RESOLVED, That the American Bar Association supports prompt ratification, by the United States and other nations, of the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print-Disabled*. 
I. Introduction

The Resolution expresses the support of the American Bar Association for prompt ratification, by the United States and other nations, of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print-Disabled (the Treaty).\(^1\) U.S. leadership was critical in the framing and adoption of the Treaty, which the U.S. signed on October 2, 2013, and prompt action by the U.S. will help ensure that the Treaty achieves its objectives.

The Treaty is designed to address a problem that has become known as the “book famine.” Over 300 million visually-impaired and other print-disabled persons, the majority of them in developing countries, are excluded from accessing over 95 percent of all published works. The Treaty provides a legal framework for addressing that problem in a manner that respects the architecture of the international copyright system. In so doing, it achieves a balance that advocates on all sides have recognized as fair and just.

On June 27, 2013, a diplomatic conference convened by the World Intellectual Property Organization (WIPO) in Marrakesh, Morocco, adopted the Treaty after extensive deliberations. The U.S. delegation to the WIPO championed the Treaty throughout the negotiations, as did advocates for print-disabled persons from around the world. Associations of U.S. companies that engage in the exploitation of copyrighted content have expressed general satisfaction with the result achieved in Marrakesh.\(^2\) Fifty-one countries signed the Treaty on June 28, 2013 and the U.S. did so on October 2, 2013.\(^3\) There are currently 60 signatories. No countries have as yet completed the ratification process. The Treaty will enter into force once 20 countries have deposited their instruments of ratification or accession.

Once in effect, the Treaty will require Contracting Parties to adopt exceptions to their domestic copyright laws to permit the making of copies in accessible formats, as well as the distribution of those copies, both domestically and internationally. Because the U.S. has already incorporated appropriate exceptions into its copyright laws, no further modifications to U.S. laws will be required to bring the U.S. into compliance with the requirements of the Treaty. As other countries adopt similar exceptions, the Treaty will benefit print-disabled individuals in the U.S. and throughout the world.

---


\(^3\) The State Department has not yet submitted the treaty to the Senate for its advice and consent.
II. Goals of the Treaty

Under the copyright laws in many countries, making copies of works in formats accessible to the print-disabled, such as Braille, without the authorization of the rights-holder, could constitute an infringement of the reproduction right. Similarly, the unauthorized distribution of such copies could constitute an infringement of the distribution or making available to the public right. In addition, the export or import of accessible format copies could trigger infringement liability.

For these reasons, over 50 countries, primarily in the developed world (including the U.S.), have adopted exceptions that allow the making and distribution of accessible format copies. However, over 130 WIPO countries, in which the majority of print-disabled people live, do not have such exceptions. Moreover, the existing exceptions do not always explicitly permit the import or export of accessible format copies. Because of the high cost of producing accessible format copies and the relatively low demand for many individual titles, the ability to share accessible format copies across borders would benefit the print disabled in both developed and developing countries. Among other things, it will enable countries that speak the same language to import and export accessible copies of a given text, rather than having to create their own. It will make available to print-disabled persons in the U.S. a vast library of both English and foreign language works that are not currently available here, and will enable those in other countries to acquire U.S. editions that are not now available in their home countries.

The Marrakesh Treaty addresses these problems by requiring Contracting Parties to adopt copyright exceptions that allow, under certain conditions:

1) the making of accessible format copies;
2) the domestic distribution of accessible format copies;
3) the export of accessible format copies; and
4) the import of accessible format copies.

The Treaty provides Contracting Parties with great flexibility in implementing these obligations. As Article 10(3) provides, “Contracting Parties may fulfill their rights and obligations under this treaty through limitations or exceptions specifically for the benefit of beneficiary persons, other limitations or exceptions, or a combination thereof.…”

At the same time, the Treaty does set forth one approach for meeting its obligation to permit the making and distribution of accessible format copies domestically. Likewise, the Treaty sets forth one way a Contracting Party may meet its obligation to permit the cross-border exchange of accessible format copies. The Treaty should be understood as creating minimum standards for exceptions, subject to existing limitations under the so-called “Three-Step Test” of the Berne Convention for the Protection of Literary and Artistic Works.4

---

4 Article 9(2), Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as amended Sept. 28, 1979, 828 U.N.T.S. 221, available at
Many aspects of the Treaty (e.g., the focus on actions by “authorized entities”) are similar to the specific exception for the print disabled in the U.S. Copyright Act, 17 U.S.C. § 121, known as the Chafee Amendment (named for its author, Senator John H. Chafee). This similarity is not an accident: significant elements of the Treaty are based on proposals originally submitted by the U.S. delegation, and are modeled directly on U.S. law.

