

The Implementation of the Marrakesh Treaty in the European Union: An Important Piece in the Accessibility Jigsaw?*

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The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (Marrakesh Treaty) aims to enable the creation and cross-border exchange of copyrighted works in formats that are accessible to individuals with disabilities. To that end, it requires Contracting Parties to introduce a set of limitations and exceptions to existing copyright rules. Following Opinion 3/15 of the Court of Justice, the Marrakesh Treaty was concluded by the European Union (EU) on behalf of its Member States. It was implemented by means of a Directive governing the substantive rights of reproduction, distribution and making available of published works in accessible formats, and a Regulation governing the cross-border exchange of accessible format works with Third Countries, both based on Article 114 of the Treaty on the Functioning of the European Union (TFEU). This article examines the role of the Marrakesh Directive and Regulation in enhancing access to printed material to persons with disabilities. In that connection, it discusses common trends and perceptions of such a Marrakesh framework on the basis of empirical research consisting of a set of semi-structured interviews conducted with key stakeholders across twelve Member States. It locates the Directive and Regulation within the growing body of EU legislation that aims to ensure accessibility of an array of materials, products and services for persons with disabilities, while driving forward economic integration. In doing so, it conceives of the Marrakesh Directive and Regulation as part of the broader remit of EU disability law, which is an emerging cross-cutting area of EU action. On the whole, this article argues that the Marrakesh Treaty and its implementing legislation contribute to the protection of the rights of persons with disabilities within the internal market, but form just one piece – albeit an important one – of the accessibility ‘jigsaw’.

Keywords: Marrakesh Treaty, Directive 2017/1564/EU (Marrakesh Directive), Disability, Copyright exceptions, Accessibility, European Accessibility Act, European Union Law, Implementation, Empirical Research

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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 (Marrakesh Treaty),¹ adopted on 27 June 2013 in Marrakesh and entered into force in September 2016, requires Contracting Parties to introduce a set of limitations and exceptions to existing copyright rules 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. It also obliges Contracting Parties to allow the exchange of these accessible works across borders. Since its inception, the Marrakesh Treaty has been considered unique in that no other World Intellectual Property Organization (WIPO) treaty before had been based entirely on exceptions.²

Given that ‘limitations and exceptions are the most important legal instrument for reconciling copyright with the individual and collective interests of the general public’,³ the Marrakesh Treaty has been heralded as a progressive treaty and ‘a watershed development in human rights and intellectual property law’.⁴ In particular, the Marrakesh Treaty is said to constitute an important step forward in ensuring the realization of human rights of persons with disabilities and their full participation in society,⁵ and in addressing the so called ‘book famine’.⁶ It is considered complementary to the United Nations Convention on the Rights of Persons with Disabilities (CRPD)⁷ in guaranteeing accessibility of published works to persons with disabilities,⁸ and supporting the realization of the right to participate in cultural

¹ WIPO, *Marrakesh Treaty Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* (Marrakesh 27 Jun. 2013).

² L. R. Helfer et al., *The World Blind Union Guide to the Marrakesh Treaty: Facilitating Access to Books for Print-Disabled Individuals* (Oxford University Press 2017).

³ C. Geiger, R. Hilty, J. Griffiths & U. Suthersanen, *Declaration A Balanced Interpretation of the ‘Three-Step Test’ in Copyright Law*, 1(2) JIPITEC 119 (2010).

⁴ M. K. Land, *The Marrakesh Treaty as ‘Bottom Up’ Lawmaking: Supporting Human Rights Action on IP Policies*, 8(3) UCILR 553 (2018).

⁵ P. Harpur & N. Suzor, *The Paradigm Shift in Realising the Right to Read: How Ebook Libraries Are Enabling in the University Sector*, 29(10) Disability & Soc’y 1658–1671 (2014).

⁶ The term ‘book famine’ is used to refer to the lack of printed material in accessible formats. See https://www.wipo.int/edocs/pubdocs/en/wipo_pub_marrakesh_overview.pdf (accessed 5 May 2022). See also K. Koklu, *The Marrakesh Treaty – Time to End the Book Famine for Visually Impaired Persons Worldwide*, 45(7) IIC – Int’l Rev. Intell. Prop. & Competition L. 737–739 (2014); M. Trimble, *The Marrakesh Puzzle*, 45 IIC – Int’l Rev. Intell. Prop. & Competition L. 768–795 (2014). Notably, Ramirez-Montez makes reference to an array of studies suggesting that persons with disabilities (and in particular persons with visual impairments) are unable to access the majority of titles in any accessible format (C. Ramirez-Montez, *The Marrakesh Treaty*, European Parliament Policy Department for Citizens’ Rights and Constitutional Affairs, 54 (2016)).

⁷ UN Convention on the Rights of Persons with Disabilities (CRPD), 13 Dec. 2006, UN Doc. A/RES/61/106, 3 May 2008 Annex I.

⁸ P. Harpur & N. Suzor, *Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm*, 36(3) U. New S. Wales L.J. 745–778 (2013).

life, provided for in Article 30 CRPD,⁹ as well as other rights, such as the right to education.¹⁰ In that regard, the Marrakesh Treaty is a breakthrough to facilitate the implementation of Article 30(3) CRPD, which requires States 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’.

The Marrakesh Treaty was signed by the European Union (EU) on 30 April 2014,¹¹ but such a signature was followed by a long stalemate. The initial Commission proposal for the conclusion of the agreement,¹² based on Articles 114 and 207 of the Treaty on Functioning of the European Union (TFEU), was rejected by some Member States claiming that the competence to ratify the Marrakesh Treaty was shared,¹³ giving rise to a mixed agreement, and not exclusive to the EU. In 2015, pursuant to Article 218(11) TFEU, the Commission decided to submit to the Court of Justice of the EU (CJEU) the request for an opinion on the type of the competence of the Union as regards the Marrakesh Treaty. In its noteworthy Opinion 3/15, released on 14 February 2017, 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’.¹⁴ For this reason, the Luxembourg judges held that the EU had exclusive competence to ratify that Treaty.¹⁵ The EU then concluded the Marrakesh Treaty on 1 October 2018 on behalf of itself and its Member States,¹⁶

⁹ I. Bantekas et al., *Participation in Cultural Life, Recreation, Leisure, and Sport*, in *The UN Convention on the Rights of Persons With Disabilities: A Commentary* (I. Bantekas, M. A. Stein & D. Anastasiou eds, Oxford: OUP 2018).

¹⁰ A. P. Rekas, *Access to Books: Human Rights, Copyright and Accessibility*, in *Universal Access in Human-Computer Interaction: Applications and Services for Quality of Life* 383 (C. Stephanidis & M. Antona eds, Springer-Verlag Berlin Heidelberg 2013).

¹¹ Council Decision (EU) of 14 Apr. 2014 on the signing, 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 115, 17 Apr. 2014, paras 1–2.

¹² Proposal for a Council Decision (EU) 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, COM/2014/0638 final.

