

The “Marrakesh Treaty Implementation Act of 2016” Statement of Purpose and Need and Sectional Analysis

The proposed Marrakesh Treaty Implementation Act of 2016 would make limited changes to U.S. law in order to implement the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, done at Marrakesh, Morocco, on June 27, 2013 (Marrakesh Treaty), and signed by the United States on October 2, 2013. This treaty was negotiated and concluded under the auspices of the World Intellectual Property Organization (WIPO) to facilitate access to printed works for persons who are blind or have other print disabilities. What follows is a brief description of the background of the treaty, the provisions of the treaty and its relation to current U.S. law, and discussion of the proposed changes.

PROVISIONS TO IMPLEMENT THE TREATY

Background

The Marrakesh Treaty aims to reduce the global shortage of print materials in special accessible formats for the many millions of Americans and others throughout the world who are blind or visually impaired or have other print disabilities (such as physical limitations that prevent holding a book). At present, according to WIPO, only a small percentage of books published worldwide every year are available in braille, large print, and accessible digital files, resulting in diminished access to information, culture, and education for persons with print disabilities. The Marrakesh Treaty addresses this gap by providing, with appropriate safeguards, that copyright restrictions should not impede the creation and distribution of such accessible format copies, and by fostering the exchange of such copies internationally. By facilitating the cross-border dissemination of such copies, the Marrakesh Treaty will reduce duplicative efforts and meaningfully increase the number of works available around the world for blind and print-disabled persons, including U.S. citizens residing in the United States and abroad.

The Marrakesh Treaty contains two principal requirements. First, it requires parties to provide an exception or limitation in their national copyright laws for the creation and distribution of accessible format copies for the exclusive use of blind and other print-disabled persons, subject to their international obligations, including the well-established international standard for copyright exceptions and limitations known as the three-step test. Second, the treaty requires parties to permit the export of accessible format copies made under such an exception for the use of blind and other print-disabled persons in other parties to the treaty, subject to various safeguards.

Discussion

The treaty’s provisions are broadly consistent with the approach and structure of existing U.S. law, primarily reflected in Section 121 of the Copyright Act. Under Section 121, certain non-profit organizations and government agencies are permitted to produce and distribute copies of previously published, nondramatic literary works in specialized formats for the exclusive use of the blind or other persons with disabilities. Section 121 does not

define “blind or other persons with disabilities,” but instead refers to individuals who qualify under 2 U.S.C. 135a, which authorizes appropriations for the Library of Congress’s loans of library materials for blind and other physically handicapped persons. This proposed legislation puts forth a limited set of changes to Section 121 to implement the Treaty’s provisions.

Current U.S. Law and Proposed Changes:

1. Scope of Works

The treaty (Article 2) defines “works” as “literary and artistic works within the meaning of Article 2(1) of the Berne Convention.” Article 2(1) sets forth categories of protected subject matter, including literary works such as books, dramatic works such as plays, and musical compositions such as musical scores. The subject matter required to be covered by the treaty encompasses such works only when “in the form of text, notation, and/or related illustrations.” The treaty’s scope, therefore, includes dramatic works in the form of text such as the script of a play, as well as musical works in the form of text and notation such as sheet music.

By contrast, neither musical sound recordings nor audiovisual works, which consist of a series of related images with or without accompanying sounds, are works in the form of text, notation, and/or related illustration, and therefore they are not covered by the treaty.

Currently, section 121(a) of the Copyright Act is expressly limited to literary works that are non-dramatic, and is silent with respect to related illustrations and musical works. To ensure complete coverage of the works addressed by the treaty, the proposed bill broadens the categories of works in Section 121(a), as discussed more fully in the sectional analysis below.

2. Beneficiary Persons

The treaty (Article 3) defines a beneficiary person as a person who, regardless of any other disabilities, is “blind” or “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 substantially the same degree as a person without an impairment or disability.” Persons who are “otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading” are also beneficiary persons under the treaty.

