 submission by an alliance of disability representative organisations in preparation of Hungary’s second report to CRPD Committee highlighted that ‘unreasonably short deadlines

⁶⁶ Ibid, 17.

⁶⁷ See IFLA (2018), *Towards Ratification of the Marrakesh Treaty in the European Union*, 1, available at: <https://www.ifla.org/wp-content/uploads/2019/05/assets/clm/update_marrakesh_eu_june_2018.pdf>; see also European Blind Union (2021), *Campaigns and Activities. The Marrakesh Treaty*, available at:

<<http://www.euroblind.org/campaigns-and-activities/current-campaigns/marrakesh-treaty>> both accessed 18 November 2021.

⁶⁸ Act LVI of 2018 has amended Act LXXVI of 1999 on Copyright Law to introduce Sections 41(1a) to 41(1g). Official publication: *Magyar Közlöny, Issue 155/2018*; Publication date: 2018-10-08 p. 30440-30442.

⁶⁹ Ibid, Section 41(1a). In its 2011 Report to the CRPD Committee, Hungary provided a definition of disability which it stated builds upon Act XXVI of 1998 on the rights and equal opportunities of persons with disabilities, as follows: ‘persons living with disabilities are the individuals who are to a significant extent or entirely not in possession of sensory — particularly sight, hearing — locomotive or intellectual functions, or who are substantially restricted in terms of communication and are thereby placed at a permanent disadvantage regarding active participation in the life of society.’ See UN Committee on the Rights of Persons with Disabilities (2011, June 28) *Initial Reports Submitted by State Parties under Article 35 of the Convention. Hungary*, CRPD/C/HUN/1, para. 4.

⁷⁰ Ibid, Section 41(1a), (1b) and (1c).

⁷¹ Reid and Ncube, cit. *supra* note 61, 57.

⁷² Hungary, cit. *supra* note 68, para. 24.

⁷³ Ibid, para. 26.

⁷⁴ Ibid.

often make consultations tokenistic⁷⁵, echoing fears previously expressed by the European Network on Independent Living.⁷⁶

Ireland

Ireland transposed the Marrakesh Directive by means of the European Union (Marrakesh Treaty Regulations) 2018, at the end of the implementation period indicated by the Directive⁷⁷, following a public consultation,⁷⁸ by modifying its existing copyright legislation.⁷⁹ The Regulations make it clear that any word or expression used have the same meaning as that in the Directive. The Guidance Note on the legislation, in line with the Marrakesh Treaty and the text of the Directive, refers to ‘persons who are blind, persons who have a visual impairment which cannot be improved so as to give them visual function substantially equivalent to that of a person who has no such impairment, persons who have a perceptual or reading disability, including dyslexia or any other learning disability preventing them from reading printed works and persons who are unable, due to a 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, insofar as, as a result of such impairments or disabilities, those persons are unable to read printed works to substantially the same degree as persons without such impairments or disabilities’.⁸⁰ Ireland did not opt to implement a compensation scheme.

The consultation carried out by Ireland can be heralded as a wide participatory process, although it is not clear the extent to which organisations of persons with disabilities participated in that process.⁸¹ The Electronic Information for Libraries (EIFL) has however highlighted that the transposition of the Marrakesh Directive will help to implement the CRPD by removing the copyright barriers to accessible information and culture.⁸² The EIFL also welcomed the

⁷⁵ Hand in Hand Foundation, Hungarian Autistic Society, Hungarian Civil Liberties Union, Hungarian Federation of the Blind and Partially Sighted, Mental Disability Advocacy Centre, Mental Health Interest Forum, National Association of the Deaf and Hard of Hearing, National Council of Disabled Persons’ Organisations, National Federation of Disabled Persons’ Associations (2017), *Joint DPO and CSO submission to the Committee on the Rights of Persons with Disabilities for consideration when compiling the List of Issues Prior to Reporting for the Second Periodic Report of HUNGARY*, 4, available at: <<http://www.feszt.eu/projektjeink/nemzetkozi-egvezmenyek-monitorozasa/dokumentumtar/>> accessed 21 September 2021.

