



**Position Statement of the
Max Planck Institute for Innovation and Competition
on the Proposed Modernisation of European Copyright Rules**

PART B

Exceptions and Limitations

Chapter 4

Implementation of the Marrakesh Treaty

(Proposal for a Directive - COM(2016) 596;

Proposal for a Regulation - COM(2016) 595)

I. Introduction

1. Concerning the implementation of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (2013) into the EU *acquis communautaire*, the Max Planck Institute for Innovation and Competition (MPI) would first like to refer to its own position paper issued in 2015 (http://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/positionspapier_wipo_marrakesh_treaty-2015-05-20.pdf).
2. The Commission has submitted a proposal for a Directive (COM(2016) 596) and a proposal for a Regulation (COM(2016) 595). The proposed Directive covers the limitations to be provided under national law and intra-EU uses, while the proposed Regulation refers to cross-border exchange of accessible format copies between Member States of the European Union and third countries.

II. Regulatory approach

3. The Commission's intention to implement the Marrakesh Treaty, as called for in the abovementioned Opinion, is welcome. The Marrakesh Treaty explicitly aims at the cross-border flow of accessible format copies (see Article 5), which, from an EU perspective, also has an implication for the internal market, (see Article 4(2)(a) Treaty on the Functioning of the European Union (TFEU)).
4. However, the regulatory method appears ill conceived. It seems unnecessary to provide for two different instruments for the implementation of the Marrakesh Treaty; the already complex **legal situation** in EU copyright law would thereby be rendered yet **more complicated** without an evident need. As explained in Part A of this statement – paras 11–14 and 29–34 – to which reference is made, the regulatory framework remains **fragmented if a Directive** and a **Regulation** covering the same subject-matter **coexist**. The MPI notes that the Court of Justice of the European Union (CJEU) in its recent opinion (opinion procedure 3/15) when deciding on the exclusive competence of the EU for the conclusion of the Marrakesh Treaty observed that according to the Treaty, “the Contracting Parties must use two separate and complementary instruments” (No. 71). In fact, the Treaty imposes two different categories of obligations (as the CJEU explains in Nos. 72 and 73). However, the term “instrument” is misleading. No provision in the Treaty specifies the formal method of implementation of these obligations in the laws of the Member States. Therefore, the MPI maintains its position that the implementation of the Treaty would best be made based on one Directive only.
5. In any case, the choice of the legal instrument has an impact on the implementation of European law into national law. While the permitted use drafted in the proposed Directive has to be transposed into national law, the proposed Regulation would apply directly. In this regard, some have raised the question of whether, in this case too, in order to establish a consistent system, the Member States are permitted to “implement” the Regulation into national

law in the same way as in the case of Regulation 2016/679 (General Data Protection Regulation), Recital 8 “*Where this Regulation provides for specifications or restrictions of its rules by Member State law, Member States may, as far as necessary for coherence and for making the national provisions comprehensible to the persons to whom they apply, incorporate elements of this Regulation into their national law*”. However, this approach does not seem desirable and appears to be inconsistent with the system of sources of European law: Where it is necessary to transpose or adapt European law to national law, legislators should issue a Directive. Otherwise, the distinction between Regulation and Directive loses its essential meaning. This would increase the level of uncertainty of law in the European system, thereby hindering the digital single market.

6. The legislative instrument should be chosen in a way that does not counteract the mid- to long-term vision of a modern European copyright law. From this perspective, above all it makes sense to **simplify European copyright law**. Therefore the provisions of the proposed Regulation COM(2016) 595 could be transposed into a Directive without evident harm to the EU’s obligations towards third countries.
7. Moreover, in a broader perspective, as argued in Part A (paras 29–34), existing legislative measures could be replaced with a new (possibly single) measure, thereby avoiding overlaps and inconsistencies in the EU legal framework. However, since this postulation might go beyond the realistically attainable objectives, the copyright package should at least be limited to one new Directive containing all mandatory exceptions, including those concerning uses for the benefit of people with disabilities (Implementation of the Marrakesh Treaty (COM(2016) 596 and COM(2016) 595)). At the same time, we acknowledge that a separate instrument may enable a faster implementation and ratification of the Marrakesh Treaty.