The Copyright Act does not define “blind or other persons with disabilities,” but instead refers to individuals who qualify under 2 U.S.C. 135a, which in turn refers to associated Library of Congress regulations governing loans of library materials for blind and other physically handicapped persons by the National Library Service (NLS). 36 C.F.R. 701.6. The Library of Congress administers this national program to loan books in braille format or sound-reproduction recordings “to blind and to other physically handicapped readers certified by competent authority as unable to read normal printed material as a result of

physical limitations.” 36 C.F.R. 701.6(b)(iii).

The relevant definition in the Library of Congress regulation refers to reading disabilities that result from “organic dysfunction,” i.e., that have a physical basis. 36 C.F.R. § 701.6(b)(iv); *See* NLS Fact Sheet, 2014, available at <http://www.loc.gov/nls/reference/factsheets/readingdisabilities.html>. To ensure complete coverage of the beneficiary persons set out in the treaty, the bill amends the definition of “blind or other persons with disabilities” in Section 121(d)(2), as discussed more fully in the sectional analysis. The bill also provides that copies in specialized formats may be made for use by, and exported to, “eligible persons,” a new term defined in subsection (e)(6), as discussed more fully in the sectional analysis.

3. Authorized Entities

The treaty (Article 2) defines an “authorized entity,” as an entity “that is authorized or recognized by the government” to provide certain services to beneficiary persons. The definition states that such an entity also includes a government institution or non-profit organization that provides accessible format copies to beneficiary persons “as one of its primary activities or institutional obligations.”

Article 2 also specifies areas regarding the handling and distribution of accessible format copies, in which an authorized entity in a Contracting Party “establishes and follows its own practices.” The article sets out four such practices: (1) establishing that the people it is serving are beneficiary persons; (2) limiting its distribution and making available of accessible format copies to beneficiary persons or authorized entities; (3) discouraging the reproduction, distribution, and making available of unauthorized copies; and (4) maintaining due care in, and records of, its handling of copies of works, while respecting the privacy of beneficiary persons. For the purposes of the treaty, these practices are self-judging by the authorized entities.

The treaty definition of “authorized entity” is consistent with the definition of “authorized entity” in Section 121. Both provisions include nonprofit organizations or government agencies that provide services relating to training, education, or adaptive reading or information access to beneficiary persons. As to the practices of authorized entities specified in Article 2 of the treaty, the first three are substantially equivalent to the functions of authorized entities in Section 121, and it is understood that authorized entities in the United States generally establish and follow their own practices with regard to the fourth practice, maintaining due care in, and records of, their handling of copies of work while respecting the privacy of the blind and other persons with disabilities they serve. While it is not necessary to amend the definition in Section 121, it is recommended that the legislative history accompanying the proposed bill include a statement reflecting the understanding that authorized entities in the United States have and follow their own practices as specified in Article 2 of the treaty, as discussed more fully in the sectional analysis below.

4. Exports of Accessible Format Copies

The treaty (Article 5) requires that a party permit an accessible format copy made under an

exception to be distributed or made available to a beneficiary person or authorized entity in another Marrakesh Treaty party. The Treaty provides that one way a party may satisfy that obligation is by adopting a limitation or exception permitting authorized entities to distribute or make available accessible format copies for the exclusive use of beneficiary persons to authorized entities in other Contracting Parties, and to distribute or make available such copies directly to beneficiary persons in other Contracting Parties, so long as prior to such distribution or making available, an authorized entity did not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons.

Section 121 permits the distribution of accessible-format copies that are made pursuant to its provisions, “exclusively for use by blind or other persons with disabilities.” However, it does not refer to distribution from the United States to other countries.

The definition of “blind or other persons with disabilities” in Section 121 refers for its substance to “An Act to provide books for the adult blind,” enacted in 1931. (2 U.S.C. 135a). Section 135a authorizes appropriations for the NLS loan program that provides copies “for the use of the blind and for other physically handicapped residents of the United States . . . [which] will be loaned to blind and other physically handicapped readers certified by competent authority as unable to read normal printed material as a result of physical limitations under regulations prescribed by the Librarian of Congress for this service.”

The bill amends Section 121 to specify that accessible-format copies may be distributed to Marrakesh Treaty parties and to eligible persons abroad who are citizens or domiciliaries of the United States.