¹³ Ramalho suggests that there were no less than seven Member States opposing the exclusive ratification of the EU. See A. Ramalho, *Signed, Sealed, but Not Delivered: The EU and the Ratification of the Marrakesh Treaty*, 6(4) Eur. J. Risk Reg. 629–632 (2015).

¹⁴ Opinion of the Court (Grand Chamber) of 14 Feb. 2017, 3/2015, ECLI:EU:C:2017:114, para. 128.

¹⁵ *Ibid.*, para. 129. See also G. Kübek, *Redefining the Boundaries of the Common Commercial Policy and the ERTA Doctrine: Opinion 3/15, Marrakesh Treaty*, 55(3) Com. Mkt. L. Rev. 883–899 (2018); D. Acquah, *CJEU Invokes ERTA Principle to Assert EU Competence to Ratify Marrakesh Treaty*, 12(7) J. Intell. Prop. L. & Prac. 548–550 (2017); A. Arena, *The ERTA Pre-emption Effects of Minimum and Partial Harmonisation Directives: Insights from Opinion 3/15 on the Competence to Conclude the Marrakesh Treaty*, 5 Eur. L. Rev. 770–779 (2018).

¹⁶ Council Decision (EU) 2018/254 of 15 Feb. 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, paras 1–2.

and implemented it by means of Directive 2017/1564/EU (Marrakesh Directive),¹⁷ and Regulation 2017/1563/EU (Marrakesh Regulation).¹⁸

Against this background and on foot of a multimethod analysis that combines doctrinal legal research with empirical research, this article discusses the role of the Marrakesh Directive and Regulation in enhancing access to printed material for persons with disabilities. It locates those Directive and Regulation within the growing body of EU legislation that, while purporting further harmonization and driving forward economic integration, aims to ensure accessibility of an array of materials, products and services for persons with disabilities. In doing so, it also conceives of the Marrakesh Directive and Regulation as part of the broader remit of EU disability law, which is an emerging cross-cutting area of EU action.¹⁹ Special attention is paid to the Marrakesh Directive and how it interplays with the European Accessibility Act (EAA),²⁰ highlighting that both instruments contribute to the realization of the rights of persons with disabilities and can be considered somewhat complementary one another. In that connection, this article discusses common trends and perceptions of the effectiveness of the Marrakesh framework on the basis of empirical research consisting of a set of semi-structured interviews conducted with key stakeholders.

This article is informed by a social-contextual understanding of disability, i.e., by the view that disability arises from the interaction between individual impairments and external barriers,²¹ embedded in the CRPD. In line with this Convention, this article uses person-first language placing ‘the person’ before a

¹⁷ Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 Sep. 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 harmonization of certain aspects of copyright and related rights in the information society, OJ L 242, 20 Sep. 2017, at 6–13.

¹⁸ Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 Sep. 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 Sep. 2017, at 1–5.

¹⁹ D. Ferri & A. Broderick, *Introduction*, in *Research Handbook on EU Disability Law* (D. Ferri & A. Broderick eds, Edward Elgar 2020).

²⁰ Directive (EU) 2019/882 of the European Parliament and of the Council of 17 Apr. 2019 on the accessibility requirements for products and services (European Accessibility Act), OJ L 151/70, 7 Jun. 2019, at 70–115.

²¹ A. Broderick & D. Ferri, *International and European Disability Law and Policy: Text, Cases and Materials* (1st ed., Cambridge University Press 2019). While scholarship has not been consistent in the use of terminology, the ‘social-contextual’ model of disability is usually considered a more refined version of the social model. The latter focused merely on societal barriers, while the social-contextual model conceives of disability as an interactive process between people with impairments and societal barriers.

disabling identifier,²² to acknowledge individual abilities and to constitute disability as part of ‘human diversity’.²³

Further to this introduction, the article is structured as follows. Section 2 sets out the methodology used for the research and highlights the socio-legal approach adopted. Section 3 moves on to examine the core tenets of the Marrakesh Treaty, and its implementation in the EU. Section 4 locates the Marrakesh Directive and Regulation within the broader remit of EU disability law and policy. In doing so, it highlights the role of internal market legislation in promoting the rights of persons with disabilities. Section 5, on the basis of empirical research, discusses the extent to which stakeholders know the Marrakesh framework and consider it effective in ensuring access to printed material for persons with disabilities. Finally, section 6 provides some concluding remarks.

2 METHODOLOGY

This article is based on a blended methodology that combines legal desk-based research and empirical research, recognizing the need to explore intellectual property (IP) law from interdisciplinary perspectives, in particular socio-legal perspectives.²⁴ It also situates within the growing body of EU law scholarship which has opened up to an array of interdisciplinary perspectives and ‘law in context’ approaches.²⁵

While desk-based research follows well rooted legal methods, relying upon the analysis of primary sources and relevant legal scholarship, the empirical findings emerge from a broader study involving interviews with organizations working on disability in twelve selected countries across the EU. The interviews focused on participants’ perceptions of barriers to access to digital culture by people with disabilities and the role of copyright law, and were part of the EU funded project ‘*Rethinking digital copyright law for a culturally diverse, accessible, creative Europe- reCreating Europe*’.²⁶ While the study covered nominally twelve jurisdictions, which represented a balance both in terms of Nordic, Continental and Mediterranean geographical locations and in terms of country and

²² M. Sabatello, *Cultivating Inclusivity in Precision Medicine Research: Disability, Diversity, and Cultural Competence*, 10(3) J. Community Genetics 363–373 (2019).

²³ Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on Equality and Discrimination*, CRPD/C/GC/6 (26 Apr. 2018).

²⁴ See W. T. Gallagher & D. J. Halbert, *Intellectual Property Law and Sociolegal Studies*, in *Handbook on Intellectual Property Research* 547–557 (I. Calboli & M. L. Montagnani eds, Oxford University Press 2021).

²⁵ A recent example of this is *EU Law Stories: Contextual and Critical Histories in European Jurisprudence* (B. Davies & F. Nicola eds, 1st ed., Cambridge University Press 2019).

²⁶ The interviews were primarily conducted and transcribed by Dr Maria Laura Serra (Post-doctoral researcher at Maynooth University in the first phase of the project).

population size, in one of the selected countries all interviewees declined to participate.²⁷ On the whole, we conducted twelve semi-structured interviews with representatives from twelve organizations across eleven countries. Recruited during 2020 and 2021 by way of a purposeful sampling strategy,²⁸ the interview participants were drawn from umbrella organizations of people with disabilities (n=4), organizations of people who are blind or visually impaired (n=5), and civil society organizations working on disability rights (n=3). Further, interview participants were generally policy officers or persons engaged in a range of advocacy activities to promote the rights of persons with disabilities.