⁷⁶ According to the European Network on Independent Living (ENIL), Article 4(3) requires that State Parties can show ‘specific, measurable examples of how exactly disabled people have been involved in the creation of policy and services’ through processes that aren’t merely ‘tokenistic’. See Miro Griffiths (2014), *FACT SHEET: Implementing Article 4(3) of the UN Convention on the Rights of Persons with Disabilities*, European Network on Independent Living, 4, available at: <http://enil.eu/wp-content/uploads/2016/06/Fact-Sheet_Article4_FINAL.pdf> accessed 18 November 2021.

⁷⁷ Law Reform Commission (2020), *Discussion Paper 124-2020. Domestic Implementation of International Obligations*, 121, available at: <<https://www.lawreform.ie/fileupload/Reports/LRC%20124%202020%20-%20Domestic%20Implementation%20of%20International%20Obligations.pdf>> accessed 18 November 2021.

⁷⁸ Department of Business, Enterprise and Innovation (2017), *Consultation on the transposition of Directive (EU) 2017/1564 on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (Marrakesh Treaty)*, available at: <<https://enterprise.gov.ie/en/Consultations/Consultations-files/Public-Consultation-on-Directive-EU-2017-1564-implementing-the-Marrakesh-Treaty.pdf>> accessed 18 November 2021.

⁷⁹ *Statutory Instrument No. 412 of 2018 – European Union (Marrakesh Treaty) Regulations 2018* Official publication: *Iris Oifigiúil*; Number: 82; Publication date: 2018-10-12. This modified Section 104 Copyright and Related Rights Act, 2000 and created Sections 104A and 104B of the Copyright and Other Intellectual Property Law Provisions Act, 2019.

⁸⁰ Department of Business, Enterprise and Innovation (2018), Guidance Notes on the European Union (Marrakesh Treaty) Regulations 2018. S.I. No. 412 of 2018, 3, available at <<https://enterprise.gov.ie/en/Publications/Publication-files/Standard-Print-Guidance-Notes-Marrakesh-Treaty-2018.pdf>> accessed 18 November 2021.

⁸¹ The results of the consultation are not available.

⁸² EIFL (2018), *Re: Public consultation on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled Directive (EU)*

government's intention not to transpose the optional provision on compensation schemes. Notably, the Initial Report of Ireland to the CRPD Committee published on 8 November 2021 cites the EU Marrakesh Regulations as part of its commitments to implement Article 30 CRPD.⁸³

Italy

In order to implement the Marrakesh Directive, Italy introduced legislation⁸⁴ to amend its existing copyright framework.⁸⁵ Article 71-bis para. 1 of the Copyright Law states that the reproduction of works or protected subject matter or the use of their communication to the public are permitted to persons with disability, for personal use, provided these permitted acts are directly related to the disability, are of a non-commercial nature and are limited to the extent required by the specific disability. It leaves to a decree adopted by the Minister of Culture to identify the categories of disabilities referred to.⁸⁶ The reproduction, distribution and communication to the public of works in accessible format by beneficiary persons and authorized entities is allowed without limitation for those beneficiaries as indicated in the Marrakesh Directive.⁸⁷ Italy did not opt to implement a compensation scheme.

While Italy has a consultative body set up to monitor the implementation of the CRPD - the National Observatory on the Status of Persons with Disabilities -⁸⁸ the extent to which the Observatory was in fact involved in the transposition of the Directive is not evident.

The Netherlands

The implementation of the Marrakesh Directive in the Netherlands was pursued by inserting provisions into the existing copyright legislative framework⁸⁹ by means of both an Act⁹⁰ and a related Decree.⁹¹ The reproduction or disclosure of copyrighted work for the benefit of persons with a disability is allowed provided that it is directly related to the disability, of a non-commercial nature and necessitated by the disability.⁹² Equitable remuneration should be ensured to the author. Furthermore, in compliance with the Marrakesh Directive, Dutch legislation does not regard as an infringement of copyright the conversion of a published work

2017/1564 implementing the Marrakesh Treaty, available at: https://eifl.org/sites/default/files/resources/eifl_response_marrakesh.pdf accessed 18 November 2021.

⁸³ UN Committee on the Rights of Persons with Disabilities (2021, November 8), *Initial Report of Ireland under the convention on the rights of Persons with Disabilities*, (Advance Unedited Version) CRPD/C/IRL/1, para. 424.

