



MARRAKESH TREATY IMPLEMENTATION GUIDE *SOUTH AFRICA**

This guideline document aims to enable the South African lawmaker to swiftly move forward with the implementation of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, in line with the country's public expression of support for the treaty. The document examines the compatibility of the provisions of the treaty with the current copyright regime in South Africa and, where necessary, it provides suggestions for legislative amendments. The copyright law revision process currently underway in South Africa, together with the country's goal of introducing a national IP Policy, provide a unique opportunity for making these changes in a timely manner.

In South Africa, 880,000 persons are visually impaired, yet only 0.5% of books have been published in or converted to an accessible format. This is in obvious conflict with Human Rights Principles.

INTRODUCTION

In South Africa it is estimated that approximately 880 000 persons have no sight ability or are visually impaired. According to recent studies by the World Blind Union (WBU), in 2012 only 7 per cent of books published were made available in a format accessible to those who are visually impaired in developed (or rather, richer) countries, while less than 1 per cent of books published that year were made available in developing, poorer countries. The situation is even worse in South Africa, where only 0.5 per cent of books have been published in or converted to an accessible format for people with visual impairments. These figures underline the necessity and urgency to adopt adequate measures to facilitate adequate access to published works for blind, visually impaired or otherwise print-disabled persons (hereinafter referred to as 'VIPs' or 'print disabled persons'). Currently, the severe shortage of knowledge materials in accessible formats aggravates the social and economic constraints faced by VIPs in developing countries. This is in obvious conflict with the principles of non-discrimination, equal opportunity, accessibility and full and effective

participation and inclusion in society, proclaimed in the Universal Declaration of Human Rights and the United Nations Convention on the Rights of Persons with Disabilities.

Restrictions imposed by copyright law on the rights to make reproductions and create adaptations of copyright protected works were identified by the international community as a key factor for VIPs' hampered access to published materials. In particular, the sets of existing copyright limitations and exceptions, such as 'fair dealing', were considered inadequate to safeguard sufficient access opportunities.

In June 2013, therefore, the "Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled" (the Treaty) was adopted by a Diplomatic Conference of the World Intellectual Property Organization (WIPO) and subsequently signed by 79 Contracting Parties. With its focus on formulating minimum standards for national copyright exceptions and limitations, the treaty's overarching objective is to drastically increase VIPs' access to books and other printed materials, and combat what is commonly referred to as book famine. Under the Treaty, there is considerable flexibility provided to Contracting Parties in terms of how they wish to implement the treaty (see Article 10: "General Principles of Implementation"); however, existing treaty obligations such as the three-step step need to be observed (Article 11).

For the treaty to enter into force, ratification is required from 20 states. As of April 2015, eight countries have ratified the treaty, including Mali as the first country in Africa. South Africa has been a long-standing supporter of the treaty. In its Closing Statement at the Diplomatic Conference in Marrakesh the South African delegation stated:

"This treaty will have a meaningful impact on the lives of millions of blind and visually impaired persons both in the developed and developing world. The treaty will unlock access to education, news, cultural materials and entertainment. [...] South Africa is embarking on the process of reviewing its copyright legislation and will accede to the Treaty when all internal processes are concluded."

This document's main purpose is to enable the South African lawmaker to swiftly move forward with the ratification/accession process in this country, in line with South Africa's expression of support for the treaty. The document examines the compatibility of the provisions of the treaty with the current *copyright regime* in South Africa and, where necessary, it provides suggestions for legislative amendments. Additional changes may, however, be necessary with regard to so-called "related rights" as stipulated in the country's Performers Protection Act.¹ The copyright law revision process currently underway in South Africa, together with the country's goal of introducing a national IP Policy, provide a unique opportunity for making these changes in a timely manner.

