




The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled in the European Union: Reflecting on Its Implementation and Gauging Its Impact from a Disability Perspective

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Abstract The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (Marrakesh Treaty) requires State Parties to introduce limitations and exceptions to national copyright rules in order to allow the reproduction, distribution and making available of published works in formats that are accessible to persons who are blind, visually impaired or otherwise print disabled. This Treaty was concluded by the European Union (EU) on behalf of its Member States in 2018. It was then implemented by means of a Directive and a Regulation. On the tenth anniversary of its adoption, and six years after the enactment of the EU implementing acts, this article reflects on the implementation of the Marrakesh Treaty in the EU, highlighting its strengths and shortcomings. It then discusses, from a disability perspective, the impact of the Marrakesh Treaty within Europe on foot of a multimethod empirical study conducted within the project *ReCreating Europe*. On the whole, this article argues that, in spite of some weaknesses of the Marrakesh Directive, which leaves room for differences across the Member States, the ratification of the Marrakesh Treaty by the EU has supported access to printed materials for people with disabilities.

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1 Introduction

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (hereinafter “Marrakesh Treaty” or simply “the Treaty”) was adopted in Marrakesh on 27 June 2013 within the World Intellectual Property Organisation (WIPO) and entered into force in September 2016. This Treaty has attracted growing scholarly attention from both copyright law scholars and disability law scholars.¹ Being the first treaty entirely based on exceptions to copyright,² the Marrakesh Treaty has been called “a watershed development in human rights and intellectual property law”.³ Stamm and Hsu suggest that the Marrakesh Treaty has expanded the concept of “fair use” to support access for people with disabilities.⁴ From a disability perspective, the Marrakesh Treaty is generally heralded as one of the most significant steps taken to ensure access to printed material to persons with disabilities and to address the “book famine”, i.e. the dearth of books available in accessible formats.⁵ As noted elsewhere,⁶ the Marrakesh Treaty is complementary to the UN Convention on the Rights of Persons with Disabilities (CRPD) in that it helps guarantee the accessibility of published works and to realise the right to information and communication provided for in Art. 21 CRPD, the right to education included in Art. 24 CRPD and the right to participate in cultural life provided for in Art. 30 CRPD. In fact, the latter provision *inter alia* requires State Parties to the Convention “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”.⁷

Thus far the Marrakesh Treaty has been ratified by 94 states across the globe, including the United States (which, however, has not ratified the CRPD), and by the

¹ See among others Ferri and Donnellan (2022); Harpur (2017); Land (2018); Helfer et al. (2020); Sganga (2020); Koklu (2014); Vezzoso (2014). On the genesis of the Treaty and the choice of drafting a hard law instrument to address the book famine, see Kaminski and Yanisky-Ravid (2014).

² Ayoubi (2019).

³ Land (2018).

⁴ Stamm and Hsu (2021).

⁵ Harpur (2017). This author contends that only 5–7% of published books are currently available in formats accessible to those with print disabilities. In a recent article, Otike and Barát recall data of the World Blind Union according to which 90% of published materials are not accessible for the visually impaired. See Otike and Barát (2023).

⁶ Ferri and Donnellan (2022), Ferri and Rossello (2023).

⁷ Article 30(3) CRPD.

European Union (EU) on behalf of its 27 Member States.⁸ Notably, one of the latest countries to accede to the Marrakesh Treaty was Ukraine, which deposited its instrument of ratification in June 2023.⁹ Further to their accession to the Treaty, all Contracting States have to varying degrees engaged in copyright law reforms. As will be further discussed below, the EU implemented the Treaty by means of Directive 2017/1564/EU (Marrakesh Directive),¹⁰ which also amended existing EU copyright law,¹¹ and Regulation 2017/1563/EU (Marrakesh Regulation).¹² Interestingly, even in countries where the ratification of the Treaty has not yet occurred, attempts to align the provisions included in the Marrakesh Treaty and to better ensure access to printed materials to persons with disabilities are emerging globally. One example of such attempts is the decision adopted on 21 September 2022 by the South African (SA) Constitutional Court.¹³ Upholding a judgment of the Pretoria High Court, the Constitutional Court established that the SA Copyright Act 1978 was unconstitutional and unfairly discriminatory to the extent that it limited the availability of works covered by copyright in formats accessible to persons with print and visual disabilities. In doing so, the SA Constitutional Court referred to the Marrakesh Treaty, and actually considered its provisions when assessing the constitutionality of national copyright law.¹⁴

As yet scholarly works on the Marrakesh Treaty have mostly focused on its legal implementation with reference to specific jurisdictions or have looked at its broader impact on accessibility for persons with disabilities.¹⁵ In spite of some textual

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 Feb 2018, at paras. 1–2.

⁹ The Treaty will enter into force in Ukraine on 8 September 2023.

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 Sept 2017, at 6–13.

¹¹ 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 June 2001, OJ L 130, at 10–19. See *infra* Sect. 3 of this article.

¹² 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 Sept 2017, at 1–5.

¹³ SA Constitutional Court, *Blind SA v Minister of Trade, Industry and Competition and Others*, 21 September 2022, [2022] ZACC 33. A summary of the case is available at <https://www.concourt.org.za/index.php/judgement/485-blind-sa-v-minister-of-trade-industry-and-competition-and-others-cct320-21>.

¹⁴ The Court assessed *inter alia* whether the powers conferred by the Copyright Act 1978 upon the Minister to issue regulations in respect of general exceptions in the reproduction of works could allow the act to be considered constitutional. The Court deliberated on the distinction between adaptation and reproduction, and referred to Art. 4(1)(a) of the Marrakesh Treaty (“[t]he limitation or exception provided in national law should permit changes needed to make the work accessible in the alternative format”). It argued that the reproduction of literary works, no matter how broadly interpreted, was insufficient for the conversion of literary works into accessible format copies. See Samtami (2022).