Relying on 'key informants' as gatekeepers was vital to obtain a range of qualitative data in a relatively short period of time. 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 organization of persons who are blind or visually impaired. The purposeful sampling strategy was complemented by snowball sampling.²⁹ Appropriate ethical approval was obtained before the commencement of the study.³⁰ The interviews were conducted by video call, recorded and transcribed.³¹ We stored a file with relevant metadata, and the anonymized transcripts files were named using a conventional code indicating the country and a general identifier 'DIS' (e.g., IT_DIS). Those transcriptions were coded,³² and the subsequent analysis followed the stages for thematic analysis outlined by Braun and Clarke, which include, after coding, the following steps: generating initial themes; reviewing and developing themes; and refining, defining and naming themes.³³ Thematic analysis provides significant flexibility and allows for combining inductive (data-driven) and deductive (theory-driven) orientations to coding, capturing

²⁷ The selection included originally twelve jurisdictions: Belgium, Croatia, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Malta and Spain. However, in Belgium, all of the organizations contacted refused to engage with the study.

²⁸ L. Palinkas et al., *Purposeful Sampling for Qualitative Data Collection and Analysis in Mixed Method Implementation Research*, 42(5) *Administration & Pol'y Mental Health & Mental Health Servs. Res.* 533 (2015).

²⁹ *Ibid.*, at 554.

³⁰ Best practices were followed in obtaining informed consent, by way of a consent form, translated into the relevant language where necessary, detailing the objectives and intended use of data provided, and ensuring participant anonymity at all times.

³¹ Interviews generally lasted between sixty and ninety minutes, which allowed enough time to explore the questions and receive comprehensive answers without causing fatigue in the interviewee. Transcription was completed by Dr Maria Laura Serra between Nov. 2020 and Aug. 2021. Some interviews were conducted in a language other than English. The transcription in the original language was then translated into English by a professional translation service.

³² Coding and analysis were conducted jointly by the authors of this article.

³³ V. Braun & V. Clarke, *Thematic Analysis* (1st ed., SAGE Publications 2021). See also V. Braun, V. Clarke & N. Hayfield, *A Starting Point for Your Journey, not a Map: Nikki Hayfield in Conversation With Virginia Braun and Victoria Clarke About Thematic Analysis*, *Qualitative Research in Psychology* (2019).

semantic meanings (explicit or overt) and latent meanings (implicit, underlying; not necessarily unconscious).³⁴

Data gathered through those interviews do not allow the measurement or quantification of the impact of the Marrakesh Treaty and its implementation in the EU legal order. However, they do permit the discerning of common trends and perceptions around the Marrakesh Directive and Regulation, and their role in fostering access to printed material for persons with disabilities. As noted by Gallagher and Halbert, the added value of semi-structured qualitative interview format for collecting and analysing data concerning IP law is that it facilitates the collection of data not otherwise obtainable, ‘such as attitudes, beliefs, understandings, and practices of the interview subjects’.³⁵ In that connection, those interviews allowed a deeper understanding of what is the perceived value of the Marrakesh Treaty and of the EU legislation transposing it, as well as of their relationships with other pieces of EU legislation. Interviews also showcased the extent of ‘legal consciousness – how individuals understand IP and conceive of their potential rights, or individual experiences in asserting or resisting IP rights (IPR)’.³⁶

3 THE MARRAKESH TREATY AND ITS IMPLEMENTATION IN THE EU

3.1 THE MARRAKESH TREATY

As highlighted above in the introduction, the Marrakesh Treaty supports the realization of human rights of persons with disabilities by securing their access to printed materials, while concurrently achieving the goal of protection of creative outputs.³⁷ It requires Contracting Parties to include ‘in their national copyright laws [...] 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)). Contracting Parties may also provide for a limitation or exception to the right of public performance to facilitate access to works for persons with disabilities, but are not required to do so (Article 4(1)(b)).

With regard to the personal scope of the Marrakesh Treaty, Article 3 includes among the beneficiaries: people who are blind, people who have ‘a visual

³⁴ *Ibid.*

³⁵ *Ibid.*, at 550. In a more general fashion McCutcheon and Ramalho advocate for an interdisciplinary approach ‘[i]n order to capture a holistic picture of the legal and policy landscape surrounding disability access’ (J. McCutcheon & A. Ramalho, *Introduction*, in *International Perspectives on Disability Exceptions in Copyright Law and the Visual Arts 2* (J. McCutcheon & A. Ramalho eds, Routledge 2021)).

³⁶ *Ibid.*

³⁷ Helfer et al., *supra* n. 2.

impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment', and people who are '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'. Helfer et al. posit that '[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'.³⁸ Interestingly, those scholars also suggest that the beneficiaries are 'defined by reference to the functional and social barriers that prevent disabled individuals from accessing traditional printed works' and not by their impairments, such as traumatic brain injury, dyslexia, or dementia.³⁹ In a similar vein Ramirez-Montez qualifies the Marrakesh Treaty as a 'triumph for the social model of disability'.⁴⁰ By contrast, Sganga notes that the Marrakesh Treaty 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 a major cause of disability, failing to properly embed 'the social-contextual model that the CRPD advocates for'.⁴¹ It also holds true that the scope of the Marrakesh Treaty is narrower than the scope of the CRPD, which applies to all persons with disabilities who include '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'.⁴² However, Contracting Parties can extend the exceptions and limitations beyond the personal scope of Article 3, which represents a minimum standard. Furthermore, Helfer et al. suggest that nothing in the Marrakesh Treaty 'requires states to narrow pre-existing copyright exceptions that go beyond the minimum requirements of Article 3', and if a Contracting Party 'already extends access and sharing rights to individuals with other disabilities', it is not required to change that law to align with the Marrakesh Treaty.⁴³

The exceptions laid out in the Marrakesh Treaty entail that 'beneficiary persons', a 'primary caretaker or caregiver' of such persons, 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

³⁸ *Ibid.*, at 33.

³⁹ *Ibid.*, at 31.

⁴⁰ Ramirez-Montez, *supra* n. 6, at 45.

⁴¹ C. Sganga, *Disability in EU Copyright Law*, in *Research Handbook on EU Disability Law* (Ferri & Broderick eds, Edward Elgar Publishing 2020).

⁴² Article 1 CRPD, *supra* n. 7.

⁴³ Helfer et al., *supra* n. 2, at 37.

information access to beneficiary persons on a non-profit basis⁴⁴ 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 wireless means, and undertake any intermediate steps to achieve those objectives.⁴⁵

Furthermore, the Marrakesh Treaty obliges Contracting Parties to allow the import and export of accessible format copies under certain conditions (Article 5). The cross-border exchange of accessible works by authorized entities must be allowed ‘provided that prior to the distribution or making available the originating authorized entity did not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons’ (Article 5).

