

Does copyright ease inclusivity of differently able individuals?

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Abstract. As a response to the new threats posed by digital technologies, the WIPO Internet Treaties (1996) launched a new waves of copyright reforms, which broadened the range of exclusive rights, compressed exceptions and limitations, and introduced sanctions against the circumvention of technological protection measures implemented by rightholders. This tilt in the copyright balance worsened the problems affecting the market of accessible works for differently able individuals. The UN Convention for the Rights of Persons with Disabilities acknowledged this clash and stated, in the same provision recognizing the right to culture (Article 30), that States should ensure that their intellectual property laws do not hinder the enjoyment of cultural rights of disabled individuals. This move triggered the issuance of the WIPO Marrakesh Treaty, introducing a specific copyright exception for visually impaired individuals, and leading to reforms rethinking the balance between copyright and the need of differently individuals. This chapter will provide an overview of the long path that led legislators to intervene on this interplay, first through private ordering tools and then through the enactment of specific copyright exceptions (Section 1). Section 2 will analyse the WIPO Marrakesh Treaty and the feature of its mandatory exception for visually impaired individuals and authorized entities, followed by an assessment of its implementation in the European Union (Section 3) and across the world (Section 4). This will allow sketching the state of the art of the copyright balance vis-à-vis disability, and to conclude by looking at the road ahead (Section 5).

Keywords: disability, WIPO Marrakesh Treaty, accessibility, right to culture, exceptions and limitations, EU copyright harmonization

After the enactment of the two WIPO Internet Treaties in 1996,¹ issued as a response to the evolution of digital technologies, a number of countries and regions updated their copyright acts accordingly. To tackle piracy threats and protect new forms of exploitation proper of digital business models, legislators broadened the list of exclusive rights, tightened exceptions and limitations (L&Es) and introduced sanctions for the circumvention of technological protection measures (TPMs) used by rightholders to digitally enforce their rights. Such a move had the effect of tilting the copyright balance and create new clashes between authors' exclusive rights and fundamental rights and freedoms such as freedom of expression, the right to education, and the right to culture and science, well highlighted by scholars and courts.²

¹ WIPO Copyright Treaty (WCT), S. Treaty Doc. No. 105-17 (1997); 36 ILM 65(1997), and WIPO Performers and Producers of Phonograms Treaty (WPPT), S. Treaty Doc. No. 105-17; 36 ILM 76 (1997).

² See, eg, Lawrence Helfer, 'Toward a Human Rights Framework for Intellectual Property' [2007] 40 University of California Davis Law Review 971; Henning Grosse Ruse-Khan, 'Time for a Paradigm Shift? Exploring Maximum Standards in International Intellectual Property Protection' [2009] 1 Trade, Law and Development 56; Lea Shaver and Caterina Sganga, 'The Right to Take Part in Cultural Life: on Copyright and Human Rights' [2010] 27 Wisconsin International Law Review 637; Daniel Gervais,

The straightjacketing of copyright rules had only worsened the problems affecting the market of accessible works for differently able individuals. Numbers are telling. Due to the high cost of production, little attractiveness for private investments and scarce public funding available, in the early 2010s only 5% of worldwide books were available in Braille, and a mere 1% in developing countries.³ And while digital technologies have increased the availability of accessible collections, by drastically curtailing their production costs, facilitating cross-border exchanges and offering new devices for disabled individuals to enjoy cultural works and sites,⁴ digital copyright laws have long omitted to include provisions that could allow new technologies to ensure access to knowledge for people with disabilities, rather creating obstacles against the use of existing exceptions to create and make available accessible copies of protected works.⁵

The following pages will provide an overview of the long path that led legislators to strike a balance between copyright and the need of differently able individuals, first through private ordering tools and then through the enactment of specific copyright exceptions (Section 1). Section 2 will analyse the WIPO Marrakesh Treaty and the feature of its mandatory exception for visually impaired individuals and authorized entities, followed by an assessment of its implementation in the European Union (Section 3) and across the world (Section 4). This will allow sketching the state of the art of the copyright balance vis-à-vis disability, and to conclude by looking at the road ahead (Section 5).

³ 'Intellectual Property and Human Rights: Learning to Live Together', in PLC Torremans (ed), *Intellectual Property and Human Rights* (Kluwer Law International 2008); Lawrence Helfer and Graeme Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (CUP 2011). In the EU, see Christophe Geiger, "'Constitutionalising" intellectual property law? The influence of fundamental rights on intellectual property in the European Union' [2006] IIC 371; Tuomas Milly, 'The constitutionalisation of the European legal order: impact of human rights on intellectual property in the EU', in Christophe Geiger (ed), *Research Handbook on Intellectual Property and Human Right* (Edward Elgar 2015), 119; Jens Schovsbo, 'Constitutional foundations and constitutionalization of IPR law' [2015] Zeitschrift für Geistiges Eigentum 383; Jonathan Griffiths, 'Taking Power Tools to the Acquis - The Court of Justice, the Charter of Fundamental Rights and European Union Copyright Law', in Christophe Geiger (ed), *Intellectual Property and the Judiciary* (Edward Elgar 2018); Jane C. Ginsburg & André Lucas, 'Copyright, Freedom of Expression and Free Access to Information (Comparative Study of American and European Law)' [2016] 249 RIDA 4; P Bernt Hugenholtz, 'Copyright and Freedom of Expression in Europe', in Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman and Harry First (Eds), *Expandign the Boundaries of Intellectual Property* (OUP 2001); the contributions in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech. Comparative and International Analyses* (OUP 2005).

³ As in WIPO Standing Committee on Copyright and Related Rights (SCCR), 'Background Paper by Brazil, Ecuador and Paraguay on a WIPO Treaty for Improved Access for Blind, Visually Impaired and Other Reading Disabled Persons', Annex 1.2, SCCR/19/13 Corr. (11 December 2009); World Blind Union (WBU), 'Press Release for WIPO Book Treaty (17 June 2013), <http://www.worldblindunion.org/English/news/Pages/JUNE-17-Press-Release-for-WIPO-Book-Treaty.aspx> (accessed 31 May 2019); Maryanne Diamond, 'Opening Remarks' (18 June 2013), <http://www.worldblindunion.org/English/news/Pages/WIPO-Opening-Remarks-by-Maryanne-Diamond.aspx> (accessed 31 May 2019); Abigail Rekas, 'Access to Books: Human Rights, Copyright and Accessibility', in Constantine Stephanidis and Margherita Antona (eds), *Universal Access in Human-Computer Interaction: Applications and Services for Quality of Life* (Springer 2013); 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.

⁴ See Abbe Brown, Shawn Harmon and Charlotte Waelde, 'Do you See What I see? Disability, Technology, Law and the Experience of Culture' [2012] 43(8) IIC 925.

⁵ Study presented before the WIPO SCCR by Nic Garnett, 'Automated Rights Management Systems and Copyright Limitations and Exceptions, SCCR/14/5 (27 April 2006), and Sam Ricketson, 'WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, SCCR/9/7 (5 April 2003).

1. Balancing copyright protection with the needs of differently able individuals: a long and bumpy journey

Disability exceptions started appearing in national laws in the second half of the 20th century. Only with the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled (WIPO Marrakesh Treaty or VIP Treaty),⁶ however, the need to create a level playing field for cross-border uses was first taken into account. The VIP Treaty came as a consequence of the entry into force of the Convention on the Rights of People with Disabilities (CRPD, 2006),⁷ which recognizes the right to take part in cultural life for disabled individuals (Article 30) and, in the same provision, requires States Parties “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”.⁸

In the EU, the first disability exception appeared in the InfoSoc Directive (2001/29/EC, Article 5(3)(b)),⁹ adopted to comply with the obligations that the Union had assumed as a direct signatory of the WIPO Internet Treaties. As all the other exceptions under Article 5(2)-(3) InfoSoc, the provision is merely optional, thus leaving Member States free to decide on its implementation, in stark contrast with the maximum harmonization of exclusive rights. Albeit weak and vague, Article 5(3)(b) InfoSoc still shows the Union’s awareness of the negative impact of copyright on access to culture for people with disabilities,¹⁰ as testified by Recital 43, which requires Member States to “adopt all the necessary measures to facilitate access to works by persons suffering from a disability which constitutes an obstacle to the use of the works themselves, and to pay particular attention to accessible formats”. To this end, Article 5(3)(b) InfoSoc allows the unauthorized reproduction and communication to the public of protected works 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”. Meaningfully, Article 6(4) InfoSoc lists the exception among the provisions which Member States should ensure not to be hindered by the enforcement of TPMs.