¹⁵ See for example, among many others, Keller (2023); Zewe (2022); Ncube et al. (2020); Kouletakis (2020); Li and Selvadurai (2017); Li and Selvadurai (2019); Rodés and Motz (2020).

shortcomings,¹⁶ scholars have generally highlighted the positive effects displayed by the Marrakesh Treaty in terms of enhanced access to printed material. Generally, the Marrakesh Treaty is said to be vital for developing countries that have a limited number of books in accessible formats and can now import books from countries with more resources.¹⁷ In a blog written on the occasion of its tenth anniversary, Corlett-Rivera argued that the Marrakesh Treaty “really has made a huge difference for people who are blind and print disabled around the world”.¹⁸ She posits that, thanks to the Marrakesh Treaty, the U.S. National Library Service for the Blind and Print Disabled (NLS) has been able to facilitate cross-border exchanges of accessible copies. She points to the example of “a patron in California [who] was delighted to find audiobooks in Persian that had been obtained via Marrakesh after worrying that he might never read in his native language again after losing his sight”.¹⁹ In the EU, the European Blind Union (EBU) in a position paper published in May 2023 has welcomed “the positive impact of the EU’s Marrakesh Treaty legal framework, which largely meets its intended goals of increasing the international circulation of accessible-format printed works and, to a lesser extent, their production”.²⁰ EBU also suggests that “[a]ccess to adapted works in foreign languages has improved considerably, especially in more internationally used languages” and that “[t]he costs of producing accessible-format works have been reduced”.²¹ The European Commission plans to assess the availability of printed works for persons with disabilities in light of the Marrakesh Treaty by October 2023, but no assessment has been disclosed so far. A targeted stakeholder consultation on the application of the Marrakesh Directive and Regulation was launched on 22 June 2023 and will close on 11 August 2023.²² The Commission aims to encourage stakeholders (including beneficiaries, rightsholders, publishers and authorised entities) “to provide qualitative and, where possible, quantitative data for the evaluation” of the effects of the Marrakesh “package”.

Thus, as yet, aside from anecdotal evidence, the practical impact of the Treaty is still relatively under-researched and unknown. In that regard, this article aims to bring a novel contribution to the debate by reflecting on the implementation of the Treaty in the EU and discussing, from a disability perspective, its practical effects on foot of a multimethod empirical study conducted within the project *ReCreating Europe*.²³ Building on a range of outputs of the project,²⁴ it presents the findings of qualitative interviews conducted in 12 countries of the EU (Belgium, Croatia, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Malta and

¹⁶ Otiike and Barát (2023). See Sect. 2 of this article.

¹⁷ Turner (2019).

¹⁸ Corlett-Rivera (2023).

¹⁹ *Ibid.*

²⁰ EBU (2023).

²¹ *Ibid.*

²² <https://digital-strategy.ec.europa.eu/en/consultations/targeted-stakeholder-consultation-application-marrakesh-directive-and-regulation>.

²³ <https://recreating.eu/>.

²⁴ Ferri and Donnellan (2022); Ferri and Rossello (2023); Rossello et al. (2022).

Spain) and of a survey conducted across six European states (Germany, Hungary, Italy, Ireland, the Netherlands and Sweden).²⁵ On the whole, this article argues that, in spite of a delayed implementation that has left room for differences across the Member States, the Marrakesh Treaty is supporting access to printed materials for people with disabilities. Further to these introductory remarks, the article proceeds as follows. Section 2 gives an overview of the Marrakesh Treaty and its core tenets. Section 3 zooms in on its implementation in the EU. Then, Sect. 4 focuses on the perceived effects of such implementation from the point of view of persons with disabilities. This section is divided into three subsections that present respectively the methods, the limitations and the results of the study. Section 5 provides some concluding remarks.

2 The Marrakesh Treaty: A Brief Overview

As mentioned above, the Marrakesh Treaty is the first copyright treaty based entirely on exceptions and explicitly referring to the “principles of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in society” proclaimed both in the Universal Declaration of Human Rights and the CRPD.²⁶ In line with the CRPD, the Treaty, while reaffirming the importance of copyright, highlights “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”, as well as the barriers people with disabilities face in accessing published works. As noted by Harpur and Suzor,²⁷ the Marrakesh Treaty has the overall aim “to increase the amount of accessible material available worldwide by creating a standardised framework to ensure that countries around the world introduce exceptions into their copyright regimes to enable both people with print disabilities and the institutions that assist them to create accessible copies of publicly available written materials”. Guo has even suggested that the Marrakesh Treaty can be positioned within the bulk of international human rights treaties because it “define[s] the boundary of the rights of copyright holders under the human rights principle”.²⁸

The Treaty is comprised of a non-binding Preamble followed by 22 Articles. It has a relatively broad material scope, ensuing from the definition of “works” included in Art. 2. In fact, the Marrakesh Treaty covers all literary and artistic works in the form of text, notation and/or related illustrations, whether published or made available on any media. While audiovisual works fall outside the scope of the Treaty, the EIFL Guide for Libraries suggests that “textual works embedded in audio-visual works, for example educational multimedia DVDs”, should be

²⁵ This section builds on the work conducted with Katie Donnellan and Giulia Rossello, and on data partially published in the reports of the *ReCreating Europe* project.

²⁶ Preamble of the Marrakesh Treaty.

²⁷ Harpur and Suzor (2014).