The material scope of the Marrakesh Treaty encompasses a broad category of works protected by copyright. Article 2(a) makes reference to ‘literary and artistic works’, regardless of the media in which they appear. 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’. Contracting Parties may, however, ‘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’ (emphasis added) (Article 4(4)). Under what is usually referred to as the ‘commercial availability option’, Contracting States ‘may choose to narrow the reach of the [Marrakesh Treaty] by prohibiting the creation of accessible format copies of works that the copyright owner has made commercially available in that particular format’.⁴⁶ However, as Helfer et al. note, given that this option is ‘format specific’, Contracting States ‘may only exclude works that are already available in the particular format sought by a print-disabled person’.⁴⁷

Notably, the Marrakesh Treaty incorporates the three-step test, which requires that national provisions implementing 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 rightholder’ (Article 11). Article 4(5) of the Marrakesh Treaty also permits Contracting Parties to decide whether exceptions and limitations implementing Article 4(1) are subject to remuneration, in substance

⁴⁴ L. R. Helfer et al. suggest that authorized entities may be public institutions or non-profit organizations or groups that provide a range of services to individuals with print disabilities, including schools, libraries, healthcare organizations, and civil society groups. See *ibid.*, at 25–27.

⁴⁵ *Ibid.*, at 39–40.

⁴⁶ Helfer et al., *supra* n. 2, at 48.

⁴⁷ *Ibid.*

allowing States to make the creation, distribution, or making available of accessible format copies conditional to the payment of a royalty or other license fee to the copyright holder. It also allows Contracting Parties to take into account their own legal systems and practices, including determinations on ‘fair practices, dealings or uses’, provided they comply with their three-step test obligations under other relevant international treaties,⁴⁸ leaving them a great deal of discretion ‘to tailor national implementing legislation to their specific policy goals and the needs of domestic beneficiaries’.⁴⁹

3.2 THE MARRAKESH DIRECTIVE AND THE MARRAKESH REGULATION

The Marrakesh Treaty was implemented by means of Directive 2017/1564/EU (Marrakesh Directive),⁵⁰ and Regulation 2017/1563/EU (Marrakesh Regulation),⁵¹ which have the same personal scope, with the definitions of beneficiary persons as well as those of authorized entities mirroring those included in Articles 2 and 3 of the Marrakesh Treaty. The Directive had to be transposed into national law by 11 October 2018, while the Regulation entered into force on the 12 October 2018.⁵²

The Marrakesh Directive ‘aims to further harmonise Union law applicable to copyright and related rights in the framework of the internal market’ (Article 1) and introduces a mandatory exception to the harmonized rights of creators and authors, empowering beneficiaries and authorized entities to undertake the necessary steps to transform printed works (e.g., books, newspapers, magazines, etc.)⁵³ into an accessible format⁵⁴ for their own benefit (Article 3). 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

⁴⁸ Article 9(2) of the WIPO Berne Convention for the Protection of Literary and Artistic Works (Berne 9 Sep. 1886); Art. 13 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (Marrakesh 15 Apr. 1994); and Arts 10(1) and 10(2) of the WIPO Copyright Treaty (Geneva 20 Dec. 1996).

⁴⁹ Helfer et al., *supra* n. 2, at 46.

⁵⁰ *Supra* n. 17, at 6–13.

⁵¹ *Supra* n. 18, at 1–5.

⁵² (Ramirez-Montez, *supra* n. 6, at 45–46) indicates that the initial proposal for a Directive and Regulation to implement the Marrakesh Treaty were initially published within the 2016 Copyright reform package, before the ratification of the Marrakesh Treaty.

⁵³ ‘Printed works’ encompass any kind of written works. These works are covered by the Marrakesh Directive regardless of the media by which they are made available (being it digital or analogue, online and offline). Therefore, e-books are also included in this definition.

⁵⁴ This is defined in Art. 2(3) of the Directive in line and compliance with the Marrakesh Treaty. According to this provision ‘accessible format copy’ means a copy of a work or other subject matter in an alternative manner or form that gives a beneficiary person access to the work or other subject matter, including allowing such person to have access as feasibly and comfortably as a person without any of the impairments or disabilities covered by the Marrakesh Treaty.

encompasses the distribution right. The Directive incorporates the reference to the three-step test by explicating that the exception ‘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’ (Article 3(3)). The Directive, however, somewhat 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.⁵⁵

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.⁵⁶ This means that right-holders cannot invoke TPMs to prevent persons falling within the scope of the Marrakesh Directive from enjoying their rights provided for in that Directive.⁵⁷ However, authorized copies must respect the integrity of the original work as far as possible (Article 3(2)).

Article 3(6) of the Marrakesh Directive enables Member States to provide that uses permitted under the Directive, if undertaken by authorized entities established in their territory, be subject to compensation schemes.⁵⁸ Yet, as Helfer et al. suggest, ‘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’, and the remuneration must be determined taking into account the public interest in cross-border dissemination of accessible works, but also the non-profit nature of authorized entity activities.⁵⁹ Further, the Marrakesh Directive, in the attempt to strike a balance between the rights of beneficiaries and copyright holders, places an array of obligations on authorized entities requiring them to actively discouraging copyright violations in the form of ‘unauthorised reproduction, distribution, communication to the public or making available to the public of accessible format copies’ and demonstrating ‘due care’ in handling accessible format copies.

⁵⁵ See Helfer et al., *supra* n. 2, at 47–49.

⁵⁶ Article 3(4) of the Marrakesh Directive, with reference to the first, third and fifth sub-paragraphs of Art. 6(4) InfoSoc Directive.

⁵⁷ C. Oppenheim, *The Marrakesh Copyright Treaty for Those With Visual Disabilities and Its Implications in the European Union and in the United Kingdom*, 27(1) Alexandria: J. Nat'l & Int'l Lib. & Info. Issues 6 (2017).

⁵⁸ 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.

⁵⁹ L. R. Helfer, M. K. Land & R. Okediji, *Copyright Exceptions Across Borders: Implementing the Marrakesh Treaty*, 42(6) Eur. Intell. Prop. Rev. 332–340 (2020).

Article 4 of the Marrakesh Directive requires Member States to ensure that an authorized entity 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’⁶⁰ established in any Member State. Member States must also ensure that a beneficiary person or an authorized entity may request an accessible format copy from an authorized entity established in any Member State. These provisions should facilitate the circulation of accessible copies within the internal market. Moreover, to facilitate such a cross-border exchanges in the EU, the Marrakesh Directive requires authorized entities to exchange information.

Finally, the Regulation, which is complementary to the Directive, 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.

3.3 FROM BRUSSELS TO MARRAKESH: THE EVOLUTION OF THE DISABILITY EXCEPTION IN EU LAW

The Marrakesh Directive and the Marrakesh Regulation have become an integral part of the complex body of EU copyright law, whose centrepiece remains the InfoSoc Directive,⁶¹ most recently amended by the Digital Single Market (DSM) Directive,⁶² which harmonizes certain aspects of copyright and related rights, still leaving a degree of discretion to the Member States.⁶³ EU copyright legislation has been adopted on the basis of Article 114 TFEU, in pursuance of internal market goals,⁶⁴ in order to drive forward economic integration.

While the market-based foundation of EU copyright law has long ‘overshadowed other copyright functions, more closely related to cultural and social policies’,⁶⁵ non-economic considerations emerge in the copyright exceptions

⁶⁰ Article 3(1)(b) of the Marrakesh Directive.

⁶¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (InfoSoc Directive) OJ L 167, 22 Jun. 2001, OJ L 130, at 10–19.