The first part (A) of this document describes and explains the treaty's key definitions. Part (B) then analyses the treaty provisions regarding national copyright exceptions and limitations. In part (C), the document addresses cross border exchange of accessible format copies. Part (D) deals with the treaty's obligations concerning technological measures, and part (D) examines the treaty's provision dealing with privacy. Each part concludes with recommendations for implementation, accompanied by some model language. This document focuses on changes mandated by the Marrakesh Treaty. However, the South African lawmaker should also consider addressing other disabilities and works not included in the treaty.

THE TREATY PROVISIONS

A. Definitions

The treaty contains the following key terms, as defined in Articles 2 and 3 of the treaty:

- **Works**
- **Accessible format copy**
- **Authorised entity**
- **Beneficiary person**

The term “beneficiary person” is used in the definition of the other terms and will thus be addressed first. A **beneficiary person** is defined in [Article 3](#) as:

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

Importantly, the Agreed Statement concerning Article 3(b) clarifies that “cannot be improved” does not require the use of all possible medical diagnostic procedures and treatments. Hence, those suffering from cataracts, for instance, would still qualify as beneficiary persons even though cataracts are considered curable through surgery.

According to [Article 2\(a\)](#), **works** are literary and artistic works within the meaning of Article 2(1) of the Berne Convention for the Protection of Literary and Artistic Works², in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media. This

definition includes works in audio form, such as audiobooks³.

[Article 2\(b\)](#) defines **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.”

Article 2(b) further states that an accessible format copy must be used exclusively by beneficiary persons and that the integrity of the original work must be respected, *“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.”*

Lastly, [Article 2\(c\)](#) defines the term **authorized entity** as

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

In order to provide further clarity, the agreed statement concerning Article 2(c) stipulates that “entities recognized by the government” may include entities receiving financial support from the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis, for purposes of this treaty.

Article 2(c) further states that an authorized entity establishes and follows its own practices: (i) to establish that the persons it serves are beneficiary persons; (ii) to limit to beneficiary persons and/or authorized entities its distribution and making available of accessible format copies;

(iii) to discourage the reproduction, distribution and making available of unauthorized copies; and (iv) to maintain due care in, and records of, its handling of copies of works, while respecting the privacy of beneficiary persons in accordance with Article 8 (see below).

The recommendations for implementation in this section closely follow the text provided by the Marrakesh Treaty, even though the term “print disabled person” is used instead of “beneficiary person.” It is proposed, however, not to add the definition for “work” as contained in the Marrakesh Treaty to the South Africa Copyright Act’s definitions section as a conflicting definition already exists. Instead, the definition for *works* provided in the Marrakesh Treaty will be used within the newly added substantive provisions as proposed in subsequent sections of this document. It may add further clarity if non-exhaustive lists of examples are added to the definitions proposed here (e.g., examples of other print disabilities).

Recommendations for implementation

The definition section of the Copyright Act No. 98 of 1978 should be amended as follows:

(1) In section 1 of the Copyright Act No. 98 of 1978, before “adaptation” insert –

“Accessible format copy” means a copy of literary and artistic works in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media, including such works in audio form, in an alternative manner or form which gives a print disabled person access to that work. This includes permitting the person to navigate and have access as feasibly and comfortably as a person without visual impairment or other print disability. The accessible format copy is used exclusively by print disabled 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 print disabled persons;

(2) In section 1 of the Copyright Act No. 98 of 1978, after “author” insert –

“Authorized entity” means—

- (a) an entity that is authorized or recognized by the government, or receives financial support from the government, to provide education, instructional training, adaptive reading or information access to the print disabled persons on a non-profit basis; or*
- (b) a government institution or non-profit organization that provides the same services to print disabled persons as one of its primary activities or institutional obligations.*

(3) In section 1 of the Copyright Act No. 98 of 1978, after “sound recording” insert –

“Print disabled person”⁴ means a person who:

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

(d) does not include a person who suffers from an impairment of visual functions which can be improved by the use of corrective lenses, to a level that is normally acceptable for reading without a special kind of light; regardless of any other disabilities.