III. The Marrakesh Treaty and U.S. law

A. Definitions

Articles 2 and 3 of the Treaty set forth definitions that determine the persons to whom the Treaty applies and the works and formats it is intended to govern.

1. **Beneficiaries of the Treaty.** The most basic term is “beneficiary person,” which Article 3 defines as a person who is: (a) blind; (b) “has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works;” or (c) “is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading.” Any disabling visual impairment that cannot be improved by the use of corrective lenses should be understood to qualify, as are persons with learning disabilities, spinal cord injuries, etc. The reach of this definition is coextensive with the population already served under existing accessibility exceptions to U.S. law.

2. **Works to which the Treaty applies.** The Treaty also defines the types of works to which it applies. For purposes of the Treaty, “works” means published literary and artistic works in the form of text, notation, and/or illustrations, regardless of media. Although this definition is somewhat broader than the range of “non-dramatic” literary works explicitly covered by the Chafee Amendment, the “fair use” doctrine codified in § 107 of the Copyright Act provides an independent, alternative basis on which accessible versions of dramatic literary works, as well as visual illustrations to texts, can be produced and made available to print-disabled persons. The agreed statement concerning Article 2(a) adds that this definition includes works in audio form, such as audiobooks (although audiovisual works such as films do not fall within the definition of works).

---

http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf. Article 11 of the Treaty incorporates the Three-Step Test as follows: “(a) in accordance with Article 9(2) of the Berne Convention, a Contracting Party may permit the reproduction of works in certain special cases provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.” This international copyright requirement should not pose a major impediment to good faith implementation of the treaty. Indeed, the existing exception for the print disabled in the U.S. Copyright Act, 17 U.S.C. § 121, which was enacted in 1996, has never faced any challenge – in or out of court – on this basis.

5 Marrakesh Treaty, supra note 1, art. 2(a). A second sentence adds: “[t]he accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible....”

6 Article 10(3) of the Treaty states that provisions for accessibility under national copyright laws may take a variety of forms, including “judicial, administrative, or regulatory determinations for the benefit of beneficiary persons as to fair practices, dealings or uses....”
3. Accessible formats. The Treaty then defines the formats into which these works can be converted. “Accessible format copy” means a copy of a work in a form “which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability.” The wording of the Treaty avoids any suggestion that an accessible format copy is a format usable only by a print-disabled person: its language—“the accessible format copy is used exclusively by beneficiary persons”—clearly refers to who is actually using the copy, not who is capable of using it. Again, this provision is fully consistent with current U.S. law.

4. Authorized entities. Finally, the Treaty defines the organizations that will be making and distributing the accessible format copies, known as “authorized entities.” An authorized entity is “an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis.” Article 2(c) provides that the term authorized entity “also includes a government institution or a non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations,” even if the organization is not specifically authorized or recognized by the government to do so. This definition is consistent with the Chafee Amendment’s definition of “authorized entity.” Thus, for example, both a specialized agency providing services to the blind and a general-service library with an institutional program to promote accessibility would constitute authorized entities.

B. Treaty obligations

Article 4(1) requires Contracting Parties to provide in their national law an exception to the right of reproduction, distribution, and making available to the public “to facilitate the availability of works in accessible format copies for beneficiary persons.” As has been noted, contracting Parties have significant flexibility in how they meet this obligation.

The system of compliance set forth under Article 4(2) is based on the framework established under current U.S. law. It has two subparts. First, an authorized entity is permitted to make an accessible format copy, or obtain an accessible format copy from another authorized entity, and supply the copy to a beneficiary person by any means, including electronic communication. To qualify, an authorized entity must: (i) have lawful access to the work; (ii) avoid making changes other than those needed to make the work accessible; (iii) supply copies for use by beneficiary persons; and (iv) undertake the activity on a non-profit basis. Second, a beneficiary person or someone acting on his or her behalf may make an accessible format copy for his or her own use. Again, these conditions are derived from limitations that are routinely observed by U.S. providers of accessible texts, including the National Library Service for the Blind and Physically Handicapped of the Library of Congress, and non-profits such as Bookshare.