²⁸ Guo (2022), p. 984. See also Li (2022).

covered.²⁹ Article 2 of the Marrakesh Treaty also defines the meaning of an accessible format copy, which is “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 personal scope of the Treaty is delineated by Art. 3, which identifies as beneficiaries of the copyright exception: blind persons, visually impaired people, 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”.³⁰ The definition proffered by the Marrakesh Treaty is wide. As discussed by Helfer et al.,³¹ it also encompasses individuals who experience temporary blindness, or visual impairment, or a temporary print disability. Further, Contracting States can extend the exceptions beyond the categories identified in the Marrakesh Treaty, whose definition of beneficiaries remains a “floor”, not a “ceiling”. However, as such, the scope of the Marrakesh Treaty is narrower than the scope of the CRPD, which applies to all persons with disabilities, 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”.³²

The Marrakesh Treaty obliges Contracting Parties to provide for a limitation or exception to the right of reproduction, the right of distribution and the right of making available to the public in their national copyright laws to facilitate the availability of works in accessible format copies for beneficiary persons (i.e. people who are blind, visually impaired or otherwise print disabled).³³ It also allows, but does not oblige, Contracting Parties to provide a limitation or exception to the right of public performance to facilitate access to works for beneficiary persons.³⁴ To comply with the Marrakesh Treaty, national copyright laws must ensure that the “beneficiary persons”, a “primary caretaker or caregiver” of such a person, anyone acting on behalf of a beneficiary person as well as authorised entities (i.e. entities authorised or recognised by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis, including any “government institution or non-profit organisation that provides the same services to beneficiary persons as one of its primary activities or institutional obligations”) are permitted, without the authorisation of the copyright right-holder, “to make an accessible format copy of a work”. They must also be allowed to obtain from another authorised entity accessible format copies and supply those copies to beneficiary persons on a non-profit basis. Further, the

²⁹ The guide can be retrieved at <https://www.eifl.net/resources/marrakesh-treaty-eifl-guide-libraries-english>.

³⁰ Article 3 Marrakesh Treaty.

³¹ Helfer et al. (2020).

³² Article 1 CRPD.

³³ Article 4(1)(a) Marrakesh Treaty.

³⁴ Article 4(1)(b) Marrakesh Treaty.

Marrakesh Treaty requires Contracting Parties to set out in their national laws 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” in another Contracting State.³⁵

As consistently highlighted,³⁶ the text of the Marrakesh Treaty presents a number of shortcomings from a disability perspective. First, it leaves some room for manoeuvre to Contracting Parties, as it incorporates the so-called “three-step test”, which provides that national provisions implementing the Treaty 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”.³⁷ Secondly, Contracting Parties may also “confine limitations or exceptions [...] to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market”. This provision had in fact been opposed by the World Blind Union (WBU) for being burdensome to implement by charities and NGOs.³⁸ Thirdly, Contracting Parties are also allowed to require remuneration as a condition for creating, reproducing and/or distributing copies in accessible formats. Otike and Barát³⁹ also highlight a number of weaknesses of the Marrakesh Treaty. First, they point to the fact that the Treaty does not oblige publishers to make copies of works in accessible formats. Secondly, they posit that “copyright holders are not mandated to make the reproductions”.⁴⁰ Thus, they substantially contend that the Marrakesh Treaty ends up relying “on non-governmental organisations or well-wishers to do the reproductions”.⁴¹ More generally, because of its limited personal scope, as mentioned by Ncube et al, “[w]hilst the Marrakesh Treaty has made significant inroads toward ending the book famine and addressing the access needs of persons who are blind or have visual disabilities, other access needs must be addressed”.⁴² Furthermore, according to Sganga, the Marrakesh Treaty does not align fully with the spirit of the CRPD, as it still constitutes “disability as a ‘deviation’, which has to be tolerated and managed through an exception”, rather than viewing it as part of human diversity and focusing on external barriers as the major cause of disability. It thus fails to properly embed “the social-contextual model that the CRPD advocates for”.⁴³ A similar criticism was raised by Yang et al., although with specific reference to the implementation of the Marrakesh Treaty in China, rather than the Treaty itself.⁴⁴ Those authors contend that most signatories, including China, have looked at the Treaty as “grant[ing] ‘privileges’ or specialized benefits to visually impaired

³⁵ Article 5 Marrakesh Treaty.

³⁶ Helfer et al. (2020), Vezzoso (2014); Ferri and Donnellan (2022).

³⁷ Article 11 Marrakesh Treaty.

³⁸ See on this issue the study of the European Parliament (2016).

³⁹ Otike and Barát (2023).

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Ncube et al. (2020).

⁴³ Sganga (2020).

⁴⁴ Yang et al. (2023).

people”.⁴⁵ With regard to China, they suggest that the approach of “providing ‘special protections’ for visually impaired people based on the traditional disability-related views” restricts “the meaning of the Treaty to simple humane charity”.

However, in spite of those limitations and flaws, scholars and disability organisations alike have largely considered the Marrakesh Treaty a positive development that aligns copyright law with human rights.⁴⁶ The UN Committee on the Rights of Persons with Disabilities, the treaty body set up by the CRPD, has also repeatedly called on states to ratify this Treaty, acknowledging its potential to advance the rights of persons with disabilities.⁴⁷

3 The Implementation of the Marrakesh Treaty in the EU

The Marrakesh Treaty was signed by the EU (on behalf of itself and its Member States) on 30 April 2014 and then ratified on 1 October 2018.⁴⁸ As mentioned in the introduction to this paper, it was implemented by means of the so-called Marrakesh Directive and Marrakesh Regulation. The Marrakesh Directive had to be transposed into national law by 11 October 2018, while the Regulation, which is directly applicable in all EU Member States, entered into force on the 12 October 2018. All Member States have transposed the Directive. In a similar vein to the Marrakesh Treaty, the alignment between copyright and human rights is entrenched in the Directive and Regulation. Both these acts respect fundamental rights enshrined in the Charter of Fundamental Rights of the EU and the CRPD and “should be interpreted and applied in accordance with those rights and principles”.⁴⁹ They have the same personal scope as the Marrakesh Treaty, and include definitions of beneficiary persons as well as authorised entities that are similar to those included in the Marrakesh Treaty.