The optional nature of Article 5(3)(b) InfoSoc resulted, expectedly, in a high fragmentation of national solutions. While all Member States’ copyright laws now feature a disability exception, their provisions present divergences with regard to beneficiaries, works, uses/rights covered, and additional conditions

⁶ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, VIP/DC/8 REV (2013).

⁷ The process, very common in the field of IP, has been labelled as ‘regime shifting’. See Lawrence Helfer, ‘Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking [2004] 29(1) Yale Journal of International Law 1.

⁸ Convention on the Rights of Persons with Disabilities, A/RES/61/106, Annex I (2006) (CRPD), Article 30(3).

⁹ Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

¹⁰ The Database Directive (Directive 96/9/EC on the legal protection of databases [1996] OJ L77/20) does not mention disability, thus the InfoSoc exception does not apply to the *sui generis* right (Article 7).

of applicability.¹¹ As to the types of disabilities, some countries offer a general reference,¹² others limit it to blindness,¹³ blindness and deafness,¹⁴ or disabilities causing inability to read.¹⁵ Differences characterize also the definition of accessible format and the rights covered by the exception, with some Member States limiting it to reproduction,¹⁶ others covering also distribution,¹⁷ or combinations of other rights, from communication/making available to the public, to public performance, rental and lending.¹⁸ The payment of fair remuneration to rightholders is requested by a limited number of countries,¹⁹ and only a few national laws mention the need for TPMs not to prevent the exercise of the exception,²⁰ often leaving to governmental agencies or courts to mediate.²¹

The patchwork of national solutions, coupled with copyright territoriality, created serious obstacles to the cross-border exchange of accessible copies, with inevitable duplications of efforts and expenditures across Member States, and a negative impact on the variety of works available in accessible format of differently able individuals.²² For this reason, the Green Paper on Copyright in the Knowledge Economy²³ and its Follow-up²⁴ proposed the broadening and clarification of the disability exception and its inclusion also in the Database Directive, and the devising of incentives for publishers to share master copies and conclude license agreements for the production of accessible copies. Such measures were deemed necessary to increase the number of accessible books in the Union (still just 5% of the works published yearly), and to increase the intervention of private actors, since a model where 95% of accessible copies were produced and distributed by 'agencies funded through charities or public subsidies, working under copyright exceptions' could not be sustained for long.²⁵

The Commission constituted a stakeholders' forum, including associations representing people with disabilities and publishers,²⁶ to facilitate the development of bottom-up solutions that could leverage

¹¹ More in Judith Sullivan, 'Study on Copyright Limitations and Exceptions for the Visually Impaired', SCRR/15/7, prepared for the 15th Session of the Standing Committee on Copyright and Related Right (20 February 2007).

¹² E.g. Austria, Belgium, Croatia, Czech Republic, Germany, Hungary, Ireland, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Sweden.

¹³ Bulgaria (implicitly), Estonia, Spain.

¹⁴ Greece, Latvia.

¹⁵ Denmark, Finland, France, Lithuania, the United Kingdom.

¹⁶ Bulgaria, Croatia, Greece, Lithuania, Spain.

¹⁷ Austria, Czech Republic, Estonia, Germany, Hungary, Ireland, Latvia, the Netherlands, Slovenia, the United Kingdom.

¹⁸ Belgium, Denmark, Finland, France, Italy, Luxembourg, Malta, Poland, Portugal, Slovakia, Sweden.

¹⁹ Austria, Germany, the Netherlands, Slovenia; Denmark only for recordings; Sweden in case of libraries and other organizations, or in case of distribution of more than a modest number of copies.

²⁰ Austria, Bulgaria, Finland, Hungary, Italy, Poland, Slovakia, Spain.

²¹ Croatia, Denmark, Estonia, France, Germany, Greece, Latvia, Lithuania, the Netherlands, Portugal, Slovenia, Sweden, the United Kingdom

²² Sullivan (n 11) at 47-64.

²³ Commission, Green Paper 'Copyright in the Knowledge Economy', COM(2008) 466, 13-16.

²⁴ And particularly with Articles 4, 9, 21 and 30. See Communication from the Commission 'Copyright in the Knowledge Economy', COM(2009) 532 final, 8.

²⁵ Ibid.

²⁶ The Federation of European Publishers, the European Writers Council, the European Dyslexia Association, the International Federation of Reproduction Rights Organisations and the International Association of Scientific, Technical and Medical

market forces to reduce the book famine. The forum drafted and signed a Memorandum of Understanding (MoU) in September 2010, which launched a network of Trusted Intermediaries (TIs) having the goal of facilitating the cross-border exchange of accessible works through the use of a model license agreement²⁷ and the application of the disability exception of the country where the accessible copy was produced (country of origin principle), to reduce uncertainty.²⁸ Beneficiaries were individuals who were blind, visually impaired, incapacitated to hold or manipulate a work or to focus or move one's eyes for reading due to physical disability, or dyslexic,²⁹ while TIs were non-profit entities sharing the mission of providing works in accessible format to differently able individuals, centrally accredited at the EU level.³⁰ The latter were subject to a detailed list of obligations, from the maintenance of a registry of beneficiaries to the conclusion of license agreements with rightholders, the implementation of processes that could monitor the beneficiaries' compliance with copyright law and the stipulation of end-user license agreements between beneficiaries and rightholders before accessing the work.³¹ TIs and the national representative of rightholders were to manage the clearance of exclusive rights.³² Publishers were incentivized to release accessible master copies of their works from their publication, using the WIPO Enabling Technologies Framework.³³ Only in case of unavailability of such copies, TIs could produce and distribute them or request them from another TI, at home or abroad.³⁴ This was facilitated by the creation of an EU-wide online catalogue of accessible works, which reported the copyright status of each item and its regime (exception or TI license).³⁵ The MoU also constituted the European Network of Trusted Intermediaries (ETIN). To be accredited at TI, entities should have become members of the network and sign the ETIN national license agreement with rightholders, which authorized the production and distribution of accessible copies.³⁶

While the EU legislator mentioned several times the MoU and ETIN as successful experiments having a positive impact on the fulfillment of Article 30 CRPD,³⁷ with no need to intervene on the InfoSoc disability

Publishers. See EU Stakeholders Dialogue Memorandum of Understanding (MoU) on Access to Works by People with Print Disabilities (2010).

²⁷ The MoU took inspiration from successful national collective agreements between cultural institutions, non-profit organizations and publishers for the production and distribution of accessible works, such as those stipulated in Denmark and France. See Abbe Brown and Charlotte Waelde, 'Human Rights, Persons with Disabilities and Copyright', in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015), 588.

²⁸ MoU (n 26) Article 2(1).

²⁹ Ibid Article 2(a)-(e).

³⁰ Ibid Article 5.

³¹ Ibid Article 5(4).

³² Ibid Article 6(b).

³³ Ibid Article 6(a).

³⁴ Ibid Article 6(b).

³⁵ Ibid Article 6(e).

³⁶ The bylaws, accreditation guidelines and license agreement of ETIN are still available, *inter alia*, at <https://fep-fee.eu/ETIN-Board-finally-approved>, accessed 21 July 2023.

³⁷ See Commission, 'Overview of progress on the 132 Digital Agenda actions inclusive Digital Agenda Review Package', available at https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=5007, accessed 21 July 2023. Commission, Staff Working Document accompanying the Communication 'European Disability Strategy 2010–2020: a Renewed Commitment to a Barrier-Free Europe. Initial Plan to Implement the European Disability Strategy 2010-2020. List of Actions 2010-2015', COM(2010) 636 final, 4, 8.

exception,³⁸ responses to the Public Consultation on the Review of the EU Copyright Rules (2013)³⁹ depicted quite a different scenario. Several end users with disabilities complained about the difficulties in finding accessible copies and in dealing with TPMs and obtaining copies from abroad due to copyright territoriality, and pointed out that the MoU licensing system did not meet their expectations.⁴⁰ The ETIN was, in fact, praised only by publishers as a good market-based incentive for private actors to produce accessible copies.⁴¹

Against this background, to get a sense of the awareness and understanding by EU Member States' legislators of the interplay between copyright law and the right to culture of people with disabilities, it is interesting to examine the content of the reports prepared by national governments on their compliance with the obligations set by the CRPD, particularly under Article 24 on the right to education and Article 30 on the right to take part in cultural life.⁴² In fact, it is striking to note that only a limited array of countries refer to copyright exceptions in their answers,⁴³ while the EU emphasizes the positive effects of the interplay of the InfoSoc exception and the MoU as two complementary regulatory options.⁴⁴ Similar findings emerge from an overview of the periodic national reports on the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), where Article 15(1)(a)-(c) includes under the same provision the right of everyone to take part in cultural life and the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.⁴⁵ Despite the ESCR Reporting Guidelines require States to comment on the balance between the two rights and explicitly refer to the particular condition of differently able individuals,⁴⁶ only a few reports⁴⁷ address the matter, and even they are silent on the accessible book famine.