__________
7 Id. art. 2(b).
C. Additional flexibilities

Article 4(3) provides that a Contracting Party may fulfill its obligations under Article 4(1) by providing other exceptions and limitations, rather than pursuant to Article 4(2). However, these other exceptions must be consistent with Articles 10 and 11, discussed above.

Article 4(4) provides that a Contracting Party may choose to confine exceptions under Article 4 to works “which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market.” Under this provision, a country implementing the treaty could choose to limit the scope of its exception accordingly: That is, to situations where a print-disabled person could not readily purchase or license an accessible copy in a particular format. This provision is price-sensitive and format specific: if, for example, an appropriate (and appropriately priced) electronic text of a work were available, a Contracting Party that opts for this restriction on the exception on accessibility could still be required to permit reproduction and distribution in Braille format. U.S. law contains no such restriction, and because this language is permissive rather than mandatory, the U.S. would not be required to adopt such a restriction if it ratifies the Treaty. Thus, U.S. law in its present form is fully compliant with the Treaty.

Article 4(5) provides that “[i]t shall be a matter for national law to determine whether limitations or exceptions under this Article are subject to remuneration.” This provision allows a Contracting Party to condition an exception on the payment of a royalty to the rights-holder. In other words, a Contracting Party could adopt a statutory license rather than an absolute exception. However, the language of Article 4(4) suggests that the amount of remuneration provided by such a license would necessarily have to be appropriate to local market conditions. U.S. law currently contains no provision with respect to remuneration, nor would the U.S. be required to adopt such a provision if it ratifies the Treaty.

Article 5(1) provides that a Contracting Party must permit an authorized entity to export an accessible format copy to a beneficiary person or an authorized entity in another Contracting Party. As with Article 4, Article 5 provides Contracting Parties with flexibility on how to implement this obligation. This provision is fully in accord with existing U.S. law. Although the Copyright Act provides that the exportation of “infringing” copies is an act of infringement in its own right, accessible copies made in compliance with defined exceptions in the Copyright Act are, by definition, not infringing.

Also as in Article 4, Article 5 sets forth one approach for a Contracting Party to fulfill its Article 5(1) obligation. Under Article 5(2), a Contracting Party may adopt an exception in its national copyright law that permits an authorized entity to distribute an accessible format copy to an authorized entity or a beneficiary person in another Contracting Party,

---

8 See Marrakesh Treaty, supra note 1, art. 5(3).
provided that prior to the distribution “the originating authorized entity did not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons.” Again, this provision is fully consistent with U.S. law. Although making accessible copies available with knowledge that they would not be used for the intended purpose might constitute either direct or secondary infringement of copyright, in violation of 17 U.S.C. § 106, doing so within the framework of exceptions provided by §§ 107 and 121 would (by definition) not constitute infringement.

Article 6 is the counterpart to Article 5, obligating Contracting Parties to allow authorized entities or beneficiary persons to import accessible format copies from other Contracting Parties. This importation obligation applies only to the extent that the national law of a Contracting Party would permit an authorized entity or a beneficiary person to make an accessible format copy. This activity clearly falls within the scope of fair use as defined in 17 U.S.C. § 107. In addition, as explained below, it falls within the scope of the “first sale” doctrine and the “personal use” exemption to 17 U.S.C. § 602.

Article 7 provides that when a Contracting Party prohibits the circumvention of technological protection measures in its general copyright legislation, it “shall take appropriate measures, as necessary, to ensure that … this legal protection does not prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty.” U.S. law includes such anti-circumvention prohibitions under 17 U.S.C. § 1201(a)(1), which provides that “persons [who] are, or are likely to be … adversely affected by virtue of [the prohibition on circumvention] in their ability to make non-infringing uses” can apply for and receive exemptions from that prohibition on a triennial basis. Clearly, both print-disabled persons and authorized entities would be in a position to seek such exemptions were their legitimate interests in accessibility affected.10

D. Other provisions

Article 8 provides that in the implementation of the Treaty, Contracting Parties “shall endeavor to protect the privacy of beneficiary persons on an equal basis with others.” This should be viewed as a floor and not a ceiling, designed to encourage countries with relatively weak privacy laws to protect the privacy of beneficiary persons. In countries such as the United States, with well-developed systems for privacy protection, this requirement would clearly be met under current law.