⁶² See Directive (EU) 2019/790 of the European Parliament and of the Council of 17 Apr. 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 May 2019, at 92–125 (Text with EEA relevance).

⁶³ Case C-463/12, *Copydan Båndkopi* [2015] EU:C:2015:144, para. 57.

⁶⁴ A. Ramalho, *The Competence of the European Union in Copyright Lawmaking. A Normative Perspective of EU Powers for Copyright Harmonization* 14 (Springer 2016).

⁶⁵ C. Sganga, *Towards a More Socially Oriented EU Copyright Law: A Soft Paradigm Shift After Lisbon?*, in *The EU Social Market Economy and the Law* (D. Ferri & F. Cortese eds, Routledge 2019). See also G. Mazziotti, *EU Digital Copyright Law and the End-User* 45 (Springer 2008).

provided for in the InfoSoc Directive. Recital 31 of the preamble of this Directive calls for a ‘fair balance of rights and interests’ between right holders and users, whilst the degree of harmonization of exceptions should be guided by the consideration of ‘their impact on the smooth functioning on the internal market’. On foot of this underlying rationale, Article 5(3)(b) of the InfoSoc Directive, while recognizing the intersection between the rights of persons with disabilities and copyright,⁶⁶ originally allowed (but did not oblige) Member States to provide for exceptions or limitations to the rights of reproduction, communication to the public and making available for ‘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’. Notably, this provision does not specify by the type of works, subject matter or disabilities covered by the exception. Further, Article 5(3)(b) must be read in conjunction with Article 5(4) of the InfoSoc Directive, which provides that, where Member States have introduced any of the exceptions or limitations to the right of reproduction in Article 5(3), they may also introduce a similar exception to the right of distribution.

Being loosely drafted and merely optional, Article 5(3)(b) was transposed by Member States in a patchy way. While many EU Member States had included some forms of exceptions for the benefit of individuals with disabilities, the implementation of Article 5(3)(b) was inconsistent both with regard to the types of disabilities covered and the scope of the exception.⁶⁷ Sganga indicates that some national provisions included a general reference to persons with disabilities (e.g., Austria, Hungary, or Italy); others limited the exception to blind people (Bulgaria), or blind and deafblind people (e.g., Greece).⁶⁸ Ramalho notes that national norms also ‘vary in terms of the works in relation to which the exception applies (for instance, in some countries, the exception applies to all types of works, whereas in others, it only applies to “published works”)’.⁶⁹ Exceptions also diverged as to the rights covered, and Sganga notices that some Member States limited the exception to reproduction rights, while others also extended it to distribution rights, or to various combinations of other rights including communication/making available to the public, public performance, rental and lending.⁷⁰

The Marrakesh Directive complemented and contributed to solidify the ‘disability exception’ included in the original text of Article 5(3)(b) of the InfoSoc Directive. In fact it also introduced an amendment to the consolidated text of the

⁶⁶ Sganga, *supra* n. 41, at 204.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ A. Ramalho, *The EU Disability Exceptions*, in *International Perspectives on Disability Exceptions in Copyright Law and the Visual Arts* 96 (J. McCutcheon & A. Ramalho eds, Routledge 2021).

⁷⁰ *Ibid.*

InfoSoc Directive. The amended Article 5(3)(b) 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’. It also makes clear that this is without prejudice to the obligations of Member States under the Marrakesh Directive, which instead introduced a mandatory exception. This means that Member States still *may* (but are not required to) provide for an exception or limitation to the rights of reproduction and communication, as well as distribution (as provided by Article 5(4) of the Infosoc Directive) for the benefit of persons with disabilities, in cases which do not fall under the scope of the Marrakesh Directive, i.e., ‘as regards works and other subject matter and disabilities other than those covered by’ the Marrakesh Directive.⁷¹

The current ‘disability exception’ in EU copyright law is hence characterized by a compulsory fully harmonized 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 communication to the public and reproduction (and potentially the right of distribution) for other categories of beneficiaries with disabilities laid down in the InfoSoc Directive.

While, as Helfer et al. note,⁷² some States ‘have capitalised on the opportunity of joining the Marrakesh Treaty to expand exceptions and limitations to include a broader range of disabilities or to encourage other socially valuable activities’, the EU has treaded carefully. The blurred contours of this remaining ‘optional’ expansive exception leave the door open to residual divergences across Member States, albeit for the purpose of enlarging the plethora of beneficiaries of the exception.

The somewhat hazy ‘disability exception’ in EU law, which results from the application of the InfoSoc Directive and the Marrakesh Directive, might evolve across time and Ramalho notes that ‘[t]here is considerable normative and legal latitude ... to expand the scope of the current disability exceptions’.⁷³ 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 need to expand the Directive’s scope. The report on the basis of such Article 9 was released by the Commission on 14 April 2022.⁷⁴ It presents data collected across the Member States, and confirms their patchy legal approach, but also a rather diverse landscape

⁷¹ Marrakesh Directive, *supra* n. 17, at Recital 3.

⁷² Helfer et al., *supra* n. 2, at 333.

⁷³ Ramalho, *supra* n. 69, at 104.

⁷⁴ 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.

‘when it comes to the availability of accessible formats for persons with disabilities not covered by the “Marrakesh” Directive’.⁷⁵ Opinions among stakeholders as to whether an expansion of the disability exception provided for in the Marrakesh Directive to works other than printed works also vary greatly, with representatives of right-holders suggesting that an enlargement of the exception will be too onerous and unnecessary (given that accessibility will be ensured by other pieces of legislation, as will be further discussed below).⁷⁶

4 PLACING THE MARRAKESH DIRECTIVE AND REGULATION IN THE EU DISABILITY LAW CONTEXT

Since the entry into force of the Treaty of Amsterdam, which entrusted the former European Community (EC) to combat discrimination on the grounds *inter alia* of disability and included a Declaration stating that the European institutions must take account of the needs of persons with disabilities in drawing up harmonization measures under the former Article 95 EC (now Article 114 TFEU), the EU has enacted a number of legislative measures to foster the rights of persons with disabilities.⁷⁷ In 2010, the ratification of the CRPD⁷⁸ represented a blueprint in the development of EU disability law as a self-standing field of EU law.⁷⁹ Indeed, the CRPD constitutes the most significant driver of recent advances, prompting the adoption of a ten-year long disability policy framework, the European Disability Strategy 2010–2020 (EDS),⁸⁰ followed by the new ‘Union of equality: Strategy for the rights of persons with disabilities 2021–2030’ (hereafter ‘Strategy 2021–2030’),⁸¹ released in March 2021. Being an integral part of EU law,⁸² the CRPD has also

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ D. Ferri, *The UN Convention on the Rights of Persons With Disabilities in the EU Legal Framework and the Development of EU Disability Policies After 2020. What Is Coming Is Better than What Is Gone?*, in *The Implementation of the UN Convention on the Rights of Persons With Disabilities in Austria and Germany* (M. Ganner, E. Rieder, C. Voithofer & F. Welti eds, Innsbruck University Press 2020).