B. National limitations and exceptions

The novelty of the Marrakesh Treaty can be seen in its implications for national limitations and exceptions pertaining to copyright access for the blind. This is primarily encompassed in articles 4, 5 and 6. Article 4 prescribes how a country shall amend their national laws so as to create a limitation or exception for visually impaired individuals regarding the accessing of copyright protected materials. Articles 5 and 6 (discussed below under C.) look at the prescribed laws pertaining to cross-border exchange and importation of accessible format copies between Contracting Parties to the treaty. All three articles require amendments to the current copyright legislation, and all effect the position of visually impaired individuals in South Africa.

Article 4(1)

The heart of the Marrakesh Treaty can be found in Article 4(1) according to which Contracting Parties to the Treaty must provide in their copyright laws for a limitation or exception to:

- the right of reproduction,
- the right of distribution, and
- the right of making available to the public (as provided for in the WIPO Copyright Treaty)

to facilitate the availability of accessible format copies for print disabled persons (Article 4(1)(a)). Under Article 4(1)(b), Contracting Parties are also permitted (“*may*”) to provide an exception or limitation regarding the right of public performance to facilitate access to works for print disabled persons. It appears that the latter category would mainly apply when a literary work is publicly recited, e.g., a public reading of a poem or play.⁵ Under Article 4(1) changes should be permitted that are necessary to make such works accessible in the alternative format.

This puts a general requirement on all Contracting Parties to amend their current copyright laws in so far as they fail to provide limitations and exceptions pertaining to converting traditional format works into accessible formats for the benefit of print disabled persons. It is important to note, however, that the limitations and exceptions in the Marrakesh Treaty do not extend to substantive modifications that would amount to adaptations, an exclusive right still reserved for the copyright owner.⁶ Therefore, all that is permitted is the transformation of the traditional formatted work into an accessible format, not the adaptation or alteration of the content of the original work itself. The integrity of the original work is to be respected at all times, and therefore issues of potential infringement on the moral integrity of the author ought not to arise.

Article 4(4): Commercial Availability (*optional*)

Article 4(4) embodies what has become known as the ‘commercial availability requirement’ of the Marrakesh Treaty. Article 4(4) reads as follows:

*“A Contracting Party **may** confine limitations or exceptions under this Article to works which, in the particular accessible format, **cannot be obtained commercially under reasonable terms for beneficiary persons in that market.** [...]”*
(emphasis added)

In other words, article 4(4) permits - but does not require - Contracting Parties to confine the limitations or exceptions given to the visually impaired population to circumstances where the accessible format copy ‘cannot be obtained commercially under reasonable terms for the beneficiary persons in that market’. One of the by-products of a country availing itself of the commercial availability requirement is that article 5(1) – dealing with cross-border exchange as explained below - will not apply to accessible format copies which may be obtained commercially and under reasonable terms.⁷ This is because article 5(1)

only allows for the cross-border exchange of accessible format copies made pursuant to the country's national laws. Therefore, the addition of a commercial availability requirement will have a negative effect not only on the creation of accessible format copies locally, but on the cross-border exchange of accessible format copies.

We advise South Africa not to adopt a commercial availability clause. There are several reasons why South Africa ought not to introduce a commercial availability clause into its legislation. Such a clause puts the burden on institutions providing reading materials to the visually impaired to ascertain whether the text is already available in South Africa commercially and, if so, puts the additional burden on them to determine whether or not it is available under 'reasonable terms', a phrase not defined in the Treaty. For institutions that are not made up of trained legal experts and which have limited resources (both human and financial), these demands are near impossible to satisfy, rendering the institutions practically paralysed to assist the visually impaired for fear of facing legal action.