3.1 The Marrakesh Directive

The Marrakesh Directive “aims to further harmonise Union law applicable to copyright and related rights in the framework of the internal market”.⁵⁰ It introduces

⁴⁵ *Ibid.*

⁴⁶ Giannoumis et al. (2018).

⁴⁷ Leahy and Ferri (2022).

⁴⁸ The delayed timeframe of the ratification was linked to the claim of some Member States that the EU did not have the full competence to ratify the Marrakesh Treaty. In 2015, the Commission submitted to the Court of Justice of the EU (CJEU) the request for an opinion pursuant to Art. 218(11) TFEU. In its Opinion 3/15, the CJEU stated that “the body of obligations laid down by the Marrakesh Treaty falls within an area that is already covered to a large extent by common EU rules and the conclusion of that treaty may thus affect those rules or alter their scope” (Opinion of the Court (Grand Chamber) of 14 February 2017, 3/2015, ECLI:EU:C:2017:114, at para. 128). For this reason, the CJEU held that the EU had exclusive competence to ratify the Marrakesh Treaty. *See* Ramalho (2015); Acquah (2017); Kübek (2018); Arena (2018).

⁴⁹ *See* recital 21 Marrakesh Directive and Recital 13 Marrakesh Regulation.

⁵⁰ Article 1 Marrakesh Directive.

a mandatory exception to the harmonised rights of creators and authors, empowering beneficiaries and authorised entities to undertake the necessary steps to transform a work into an accessible format for their own benefit.⁵¹ The copyright exception relates to the reproduction right, the right of communication to the public and the right of making available to the public (as required by the Marrakesh Treaty). It also encompasses the distribution right. The Directive, as the Marrakesh Treaty, also refers to the “three-step test”⁵² by stating that the exception provided for in the Directive “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”. It is also prescribed that accessible copies must respect the integrity of the original work as far as possible.⁵³ As noted elsewhere and argued by Helfer et al., however, the Directive narrows the discretion afforded by the Marrakesh Treaty to its Contracting Parties, as 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.⁵⁴

A sticky point that has raised consistent criticism from persons with disabilities⁵⁵ is that Art. 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 territory, be subject to compensation schemes.⁵⁶

The Marrakesh Directive also places a range of obligations on authorised entities requiring them to actively discourage copyright violations in the form of “unauthorised reproduction, distribution, communication to the public or making available to the public of accessible format copies” and to demonstrate “due care” in handling accessible format copies. The Marrakesh Directive requires Member States to ensure that authorised entities established in their territory “make an accessible format copy of a work or other subject matter *to which it has lawful access*, or to communicate, make available, distribute or lend an accessible format copy to a beneficiary person or another authorised entity on a non-profit basis”.⁵⁷ Member States must also ensure the cross-border availability of these services. Thus, an authorised entity established in their territory may make an accessible copy “for a beneficiary person or another authorised entity established *in any Member State*”.⁵⁸ As noted elsewhere,⁵⁹ these provisions are aimed to facilitate the circulation of accessible copies within the internal market.

⁵¹ Article 3 Marrakesh Directive.

⁵² Article 4(3) Marrakesh Directive.

⁵³ Article 3(2) Marrakesh Directive.

⁵⁴ See Helfer et al. (2020), pp. 47–49.

⁵⁵ EBU (2023).

⁵⁶ 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.

⁵⁷ Article 3(1)(b) of the Marrakesh Directive. Emphasis added.

⁵⁸ Article 4 Marrakesh Directive. Emphasis added.

⁵⁹ Ferri and Donnellan (2022).

On the whole, the Marrakesh Directive complements and compounds the “disability exception” included in the original text of Art. 5(3)(b) of the InfoSoc Directive⁶⁰ and amends its text.⁶¹ Article 5(3)(b) of the InfoSoc Directive now allows (but does not oblige) Member States to provide for exceptions or limitations for

(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, *without prejudice to the obligations of Member States under Directive (EU) 2017/1564 of the European Parliament and of the Council* [...].

As a result, the current “disability exception” in EU copyright law derives from the combination of the pre-existing optional disability exception provided for in the InfoSoc Directive with the compulsory Marrakesh exception. In other words, we have a twofold overlapping exception: a compulsory fully harmonised exception to the reproduction right; the right of communication to the public; the right of making available to the public and the distribution right for the benefit of the three (broadly defined) categories of persons with disabilities identified by the Marrakesh Directive; and an optional exception to the right of reproduction, communication to the public and potentially the right of distribution for other categories of persons with disabilities which stems from Art. 5(3)(b) of the InfoSoc Directive.⁶²

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.⁶³ This means that rightsholders cannot invoke TPMs to prevent persons falling within the scope of the Marrakesh Directive from enjoying their rights provided for in that Directive.⁶⁴

3.2 The Marrakesh Regulation

The Marrakesh Regulation, which is complementary to the Directive, lays out 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 third countries who are party to the Marrakesh Treaty. Namely, it provides that “[a]n authorised entity established in a Member State may distribute, communicate or make available to beneficiary persons or to an authorised entity established in a third country that is a party to the Marrakesh Treaty an accessible format copy of a work or other subject matter made in accordance with

⁶⁰ 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 June 2001, OJ L 130, at 10–19.