To witness some changes, one has to wait for the ratification and entry into force of the WIPO VIP Treaty.

³⁸ Ibid.

³⁹ Commission Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules, July 2014, http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf (accessed 21 July 2023).

⁴⁰ Ibid at 61-62.

⁴¹ Ibid at 62.

⁴² See Committee on the Rights of Persons with Disabilities, Guidelines on periodic reporting to the Committee on the Rights of Persons with Disabilities, including under the simplified reporting procedures, UN Doc. CRPD/C/3 (2 September 2016), illustrating the information to be provided on the implementation of Articles 1 to 33 of the Convention.

⁴³ Austria, Bulgaria, Hungary, Italy, Lithuania, Poland, Slovakia, Sweden. Only Sweden perceives the need to assess the effects of the exception on the availability of accessible works.

⁴⁴ See Committee on the Rights of Persons with Disabilities, European Union – Consideration of reports submitted by States parties under article 35 of the Convention, Initial report of States parties due in 2012, UN Doc CRPD/C/EU/1 (3 December 2014) para 174.

⁴⁵ See, in this respect, Shaver and Sganga (n 2).

⁴⁶ UN Economic and Social Council, Committee on Economic, Social and Cultural Rights, 'Guidelines on Treaty-Specific Documents to be Submitted by States Parties Under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/2008/2 (24 March 2009).

⁴⁷ In the EU only Germany and Belgium make such a reference. Reports are available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=29 (accessed 21 July 2023).

2. The WIPO Marrakesh (VIP) Treaty

The WIPO Marrakesh Treaty represents the response of the UN agency for intellectual property to the obligations imposed by Article 30(3) CRPD, which highlights the need for Member States to ensure that intellectual property laws do not impose unnecessary obstacles to the enjoyment of the right to culture for people with disabilities.

Immediately after the entry into force of the CRPD, two treaty proposals were presented before the WIPO by the World Blind Union (together with Brazil, Ecuador and Paraguay)⁴⁸ and by the African Union.⁴⁹ They adopted a broad approach to disability, included also commercial entities acting for non-profit goals among the beneficiaries, and used the instrument of TIs to allow import/export of accessible copies. The proposals were rejected for the fear that such a broad exception could trigger piracy and negatively impact on the market of protected works. In response, the EU proposed a soft law instrument in the form of a Joint Recommendation,⁵⁰ which built on the MoU-ETIN experience,⁵¹ limited beneficiaries to individuals with print disabilities, and left rightholders free to opt-out from the scheme at any time. Parallel to this, the US tabled a Consensus Instrument, which suggested to postpone the discussion on the introduction of a mandatory exception and proposed, instead, the constitution of a network of TIs to allow import/export of accessible copies.⁵¹

To start tackling the accessible book famine problem, WIPO decided to establish the Trusted Intermediary Global Accessible Resources Project (TIGAR),⁵² modelled around ETIN and aimed at building accessible global libraries, in the hope to stimulate private investments through a license-based solution, and in the belief that top-down copyright exceptions would have just caused stifled reactions by rightholders and keep on relying on public funding to generate and distribute accessible copies.⁵³ While expectations and hopes were high, the project soon derailed due to its complexity, slowness and malfunctioning, ultimately leading to its abandonment by the most important organizations of disabled individuals.⁵⁴ This failure contributed to bring back parties to negotiate, with the outcome of a compromise text that listed as beneficiaries only people with disabilities and non-profit authorized entities, allowed import/export of accessible copies in any case, banned the use of TPMs, limited the exception to the rights of reproduction, distribution and making available to the public,⁵⁵ but left Member

⁴⁸ WIPO SCCR, Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU), SCCR/18/5 (25 May 2009).

⁴⁹ WIPO SCCR, Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers, SCCR/20/11 (21 June 2010).

⁵⁰ WIPO SCCR, Draft Joint Recommendation Concerning the Improved Access to Works Protected by Copyright for Persons with a Print Disability, SCCR/20/12 (21 June 2010).

⁵¹ WIPO SCCR, Draft Consensus Instrument, SCCR/20/10 (21 June 2010).

⁵² WIPO SCCR, 'Stakeholders' Platform Launches Project to Facilitate Access by VIPs to Published Works', UN Press Release PR/2010/668 (23 October 2010).

⁵³ Along these lines see Patrick Hely, 'A Model Copyright Exemption to Serve the Visually Impaired: An Alternative to the Treaty Proposals before WIPO' [2010] 43 *Vanderbilt Journal of Transnational Law* 1369, 1396-7. See also Shira Perlmutter, 'From Paralysis to Progress: The (Useful) Art of Copyright Pragmatism' [2014] 61 *Journal of Copyright Society of the USA* 561, 571-2.

⁵⁴ Maryanne Diamond, President of World Blind Union, WBU Press Statement (26 February 2011).

⁵⁵ WIPO SCCR, Proposal on an International Instrument on Limitations and Exceptions for Persons with Print Disabilities, SCCR/22/15 Rev. 1 (15 June 2011).

States free to introduce either a specific exception or an open-ended fair use clause. The latter one, in fact, was considered the most fitting with the social model of disability introduced by the CRPD, which requires flexibility – a feature that is not compatible with the strict reading of narrow exceptions typical of the continental tradition and of international copyright law.⁵⁶

The draft was still subject to several amendments and limitations. Although the fair use option was eliminated, the exception was – for the first time in the history of WIPO – declared mandatory,⁵⁷ yet with Member States still being free to provide fair compensation and to exclude the application of the provision if accessible copies are already available on the market under reasonable terms.⁵⁸ They should also ensure that the application of TPMs and the legal protection against their circumvention do not hinder the operativity of the exception.⁵⁹ In the approved version of the Treaty, the scope of the provision is limited to literary and artistic works in the form of text, notations and illustrations,⁶⁰ and beneficiaries to individuals with print disabilities and non-profit authorized entities, recognized by Member States and having the mission of offering access to protected works, education and training to disabled persons. The former can make private accessible copies of works they had lawful access to, while the latter can make, obtain and supply accessible copies, and modify protected works only to the extent necessary to make them accessible.⁶¹ Authorized entities are subject to obligations similar to those imposed by the MoU-ETIN scheme, and a system of mutual recognition for import/export purposes⁶² is conceived to allow the creation of an international network and the cross-border exchange of copies to avoid duplication of efforts and increase the availability of accessible copies.⁶³

The standardization triggered by the WIPO VIP Treaty marked a substantive step forward in the battle against the book famine for disabled individuals.⁶⁴ However, its scope remains quite limited compared to the general mandate enshrined in Article 30(3) CRPD, for it covers only print disabilities, and offers a relatively traditional solution to the problem which, albeit flexible, still risks to frustrate private investments in the production and distribution of accessible copies.⁶⁵ Its limited focus seems to ignore or

⁵⁶ Harpur and Suzor (n 3) 761; Brown and Waelde (n 27), 596-7; see, more generally, P Bernt Hugenholtz and Ruth Okediji, 'Contours of an International Instrument on Limitation and Exceptions', in Neil W Netanel (ed), *The Development Agenda: Global Intellectual Property and Developing Countries* (OUP 2009), 475.

⁵⁷ Save for the quotation exception in the Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as revised at Stockholm on July 14, 1967 828 U.N.T.S. 221, Article 10(1).

⁵⁸ WIPO Marrakesh Treaty, Article 4(5).

⁵⁹ Ibid Article 7.

⁶⁰ Ibid Article 2(a).

⁶¹ Ibid Article 4(2)(a)-(b).