⁷⁸ Council Decision (EU) 2010/48/EC of 26 Nov. 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, OJ L23/35, 27 Jan. 2010, at 35–36.

⁷⁹ Ferri & Broderick, *supra* n. 19.

⁸⁰ Commission Communication (EU) European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe COM(2020) 636 final, 15 Nov. 2010. On the Strategy, see D. Hosking, *Staying the Course: The European Disability Strategy 2010–2020*, 4(73) Eur. Y.B. Disability L. 73–97 (2013).

⁸¹ Commission Communication (EU) Union of equality: Strategy for the rights of persons with disabilities 2021–2030 COM(2021) 101 final, 21 Mar. 2021.

⁸² Joined cases, *C-335/11 and C-337/11 HK Danmark* (11 Apr. 2013), ECLI:EU:C:2013:222. See L. Waddington, *The European Union*, in *The UN Convention on the Rights of Persons With Disabilities in Practice. A Comparative Analysis of the Role of Courts* 131 (L. Waddington & A. Lawson eds, Oxford University Press 2018).

become ‘the normative standard to which the EU adheres with regard to the rights of individuals with disabilities’ and an interpretive parameter in relation to existing legislation.⁸³

4.1 A PRELIMINARY APPRAISAL: THE MARRAKESH DIRECTIVE AND THE MARRAKESH REGULATION AS ‘DISABILITY LAW’

While the Marrakesh Regulation and Marrakesh Directive are *prima facie* part of the EU copyright legislation, they also fall squarely within the remit of EU disability law, as a cross-cutting area of EU action, given that their overarching objective is to promote the right of persons with disabilities to access printed material.

Both these instruments recognize in their non-binding preambles that ‘persons who are blind, visually impaired or otherwise print-disabled continue to face many barriers to accessing books and other printed material which are protected by copyright and related rights’.⁸⁴ Additionally, references Charter of Fundamental Rights of the European Union (the ‘Charter’) are included in both those instruments. In particular the Preamble of the Directive evokes Articles 21 and 26 and expressly recalls that:

[u]nder the Charter, all forms of discrimination, including on grounds of disability, are prohibited and the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community is recognised and respected by the Union.⁸⁵

Both the Directive and the Regulation explicitly refer to the CRPD.⁸⁶ In that regard, they echo the preamble of the Marrakesh Treaty, which also cites the Convention. However, they go further than that, as they highlight the specific place that the CRPD has in the EU legal order. The Preamble of both these instruments explicitly mention that the EU is a party to the Convention and overtly state that they respect the fundamental rights and observe ‘the principles recognised in particular by the Charter and the [CRPD]’ and ‘should be interpreted and applied in accordance with those rights and principles’.⁸⁷

⁸³ Ferri & Broderick, *supra* n. 19.

⁸⁴ Recital 3 of the Preamble of the Marrakesh Regulation. Recital 3 of the Preamble of the Marrakesh Directive.

⁸⁵ Recital 17 of the Preamble of the Marrakesh Directive. See Recital 11 of the preamble of the Marrakesh Regulation.

⁸⁶ Recital 3 of the Preamble of the Marrakesh Directive. Recital 10 of the Marrakesh Regulation.

⁸⁷ Recital 21 of the Marrakesh Directive. Recital 13 of the Marrakesh Regulation.

4.2 ACCESSIBILITY LEGISLATION: PROMOTING THE RIGHTS OF PERSONS WITH DISABILITIES THROUGH MARKET INTEGRATION

From a disability perspective, the Marrakesh Regulation and Marrakesh Directive can also be seen as complementary to an array of measures that, while driving forward economic integration, enhance the rights of persons with disabilities and their access to a range of materials, products and services, as well as cultural content, information and communication, in compliance with the CRPD.

Even before 2010, the EU embedded accessibility requirements across different strands of its legislation.⁸⁸ In the aftermath of the conclusion of the CRPD, accessibility has become a priority field of action for the EU,⁸⁹ falling within the remit of EU shared competence.⁹⁰ A number of EU legislative instruments have been enacted, mostly on the basis of Article 114 TFEU, and a range of other measures have been put forward.⁹¹ With regard, broadly speaking, to accessibility of information and communication, as well as of cultural content, there are a number of relevant legislative provisions. The Directive that harmonizes laws related to radio equipment⁹² includes references to accessibility of telecommunications terminals for persons with disabilities. The Audiovisual Media Services Directive (AVMSD),⁹³ as amended in 2018,⁹⁴ requires Member States to ensure that audiovisual media services are made accessible for persons with disabilities. The Web Accessibility Directive (WAD),⁹⁵ adopted in 2016, aims to harmonize Member States' legislation on accessibility of the websites and mobile applications of public sector bodies.⁹⁶ It provides for mandatory accessibility requirements, but, given that this is a minimum

⁸⁸ S. Charitakis, *Accessibility of Goods and Services*, in *Research Handbook on EU Disability Law* (D. Ferri & A. Broderick eds, Edward Elgar Publishers 2020).

⁸⁹ See European Disability Strategy, *supra* n. 80.

⁹⁰ L. Waddington, *The European Union and the United Nations Convention on the Rights of Persons With Disabilities: A Story of Exclusive and Shared Competences*, 18(4) Maastricht J. Eur. & Comp. L. 431 (2011).

⁹¹ For a detailed account see S. Charitakis, *Access Denied: The Role of the European Union in Ensuring Accessibility Under the United Nations Convention on the Rights of Persons With Disabilities* (Intersentia 2018).

⁹² Directive (EU) 2014/53 of the European Parliament and of the Council of 16 Apr. 2014 on the harmonization of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC, OJ L 153, 22 May 2014, at 62–106.

⁹³ Directive (EU) 2010/13 of the European Parliament and of the Council of 10 Mar. 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L95, 15 Apr. 2010, at 160–183.

⁹⁴ Directive (EU) 2018/1808 of the European Parliament and the Council of 14 Nov. 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administration action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, OJ L 303, 28 Nov. 2018, at 69–92.

⁹⁵ Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 Oct. 2016 on the accessibility of the websites and mobile applications of public sector bodies (Web Accessibility Directive), OJ L327/1, 2 Dec. 2016, at 1–16.