⁸⁴ Law of 3 May 2019, No. 37, 'Provisions for the fulfillment of obligations arising from Italy's membership of the European Union - European Law 2018'. Official publication: *Gazzetta Ufficiale della Repubblica Italiana* No.: 109 of 2019-05-1.

⁸⁵ Art. 71 bis was included into Law No 633 of 1941 Law No. 633 of April 22, 1941, for the Protection of Copyright and Neighboring Rights (as amended up to Decree-law No. 64 of April 30, 2010), available at <https://wipolex.wipo.int/en/legislation/details/13133> accessed 17 September 2021.

⁸⁶ Art. 71 bis para. 2 of Law No 633 of 1941 Law No. 633 of April 22, 1941, for the Protection of Copyright and Neighbouring Rights (as amended up to Decree-law No. 64 of April 30, 2010).

⁸⁷ Art. 71-bis paras. 2-bis and 2-ter.

⁸⁸ There are three elements to its mandate: '1) the statistical information on the condition of persons with disabilities, 2) monitoring the implementation of policies, 3) the definition of the action plan for disability.' See at <http://www.osservatoriodisabilita.gov.it/it/documentazione-europea/> accessed 20 September 2021.

⁸⁹ Insertion of Articles 15c and 15i of the Dutch Copyright Act (Act of September 23, 1912).

⁹⁰ 'Act for the Implementation of the Reading Disability Convention Directive and for the Implementation of the Reading Disability Convention Regulation' Official publication: *Staatsblad (Bulletin des Lois et des Décrets royaux* No. 302 of 2018-09-07 .

⁹¹ Decree of 30 August 2018 determining the date of entry in to force the Act for the Implementation of the Print Disability Directive for the Implementation of the Reading Disability Convention Regulation. Official publication: *Staatsblad (Bulletin des Lois et des Décrets royaux)* No. 304 of 2018-09-14.

⁹² Art. 15i para. 1 of the Dutch Copyright Act (Act of September 23, 1912).

into a form accessible to a person with a reading disability, by a person with a reading disability or a person acting on his or her behalf, or by an authorised entity, provided that they have lawful access to the published work, that the converted work is exclusively intended for use by the person with a reading disability and that the integrity of the published work is respected as much as possible. The Copyright Act includes an exception to the obligation of fair payment for reproducing books in adapted form to persons with visual disabilities.

The Netherlands were slow in ratifying the CRPD.⁹³ Its initial report to the CRPD Committee, released in 2018, explicitly indicates that Dutch copyright legislation (namely Article 15) ‘*guarantees that all copyright-protected cultural expressions can be made accessible to people with visual or auditory disabilities*’.⁹⁴ It is not clear whether the claim of the Dutch government of full accessibility of all copyrighted works in the State mirrors the reality on the ground. Nor is it clear the extent to which disability organisations participated in the process of implementation of the Marrakesh Directive. However, the role of civil society organisations in the development of further accessibility policy is explicated in the report⁹⁵, and the latest National Action Plan on Human Rights highlights the importance of participatory decision-making procedures in more general terms.⁹⁶

Sweden

Sweden implemented the Marrakesh Directive by inserting into its existing copyright framework a copyright exception for the benefit of visually impaired or otherwise print disabled persons. The type of work subject to the exception may be ‘in the form of a book or other document, notation, or associated illustration.’⁹⁷ The law entitles anybody to make Braille copies, however limits the possibility of making sound recordings to approved institutions. This exception is conditioned upon the work not being commercially available.⁹⁸

Sweden has submitted reports to the CRPD Committee, both pre and post-Marrakesh Treaty,⁹⁹ highlighting the importance of the Swedish Copyright Act in ensuring that persons with disabilities have access to copyright protected works.¹⁰⁰ Notably, the report also highlights the work of Government agencies, such as the Swedish Library of Talking Books and Braille (TPB), who conduct extensive work on ‘producing and transferring talking books and braille books, as well as supplying and participating in the development of new technology regarding adapted media’¹⁰¹. The 2019 combined second and third reports reference Sweden’s implementation of the Marrakesh Directive, however fail to enunciate any policy actions

⁹³ The CRPD was signed by The Netherlands on 13 December 2006, it was ratified on 14 June 2016, following Constitutional restructuring to allow for its implementation. It entered into force on 14 July 2016. See UN Committee on the Rights of Persons with Disabilities (2018, July 13), *Initial Reports Submitted by State Parties under Article 35 of the Convention. The Netherlands*, CRPD/C/NLD/1, paras. 1-2.