⁶² By imposing to States the obligation to allow beneficiaries to import accessible works, and authorized entities to distribute and make available accessible works to other contracting countries, to the extent they are not aware – nor can they reasonably be – of the risk that the copy is used by persons others than a beneficiary (ibid Article 5(2)). The WIPO International Bureau should facilitate the cooperation among contracting states and the exchange of information between authorized entities (ibid Article 9(1) and (3)).

⁶³ Ibid Article 2(c).

⁶⁴ In Article 2 (disability and work) and Article 4(1) (exclusive rights covered).

⁶⁵ In fact, the final version of the Treaty was still criticized by those who maintained that a broad mandatory exception risks to have severe chilling effects on private investments in the production and distribution of accessible copies, with a perduring divide between the advocates of an intervention of exceptions only in case of market failure, and those who read Article 30(3) UNCRPD

at least to underestimate the fact that the notion of disability is highly prismatic and fast-changing, and copyright enforcement poses challenges to the access to and accessibility of cultural and creative products for a range of disabilities that goes much beyond visual and reading impairments – and this is particularly the case vis-à-vis the evolution of entertainment technologies. More generally, the Marrakesh approach, which sees disability as a deviation to be handled via exceptions, is also far from the social model of disability introduced by the CRPD. In this sense, the Treaty represents only a slight amelioration of the solution offered by the InfoSoc Directive, which, due to its optional nature, caused an extreme fragmentation of national provisions, with severely negative effects on the development of a functioning internal market of accessible works.

3. EU copyright law before and after Marrakesh

Due to disagreements on the division of competences between EU and Member States, ultimately solved by the CJEU, it took a relatively long time for the EU to ratify the WIPO VIP Treaty.⁶⁶ To comply with its new international obligations, the Union enacted Directive 2017/1564/EU (Marrakesh Directive),⁶⁷ amending the InfoSoc Directive and Regulation 2017/1563/EU (Marrakesh Regulation),⁶⁸ which allows the import/export (both in form of distribution and communication to the public) of accessible copies lawfully made in Member States from and to third countries that are parties to the WIPO Marrakesh Treaty.⁶⁹

Both the Directive and the Regulation⁷⁰ align with the Treaty with regard to the identification of beneficiaries - individuals who are blind, have an irreversible visual impairment, or a perceptual or reading disability that makes them unable to read, or other physical disability that makes them unable to hold or manipulate a book or to focus or move their eyes in order to read,⁷¹ and authorized entities having the mission to provide education, training, adaptive reading or information access to beneficiaries on a non-profit basis.⁷² Similarly, works covered are books, journals, newspapers, magazines, other writings, sheet music and illustrations, whatever the media and form,⁷³ while the notion of accessible

as a paradigm shift that sets a clear ceiling to copyright protection in case of conflict with the cultural rights of people with disabilities. The debate is illustrated in great detail by Harpur and Suzor (n 3) 761-8.

⁶⁶ Opinion of the Court C-3/15 on the request for an Opinion pursuant to Article 218(11) TFEU, made on 11 August 2015 by the European Commission [2017] ECLI:EU:C:2017:114, para 112. The Treaty was signed on behalf of the Union on 30 April 2014 (Council Decision 2014/221/EU of 14 April 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 [2014] OJ L115/1). On the debate see Ana Ramalho, 'Signed, sealed, but not delivered: the EU and the ratification of the Marrakesh Treaty' [2015] 6(4) European Journal of Risk Regulation 629.

⁶⁷ Directive 2017/1564 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2017] OJ L242/6 (Marrakesh Directive).

⁶⁸ Regulation 2017/1563/EU 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 [2017] OJ L242/1 (Marrakesh Regulation).

⁶⁹ Marrakesh Directive, Recital 6 and Article 3. Marrakesh Regulation, Recital 7 and Article 4.

⁷⁰ Marrakesh Regulation, Articles 2 and 5.

⁷¹ Marrakesh Directive, Article 2(2)(a)-(d).

⁷² Ibid Article 2(4).

⁷³ Ibid Article 2(1).

format is formulated in technologically neutral terms.⁷⁴ The exception, declared mandatory and subject to the three-step-test,⁷⁵ applies to all the exclusive rights harmonized under EU law, that is to reproduction, communication/making available to the public, distribution under the InfoSoc Directive,⁷⁶ the copyright and *sui generis* right over a database,⁷⁷ the right to reproduce, translate, adapt, arrange, distribute and rent a software,⁷⁸ the general right of rental and lending, the right of communication to the public and rebroadcasting of broadcasters, and the right of distribution of performers, producers of phonograms and broadcasters.⁷⁹ Again as in the Marrakesh Treaty, beneficiaries can make accessible copies of works to which they have lawful access for their exclusive use, while authorized entities can make accessible copies and communicate, make available, distribute or lend them to beneficiaries for their non-profit exclusive use.⁸⁰ The latter are subject to specific requirements, in line with the MoU and the VIP Treaty.⁸¹ Accessible copies should respect the integrity of the work, but moral rights cannot be enforced against changes that are necessary to make the work accessible.⁸² The exception can be subject to fair compensation,⁸³ but Member States shall ensure, as under Article 6(4) InfoSoc, that the imposition of TPMs does not hinder the operativity of the provision.⁸⁴ The Directive also introduces the principle of free circulation of accessible format copies in the internal market.⁸⁵

The Directive has been implemented by all Member States (including the then-Member-State United Kingdom), which generally transposed the language of the Directive almost verbatim.⁸⁶ This is particularly the case for the definition of beneficiaries, which are usually identified in line with the EU text. Some national legislations, however, opted for a broader subjective scope. In Denmark, third parties in general are allowed to reproduce copies of protected works for the benefit of visually and hearing-impaired people by means of sound and visual recording devices, and “authorized institutions” encompass governmental or municipal entities, as well as any other social or non-profit institutions. France offers an even broader definition of disability (Article L. 122-5-7° CPI), covering motor, physical, sensory, mental, cognitive, or psychic disabilities that are effectively able to prevent access to works in

⁷⁴ Ibid Article 2(3).

⁷⁵ Ibid Article 3(3) and (4).

⁷⁶ As in Articles 2-4 InfoSoc.

⁷⁷ Articles 5 and 7 Database.

⁷⁸ Article 4 of Directive 2008/24/EC on the legal protection of computer programs [2009] OJ L111/16.

⁷⁹ Article 1(1), Article 8(2) and (3) and Article 9 of Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L376/28.

⁸⁰ Marrakesh Directive, Article 3(1).

⁸¹ This connection is also noted by Reto M Hilty et al, ‘Position Paper of the MPI for Innovation and Competition Concerning the Implementation of the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled’ [2015] 46(6) IIC 707, para 49. Authorized entities are requested to offer accessible copies only to beneficiaries and other authorized entities, manage piracy risks, exercise due care and maintain records of their handling of works and accessible copies, and provide information of their list of works in accessible formats, and the name and contact details of the authorized entities with which they engage in exchanges (Marrakesh Directive, Article 5).

⁸² Ibid Article 3(2).

⁸³ Ibid Article 3(6).

⁸⁴ Ibid Article 3(4), with reference to the first, third and fifth subparagraphs of Article 6(4) InfoSoc.

⁸⁵ Ibid Article 4.

⁸⁶ The measures of national implementation notified to the EU Commission are available at <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32017L1564>, accessed 21 July 2023.

their traditional format, and the notion of authorized entities covers cultural heritage institutions and any other institution and legal person specifically appointed by the Ministry of Culture. Similarly, in Germany, “disability” (Section 45a UrhG-G) includes all forms of impairment and related health problems discouraging access to works. Greece (Article 28(12) GCA) and Lithuania (Article 25 LiCA) also add hearing impairments, while Ireland (Section 2 CRRA) refers to Section 2 of the Disability Act (2005), which defines “disability” as “a substantial restriction of someone’s ability to carry out a professional task, business, or any other occupation in the State, as well as the lack of ability to take part in the social and cultural life of the State due to some kind of physical, sensory, mental health or intellectual impairment”. Restrictive approaches could instead be found in Latvia (19(1)(3) LaCa), the Netherlands (Article 15j AW), Sweden (Article 17 URL) and Poland (Article 35a UPA).