⁹⁶ *Ibid.*, Art. 1(1).

harmonization directive, ‘Member States may maintain or introduce measures in conformity with Union law which go beyond the minimum requirements’ established by this Directive.⁹⁷

The ‘crown jewel’ (and the most relevant piece of legislation when it comes to printed material and cultural content) is however the EAA, adopted by the EU legislators in 2019,⁹⁸ which requires that a range of key products and services, such as computers, smartphones, tablets, TV sets, banking ATMs and services, payment terminals, e-books and e-readers, e-commerce websites and mobile applications and ticketing machines, and check-in machines are made accessible to users with disabilities. When referring to e-books (and dedicated software), the EAA defines them as ‘a service, consisting of the provision of digital files that convey an electronic version of a book, that can be accessed, navigated, read and used and the software including mobile device-based services including mobile applications dedicated to the accessing, navigation, reading and use of those digital files’.⁹⁹ In a nutshell, the EAA places a range of accessibility obligations on manufacturers, authorized representatives, importers, distributors and service providers,¹⁰⁰ and they apply equally to economic operators from the public and private sectors,¹⁰¹ although microenterprises are exempt from complying with accessibility requirements.¹⁰² Notably, the EAA adopts a definition of disability which is far broader than that of the Marrakesh Directive, as it reflects the social-contextual model of disability that is included in the CRPD. On the whole, as noted elsewhere, the EAA pursues a balance between accessibility duties of market operators and the right of people with disabilities to access products and services on an equal basis with others.¹⁰³

Within the remit of the broader cross-cutting field of disability law, accessibility legislation uses economic integration to enhance the rights of persons with disabilities. The reliance on Article 114 TFEU has allowed the adoption of various measures, including copyright ones. The most recent ‘Strategy 2021–2030’ identifies copyright legislation as one of the tools available to enhance accessibility alongside a panoply of other legislative and non-legislative measures.¹⁰⁴ The ‘Strategy 2021–2030’ makes evident that coexistence and synergy of accessibility legislation (in particular the EAA) with the Marrakesh Directive and Regulation should guarantee

⁹⁷ *Ibid.*, Art. 2.

⁹⁸ European Accessibility Act, *supra* n. 20.

⁹⁹ *Ibid.*, Art. 3.

¹⁰⁰ *Ibid.*, Arts 7 et seq.

¹⁰¹ *Ibid.*, Preamble para. 57.

¹⁰² *Ibid.*, Art. 4(3).

¹⁰³ D. Ferri, *The European Accessibility Act and the Shadow of the ‘Social Market Economy’*, 5 Eur. L. Rev. 660–680 (2020).

¹⁰⁴ *Supra* n. 80.

access to an array of information, cultural content and printed material to people with disabilities.

On the one hand, the Marrakesh Directive allows, without prior authorization of the copyright holder, the conversion of existing printed material (books, newspapers, magazines, sheet music, and related illustrations and any other kind of written works, regardless of the media in which they are made available) in accessible formats (e.g., the creation of an audiobook from a printed volume) and the reproduction of accessible format copies (making additional copies of book in Braille). It also permits the transfer of those accessible copies (e.g., through gifts and donations), or the making available of those copies to beneficiary persons (e.g., posting of an audiobook on website available exclusively to print-disabled persons). However, as noted above, it allows it to be done for certain categories of persons with disabilities. National disability exceptions to copyright may be broader than the Marrakesh one, but will still ensure access to a range of existing material already on the market.

On the other hand, the EAA will create 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 will require publishers to deploy their digital publications in an accessible format from the outset. It will also require for e-books to be accessible to people with disabilities other than print disability such as cognitive, intellectual or specific learning disability (e.g., dyslexia, autism, Down syndrome). Furthermore, retailers, e-commerce sites, as well as online platforms will have to make content available to users in accessible formats.¹⁰⁵ Put simply, the EAA will ensure the production and distribution of ‘born accessible publications’ and, from June 2025, consumers must be able to acquire and read e-books irrespective of their disability. In that regard, for e-books, Annex I of the EAA establishes a number of accessibility criteria, and requires *inter alia* that ‘when an e-book contains audio in addition to text, it then provides synchronised text and audio’¹⁰⁶ and that e-books generally allow the operation of assistive technology.

5 THE MARRAKESH DIRECTIVE AND REGULATION: ESSENTIAL PIECES IN THE EU ACCESSIBILITY JIGSAW?

The previous section has highlighted that, when the EAA will be fully implemented and its obligations will be in force, accessibility will become a key element of the whole publishing value chain, increasing the accessibility of ‘born accessible’ printed works but potentially narrowing the role of copyright exceptions. However, until

¹⁰⁵ See *What Does the European Accessibility Act Mean for Global Publishing?* (Inclusive Publishing 13 Apr. 2021), <https://inclusivepublishing.org/blog/what-does-the-european-accessibility-act-mean-for-global-publishing/> (accessed 29 Mar. 2022).

¹⁰⁶ European Accessibility Act, *supra* n. 20, Annex I, s. 2.1.1 (i).

then and in relation to all existing printed material, the Marrakesh Directive and Regulation have a key role to play. In spite of such evidence, our qualitative research shows a somewhat blurred awareness among persons with disabilities and their representative organizations of the importance of copyright exceptions and of the Marrakesh Treaty and its EU implementing framework.

Some participants did indicate that copyright may constitute a barrier for persons with disabilities, in particular people who are blind or visually impaired, to access printed material. One interviewee for example noted:

this legal asset [copyright], which should also be very sacred, such as protecting authorship and defending it against plagiarism, becomes a barrier for us because it prevents us from having access to other formats [ES_DIS]

Further, two representatives of organizations of persons with disabilities suggested that authors are reluctant to provide their work in an accessible format, and they will not give permission to copy such copyrighted work into accessible formats, out of a(n ill-founded) fear that the permission will be abused and that the work will be reproduced and distributed outside the boundaries of what they have permitted.¹⁰⁷ In particular one of those interviewee referred to the difficulties encountered during the negotiations of the Marrakesh Treaty:

there were hard negotiations for the WIPO because publishers thought, “oh, if you get digital books or digital material, then not only the disabled will take them but also the sighted people and nobody will buy books anymore”. [...] So, the negotiations were hard because of fear. There is always a fear that we give the books or dispatch the books where we shouldn't. Each time we receive a look made by such organisations as mine, there is a declaration saying that the book cannot be dispatched or distributed or given, except to the people who have a reading difficulty [DE_DIS]

Other interviewees had little knowledge of copyright and tended to speak of general barriers to access cultural material, such as financial barriers.

Interviews also made evident a rather patchy knowledge of the Marrakesh Treaty itself, and a very limited knowledge of the overall role of the EU in implementing this Treaty. Only representatives of disability organizations from seven Member States identified the Marrakesh Treaty as a source of legislative support for access to digital culture, in particular those organizations with a focus on people who are blind and/or visually impaired, displaying general awareness of this Treaty. Among the participants, representatives of organizations of persons with visual impairments showed more awareness of copyright law. Those participants that indicated their knowledge about the Marrakesh Treaty highlighted its role in guaranteeing access. One interviewee noted that:

¹⁰⁷ FR_DIS; IE_DIS2; DK_DIS.

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]

Another interviewee noted the importance of cross-border exchange of accessible copies:

So, if other countries have got the same WIPO decisions, like the ones we have in France, then we can exchange books with those countries. For example, the French-speaking countries of Africa, some of which have signed and ratified. So, we will be able to send them books. If the blind organization or organization for disabled people have been authorized to receive our books. [FR_DIS]

Some interviewees were also aware that the Treaty had been ratified by the EU on behalf of its Member States. For example, one interviewee noted:

France wanted to ratify ... [the Marrakesh Treaty], but then it was decided that the EU should do it for all its member countries. So now it's been done [FR_DIS].