⁶¹ Article 8 Marrakesh Directive.

⁶² Ferri and Donnellan (2022).

⁶³ Article 3(4) of the Marrakesh Directive, with reference to the first, third and fifth sub-paragraphs of Art. 6(4) InfoSoc Directive.

⁶⁴ Oppenheim (2017).

the national legislation adopted pursuant to Directive (EU) 2017/1564”⁶⁵ Further, it allows a beneficiary person or an authorised entity established in a Member State to “import or otherwise obtain or access and thereafter use” an “accessible format copy of a work or other subject matter that has been distributed, communicated or made available to beneficiary persons or to authorised entities, by an authorised entity in a third country that is a party to the Marrakesh Treaty”.

3.3 Reflecting on Strengths and Weaknesses of the Marrakesh Directive and Regulation

The Marrakesh Directive and Regulation implement the Treaty in a consistent and cogent manner. In doing so, they embed some of the inherent shortcomings of the Treaty itself, in particular the limited personal scope compared to the CRPD, and the fact that they, like the Treaty itself, do not oblige publishers to make copies of works in accessible formats. However, this latter criticism can be diluted if we consider that the Marrakesh Directive and Regulation must be seen in the overall context of EU accessibility legislation and considered a piece of a more complex ‘jigsaw’.⁶⁶ In particular, in the EU, the European Accessibility Act (EAA)⁶⁷ creates an EU-wide obligation for publishers to consider accessibility concerns *ex ante* when producing e-books and placing them on the market. In substance, it requires publishers to deploy their digital publications in an accessible format from the outset and require ebooks to be accessible to people with disabilities other than print disabilities, such as cognitive, intellectual or specific learning disabilities (e.g. dyslexia, autism, Down syndrome).⁶⁸

Nonetheless, from a disability perspective, the Marrakesh Directive presents some inherent shortcomings that have been variously highlighted by disability organisations. As noted above, the most contentious provision concerns optional compensation schemes. As yet these have been adopted by a relatively small number of states.⁶⁹ Further, Helfer et al. contend that “the Directive substantially limits the discretion of EU members that exercise this option”, as “copyright owners cannot seek compensation from beneficiary persons themselves or from authorised entities in other EU Member States or non-EU Marrakesh parties”. They also argue that the determination of remuneration must take into account not only the public interest in cross-border dissemination of accessible works but also the non-profit nature of authorised entity activities.⁷⁰ However, EBU, in its position paper of May 2023, argues that such possibility for Member States to provide for

⁶⁵ Article 3 of the Marrakesh Regulation.

⁶⁶ Ferri and Donnellan (2022); Ferri (2023).

⁶⁷ Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services (European Accessibility Act), OJ L 151/70, 7 June 2019, at 70–115.

⁶⁸ Ferri (2023).

⁶⁹ According to the Commission’s Report on the availability of certain copyright protected works for persons with disabilities (2022), Austria, Belgium, Finland, Germany, the Netherlands and Sweden use that option.

⁷⁰ Helfer et al. (2020).

“compensation” for rightsholders should be abolished, as it hampers *de jure et de facto* the right to access to printed material.⁷¹ EBU suggests that authorised entities incur additional costs and use considerable resources to create accessible copies for the print-disabled on a non-profit basis and do not cause any loss to rightsholders.⁷² In that regard, EBU refers to Austrian and German member organisations, namely the *Blinden- und Sehbehindertenverband Österreich* (BSVÖ) and *Deutscher Blinden- und Sehbehindertenverband* (DBSV), which have alleged that the compensation scheme allowed by their national legislation has had a negative financial impact on their production of accessible-format versions.⁷³ EBU also argues that such compensation schemes “are against the spirit of the Marrakesh Treaty”.⁷⁴ While the former criticism seems well founded, the latter, i.e. invoking the spirit of the Treaty, seems rather slippery.⁷⁵ In fact, the Marrakesh Treaty tries to strike a delicate balance between copyright and human rights of persons with disabilities; it still leaves considerable room to Contracting States and, in itself, does not completely align with the CRPD. A stronger legal argument could have been that compensation schemes are at odds with the capacious CRPD obligations, and that the Directive needs to be interpreted and implemented in line with those obligations, as indicated in the Preamble and established by CJEU case law.⁷⁶

EBU, in its recent position paper, has raised another general concern with regard to the fact that authorised entities in some Member States, in order to benefit from the Marrakesh Treaty provisions, need to be registered on an “approved list”.⁷⁷ Arguably *de facto* and *de jure* such national requirements do restrict the number of entities capable of making and distributing accessible copies. However, on the basis of the *littera lege*, they do not seem, as such, in breach of the Directive, which in fact leaves some room for manoeuvre to Member States. It would be interesting to see whether a case could be brought in front of the CJEU, and whether the Luxembourg judges, by making use of teleological interpretation and referring to the purpose of the Marrakesh Treaty and the CRPD, might push towards a more stringent protection of disability rights and argue that the Directive does not allow such national requirements.

The limited material scope of the Marrakesh Directive (which indeed reflects the scope of the Marrakesh Treaty) has also raised concerns among disability scholars and activists. Article 9 of the Marrakesh Directive requires the Commission to assess the availability of works and disabilities not covered by the “Marrakesh Directive” and the potential for the Directive’s scope expansion. The report on the

⁷¹ EBU (2023).

⁷² EBU (2023).

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ This criticism echoes the European Parliament study, which praised the initial Commission proposal for excluding compensation. See European Parliament (2016) p. 54.