Not many divergences can be found with regard to the types of works covered,⁸⁷ with rare departures from the EU text to broaden the scope of the exception,⁸⁸ and a few countries opting for limiting the provisions to works not commercially available or not explicitly produced for disabled individuals (Lithuania, Article 25 LiCA; Poland, Article 33(1) UPA).⁸⁹ As to permitted uses, only some particularities can be found, such as the Hungarian Section 41(1) SZJT, which contains a free-use rule for the benefit of disabled persons, or the Finnish Section 17(2) TL, which covers also lending, selling, and allowing the use of the copies made by authorized entities as such, except for radio and tv broadcasting. At the opposite side of the spectrum, Article L. 122-5-1-2° CPI (France) only includes acts of reproduction and “représentation” of works whose copies have been deposited in the National Library of France, while Section 104(1)A CRRA (Ireland) obliges authorized entities to incorporate an explicit statement in the copies of protected works they make to ensure access to disabled persons, declaring that the work is covered by the national Marrakesh exception. Adopting a much more flexible language, Article 9(1)(i) MCA (Malta) explicitly allows the reproduction, dissemination, and communication to the public and translation on behalf of disabled people. Already before the Marrakesh Directive, Section 46 (1) ZKUASP (Slovakia) encompassed also public performance rights, and specified that elements of the protected works reproduced could be further explained through descriptions to assist beneficiaries.

The majority of EU countries does not provide remuneration duties nor mandatory collective license schemes, while Denmark, Sweden, France, the Netherlands, and Finland impose fair remuneration in all or specific circumstances. In Denmark, Section 17c DCA states that remuneration, established by law under an ECL scheme, is required only if the economic harm to rightsholders is not minimal. In Finland, remuneration duties are imposed under Section 17(3) TL only if an accessible format copy that has been

⁸⁷ Some countries introduce specific exclusions, such as Denmark (Section 17(1) DCA), which carves out musical works and sound recordings. The German system is more articulated, as two different provisions cover all types of works, in a way that those excluded in the former are included in the other. Section 45b UrhG-G is work-specific, as it was devised to cover works in text or any other format that may uneasily be accessed by visually impaired individuals. Hence, since it is dedicated to persons with visual and reading disabilities, Section 45b UrhG-G specifically addresses a list of works - published literary available in text as well as graphic recordings of musical works - also including illustrations. In fact, the general provision enabling use for private purposes by disabled people - Section 45a(2) UrhG-G - does not include these kinds of works.

⁸⁸ Article L. 122-5-1-2° b) CPI (France) obliges publishers of textbooks to make such works available for reproduction and making available in digital format to disabled people within ten years from the date of first publication.

⁸⁹ In Sweden (Article 17e URL), authorized entities are the only ones allowed to use specific types of works, so as they can make sound recordings, distribute radio and TV broadcasts, as well as cinematographic works, in a format that also ensures access to people with hearing disabilities.

reproduced through sound recording is left for the permanent use of the beneficiary person. In Sweden, Article 17a URL establishes that remuneration is due only if more than one copy is distributed or permanently retained by the individual end beneficiaries for whom it was made. In France, exemptions from remuneration can be enlisted by the Ministry of Culture in favor of specifically identified entities, such as those purchasing recording and audio media to make copies autonomously (Article L. 311-8-1-3° CPI). Austria (Section 42d(8) UrhG-A) and The Netherlands (Article 15j AW), instead, require payment in all circumstances.

Finally, only a few national legislations explicitly mention the need for the exception to comply with the three-step test,⁹⁰ or the need to preserve the integrity of the work while realizing the accessible copy.⁹¹

All in all, national implementations of the Marrakesh disability exception present a high degree of harmonization and tend to align to the EU text. According to the responses to the recent Call for evidence launched by the EC on the effects of the Directive, most beneficiaries praise the greater number of works now made available to disabled individuals and the cost saving derived from the sharing of accessible collections between authorized entities.⁹² While this represents a major achievement in the field, a long road is still ahead with regard to other forms of disabilities and particular type of works, for which exceptions under Article 5(3)(b) InfoSoc are still heavily fragmented across the Union.⁹³

4. The implementation of the Marrakesh Treaty and the state of disability exceptions outside the EU

As of July 2023, 93 countries plus the European Union as a single entity have ratified the Marrakesh Treaty. Not for all of them, however, there was a reported implementation,⁹⁴ while in some States there was no

⁹⁰ Belgium (Article XI.190 CDE), Luxembourg (Article 10ter), Romania (Article 35 1 RCA), Cyprus (Article 7R(3) CL) and Greece (Article 28C GCA)

⁹¹ Greece (Article 28A(4) GCA), Luxembourg (Article 10-ter LuDA), The Netherlands (Article 15j AW), Bulgaria (Article 26b(5) BCA), Croatia (Article 195(5) NN), Cyprus (Article 7R(5) CL) and Estonia (Section 19(6) AutÕS).

⁹² The Call for evidence and related responses can be consulted at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13615-EU-copyright-law-for-blind-and-visually-impaired-people-evaluation-of-the-Marrakesh-Directive-and-Regulation_en (accessed 21 July 2023).

⁹³ For more details see Caterina Sganga et al [2023] 'Copyright flexibilities: mapping and comparative assessment of EU and national sources', 16 January 2023, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=432537610, at 559-560.

⁹⁴ There are 38 countries which ratified the Treaty but did not notify any implementation: Afghanistan (2018), Bangladesh (2022), Barbados (2023), Belize (2018), Bolivia (2019), Botswana (2016), Burkina Faso (2017), Central African Republic (2020), Comoros (2021), Costa Rica (2017), Ethiopia (2021), Ghana (2018), Honduras (2017), Jordan (2018), Kiribati (2019), Lesotho (2018), Liechtenstein (2021), Malaysia (2022), Mali (2014), Marshall Islands (2019), Montenegro (2022), Morocco (2019), Paraguay (2015), Qatar (2018), Rwanda (2021), Saint Lucia (2020), Saint Vincent and Grenadines (2015), San Marino (2020), Sao Tome and Principe (2020), Saudi Arabia (2018), Sri Lanka (2016), Tajikistan (2019), Tanzania (2020), Tunisia (2016), United Arab Emirates (2014), Vanuatu (2020), Venezuela (2019), Zimbabwe (2019). Bosnia and Herzegovina ratified the Treaty in 2021 but kept its pre-Marrakesh exception, which has a very vague wording and does not comply with the specifications of the VIP Treaty. The same applies to Azerbaijan (2020), Cape Verde (2019), Chile (2016), Cameroon (2021), North Korea (2016), Dominican Republic (2018), El Salvador (2014), Indonesia (2020), Mauritius (2021), Mongolia (2015), Nicaragua (2020), Panama (2017), Philippines (2018), South Korea (2015), Serbia (2020), Turkmenistan (2020). India (2014) provides for a compulsory license instead of an exception, subject to an evaluation of the request by the Copyright Board (Indian Copyright Act, Sections 31B and 52), while Uganda (2018) uses a pre-Marrakesh fair use clause (Ugandan Copyright Act, Section 15).

need for a legislative intervention due to the status of self-executing acts which their legislations attribute to international treaties.⁹⁵

Most national laws align with the Marrakesh Treaty, albeit not always using the same language. Beneficiaries are expressly identified in people with disabilities impacting on the capability to read, differently labelled,⁹⁶ and authorized entities are those recognized as such by the State. Some countries expand their provisions to cover also other forms of impairments,⁹⁷ or provide very general, broad definitions,⁹⁸ while others adopt a more cautious approach by requiring that the disability status is ascertained through rigid procedures.⁹⁹ A number of national legislations introduce articulated processes for the attribution of the status of authorized entities and impose on them specific obligations – an

⁹⁵ This is the case for Armenia (accession 2022), Kenya (accession 2019), Mexico (ratification 2015), Moldova (2018). Kenya, however, implemented the Treaty in 2019 with an amendment to its Copyright Act, which follows verbatim the text of the Marrakesh Treaty (Sections 2 and 29). The same can be said for Mexico which, however, introduced a very general provision that does not comply with the Marrakesh text (Mexican Copyright Act Section 148).

⁹⁶ Brazil (Decree n.9522 of 8 October 2018, Article 2) follows almost verbatim the Marrakesh Treaty, and the same can be said for Canada (Article 32.01(8) Copyright Act, Cote d'Ivoire (Article 1 Copyright Act), Guatemala (Article 63bis Copyright Act), Kyrgyzstan, Article 4 Copyright Act.