Sectional Analysis

SECTION 1. SHORT TITLE: The short title is the “Marrakesh Treaty Implementation Act of 2016.”

SECTION 2. TREATY IMPLEMENTATION

The bill proposes a series of amendments to section 121 of the Copyright Act, which was enacted in 1996 to permit the reproduction and distribution of accessible format copies for exclusive use by “blind or other person with disabilities,” to specify that accessible-format copies may be distributed to Marrakesh Treaty parties and to eligible persons abroad who are citizens or domiciliaries of the United States.

1. Scope of Works

To ensure complete coverage of the works addressed by the treaty, the proposed bill amends Section 121(a) by striking the word “non-dramatic” before “literary work,” and adding musical works in the form of musical scores/sheet music by inserting the phrase “or of a musical work that has been fixed *in the form of text or notation.*” As amended, Section

121(a) would read in pertinent part as follows: "...it is not an infringement of copyright for an authorized entity to reproduce or distribute copies or phonorecords of a previously published literary work, or of a musical work that has been fixed in the form of text or notation...if such copies..."

The terms "literary work" and "musical work that has been fixed in the form of text or notation" encompass "related illustrations" incorporated in such works, and, therefore a reference to related illustrations is not included in the proposed amendment to Section 121(a). However, to avoid any possible misunderstandings, it is recommended that a statement be included in the legislative history noting that illustrations related to protected subject matter under Section 121(a) are covered.

2. Beneficiary Persons

To ensure complete coverage of the beneficiary persons set out in the treaty, the bill amends the definition of "blind or other persons with disabilities" in Section 121(d)(2) by providing that the regulations prescribed by the Librarian of Congress pursuant to 2 U.S.C. 135a, which set forth conditions of eligibility for beneficiaries of Section 121, shall be consistent with the Marrakesh Treaty's definition of "beneficiary persons" by including persons who, regardless of any other disabilities, (i) are blind; (ii) have a visual impairment or perceptual reading disability 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 are unable to read printed works to substantially the same degree as a person without an impairment or disability; or (iii) are unable to read or unable to use standard printed material as a result of physical limitation. The exception applies to persons who meet any of the three criteria set out in the treaty.

3. Authorized Entities

It is recommended that the legislative history accompanying the proposed bill state the understanding that authorized entities in the United States have and follow their own practices to establish that the people they serve are blind or other persons with disabilities; limit their distribution and making available of accessible format copies to blind or other persons with disabilities or authorized entities; discourage the reproduction, distribution, and making available of unauthorized copies; and maintain due care in, and records of, their handling of copies of works, without government oversight, while respecting the privacy of the blind or other persons with disabilities they serve.

4. Exports of Accessible Format Copies

The bill amends Section 121 by adding a new subsection (c) that specifies that copies or phonorecords of works in specialized formats may be distributed to eligible persons or authorized entities in Marrakesh Treaty parties and to other eligible persons who are citizens or domiciliaries of the United States. "Eligible person" is defined in new subsection (e)(3), which refers to persons who are certified as having the disabilities set forth in the regulations referred to above prescribed by the Librarian of Congress. Because

U.S. citizens and domiciliaries who are abroad should not be deprived of the benefits of section 121, the bill also makes clear that exports to an eligible person who is a citizen or domiciliary of the United States are permitted. Exports under subsection (c) are subject to a proviso that prior to the export, the exporting authorized entity did not know or have reasonable grounds to know that the copies or phonorecords of works in specialized formats would be used for other than blind or other persons with disabilities. In order to clarify that copies in specialized formats may be made for use by “eligible persons” who are abroad, the bill also amends subsection (a) expressly to permit the making of copies for such use.

To avoid any unintended implications, it is recommended that the legislative history accompanying the bill include a statement to make clear that nothing in this section affects the ability to engage in fair use under section 107, and that these amendments do not prevent the application of existing law to the extent that it may otherwise authorize any exports of accessible format copies.

SECTION 3. EFFECTIVE DATE.

The effective date of section 2 of the Act will be the date on which the Marrakesh Treaty enters into force with respect to the United States.

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