In a similar vein, another interview participant suggested:

of course, the Marrakesh Treaty has been agreed upon within the EU [...] that it should be implemented within the EU countries ... [...] we have been aware of it and we have been aware of the Marrakesh Treaty and following how it is being implemented on the EU level, but we are not sure or not fully aware where it stands at the moment [DK_DIS]

However, most of interviewees did not have specific knowledge of the role of the EU in ratifying the Marrakesh Treaty, nor of its competence and action in that regard. One interviewee suggested as a critical point that the Member State in which they were based had not ratified the Treaty yet, blaming strong resistance from publishing houses as one of the causes of the delay in ratification.¹⁰⁸ Another participant talked of their efforts in demanding that the Marrakesh Treaty be implemented, stating national ratification was still pending.¹⁰⁹ Notably, some interviewees indicated that they had not heard of the Marrakesh Treaty at all.¹¹⁰ Even those interviewees that indicated their knowledge of the Marrakesh Treaty, and the role of the EU in implementing it, did not engage with any of the technical aspects. Interestingly, one interviewee alluded to a limited impact of the Marrakesh Directive, given the existing copyright exception adopted in the transposition of Article 5(3)(b) of the InfoSoc Directive.¹¹¹

In contrast with such patchy awareness of copyright legislation, almost all interviewees did refer to EU accessibility legislation, often mentioning the EAA,

¹⁰⁸ IT_DIS.

¹⁰⁹ ES_DIS.

¹¹⁰ HRV_DIS.

¹¹¹ DK_DIS, *supra* n. 107.

and heralding it as a key development to promote the rights of persons with disabilities.¹¹² One interviewee mentioned:

we see coming up the European Accessibility Act, which is a law that will bring the publishers [...] to make their books and e-books accessible, and we collaborate at the moment with the publishers to help them and to make more books accessible to our customers. [DE_DIS]

The findings of our interviews somewhat match what has been highlighted in the recent study on works not covered by the Marrakesh Directive.¹¹³

Further, the interviews conducted signal that the EAA is seen as a tool to better exploit the potential that new technologies bring. Some interviewees seemed to suggest that law plays a part in contributing to enhanced access, but innovation is key to bring accessibility forward. In particular, one interviewee noted:

And I think that's why it's important to work together and to use modern technology, new technology, digital technology to improve this process of making more science, metrical, medical, technical documents accessible. [DE_DIS]

Interviewees suggested that the EAA might support a more holistic approach to accessibility, beyond the creation of accessible material. One interviewee, for example, suggested that it is generally possible to find and purchase accessible copies of books on platforms, but the website itself is not accessible:

I want to go to Amazon, for example, to get a book, you can do it, you can always do it, but when you want to pay or sometimes you have those CAPTCHAs and for us are a terrible obstacle because sometimes, first, you cannot see them, and some CAPTCHAs are so difficult to understand, even to hear. So, websites that are not accessible, CAPTCHAs or catalogues that are not so easy to go through [FR_DIS]

On the whole, the data gathered through the semi-structured interviews suggest that the copyright exceptions laid out in the Marrakesh Directive and Regulation are not fully known and understood 'on the ground', even among those national disability advocates that promote the rights of persons with disabilities on a daily basis. These interviews also confirm that, when it comes to accessibility, the EAA (and more generally accessibility legislation) is viewed as indispensable and may bring a more visible positive shift in supporting the rights of persons with disabilities. Overall, in different modes but in a similar vein, our empirical research confirms that the Marrakesh Directive must be considered as one of the tools to enhance accessibility, and, ultimately, accessibility of printed material (and other cultural goods) will derive from the combined effect of all EU legislative instruments.

¹¹² Among others: IT_DIS, *supra* n. 108; IE_DIS; MT_DIS.

¹¹³ *Supra* n. 74. This study signals that, beside copyright law, the respondents referred to EAA (and the Audiovisual Media Services Directive) as 'having an impact' when it comes to access to cultural goods.

6 CONCLUDING REMARKS

After an initial enthusiastic endorsement and a long deadlock due to the lack of agreement between the Commission and (some) Member States around the extent of the EU competences, the EU ratified and transposed the Marrakesh Treaty, whose significance has been highlighted consistently by copyright scholars.¹¹⁴ By locating the Marrakesh Directive and Regulation within the growing body of EU legislation that aims to ensure accessibility of an array of materials, products and services for persons with disabilities, this article has conceived of the implementation of the Marrakesh Treaty as part of the broader remit of EU disability law. As accessibility legislation, the Marrakesh Directive also uses economic integration to enhance the rights of persons with disabilities.

Leveraging on the analysis of empirical data collected across a representative sample of EU Member States, and moving beyond a black letter analysis, our socio-legal research has endeavoured to explore the Marrakesh Directive and Regulation ‘from the “bottom-up”, understanding how they are actually experienced and understood in everyday life’.¹¹⁵ We highlighted the perceptions of key disability stakeholders around the importance of copyright exceptions for persons with disabilities and the impact of the Marrakesh framework in this regard. While the importance of the Marrakesh Treaty is clear to scholars and cannot be understated, the analysis conducted reveals a more nuanced perception of this Treaty and, most importantly, of its implementing legislation in the EU. Whether they see the Marrakesh Treaty as an important step forward in ensuring the human rights of persons with disabilities depends often on the overall knowledge of the interviewees. In general, interviewees did demonstrate an awareness of the significance of copyright exceptions, and this awareness was higher amongst interviewees who are representatives of organizations of persons with visual impairments, which are the most obvious (but not the only) beneficiaries of the copyright exception. Such awareness was not accompanied, however, by demonstrations of any in-depth, technical knowledge of the Treaty itself. Also, the empirical data confirm that dismantling barriers created by copyright law is only one of the necessary steps to grant accessibility of printed materials.

The Marrakesh Directive has certainly the merit to solidify, expand, and (partially) harmonize, the optional, loosely drafted and patchily implemented disability exception provided for in Article 5(3)(b) of the InfoSoc Directive. To some extent, it has succeeded in reconciling divergences amongst EU Member States, introducing a mandatory disability exception to rights of reproduction,

¹¹⁴ Helfer et al., *supra* n. 2.

¹¹⁵ Gallagher & Halbert, *supra* n. 24, at 548.

communication to the public, making available to the public and distribution in relation to the three broadly defined categories of disability elicited under the Marrakesh Treaty. However, interviewees did not engage with these aspects. Rather, they themselves situated the EU copyright regime in the disability law context, by referring to accessibility legislation and in particular the EAA. Interviewees displayed a far greater awareness and knowledge of the EAA, in comparison to Marrakesh legislation, the former identified broadly by interviewees as an important tool both in ensuring accessibility of published material and in exploiting the potential that new technologies bring. On the whole, as the EU awaits the full implementation of the EAA, the Marrakesh Directive and Regulation have an important role to play in ensuring accessibility, but they remain only one piece – albeit an important one – of the accessibility ‘jigsaw’.

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