III. Concerns regarding the content of the proposed Directive

8. The following remarks refer to individual provisions of the proposal for a Directive, and where the text is the same, also for the proposal for a Regulation, in particular as regards the definitions.

1. Right of remuneration

9. Among the main points to criticise with respect to the implementation of the Marrakesh Treaty as proposed, the MPI would like to highlight Recital 11 of the proposed Directive, which seems to forbid Member States from providing authors and derivative rightholders with a statutory right of remuneration for the use of works according to the introduced exception to protection. There is no need to destroy existing systems of remuneration as they exist, for example, in Germany. While it would seem appropriate to provide for a mandatory statutory remuneration right in all Member States, it should at least be possible to do so. After all, the EU and its Member States fought for this possibility in Marrakesh, and it would send the wrong signal now to prohibit the provision of such a remuneration and compensation right.
10. Furthermore, it is **up to the national legislator rather than the EU to determine**, as regards such local uses, **whether or not to introduce such a remuneration right**. In fact, given the languages of most EU Member States, demand from beneficiary persons will mainly come from within these countries, without any cross-border effect being involved. Even where cross-border uses take place, remuneration may be paid through collective management organizations (CMOs), which have to a certain extent already developed practical solutions for management of the remuneration right, such as between German-speaking countries.

2. Priority to commercial offers made under reasonable terms

11. Concerns are related to the flexibility offered in the Marrakesh Treaty to give priority to commercial offers made under reasonable terms. This is another flexibility fought for by the EU in the international negotiations for the Marrakesh Treaty, and for good reason. The aim of the Marrakesh Treaty is to facilitate access where necessary, but not where such access is offered commercially under reasonable terms; in the latter case, there is no need for a limitation of copyright. At least as regards local uses such as reproduction and distribution or making available to users in one Member State, it is again a matter for the national legislator to regulate the issue of commercial availability. Where accessible format copies are already available under reasonable terms, such facilitation may not occur or be necessary. While it would seem appropriate to provide for a mandatory provision on commercial availability in all Member States, as suggested in the Opinion of the MPI in 2015 (see above), it should at least be possible to do so if no agreement on a mandatory provision is possible, rather than prohibiting, as in Recital 11 of the proposed Directive, such a provision on commercial availability.

3. Definitions

a) “Work and other subject-matter”

12. The definition of a “work and other subject-matter” seems less clear than in the Marrakesh Treaty as regards the reference to publication: what is meant under the Treaty are works that have already been published or otherwise made publicly available in any media. Accordingly, unpublished works are not covered. The phrase “which is published” in the English version is ambiguous and should be clarified (by the phrase “has been published”). Also, it would be clearer to state: “... published or otherwise lawfully made available in any media”, as formulated in Article 2(a) Marrakesh Treaty, in order to express the

fact that the work in the form of text, etc., must have been published or otherwise lawfully made publicly available in any media.

13. Furthermore, if the approach of an independent Directive and a Regulation in addition is pursued, the clarification in Recital 5 of the proposed Directive (according to which works and other subject-matter may have been published or otherwise lawfully made publicly available “in analogue and digital form”) should also be included in the corresponding Recital 3 of the Regulation. In the near future, however, most digital publications of text will by their nature be “born-accessible”. If that happens, this particular piece of legislation might address a transitional problem that, in the long run, can only be solved technologically.

b) “Accessible format copy”

14. As regards the definition of “accessible format copy”, the second sentence of Article 2(b) of the Marrakesh Treaty (“*The accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons*”) should be taken into account, which is a part of the definition, as is reflected by its placement under the heading “definitions”. Accordingly, under the Treaty, an accessible format copy is only one that also fulfils the conditions of phrase 2 of Article 2(b) Marrakech Treaty, such as the use exclusively by beneficiary persons.

c) “Authorised entities”

15. A similar remark applies to the definition of “authorised entity” in Article 2(4) of the proposed Directive, which does not include the qualifications under Article 2(c) Marrakesh Treaty. However, under the Treaty, such qualifications are part of the definitions, so that, for example, an entity that does not establish and follow its own practice as described in lit. (i) is not an “authorised” entity

under that definition. Furthermore, as under Article 2(c) Marrakesh Treaty, the authorised entity should be one that is authorised or recognised by the government to provide education, etc.