The problems are especially evident when looking at the example of an organisation in South Africa wanting to send a book in an accessible format to another part of Africa, which is a likely scenario for the future. It is doubtful, at best, whether in such an instance the organisation would have the resources to perform the required checks, and so would effectively be unable to satisfy such requests.⁸ Further, it remains unclear what precisely is meant by 'commercially obtainable [...] under reasonable terms'. The Treaty does not elaborate on 'reasonable terms'. Does it mean reasonable for the majority of the visually impaired people in the particular country? Reasonable for the individual wanting to acquire access? Reasonable in some other sense which the Treaty does not make clear? Furthermore, what are the 'terms' that must be reasonable?⁹ This lack of clarity is especially problematic in a country where there are still many members of the population without access to such basic necessities as electricity and clean sanitation,

and where most of the blind population are without a means of employment. What this all translates to is that the inclusion of a commercial availability clause will mean the transaction costs for the visually impaired will be much higher than those for sighted readers, which in our view defeats the aim of the Treaty.¹⁰

We propose adding a subsection under section 12 in which to address the obligations arising from the Marrakesh Treaty. Section 12 grants exceptions and limitations from the protection of literary and musical works and is therefore the most appropriate subheading under which to place these new exceptions and limitations. In order to remain faithful to the spirit of the Marrakesh Treaty, it is recommended that as much of the original wording in article 4 is adopted into the Copyright Act as possible.

Article 4(5): Remuneration (optional)

Article 4(5) leaves it to the national lawmaker to decide "whether limitations or exceptions under this Article are subject to remuneration." In other words, the national lawmaker can opt for introducing a statutory licence rather than a copyright exception and limitation. The additional costs associated with remuneration would, in our view, unnecessarily hamper access for print disabled persons and thus jeopardise the overarching objective of the Marrakesh Treaty of providing equal access opportunities. This is even more so the case in developing countries such as South Africa. We therefore propose to not introduce a remuneration requirement.

Recommendations for implementation

Sections 12 and 15 of the Copyright Act No. 98 of 1978 should be amended as follows:

(1) In section 12 of the Copyright Act No. 98 of 1978, insert –

(14) Exceptions and Limitations Relating to Accessible Format Copies

(a) Copyright in literary works in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media, including such works in audio form, shall not be infringed where a print disabled person, or someone acting on behalf of the print disabled person (including a primary caretaker or caregiver), without the authorization of the copyright holder, makes an accessible format copy for the personal or private use of the print disabled person or otherwise assists the print disabled person to make and use accessible format copies where the print disabled person has lawful access to the underlying literary work or a copy thereof.

(b) Copyright in literary works in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media, including such works in audio form, shall not be infringed where an authorized entity, without the authorization of the copyright holder and on a non-profit basis:

- (i) makes an accessible format copy;
- (ii) obtains from another authorized entity an accessible format copy;
- (iii) supplies accessible format copies to print disabled persons by any means, including by non-commercial lending, public performance or by electronic communication by wire or wireless means;

- (iv) undertakes any intermediate steps to achieve the objectives in subsections (i) – (iii),

if the following conditions are met:

- (i) the authorized entity has lawful access to the underlying literary work or a copy thereof;
- (ii) the accessible format copy or public performance does not introduce changes other than those needed to make the work accessible to print disabled persons; and
- (iii) the accessible format copies or public performances are supplied exclusively to be used by print disabled persons.

(c) It shall be irrelevant under this subsection whether or not the underlying literary work is, in the particular accessible format, available commercially under reasonable terms to print disabled persons.¹¹

(2) In section 15 of the Copyright Act No. 98 of 1978, amend subsection 4 as follows –

(4) The provisions of section 12 (1), (2), (4), (5), (9), (10), (12), (13) **and (14)** shall mutatis mutandis, in so far as they can be applied, apply with reference to artistic works.