⁷⁶ The CRPD forms an integral part of EU law and in hierarchical terms has a “subconstitutional status” (above EU secondary legislation and below the EU treaties). For this reason, EU legislation needs to be interpreted in line and in compliance with the CRPD. See Broderick and Ferri (2019) at chapter 10. See Joined cases, C- 335/11 and C- 337/11 *HK Danmark*, 11.4.2013, ECLI:EU:C:2013:222.

⁷⁷ EBU (2023).

basis of Art. 9 was released by the Commission on 14 April 2022.⁷⁸ It presents data collected across the Member States and seems to unveil patchy and sceptical views on the possibility of an expansion of the disability exception provided for in the Marrakesh Directive to works other than printed works. According to this report, while a mild consensus is found among disability organisations, several representatives of rightsholders contend that an enlargement of the exception will be too onerous and unnecessary.⁷⁹

The major weakness of the Marrakesh Directive, however, is linked to its coexistence with the prior InfoSoc Directive disability exception. This latter residual “optional” exception leaves the door open to divergences across Member States, albeit for the purpose of enlarging the plethora of beneficiaries or works covered by the exception.⁸⁰

In its Combined Second and Third Reports – submitted to the CRPD Committee in April 2023⁸¹ – the Commission recalls that, in the course of 2023, it will carry out an evaluation of the Marrakesh Directive and Regulation taking into account “the views of civil society actors, including organisations representing persons with disabilities and older persons”.⁸² It is to be expected that this evaluation will point to (at least some of) the shortcomings of the Marrakesh Directive. It seems, however, unlikely that such evaluation will lead to amendments to the current legal text or prompt further harmonisation of the disability exception. This evaluation may instead lead to a more stringent monitoring of the effective implementation of the Marrakesh Treaty by the Member States, as advocated by the European Disability Forum.⁸³

4 Gauging the Impact of the Marrakesh Package from a Disability Perspective

Having reflected on the EU implementation of the Marrakesh Treaty, this section aims to assess the impact of the Marrakesh Directive and Marrakesh Regulation on the basis of a multimethod empirical study. Appropriate ethical approval was obtained before the commencement of the study. While the data gathered do not allow one to measure the practical effects of the Marrakesh Treaty and its implementation in the EU legal order, they do make it possible to discern common trends and perceptions around the Marrakesh Directive and Regulation. Particularly, this section does not aim to present the data gathered in a comprehensive way. Rather, it focuses on selected findings that give an indication of the impact of the Marrakesh Treaty in the EU, building on previous co-authored work.⁸⁴

⁷⁸ Commission Staff Working Document – Report on the availability of certain copyright protected works for persons with disabilities within the internal market, SWD(2022) 109 final.

⁷⁹ European Commission (2022).

⁸⁰ Ferri and Donnellan (2022).

⁸¹ Combined Second and Third Reports submitted by the European Union under Article 35 of the Convention, pursuant to the optional reporting procedure, due in 2021 CRPD/C/EU/2-3.

⁸² *Ibid.*

⁸³ European Disability Forum (2022).

⁸⁴ Ferri and Donnellan (2022); Ferri and Rossello (2023).

4.1 Methods

The empirical findings presented in this section emerge from a multimethod study that comprised, on the one hand, a qualitative study on participants' perceptions of the barriers for people with disabilities in accessing digital culture as well as the associated role of copyright law, and, on the other hand, a survey on the Marrakesh Treaty specifically.

Researchers in the *ReCreating Europe* project conducted 12 semi-structured interviews with representatives from 12 organisations, representative of persons with disabilities across 11 countries,⁸⁵ which represented a balance both in terms of Nordic, Continental and Mediterranean geographical locations and in terms of country and population size.⁸⁶ Recruited during 2020 and 2021 by way of a purposeful sampling strategy complemented by snowball sampling,⁸⁷ the interview participants were drawn from umbrella organisations of people with disabilities (4), organisations of people who are blind or visually impaired (5), and civil society organisations working on disability rights (3). The interviews were conducted by video call and lasted between 60 and 90 minutes, which allowed enough time to explore the questions and receive comprehensive answers without causing fatigue in the interviewee. We stored a file with relevant metadata and the anonymised transcript files were named with conventional code indicating the country and a general identifier DIS (e.g. IT_DIS). Those transcripts have been archived in the Irish Qualitative Data Archive. The thematic analysis of interviews adhered to the process outlined by Braun and Clarke, which includes, after coding, the following steps: generating initial themes; reviewing and developing themes; and refining, defining and naming themes.⁸⁸ The choice of thematic analysis is dictated by its significant flexibility and the fact that it allows for combining inductive (data-driven) and deductive (theory-driven) orientations to coding, capturing semantic meanings (explicit or overt) and latent meanings (implicit, underlying; not necessarily unconscious).⁸⁹

The survey on the Marrakesh Treaty specifically targeted people who are blind or visually impaired, i.e. the cohort that most traditionally has availed of the disability copyright exception. The survey aimed to provide evidence on the knowledge and perceptions that people who are blind and people with visual impairments have of

⁸⁵ The interviews were conducted by Dr. Laura Serra in the first phase of the project and analysed by the author of this article and Katie Donnellan.

⁸⁶ The selection originally included 12 jurisdictions: Belgium, Croatia, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Malta and Spain. However, in Belgium, all of the organisations contacted refused to engage with the study. In general, we conducted one interview in each of the countries selected, except for Ireland, where we conducted two interviews with two representatives of an organisation of persons who are blind or visually impaired.

⁸⁷ Palinkas et al. (2015).

⁸⁸ Braun and Clarke (2021).