Article 9 contains additional provisions designed to facilitate cross-border exchanges. Article 9(1) directs Contracting Parties to “foster the cross-border exchange of accessible format copies by encouraging the voluntary sharing of information to assist authorized entities in identifying one another.” The agreed statement concerning this article states that “[i]t is understood that Article 9 does not imply mandatory registration for authorized entities nor does it constitute a precondition for authorized entities to engage in activities recognized under this Treaty; but it provides for a possibility for sharing information to

facilitate the cross-border exchange of accessible format copies.” Thus, no change would be required to bring U.S. law into conformity with this provision.

The Treaty also includes several saving clauses limiting the impact of the Treaty on other matters. Article 5(4)(c) states that nothing in Article 5 “affects the determination of what constitutes an act of distribution or an act of making available to the public.” Article 5(5) provides that “[n]othing in this Treaty shall be used to address the issue of exhaustion of rights.”

Finally, Article 12(2) provides that the exceptions provided under the Treaty are “without prejudice to other limitations and exceptions for persons with disabilities provided by national law.”

IV. U.S. compliance with the Treaty


As discussed above, Article 4(1) obligates a Contracting Party to provide an exception to the right of reproduction and distribution to facilitate the domestic availability of works in accessible format copies for beneficiary persons. The Chafee Amendment permits authorized entities “to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary work … in specialized formats exclusively for use by blind or other persons with disabilities.” The Chafee Amendment appears narrower than Article 4(1) in that it excludes dramatic literary works (e.g., the script of a play) from the scope of the exception. However, the courts likely would consider the making of an accessible format copy of a play to be permissible under the fair use doctrine (Section 107).

The Chafee Amendment also does not go as far as Article 4(2), which authorizes an exception directly for beneficiary persons, as well as one for authorized entities that serve them. Again, it seems clear that the fair use doctrine would apply in this situation where a beneficiary person in the United States, or someone acting on his or her behalf, wished to create an accessible copy of a text for personal use.

Article 5(1) obligates a Contracting Party to permit an authorized entity to export an accessible format copy to an authorized entity or a beneficiary person in another Contracting Party. The U.S. Copyright Act only prohibits the export of infringing copies. 11 Because the accessible format copies being exported by the authorized entity would be made pursuant to Section 121 or Section 107, they would not infringe and thus

section 602(a)(2) would not block their export.

Importation, addressed by Article 6, is treated under Section 602(a) as a form of distribution. As such, the Chafee Amendment’s exception to the distribution right would provide an authorized entity with an exception to the importation right. Additionally, fair use, first sale, and the personal use exception to the importation right,¹² would permit the importation by a beneficiary person. In short, the Copyright Act easily meets the obligations of Article 6.

Article 7 provides that when a Contracting Party prohibits the circumvention of technological protection measures, it must take appropriate measures to ensure that this legal protection does not prevent beneficiary persons from enjoying the exceptions provided for in the Treaty. This requirement is met, as already explained, by the provisions of the Digital Millennium Copyright Act.

V. Conclusion

Because the U.S. has already incorporated appropriate exceptions into its domestic laws to permit the making and distribution of copies in accessible formats, U.S. ratification of the Marrakesh Treaty would not require changes to the Copyright Act. Nonetheless, continued U.S. leadership in support of the Treaty is critical. By requiring Contracting Parties to adopt exceptions similar to those codified in U.S. law, the Treaty would provide substantial benefits to print-disabled persons in the U.S. and throughout the world.

Respectfully submitted,

Mark D. Agrast
Chair
Commission on Disability Rights

Robert O. Lindefjeld
Chair
Section of Intellectual Property Law

Gabrielle M. Buckley
Chair
Section of International Law

August 2014

GENERAL INFORMATION FORM

Submitting Entity: COMMISSION ON DISABILITY RIGHTS

Submitted By: Mark D. Agrast, Chair, Commission on Disability Rights

1. **Summary of Resolution(s).** This resolution expresses the support of the ABA for prompt ratification, by the United States and other nations, of the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print-Disabled* (the Treaty). The Treaty is designed to address a problem that has become known as the “book famine.” Over 300 million visually-impaired and other print-disabled persons, the majority of them in developing countries, are excluded from accessing over 95 percent of all published works. The Treaty provides a legal framework for addressing that problem in a manner that is fair and just, and respects the architecture of the international copyright system.

2. **Approval by Submitting Entity.** The Commission on Disability Rights approved the resolution at its spring meeting in Los Angeles, California, on April 10, 2014. The Section of Intellectual Property Law approved the resolution at its spring council meeting in Arlington, Virginia, on April 1, 2014. The Section of International Law approved the resolution at its spring council meeting in New York, New York, on April 5, 2014.