4. Permitted use

a) Rights covered by the limitation

16. Article 3 of the proposed Directive (and Article 4 of the proposed Regulation) should not extend to the general communication right (which should thus be deleted from these provisions and in each document). It does not seem necessary to allow for a limitation of the general communication right. Indeed, the Marrakesh Treaty does not do so (see Articles 4 to 6): it only allows such limitation as regards public performance rather than communication to the public in general (see in Article 4(1)(b)). Even with respect to public performance, the debates at the Diplomatic Conference in Marrakesh showed that there are hardly any cases in real life where a limitation of the communication right in general (and even the public performance right) could at all apply. Therefore, the limitation to the communication right should be deleted or at least specified so as to single out the cases, if any, in which it would seem to be possible and necessary to facilitate access to works covered by the limitation (printed works). In addition, as regards terminology and its consistency with other Directives (in particular Article 3 of the Information Society Directive), it would be confusing to juxtapose the communication right with the making available right (as does the proposed Directive), since the communication right includes, for authors, the right to make available.

b) Conditions

Lawful access

17. The condition, set out in Article 4(2)(a)(i) Marrakesh Treaty, of “lawful access” does not seem to have been picked up in the Directive proposal for no

particular reason. Moreover, there seems to be no reason for excluding this condition, the inclusion of which is actually strongly recommended.

Further conditions

18. Article 4(2)(a) lit. (ii) to (iv) of the Marrakesh Treaty provide further conditions that seem to be included in Articles 2(4) and 3(1), (2) of the proposed Directive. However, it would be clearer to include these conditions at the end of paragraph 1 of Article 3 of the proposed Directive.

IV. Proposal

19. In the following proposal the suggested changes and amendments are highlighted. The proposed Regulation should be amended accordingly if the approach of an independent Directive and a Regulation is pursued by the EU legislator. In this case, the clarification in Recital 5 of the proposed Directive (according to which works and other subject-matter may have been published or otherwise lawfully made publicly available “in analogue and digital form”) should also be included in the corresponding Recital 3 of the Regulation.

Proposal for a Directive COM(2016) 596

Text proposed by the Commission *Amendments*

Recital 6 *Amended Recital 6*

This Directive should therefore provide for mandatory exceptions to the rights that are harmonised by Union law and are relevant for the uses and works covered by the Marrakesh Treaty. These include in particular the rights of reproduction,	This Directive should therefore provide for mandatory exceptions to the rights that are harmonised by Union law and are relevant for the uses and works covered by the Marrakesh Treaty. These include in particular the rights of reproduction, communication
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<p>communication to the public, making available, distribution and lending, as provided for in Directive 2001/29/EC, Directive 2006/115/EC, and Directive 2009/24/EC, as well as the corresponding rights in Directive 96/9/EC (...).</p>	<p>to the public, making available, distribution and lending, as provided for in Directive 2001/29/EC, Directive 2006/115/EC, and Directive 2009/24/EC, as well as the corresponding rights in Directive 96/9/EC (...).</p>
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Recital 11

Amended Recital 11

In view of the specific nature of the exception, its targeted scope and the need for legal certainty for its beneficiaries, Member States should not be allowed to impose additional requirements for the application of the exception, such as compensation schemes or the prior verification of the commercial availability of accessible format copies.