⁸⁹ *Ibid.*

copyright law, and their preferred channels of access to printed material.⁹⁰ A range of questions asked about improvements experienced in accessing printed material in the last few years. In that regard, the survey also asked whether the improvements, if any, were to be linked to the implementation of the Marrakesh Treaty. The survey comprised forced-choice questions, leading respondents to choose from a range of selected response options. These forced-choice questions were of different types: multiple-choice, dichotomous questions and Likert scales. The survey was conducted in six EU countries that were selected at the stage of the project proposal and that represented a balance in terms of geographical locations, legal systems and population size.⁹¹ The target population of the study consisted of persons with visual impairments or persons who are blind, of working age. The survey was made available in the six selected countries' official languages and was administered online through Jisc Online Survey after multiple accessibility tests and a pilot to ensure full compatibility with screen readers. Data were collected between 8 September 2021 and 15 October 2021. On the whole, we collected 201 responses, and among them 74% (n = 149) were from Italy, 14% (n = 28) from Germany, 5% (n = 10) from Sweden, 3% (n = 7) from Hungary and 1% (n = 3) from Ireland. We collected only one response from The Netherlands and three respondents were not based in the targeted countries. High participation in Italy was facilitated by the strong engagement of local branches of organisations of persons with disabilities. Fifty-five percent of the sample are persons who are blind and the remaining 45% are visually impaired persons. When it comes to the level of education, most of the respondents (41%) have completed high school. 3% completed only primary education, while 12% have undertaken vocational training. Furthermore, among the respondents, 17% have a bachelor's degree, 22% a master's degree and 2% a doctorate. Alongside some descriptive statistics, a range of multivariate analyses were performed using ordered logistic regression models in STATA 17.⁹²

4.2 Limitations

This article combines findings from qualitative and quantitative studies that have different personal and geographical scopes. This is done to ensure a level of methodological triangulation in our attempt to gauge the impact of the Marrakesh Treaty and to detect whether, on the ground, people experienced improved access after its implementation. Both the qualitative and quantitative studies present their own inherent limitations. With regard to the interviews, we acknowledge the limited number of interviews and varying nature of the organisations involved, although all of them were involved in disability advocacy activities and engaged with a range of policymakers at the national level, including activities related to accessibility legislation and raising awareness about disability rights. With regard to the survey,

⁹⁰ In the survey we included initial demographic questions: namely, we asked respondents for their gender, age and level of education. Further, we asked questions related to their geographic location, such as country of residence, and location characteristics (rural or urban area).

⁹¹ Italy, Ireland, Sweden, Germany, Hungary and The Netherlands.

⁹² The analysis was conducted by Dr. Giulia Rossello (SSSA).

the main limitation is the limited scope of the sampling, also linked to the restricted time of the opening of the survey (approximately a month), and purposive sampling.⁹³

4.3 Findings

4.3.1 *Limited Knowledge of the Marrakesh Treaty ...*

Participants in the interviews and the survey appreciated that copyright may constitute a barrier for persons with disabilities, in particular for people who are blind or visually impaired, in accessing printed material. For example, an interviewee from a Croatian organisation indicated:

Well, I know vaguely about ... copyright law in general, and I know that our library is actually being restricted [in terms of] the number of physical media they can produce. Most of our members use CDs; according to the library, they cannot distribute more than two CDs of each book. [HRV_DIS]

Some interviews also showcased a general awareness of the Marrakesh Treaty, but knowledge of its content was very limited. However, only representatives of disability organisations from seven Member States identified the Marrakesh Treaty as a source of legislative support for access to digital culture, with a particular focus on people who are blind and/or visually impaired.⁹⁴ Among the participants, representatives of organisations of persons with visual impairments showed more awareness of copyright law. For example, one participant from Germany stated:

the Marrakesh treaty [...] allows us ... to make print documents accessible. It is allowing us to do our job and also to exchange our accessible materials with others and to give it to users who are disabled here in Germany, but in other countries as well. [DE_DIS]

Even more limited was knowledge of organisations in relation to the EU implementing acts. One interviewee suggested as a critical point that the Member State in which they were based had not ratified the Marrakesh Treaty yet, while indeed the EU had ratified the Treaty on behalf of the Member States.⁹⁵ Another participant spoke about their efforts to demand the implementation of the Marrakesh Treaty, stating national ratification was still pending.⁹⁶ As noted elsewhere,⁹⁷ limited awareness of EU copyright legislation can be contrasted with quite a good knowledge of accessibility law, and the EAA especially. A representative of an Estonian organisation, for example, put a lot of emphasis on the importance of the EAA in supporting access to digital books and digital material and services:

⁹³ Ferri and Rossello (2023).

⁹⁴ See e.g. a Maltese representative that indicated no knowledge about copyright [MT_DIS].

⁹⁵ IT_DIS.

⁹⁶ ES_DIS.

⁹⁷ Ferri and Donnellan (2022).

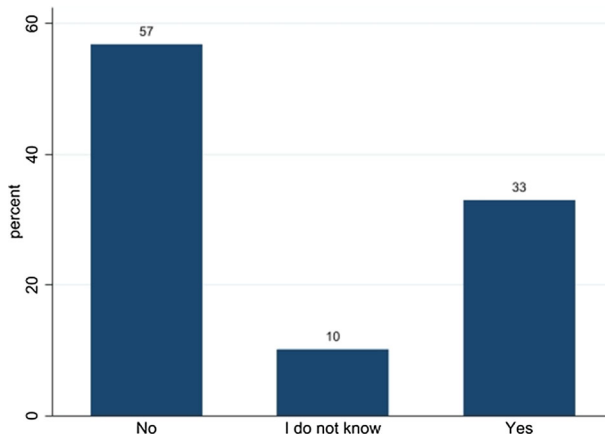


Fig. 1 Knowledge of the Marrakesh Treaty (image taken from Rossello et al. 2022)

Estonia is right now taking over the European Union Accessibility Directive (EAA), which hopefully forms into an accessibility law in Estonia, which we currently do not have, and that also includes those services. [EE_DIS]

The survey confirms a limited knowledge of copyright law among people with disabilities. Overall, 62% of total respondents have no knowledge at all or have a slight knowledge of copyright law. People who are blind, males and those with a higher level of education tend to report higher levels of knowledge of copyright law. When zooming in on knowledge about the Marrakesh Treaty itself, the survey shows that such knowledge is also low. When asked “Do you know what the Marrakesh Treaty provides for?” 67% of the respondents answered either that they have no knowledge or do not know (Fig. 1).