C. Exportation and importation of accessible format copies

Cross border exchange of accessible format copies is particularly beneficial for South Africa. This is because once South Africa implements the Marrakesh Treaty print disabled persons in the country will have better access to accessible format copies exported by other countries. For example, once the Treaty has also been ratified by the United States, print disabled persons in South Africa will then have access to thousands of English and Spanish language books digitised by volunteers and held by Bookshare.org. We recommend participation in the WIPO-initiated Trusted Intermediary Global Accessible Resources (TIGAR) project (<http://www.accessiblebooksconsortium.org/tigar/en/>).

a. Exportation

Article 5(1) of the Treaty requires Contracting Parties to permit the distribution and making available, by an authorized entity, of an accessible format copy made under a limitation or exception in another Contracting Party. Thus, authorized entities must be permitted to export an accessible format copy to print disabled persons or an authorized entity in another Contracting Party.¹²

To facilitate this process, article 9(1) of the Treaty requires parties to “endeavour to foster the cross-border exchange by encouraging the voluntary sharing of information to assist authorized entities in identifying each other.” Furthermore, under article 9(2) “Contracting Parties undertake to assist their authorized entities engaged in activities under Article 5 to make information available regarding their practices pursuant Article 2(c), both through the sharing of information among authorized entities, and through making available information on their policies and practices [...] to interested parties and members of the public as appropriate.”

b. Importation

Article 6 can be seen as the importation equivalent of article 5. Article 6 states that to the extent that our national law would permit print disabled persons, someone acting on their behalf, or an authorized entity, to make an accessible format copy, our national law must also permit said persons/entities to import an accessible format copy for the benefit of print disabled persons, without the authorization of the rightholder. Contracting Parties enjoy the same flexibilities when implementing this provision as set out in Article 4. However, the Treaty does not provide model language for this obligation.

Notably, the Marrakesh Treaty only permits and requires Contracting Parties to allow ‘authorized entities’ to *export* accessible format copies to a print disabled persons or authorized entities in another Contracting Party. However, the situation is different when it comes to *importing* accessible format copies: Article 6 allows for the importation of those copies through an authorized entity or by the beneficiary persons themselves, “to the extent” that the *making* of an accessible format copy is permitted under the Contracting Party’s national law.

It is argued here that if print disabled persons are always required to make use of an authorized entity as a ‘middle-man’, the practical implication may stifle the effectiveness of the Marrakesh Treaty: Practically, this means the request for a copy is made by an individual in Country X to a local institution, which then requests the copy from an institution in Country Y. Once the copy is brought from Country Y into Country X, it is delivered to the local institution and it is for the institution to distribute it further to the print disabled person requesting it. With approximately 80 per cent of the visually impaired population living amongst the 19 million South Africans residing in remote rural areas according to the South African National Council for the Blind¹³, the resources needed by institutions for delivering copies to such individuals would be immense. The fact that article 6 defers the situation to a Contracting Party’s national law is a clear nod of

validation to the resource difficulties that would be experienced by many predominantly developing countries such as South Africa if there were no alternative method of distribution. It is therefore proposed below that South Africa utilize the option of direct access to imported copies by print disabled persons rather than requiring access to be made through authorized entities only.

Recommendations for implementation

Sections 12 and 15 of the Copyright Act No. 98 of 1978 should be amended as follows:

(1) In section 12 of the Copyright Act No. 98 of 1978, insert –

(15) Cross border exchange of accessible format copies

(a) Copyright in literary works in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media, including such works in audio form, shall not be infringed where an authorized entity, without the authorization of the copyright holder:

(i) distributes or makes available for the exclusive use of print disabled persons accessible format copies to an authorized entity in another country; and

(ii) distributes or makes available accessible format copies to a print disabled persons in another country

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

(b) Copyright in literary works in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media, including such works in audio form, shall not be infringed where an authorized entity, print disabled persons, or someone acting on behalf of print disabled persons (including a primary caretaker or caregiver), without the authorization of the copyright holder, imports an accessible format copy for the benefit of print disabled persons, including by electronic communication by wire or wireless means.