⁹⁷ Article 36quinquies of the Argentinian Copyright Act refers to "sensory disabilities" and covers also hearing impairments. In Australia, disability is generally defined as the cause of difficulties in reading, viewing, hearing or comprehending copyright material in a particular form (Article 10(1)(c) Copyright Act). In Thailand, the reference goes to "impairment of vision, hearing, mobility, intellectuality, or learning, or other impairments, as prescribed by the Minister in the Government Gazette" (Copyright Act, Article 32/4)

⁹⁸ E.g. Cook Islands, Article 24(5) Copyright Act: "person with a disability means a person who requires a work or a copy of a work to be manipulated in some way to enable the person to access and use the work to substantially the same degree as a person without the same disability"; Malawi, Article 49 Copyright Act; Singapore, Article 54(1), Copyright Act, generally referring to reading disability; Switzerland, Article 24c(1), Copyright Act, allowing the creation of accessible copies "insofar as the work cannot be perceived, or can only be perceived with difficulty, in its already published form"; Ukraine, Article 23(1), Copyright Act, referring to "persons with limited possibilities of perceiving printed information due to disability". But see United Kingdom, Copyright, Patent and Design Act (CPDA), Section 31F(2)-(3): "(2) "Disabled person" means a person who has a physical or mental impairment which prevents the person from enjoying a copyright work to the same degree as a person who does not have that impairment, and "disability" is to be construed accordingly. (3) But a person is not to be regarded as disabled by reason only of an impairment of visual function which can be improved, by the use of corrective lenses, to a level that is normally acceptable for reading without a special level or kind of light."

⁹⁹ Brazil, Art.2(IV)(§1) Decree n.9522/2018, which requires a biopsychosocial assessment, or a report signed by a qualified professional, or a psychopedagogical assessment carried out by professionals or teams from the school or the education system.

element on which national legislations show relative divergences.¹⁰⁰ Other countries use general definitions¹⁰¹ or introduce ad hoc lists.¹⁰²

Works covered by the exception range from the baseline of literary and artistic creations¹⁰³ in the form of text, notation or illustrations, including that fixed in phonograms (such as audiobooks)¹⁰⁴ to performances and fixation of performances of protected works,¹⁰⁵ with the exclusion of films.¹⁰⁶ In some

¹⁰⁰ Argentina, Article 36quater Copyright Act (authorized entities must inform the National Library of the catalog of works reproduced in accessible format). For a very detailed list of requirements for the acquisition of the status of authorized entity (Technical capacity, internal controls, incorporation), obligations that follow (piracy control, management of registries of accessible copies and beneficiaries, non-discrimination, publicity and transparency, controlled fees), supervision and cancellation of the recognition, see Brazil, Articles 4-11 Decree n.9522/2018. See also Cote d'Ivoire, Article 32 Copyright Act (list jointly drawn up by the Minister responsible for Culture and the Minister responsible for of Social Affairs); Guatemala, Article 63bis(2)-(4) Copyright Act, imposing the obligation to assign and administer access codes to protected works in accessible format to beneficiaries, register the use of accessible copies, manage them in a national database. Kyrgyzstan, Article 20-1 Copyright Act, requires that entities take measures to prevent piracy and keep records of their activities. In New Zealand (Article 69 Copyright Act) authorized entities should give notice to the Ministry of Culture that they intend to start making and distributing accessible copies, and (Section 69C) keep records of accessible copies made, provided, reproduced, imported and exported, with transparency and publicity. In Nigeria, an entity should track beneficiaries, discourage piracy, maintain due care of records regarding the making available of accessible copies (Article 26(2) Copyright Act). In Singapore, Article 54(6) Copyright Act requires authorized entities to keep records of its activities, ascertain the identity and eligibility of beneficiaries, and control piracy. In Trinidad and Tobago, obligations are limited to tracking and piracy control (Section 12A(4) Copyright Act). The United States Copyright Act (§121A) requires authorized entities to assess the eligibility of beneficiaries, control piracy, maintain due care and records of the handling of copies, facilitate effective cross-border exchanges, and be transparent of the titles it has and the policies and practices it follows. Ukraine obliges authorized entities to take appropriate measures – including TPMs – to prevent unauthorized uses and to track beneficiaries (Article 23(2)(5) Copyright Act). Uruguay (Decree No. 295 of October 16, 2017) also mentions the duty to prevent piracy, maintain a registry of accessible works and their use, deposit an accessible copy of each work held at the General Directorate of the National Library of the Ministry of Culture and Education, and publicize in a transparent fashion its compliance with all legal obligations (Article 7 Copyright Act). Vietnam's copyright law refers to a governmental decree specifying the conditions for the acquisition of the status of authorized entity (Article 25a Copyright Act).

¹⁰¹ Australia, Article 10(1) Copyright Act (an educational institution or a not-for-profit organization with a principal function of providing assistance to persons with a disability); Brazil (Article 2(IV)(§3 Decree n.9522/2018) - libraries, archives, museums, educational establishments, social assistance institutions, institutions representing people with disabilities, and other organizations, having as missions to provide services in the areas of education, pedagogical training, adapted reading, access to information). In Canada the definition covers also governmental agencies and offices (Article 32.01 Copyright Act), and the same in in Guatemala (Article 63bis Copyright Act), which looks at State institutions or national or international NGOs. New Zealand (Article 69(1) Copyright Act) lists educational establishments, educational resource suppliers, libraries, charitable entities. Nigeria refers to entities authorized, recognized or financed by the government or NGOs providing training, education, adapting reading or information access to beneficiaries. Similarly, see Ukraine, Article 23(2) Copyright Act. In Singapore the reference goes to institution assisting persons with reading disabilities or educational institutions (Article 54(4)(a) Copyright Act). In Uruguay, Article 16 Decree no.295/2017 of the implementing Decree requires private and public educational institutions and libraries cooperating with the Uruguay Blind Union to enroll in the Registry of Authorized Entities within 6 months from the entry into force of the decree.

¹⁰² Such as Australia (Article 113D(b)-(c) Copyright Act – libraries, archives, key cultural institutions, educational institutions); Israel (Article 28A Copyright Act, including non-profit entities having the goal of educating, training and assisting persons with disabilities, a Government office or an educational institution). In the Russian Federation the identification of libraries operating as authorized entities comes from a governmental decision (Decision of January 23, 2016, n.32). Trinidad and Tobago authorizes entities are the National Library and Information System Authority (Article 12 Copyright Act) and any other entity providing education, training and access to beneficiary persons

¹⁰³ Singapore (Article 54(19) Copyright Act) include also dramatic works.

¹⁰⁴ Brazil, Art. 2(II) Decree n.9522/2018; Uruguay, Article 1 Decree no.295/2017.

¹⁰⁵ The United States Copyright Act makes explicit reference to phonorecords of previously published literary or musical works if such materials are reproduced or distributed in accessible formats exclusively for use by eligible persons (§121(a)).

¹⁰⁶ Canada, Article 32.01 Copyright Act.

instances, the list covers also architectural, photographic, fine arts and applied art works permanently located in public places.¹⁰⁷ Noteworthy specifications are present in the Russian Federation, which excludes works created for use in specific formats and music phonograms,¹⁰⁸ and in the United States, where the Copyright Act carves out standardized, secure, norm-referenced tests, related testing material and computer programs, but it includes the distribution to the National Instructional Materials Access Center of copies of educational materials in accessible format by publisher of print instructional material, if required by any State educational agency and the publisher already had the right to publish such materials in print format.¹⁰⁹ The definition of accessible format is generally framed in a technologically neutral fashion, less frequently by exemplificative lists,¹¹⁰ and only rarely with detailed definitions of the technologies allowed.¹¹¹

As to the rights included under the exception, the most common approach covers reproduction, distribution and making available to the public of works in accessible formats in the case of authorized entities, and the right of reproduction in the case of beneficiaries or people acting on their behalf, provided that they have lawful access to the work.¹¹² Other rights added to the list are the right of publishers;¹¹³ translation and rental/lending;¹¹⁴ adaptation;¹¹⁵ performance in sign language, fixation of performances other than cinematographic works; reproduction of a sound recording or fixation in a format designed for people with disabilities;¹¹⁶ and, obviously, import/export to and from contracting parties to the Marrakesh Treaty.¹¹⁷ A very limited number of countries make a general reference to “uses”, without further specifications,¹¹⁸ or introduces very particular rules, such as the ban on reproduction of a musical work in the form of a sound or audio-visual recording.¹¹⁹

¹⁰⁷ Ecuador, Article 212(7) Copyright Act.