People who are blind and more educated have a greater knowledge of the Marrakesh Treaty, while females report a greater knowledge than males in this respect.⁹⁸

This multimethod research, in spite of its evident limitations, unveils that knowledge of the Marrakesh Treaty and of its EU implementing acts is rather limited, not only on the ground, among the cohort of blind and visually impaired people that has traditionally made use of copyright exceptions to access material in braille or audio format, but also among representatives of organisations of persons with disabilities. This means that a major effort should be made to increase awareness of the Marrakesh exceptions and how they can foster access.

4.3.2 ... But De Facto Enhanced Access

All the semi-structured interviews pointed to increased access to cultural materials, including printed material, but, due to their limited knowledge of copyright law, interviewees did not point specifically to the Marrakesh Treaty or its implementing

⁹⁸ Ferri and Rossello (2023).

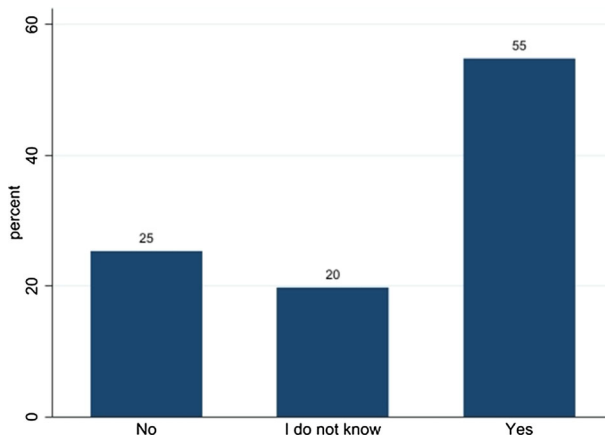


Fig. 2 Perceived improvements in access to printed materials in the last year (image taken from Rossello et al. 2022)

legislation as a main (or contributing) factor in this increase. Generally, they hinted to the role of technology as a general facilitator of access, but also, as noted above, the EAA, which they mostly referred to as the chief EU legislation enhancing accessibility. Advocacy and demands from people with disabilities are often referred to as an important boost for accessibility.

The survey, however, gives a more definite indication of improved access to printed material. In order to gauge the impact of the Marrakesh Treaty, we looked at the perceived improvement in access in the last few of years. The timeframe takes into account that the Marrakesh Treaty was implemented by the Marrakesh Directive and Regulation, and that the Directive, as noted above, had to be transposed into national law by 11 October 2018, while the Regulation displayed its effects from the 12 October 2018. As shown in Fig. 2 below, 55% of the respondents think that their access has improved particularly in the last year.

As discussed elsewhere,⁹⁹ improvements in access are related to the type of impairment and as well as to the type of format preferred. The survey shows that people who are blind and using braille printers experienced an improvement in their access to printed materials. This suggests that the Marrakesh Treaty facilitated the conversion of printed material into braille, rather than other accessible formats, and has, so far, had little impact on access to digital books.¹⁰⁰

5 Concluding Remarks

On the tenth anniversary of the approval of the Marrakesh Treaty and approximately six years after its ratification by the EU, the time seems ripe to reflect on how the Treaty has been implemented and whether it has displayed positive effects for

⁹⁹ Ferri and Rossello (2023).

¹⁰⁰ Ferri and Rossello (2023).

persons with disabilities. In addition to revisiting the strengths and weaknesses of the Marrakesh Directive and Regulation, this article, through an analysis of empirical qualitative and quantitative data collected across a sample of EU Member States, has endeavoured to give some indication of the impact of the Marrakesh Directive and Regulation (and of the Marrakesh Treaty) beyond the anecdotal evidence of improved access given by scholarship.

The Marrakesh Directive and the Regulation support access to printed materials for beneficiaries. The Marrakesh Directive also solidifies and expands the prior disability exception provided for in Art. 5(3)(b) of the InfoSoc Directive. However, full harmonisation across the EU is still an afterthought given the room for manoeuvre left by the Directive to Member States and given the coexistence of the Marrakesh exception with the InfoSoc exception.¹⁰¹

While the ratification of the Marrakesh Treaty in the EU has been generally welcomed by organisation of persons with disabilities, their knowledge of what the Treaty requires is limited. Interviewees and participants to the survey did demonstrate an awareness of the significance of copyright exceptions, but a rather limited familiarity with the Marrakesh Treaty itself. Such limited knowledge is likely to hamper the potential of the Treaty to display ground-breaking effects, and should be addressed by engaging in awareness-raising activities. However, participants in the survey (and the interviews) did perceive an enhancement of access to printed material particularly in the last year.

On 11 August 2023 an EU-wide consultation launched by the Commission to support the evaluation of the effects of the Marrakesh Directive and Regulation will close. It will be interesting to monitor the submissions of civil society and stakeholders in order to gauge whether they confirm the results of the study conducted within *ReCreating Europe*. It will also be interesting to see whether the consultation will trigger a more overt discussion of a full harmonisation and widening of the disability exception in the EU.

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¹⁰¹ Ferri and Donnellan (2022).

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