3. **Has this or a similar resolution been submitted to the House or Board previously?** No.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** The ABA has adopted many policies supporting U.S. ratification of treaties, policies that support the rights of persons with disabilities and intellectual property rights. This resolution would not directly impact those policies, but is consistent with and would supplement them.

5. **If this is a late report, what urgency exists which requires action at this meeting of the House?** N/A.

6. **Status of Legislation.** (If applicable) On June 27, 2013, a diplomatic conference convened by the World Intellectual Property Organization (WIPO) in Marrakesh, Morocco, adopted the Treaty after extensive deliberations. Fifty-one countries signed the Treaty on June 28, 2013 and the U.S. did so on October 2, 2013. There are currently 60 signatories. No countries have as yet completed the ratification
process. The Treaty will enter into force once 20 countries have deposited their instruments of ratification or accession. The Department of State has not yet submitted the Treaty to the Senate for its advice and consent.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** Adoption of the resolution will enable the Association to urge the U.S. government and other governments to take all steps that are necessary and appropriate to ratify the Treaty.

8. **Cost to the Association.** (Both direct and indirect costs) None.

9. **Disclosure of Interest.** (If applicable) N/A.

10. **Referrals.**
    - Section of Administrative Law and Regulatory Practice
    - Section of Antitrust Law
    - Section of Business Law
    - Section of Individual Rights and Responsibilities
    - Section of Litigation, Section of Science & Technology Law
    - Law Student Division
    - Senior Lawyers Division
    - Young Lawyers Division
    - Standing Committee on the Law Library of Congress
    - Standing Committee on Publishing Oversight
    - Rule of Law Initiative
    - Center for Human Rights

11. **Contact Name and Address Information.** (Prior to the meeting, Please include name, address, telephone number and e-mail address)

    Commission on Disability Rights:
    Mark D. Agrast
    1419 Crittenden Street, NW
    Washington, DC 20011
    (202) 305-7851
    agrast@gmail.com
Section of Intellectual Property Law:
Susan Barbieri Montgomery
Foley Hoag LLP
155 Seaport Blvd., Suite 1600
Boston, MA 02210-2600
(617) 832-1222
sbm@foleyhoag.com

Section of International Law:
Lelia Mooney
Partners for Democratic Change
2032 Belmont Road NW, Apt 107
Washington, D.C. 20009-5413
(202) 294-5210
leliamooney@yahoo.com

12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Mark D. Agrast
1419 Crittenden Street, NW
Washington, DC 20011
(202) 305-7851
agrast@gmail.com

Susan Barbieri Montgomery
Foley Hoag LLP
155 Seaport Blvd., Suite 1600
Boston, MA 02210-2600
(617) 832-1222
sbm@foleyhoag.com

Lelia Mooney
Partners for Democratic Change
2032 Belmont Road NW, Apt 107
Washington, D.C. 20009-5413
(202) 294-5210
leliamooney@yahoo.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution expresses the support of the ABA for prompt ratification, by the United States and other nations, of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print-Disabled (the Treaty). The Treaty is designed to address a problem that has become known as the “book famine.” Over 300 million visually-impaired and other print-disabled persons, the majority of them in developing countries, are excluded from accessing over 95 percent of all published works. The Treaty provides a legal framework for addressing that problem in a manner that is fair and just, and respects the architecture of the international copyright system.

2. Summary of the Issue that the Resolution Addresses

Hundreds of millions of visually-impaired and other print-disabled persons are currently excluded from access to over 95 percent of all published works. By ratifying the Treaty, the U.S. and other countries will take a major step toward remedying this problem.

3. Please Explain How the Proposed Policy Position will address the issue

Once in effect, the Treaty will require Contracting Parties to adopt exceptions to their domestic copyright laws to permit the making of copies in accessible formats, as well as the distribution of those copies, both domestically and internationally. The copyright exceptions called for by the Treaty are largely based on and consistent with the exceptions that are already provided under U.S. copyright laws, and the U.S. will not need to make changes to its laws to comply with the Treaty. However, U.S. ratification will encourage other nations to ratify the Treaty and to adopt similar exceptions. This will benefit many millions of print-disabled individuals in the U.S. and throughout the world.

4. Summary of Minority Views

We are unaware of any opposition to the resolution.