¹⁰⁸ Russian Federation, Article 1274(2) Copyright Act.

¹⁰⁹ US Copyright Act, §121(2) and (c).

¹¹⁰ As in Argentina, Article 36quinquies Copyright Act; Belarus, Article 34 Copyright Act.

¹¹¹ AS in the case of the Russian Federation (Decision of January 23, 2016, n.32), which provides separate lists of technologies admitted depending on the type of work for which an accessible copy is made, and also of TPMs that should be used to limit unauthorized uses.

¹¹² Argentina, Article 36bis Copyright Act; Brazil, Articles 3-4 Decree n.9522/2018; Ecuador, Article 212(7) Copyright Act.

¹¹³ Argentina, Article 36bis Copyright Act.

¹¹⁴ Belarus, Article 34 Copyright Act. The Canadian Copyright Act mentions translation, adaptation and reproduction in sign language of works other than movies (Article 32(1)(b)). See also the reference to translation made by Kyrgyzstan, Article 19 Copyright Act; Nigeria, Article 26(1) Copyright Act; to translation and rental by the Ukrainian Copyright Act (Article 23(2)-(3)).

¹¹⁵ Ecuador, Article 212(7) Copyright Act; Trinidad and Tobago (Section 12a(3)(a) Copyright Act); Uruguay, Article 8 Decree no.295/2017.

¹¹⁶ Canada Article 32(1)(a.1)(a.2) Copyright Act; Israel, Article 4A(d) Copyright Act; Vietnam, Article 25a(5)(2) Copyright Act, referring only to performance.

¹¹⁷ Brazil, Articles 3 and 4 Decree n.9522/2018; Canada (article 30.01 Copyright Act); Guatemala (Article 63bis Copyright Act); Israel, Article 28A(C)(2) Copyright Act; Liberia, §9.16(c) Copyright Act; New Zealand, Section 69A(4)(b)(i)(ii) Copyright Act; Nigeria, Section 26(5)-(6) Copyright Act; Singapore, Article 54(8) Copyright Act; Switzerland, Article 24c(3) Copyright Act; Trinidad and Tobago, Section 12A(3)(c)-(d) Copyright Act; United States, §121A(a)(1)-(2) Copyright Act; Uruguay, Article 9 Decree no.295/2017; Vietnam, Article 25a(5) Copyright Act.

¹¹⁸ Israel, Article 28A Copyright Act.

¹¹⁹ As in Malawi, Article 49(b) Copyright Act, which provides that in these cases copies shall be made available only by way of lending.

Several national laws use the opportunity offered by the Marrakesh Treaty to exclude the applicability of the exception in case of works originally published and commercially available in accessible format,¹²⁰ while almost all of them specify that TPMs and remedies against their circumventions should not prevent beneficiaries from enjoying the privileges attributed by the provision.¹²¹ Compensation, in turn, is required only in a limited number of States.¹²²

It is not rare to find additional requirements imposed to beneficiaries for the exercise of the exception. Examples are the duty to include the data of the authorized entity, the date of the original publication and the rightholder's name,¹²³ the indication that the copy is intended for visually impaired individuals,¹²⁴ the non-commercial purpose of the use,¹²⁵ the need to respect the integrity of the work,¹²⁶ or the compliance with the three-step-test.¹²⁷ In this context, the solution adopted by the Russian Federation stands out again for the extremely detailed procedures it establishes for libraries to register users and provide them with access to accessible works, including specific software and hardware specifications.¹²⁸

It is worth mentioning that not all countries follow the Marrakesh model. This is particularly the case for common law jurisdictions, which may recur to fair dealing/fair use clauses to reach the same goal.¹²⁹ In such instances, permitted uses and rights covered are not predefined – a circumstance that allows much more flexibility in the implementation phase.

¹²⁰ Argentina, Article 36ter Copyright Act; Australia, Article 113F Copyright Act (the material cannot be obtained in that format within a reasonable time at an ordinary commercial price); Canada, Article 32(1)(2) Copyright Act, a provision that is stretched by Article 32.01(2) also to cases where the work is available in a country other than Canada for a reasonable price and with reasonable effort; Israel, Article 28A(B)(4) Copyright Act; Liberia, §9.16 Copyright Act; Singapore, Article 54(4)(b) and (10)(d) Copyright Act.

¹²¹ Argentina, Article 36ter Copyright Act; Australia, Article 113D note 2 Copyright Act; Brazil, Article 19 Decree n.9522/2018; Canada, Article 41.16 Copyright Act; Cook Islands, Article 25 Copyright Act; Ecuador, Article 130 Copyright Act; Trinidad and Tobago, Section 12a(5) Copyright Act; Uruguay, Article 10 Decree no.295/2017. But see Russian Federation, Decision of January 23, 2016, n.32, which explicitly provides for the adoption of TPMs on specific categories of works to avoid piracy.

¹²² E.g. Canada, Article 32.01(4) Copyright Act, only for authorized entities. If the copyright owner cannot be located, the royalty should be paid to a collective society. Cote d'Ivoire, Article 32 Copyright Act; Singapore (Article 54(15) Copyright Act) subordinates the compensation to an explicit request in writing by the rightholder; Switzerland, Article 24c(5) Copyright Act ("Claims for remuneration may only be asserted by an authorized collective rights management organization").

¹²³ Argentina, Article 36bis Copyright Act; Cook Islands, Article 24(2)(c) and 4(b) Copyright Act; Russian Federation, Article 1274(2) Copyright Act; Trinidad and Tobago, Section 12A(3)(e) Copyright Act; Ukraine, Article 23(5) Copyright Act; United States, §121(C) Copyright Act

¹²⁴ Belarus, Article 34 Copyright Act; Israel, Article 28A(B)(1)(b) Copyright Act; Liberia, §9.16(b) Copyright Act; Ukraine, Article 23(2)(4) Copyright Act requests the actions not to have independent economic significance; US Copyright Act, §121(B).

¹²⁵ Cook Islands, Article 24(2)(d) and (4)(c) Copyright Act; Israel, Article 28A(B)(1)(a) Copyright Act; Nigeria, Article 26(1)(d) Copyright Act; Russian Federation, Article 1274(2) Copyright Act; Singapore, Article 54 Copyright Act; Thailand, Section 34/4(1) Copyright Act; Trinidad and Tobago, Section 12a(3)(b) Copyright Act (sums charged should not exceed the cost of making and supplying the copy); Switzerland, Article 24c(2) Copyright Act.

¹²⁶ Brazil, Article 2(IV)(§2) Decree n.9522/2018. Israel (Article 28A(B)(3) Copyright Act) requires that changes in the work are no greater than those necessary to make it accessible. Same is in New Zealand (Section 69A(3)(d) Copyright Act), Trinidad and Tobago (Section 12a(3)(b)) Copyright Act, Ukraine (Article 23(2)(2) Copyright Act).

¹²⁷ Ecuador, Article 121(1) Copyright Act; Guatemala, Article 63bis(1) Copyright Act.

¹²⁸ Russian Federation, Decision of January 23, 2016, n.23, Sections 3-10.

¹²⁹ Australia, Article 113E Copyright Act (Fair dealing for purpose of access by persons with a disability), which looks at the purpose and character of the dealing, at the nature of the copyright material, and the effect of the dealing upon the potential market of the material, and the amount and substantiality of the part which is dealt with.