(2) In section 15 of the Copyright Act No. 98 of 1978, amend subsection 4 as follows –

*(4) The provisions of section 12 (1), (2), (4), (5), (9), (10), (12), (13) **and (15)** shall mutatis mutandis, in so far as they can be applied, apply with reference to artistic works.*

D. Circumvention of Technological Protection Measures

Technological Protection Measures (TPMs) are defined as ‘systems or applications which block access to and/or use of digital content on an absolute or conditional basis.’¹⁴ There are generally two types of TPMs that copyright holders can use in respect of their works namely, *access control TPMs* and *use control TPMs*.¹⁵ Under Article 11 of the 1996 WIPO Copyright Treaty – a treaty signed but not ratified by South Africa - Contracting Parties are obliged to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures, when used by rights holders in connection with the exercise of their rights under the treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

According to Article 7 of the Marrakesh Treaty, Contracting Parties are obliged to take appropriate measures, as necessary, to ensure that when they provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures, this legal protection does not prevent print disabled persons from enjoying the limitations and exceptions provided for in the Treaty. According to the agreed statement concerning this Article, authorized entities may continue to apply technological measures in the making, distribution and making available of accessible format copies in accordance with national law.

In South Africa, the circumvention of technological protection measures is prohibited under the Electronic Communications and Transactions (ECT) Act 25 of 2002. Section 86(3) prohibits the possession, making or dealing in devices that are “designed primarily to overcome security measures for the protection of data”.¹⁶ Section 86(4) provides that a person who utilizes any device or computer program mentioned in subsection (3) in order to unlawfully overcome security measures designed to

protect such data or access thereto, is guilty of an offence. The penalty for the offence under s86(4) is a fine or imprisonment for a period not exceeding five years¹⁷.

Currently, the ECT Act does not contain any exceptions to the prohibition on circumventing technological protection measures. Thus, in order for South Africa to comply with Article 7 of the Marrakesh Treaty, it is recommended that the ECT Act be amended to include an exception that permits print disabled persons, persons acting on their behalf and authorized entities to circumvent technological measures for the purpose of fully enjoying the limitations and exceptions provided under the Marrakesh Treaty.¹⁸

Proposal for implementation

The Electronic Communications and Transactions Act No. 25 of 2002 should be amended as follows:

(1) In section 1 of the Electronic Communications and Transactions Act 25 of 2002, after “authentication service provider” insert –

“Authorized entity” means Authorized entity as defined in section 1 of the Copyright Act, 1978;

(2) In section 1 of the Electronic Communications and Transactions Act 25 of 2002, after “universal access” insert –

“Print disabled person” means a Print disabled person as defined in section 1 of the Copyright Act, 1978;

(3) In section 86 of the Electronic Communications and Transactions Act 25 of 2002, insert –

(6) It shall not be an offence under this section for authorized entities, print disabled persons, or someone acting on behalf of print disabled persons to overcome security measures designed to protect data or access thereto for the purpose of exercising the exceptions and limitations provided in Section 12(14) and (15) of the Copyright Act No. 98 of 1978.

E. Privacy

According to Article 8 of the Marrakesh Treaty, Contracting Parties must, when implementing limitations and exceptions provided for in the Treaty, protect the privacy of VIPs. The main motivation for this requirement is that authorized entities or persons acting on behalf of print disabled persons usually obtain information pertaining to the disability and reading habits of print disabled persons. Article 8 strives to set limits to the sharing of such information with third parties.

The protection of personal information and privacy has recently received a great deal of attention in South Africa; as evidenced, for instance, by the country's new Protection of Personal Information Act, 2013.

Proposal for implementation

It is proposed here that in order to fulfill the requirements contained in Article 8 of the Marrakesh Treaty the provisions put forward in the previous sections of this document are accompanied by the following provision:

“An authorized entity and persons acting on behalf of print disabled persons shall respect the privacy of print disabled persons when providing services under this Section.”¹⁹

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¹ See Agreed Statement concerning Article 10(2): It is

² Article 2(1) of the Berne Convention reads as follows:

“The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.”

³ Agreed statement concerning Article 2 (a)

⁴ It is suggested here to use the term “print disabled person” instead of “beneficiary person”.