In view of the specific nature of the exception, its targeted scope and the need for legal certainty for its beneficiaries, Member States ~~should not be~~ are allowed to impose ~~additional requirements for the application of the exception, such as compensation~~ remuneration schemes ~~or~~ and the prior verification of the commercial availability of accessible format copies as additional requirements for the application of the exception.

Article 2, Definitions

Amended Article 2, Definitions

For the purposes of this Directive the following definitions shall apply:

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1) ‘work and other subject-matter’ means a work in the form of a book, journal, newspaper, magazine or other

1) ‘work and other subject-matter’ means a work in the form of a book, journal, newspaper, magazine or other

writing, including sheet music, and related illustrations, in any media, including in audio forms such as audiobooks, which is protected by copyright or related rights and which is published or otherwise lawfully made publicly available;

2) (...)

3) ‘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 for the person to have access as feasibly and comfortably as a person without a visual impairment or any of the disabilities referred to in paragraph 2;

writing, including sheet music, and related illustrations, in any media, including in audio forms such as audiobooks, which is protected by copy-right or related rights and which ~~is published~~ has been published or otherwise lawfully made publicly available in any media;

2) (...)

3) ‘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 for the person to have access as feasibly and comfortably as a person without a visual impairment or any of the disabilities referred to in paragraph 2. The accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary



persons;

4) ‘authorised entity’ means an organisation providing education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis, as its main activity or as one of its main activities or public-interest missions.

4) ‘authorised entity’ means an organisation that is authorised or recognised by the government to provide ~~providing~~ education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis, as its main activity or as one of its main activities or public-interest missions.

An authorised entity establishes and follows its own practices:

(i) to establish that the persons it serves are beneficiary persons;

(ii) to limit to beneficiary persons and/or authorised entities its distribution and making available of accessible format copies;

(iii) to discourage the reproduction, distribution and making available of unauthorised copies; and

(iv) to maintain due care in, and records of, its handling of copies of works, while respecting the privacy of beneficiary persons.

Article 3 Permitted Uses

1. Member States shall provide that any act necessary for:

(a) a beneficiary person, or a person acting on their behalf, to make an accessible format copy of a work or other subject-matter for the exclusive use of the beneficiary person; and

(b) an authorised entity to make an accessible format copy and to communicate, make available, distribute or lend an accessible format copy to a beneficiary person or authorised entity for the purpose of exclusive use by a beneficiary person;

does not require the authorisation of the rightholder of any copyright or related right in the work or protected subject-matter pursuant to Articles 2, 3 and 4 of Directive 2001/29/EC, Article 1(1) of Directive 2006/115/EC, Article 8(2) and (3) and Article 9 of Directive 2006/115/EC, Article 4 of Directive 2009/24/EC and Articles 5 and 7 of Directive 96/9/EC.

(...)

Amended Article 3 Permitted Uses

1. Member States shall provide that any act necessary for:

(a) a beneficiary person, or a person acting on their behalf, to make an accessible format copy of a work or other subject-matter for the exclusive use of the beneficiary person; and

(b) an authorised entity to make an accessible format copy₂ and to ~~communicate~~, make available, distribute, or lend an accessible format copy to a beneficiary person or authorised entity for the purpose of exclusive use by a beneficiary person;

does not require the authorisation of the rightholder of any copyright or related right in the work or protected subject-matter pursuant to Articles 2, 3 and 4 of Directive 2001/29/EC, Article 1(1) of Directive 2006/115/EC, Article 8(2) and (3) and Article 9 of Directive 2006/115/EC, Article 4 of Directive 2009/24/EC and Articles 5 and 7 of Directive 96/9/EC₂, when all of the following conditions are met:

(i) the authorised entity wishing to undertake said activity has lawful access to that work or a copy of that work;

(ii) the work is converted to an accessible format copy, which may include any means needed to navigate information in the accessible format, but does not introduce changes other than those needed to make the work accessible to the beneficiary person;

(iii) such accessible format copies are supplied exclusively to be used by beneficiary persons; and

(iv) the activity is undertaken on a non-profit basis;

(...)

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