⁹⁴ *Ibid*, para. 339.

⁹⁵ *Ibid*, para. 338.

⁹⁶ Ministry of the Interior and Kingdom Relations (2020), *National Action Plan on Human Rights 2020*, 33-38, available at: <<https://www.government.nl/documents/publications/2020/05/31/national-action-plan-on-human-rights-2020>> accessed 18 November 2021.

⁹⁷ Act amending the Act (1960: 729) on copyright in literary and artistic works. Official publication Number: 2018: 1099.

⁹⁸ Section 17, Act on Copyright in Literary and Artistic works (No. 729 of 1960).

⁹⁹ UN Committee on the Rights of Persons with Disabilities (2011, February 7), *Initial Report Submitted by State Parties under Article 35 of the Convention. Sweden*, CRPD/C/SWE/1 and (2019, November 25) *Combined second and third reports submitted by Sweden under article 35 of the Convention pursuant to the Optional reporting procedure*, CRPD/C/SWE/2-3.

¹⁰⁰ *Ibid*, *Initial Report*, 30 and 49.

¹⁰¹ See *ibid*, 49, footnote 145.

initiated on foot of the amended implementing legislation. Nor does it refer to the legislative process or any disability organisation interventions in that regard.¹⁰²

Convergences and Divergences across the Six Member States

All six countries under consideration have implemented the Marrakesh Directive, although in slightly different ways, by amending existing copyright legislation. In some countries, such as Ireland or the Netherlands, definitions in the Marrakesh Directive were reproduced into copyright legislation (namely the definition of the beneficiaries, authorised entities and accessible format copy). In cases where no definition is explicitly provided, such as in Hungary, it is arguable that the transposition mirrors key concepts at the EU level.

As noted above, according to the Marrakesh Directive, the copyright exception relates to the right of reproduction, right of communication to the public, right of making available to the public and right of distribution. Italian law mentions all those rights and allows for reproduction, distribution, communication to the public of works in accessible format by beneficiary persons and authorized entities without limitation. Other national legislations are, however, more limited. In particular, Swedish legislation only mentions reproduction rights - although it may be still be argued that this reproduction right may cover all forms of permitted uses prescribed in the Directive.

Among the countries considered, only Germany introduced a compensation scheme, availing itself of the flexibility afforded by Article 3(6) of the Directive. While this might be justified by looking at the tradition of German copyright law, and is not unexpected given that Germany was among the States supporting the inclusion of Article 3(6) in the text of the Marrakesh Directive, the introduction of such compensation system likely has a negative effect on the availability of accessible copies. As noted above, compensation schemes had been a bone of contention during the whole legislative process. The Member of the European Parliament and rapporteur on the ratification of the Marrakesh Treaty, Max Andersson, indicated the need to be vigilant on how those schemes are actually implemented.¹⁰³ However, at present, little seems to have been done to ensure that compensation schemes do not inhibit the rights of persons with disabilities to access cultural material.

This succinct overview deduces that the choice of implementing the Marrakesh Treaty by means of a Directive (alongside a Regulation), although in line with the exercise of EU competence in the copyright field, has definitely (and once again) given rise to a relatively disorganised implementation into national law, and blurred divergences in the national transposition. Some states have heralded their copyright law as a gateway to accessing cultural material, and their adherence to the Marrakesh Treaty principles as a means of implementing the CRPD, in their State reports to the CRPD Committee. However, whether the legislation is

¹⁰² UN Committee on the Rights of Persons with Disabilities (2019, November 25), cit. *supra* note 99, 35.

¹⁰³ “I do not really understand why compensation schemes are necessary but some Member States insisted on them. I would just like to remind those governments that the implementation provisions include rules to make sure that compensation schemes which have to be paid for by libraries and blind people’s organisations shall not be an excessive burden on them. I think I speak for many people in this Chamber when I say to the governments who are considering how to implement the treaty that we will be watching them” Max Andersson (2018, January 17), *European Parliament Debates. Wednesday, 17 January 2018 - Strasbourg*, available at: <https://www.europarl.europa.eu/doceo/document/CRE-8-2018-01-17-INT-3-447-0000_EN.html> accessed 18 November 2021.

capacious and able to guarantee the right to culture of persons with disabilities is not to be taken for granted, and will in fact need to be monitored.