⁵ Mihály J Ficsor ‘Commentary to the Marrakesh Treaty on accessible format copies for the visually impaired’, available at

http://www.copyrightseesaw.net/archive/?sw_10_item=50, accessed 5 April 2015.; EIFL ‘The Marrakesh Treaty: An EIFL Guide for Libraries’ (2014), available at http://www.eifl.net/system/files/resources/201501/eifl-guide-marrakesh_en.pdf, accessed 5 April 2015

⁶ Mihály J Ficsor ‘Commentary to the Marrakesh Treaty on accessible format copies for the visually impaired’, available at http://www.copyrightseesaw.net/archive/?sw_10_item=50, accessed 5 April 2015.

⁷ Paul Harpur and Nicolas Suzor ‘Copyright protections and disability rights: Turning the page to a new international paradigm’ (2013) 36(3) *University of New South Wales Law Journal* 745 at 761 – 770.

⁸ Catherine Saez ‘In UN talks on treaty for the blind, concern about heavy focus on rightholders’ interest’, available at <http://www.ip-watch.org/2013/04/20/in-un-talks-on-treaty-for-the-blind-concern-about-heavy-focus-on-rightholders-interests/>, accessed 5 April 2015.

⁹ The prior draft of the Treaty made reference to ‘reasonable price’ instead of ‘reasonable terms’, so we must assume that ‘reasonable terms’ is meant to encompass something more, although the Treaty never identifies what it is.

¹⁰ See also: William New ‘Mixed reactions among participants in WIPO talks on treaty for the blind’, available at <http://www.ip-watch.org/2013/04/22/mixed-reactions-among-participants-in-wipo-talks-on-treaty-for-the-blind>, accessed 5 April 2015.

¹¹ It is recommended that the commercial availability option provided in article 4(4) be expressly excluded from the language of the Act. Whilst any country wishing to avail itself of the commercial availability option must declare this in a notification to the Director General of WIPO, it is nonetheless suggested that South Africa’s position on the matter be clearly expressed in the Act so as to avoid any uncertainty in the future interpretation of section 12(14)(1).

¹² This obligation may be fulfilled according to the method set forward in article 5(2) or by providing other limitations or exceptions in national law.

¹³ Growing Tomorrow ‘SA National Council for the Blind: Support in rural areas’, available at <http://www.agritv.co.za/articles/sa-national-council-for-the-blind-support-in-rural-areas/>, accessed 5 April 2015.

¹⁴ Nic Garnett ‘Presentation of the study entitled “Automated rights management systems and copyright limitations and exceptions”, doc SCCR/17/WWW [11452], WIPO standing Committee on Copyright and Related Rights: Seventeenth session, Informative Sessions on Limitations and Exceptions, 3 November 2008

¹⁵ Ian Kerr, Alana Maurushat et al ‘Technological protection measures: tilting at copyright’s windmill’ (2002) 34 *Ottawa Law Review* 6 at 13.

¹⁶ S86(3) of the ECT Act reads as follows:

“A person who unlawfully produces, sells, offers to sell, procures for use, designs, adapts for use, distributes or possesses any device, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data, or performs any of those acts with regard to a password, access code or any other similar kind of data with the intent to unlawfully utilize such item to contravene this section, is guilty of an offence.”

¹⁷ Section 89 (2) of the ECT Act.

¹⁸ Another mechanism to ensure compliance with this provision is to require rights-holder to provide authorized entities with a key to open the digital lock (J Band ‘A User Guide to the Marrakesh Treaty’, 11, available at <http://www.librarycopyrightalliance.org/bm-doc/user-guide-marrakesh-treaty-0913final.pdf>, accessed 5 April 2015)

¹⁹ Based on the recommendation made by Jonathan Band and Peter Jaszi in ‘Model Statute for Implementation of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled’, available at <http://infojustice.org/wp-content/uploads/2013/09/MODEL-STATUTE-FOR-MARRAKESH-IMPLEMENTATION.pdf>, accessed on 5 April 2015