5. Conclusions

For long, the needs of persons with disabilities did not find an adequate answer from copyright law. Particularly in the continental tradition, where copyright balancing tools are framed as narrow, matter-specific exceptions that are read strictly, the lack of an express provision allowing the production and circulation of accessible copies had a dramatic impact on the availability of protected works for differently able individuals. It was not until the entry into force of the InfoSoc Directive that a disability exception made its debut in the European Union. However, due to the optional nature of Article 5(3)(b) InfoSoc and its very vague wording, its transposition led to a patchwork of very different national provisions. The persisting lack of harmonization and the territoriality of copyright created a framework of legal uncertainty that frustrated any hope for the development of an effective internal market of accessible copies, which could have allowed their cross-border exchange and thus abate unnecessary duplicated costs. As shown by studies conducted slightly before the issuance of the VIP Treaty, the InfoSoc disability exception did not produce any substantial increase in the amount of accessible cultural materials available within the Union.¹³⁰

The entry into force of the CRPD reignited the discussion on the obstacles created by copyright to access to culture for people with disabilities, launched back in 1981 by WIPO and UNESCO.¹³¹ WIPO (TIGAR) and the EU (ETIN) inaugurated stakeholders' platforms and networks to explore soft law and license-based solutions to stimulate the development of a market for accessible works, still tainted by redundances created by unharmonized, ineffective copyright provisions. While ETIN soon sunk, TIGAR evolved into the ABC Global Book Service, now offering an online catalogue of accessible works with the aim of facilitating their exchange among authorized entities under the VIP Treaty.¹³²

ETIN and TIGAR followed the idea that standardized licensing schemes, by leaving publishers in control of their works, were more likely to attract private investments in the production and distribution of accessible copies. This, in turn, would have eased the reliance on public funding, which had long proven ineffective in tackling the book famine. In fact, data collected years down the launch of the two programs showed a limited increase in the number of accessible copies available on the market – a phenomenon that convinced WIPO Member States to opt for the introduction of a mandatory exception. Once again, the debate revolved around the pros and cons of two opposite regulatory tools - a top-down limitation of exclusive rights versus a market-based licensing model. Supporters of the first option were (and are) those who depict copyright as a socially costly monopoly that needs to be balanced against conflicting fundamental rights and the public interest through L&Es. Advocates of the second option saw (and see)

¹³⁰ The EU Commission took into account, eg, De Wolf and Partners, 'Study on the application of Directive 2001/29/EC on copyright and related rights in the information society' (December 2013), at http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf, accessed 21 July 2023, 417 ff.

¹³¹ See UNESCO/WIPO Model Provisions Concerning the Access by Handicapped Persons to the Works Protected by Copyright, IGC(1971)/V/13 (16 December 1983), prepared by the Working Group on Access by the Visually and Auditorily Handicapped to Material Reproducing Works Protected by Copyright; Wanda Noel, 'Copyright Problems Raised by the Access by Handicapped Persons to Protected Works', Annex II of IGC(1971)/VI/11 (12 March 1985), prepared for the 24th Session of the Executive Committee of the Berne Union and the Sixth Ordinary Universal Copyright Convention [1983] UNESCO/WIPO/WGH/II/2.

¹³² Hosted by WIPO, ABC can be reached at <https://www.accessiblebooksconsortium.org/globalbooks/en/> (accessed 21 July 2023). See Lida Ayoubi, 'Copyright Pluralism and Human Rights of the Visually Impaired Persons', in Susy Frankel (ed), *Is Intellectual Property Pluralism Functional?* (Edward Elgar 2019).

copyright as a market tool that is able to respond to both rightholders' and users' needs, and requires interventions only in case of failures. In fact, the only partially effective results of both regulatory options demonstrate that the very specific features of the market for accessible works require to overcome this dichotomic approach, and to adopt, instead, a well-tailored combination of the two solutions.

While a mandatory exception makes it possible to non-profit entities and disabled individuals to generate/distribute accessible copies and is indispensable when normal market channels are not enough to match the demand (market failure due to under-investments), its presence naturally disincentivize private initiatives,¹³³ and alone is not enough to tackle the book famine. The reasons are quite simple. Personal uses by differently able individuals are heavily dependent on personal knowledge, resources and technical skills, while the effort of authorized entities relies on public or philanthropic fundings,¹³⁴ which are not always and/or uniformly available across different States. The VIP Treaty offers now the possibility for States to exchange copies, but this opportunity will likely help only with international works and repertoires, rather than increasing the availability of local materials in accessible format. This implies that, compared to traditional L&Es, the disability exception cannot fulfill alone its goals.

International networks and standardized licensing schemes have showed the potential to contribute to the cause. However, as of today their limitations to non-profit entities and their intricate functioning have severely curtailed their incentivizing power vis-à-vis rightholders. This circumstance, coupled with the cross-border competition raised by authorized entities after the enactment of the Marrakesh Treaty, has disempowered even more the market-based regulatory option.

Against this background, one may be tempted to argue that the interplay of private and public regulatory responses to the problem has failed and shall not be experimented any longer. Such a conclusion, however, would fall short of considering that the VIP Treaty alone does not provide a full response to the obligations imposed by Article 30(1) and (3) CRPD, which ask contracting states to take all appropriate measures to ensure access to cultural materials, television programmes, films, theatre and other cultural activities in accessible formats, physical access to places for cultural performances or services, and opportunity to participate in cultural life for people with disabilities, also by ensuring that national IP laws do not hinder the pursuance of such goals.

Several studies have highlighted that, in light of the weak involvement of rightholders, the respect, protection and fulfillment of Article 30 CRPD require the creation of publicly accessible repositories of accessible copies.¹³⁵ To this end, commentators have proposed to introduce statutory licenses, followed by the commercial exploitation of the repository,¹³⁶ or provisions allowing bottom-up initiatives of crowd-digitization.¹³⁷ Whatever the option may be, these suggestions confirm the need to leverage both

¹³³ On the features of the market of accessible works and its tendency to present failures, see Shae Fitzpatrick, 'Setting Its Sights on the Marrakesh Treaty: the U.S. Role in Alleviating the Book Famine for Persons with Print Disabilities' [2014] 37(1) Boston College International and Comparative Law Review 139, 142 ff.

¹³⁴ Ibid at 143.

¹³⁵ See, eg, Dilan Thampapillai, 'Digital Copyright and Disability Discrimination: From Braille Books to Bookshare' [2008] 13 Media and Arts Law Review 1, 7.

¹³⁶ Pamela Samuelson, 'Google Book Search and the Future of Books in Cyberspace' [2010] 94 Minnesota Law Review 1308, 1321.

¹³⁷ As in the case of Bookshare, an example used by Hely (n 56) 1389.

statutory and market tools to ensure that all disabilities and cultural/creative materials are properly covered.

In this sense, adopting a solution akin to what the EU legislator did with Article 8 of the Directive on Copyright in the Digital Single Market (CDSMD) with regard to out-of-commerce works may be the most effective yet unexplored policy option.¹³⁸ Article 8 CDSMD provides that the failure to publish and commercialize protected works after a reasonable time from the first publication could cause the inclusion of the works in extended collective licensing schemes (ECLs), allowing the digitization and making available to the public of such works by cultural heritage institutions having them permanently in their collections. ECLs are managed in each Member State by collective management organizations (CMOs) that can ensure enough representativeness of rightholders. Absent adequate CMOs, the same result is reached via an exception. The scheme has the goal to reduce transaction costs and facilitate the preservation of cultural heritage, and leaves to rightholders the possibility to opt-out at any time. Mirroring this into the market for accessible copies, a measure similar to Article 8 CDSMD and attributing ECLs to private publishers could trigger positive competition and strongly complement the operation of the Marrakesh exception. Along the same lines, publishers could be obliged – subject to penalties in the case of violation - to deposit accessible master copies into public repositories at the time of the first publication of protected works.¹³⁹ This blend of market and non-market tools would provide both legal certainty and flexibility, and could apply to all forms of disabilities without always using the L&Es paradigm, thus following in a more consistent fashion the social model of disability introduced by the CDRP.

While steps ahead have been made, the road to ensure full compliance with the Convention is still long, but the existence of ready-available regulatory solutions tested in other fields could speed up the process, if adequately supported by political will and vision, also beyond the EU borders. The hope is that, riding the wave of accessibility regulations that have recently been adopted across the globe, and building on the empirical evidence on the effects of different regulatory options, such developments will not require again an international move like the WIPO Marrakesh Treaty to turn into reality.

¹³⁸ Directive 2019/790/EU on copyright and related rights in the Digital Single Market [2019] OJ L130/92.

¹³⁹ The measure would not constitute a violation of the ban to formalities under Article 2 of the Berne Convention, since its breach would only lead to the payment of an administrative sanction and not to the loss of the copyright title. In addition, none of these provisions would need to comply with the three-step test, since they do not amount to exceptions. But see Harpur and Suzor (n 3) 753–754 theorize that, even if conceptualized as exceptions, most of these solutions would be specific enough in scope and would not create an unreasonable prejudice to right-holders' interests of the rights-holder, thus being in compliance with the three-step-test.