In all countries considered, it is rather uncertain whether States consulted or involved persons with disabilities in the transposition of the Directive, as required by the CRPD Article 4(3). Several States do have stable mechanisms for the involvement of persons with disabilities in policy making and the implementation of the CRPD, but the extent to which those were involved at the time of the transposition has not been disclosed. Only Ireland carried out a broad consultation process to solicit different views ‘to help ensure our transposition is as practical and useful as possible to all stakeholders in Ireland’ and ‘to facilitate best practise and cooperation for all stakeholders in the future’.¹⁰⁴ However, the submissions are not currently available, except for the cited submission of the EFIL.¹⁰⁵

Conclusion

Scholarship asserts that the Marrakesh Treaty charted ‘a new path for human rights advocacy on intellectual property’ in laying ‘a foundation for better translation of intellectual property issues into human rights advocacy on the domestic level [by] creating a foundation for affected individuals and human rights advocates to participate in intellectual property law-making.’¹⁰⁶ The truly ground-breaking and innovative nature of the Treaty is encapsulated in the light-hearted descriptor of the Treaty, as one seeking ‘to protect rights holders against persons with a print disability’.¹⁰⁷ Oppenheim situates the radical innovation of Treaty in its focus on users’ rights, as opposed to right-holders’ rights, manifesting a departure from the standard model of international treaty-making on copyright.¹⁰⁸ The Marrakesh Treaty has been lauded for facilitating the implementation of the CRPD,¹⁰⁹ notably Article 30 which obliges States to ‘take steps 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’ and requires that IP law ‘not to be used as a barrier to access cultural materials for persons with disabilities’.

This article has examined the domestic transposition of the Directive implementing the Marrakesh Treaty in six Member States, discussing how each State acted upon the limited discretion left to it by the Directive.¹¹⁰ The analysis conducted reveals the existence of divergences in national legislation on certain aspects of the Directive, in particular in relation to compensation schemes. The result is a rather disorganised implementation of the Marrakesh Directive within the EU. Questions also arise as to the ability of the legislation to effectively guarantee the right to culture for persons with disabilities within the EU.

The article has also reflected on the role of civil society – that is, disability rights and representative associations - in the implementation of the Marrakesh Directive. The ambiguity surrounding the participation of disability organisations in the drafting of domestic

¹⁰⁴ See *supra* note 75.

¹⁰⁵ See, *supra* note 82.

¹⁰⁶ Land, cit. *supra* note 2, 515.

¹⁰⁷ Muñoz, B. M. (2021) *Publications and Resources*. EBU Focus ‘The Marrakesh Treaty’, European Blind Union, available at: <<http://www.euroblind.org/newsletter/ebu-focus-english/2018/june/en>> accessed 18 November 2021.

¹⁰⁸ Oppenheim, cit. *supra* note 33, 5.

¹⁰⁹ Saez, cit. *supra* note 22.

¹¹⁰ Marrakesh Directive, Art 3(6).

implementing legislation of the Marrakesh Directive across the Member States, as per the requirements of Article 4(3) CRPD, does little to allay the concerns as to the effectivity of the domestic provisions in enhancing the right to access cultural materials for persons with disabilities.

The Marrakesh Treaty has heralded a new era in the protection of the right to culture for blind, visually impaired and otherwise print-disabled persons, shifting the balance between right-holder interests and vulnerable end-user rights, which, with close monitoring of States under the CRPD mechanism, can finally open up the world of culture to persons with disabilities. However, while the Marrakesh Directive and its transposition at the national level are in fact a step forward in the protection of the rights of persons with disabilities, the strength and innovation of the Marrakesh Treaty is not fully exploited. The potential to expand the access to culture for persons with disabilities remains still somewhat untapped. The divergences in the domestic implementing legislation across the six subject Member States also confirm that copyright is still a tricky issue and that Member States are rather reluctant in pushing harmonisation further.