EXPLANATORY MEMORANDUM ON EUROPEAN UNION LEGISLATION

Proposal for a Regulation of the European Parliament and of the Council 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

Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of 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


SUBJECT MATTER

1. On 14 September 2016 the European Commission published a Communication (see Explanatory Memorandum 12253/16) setting out its ambition to implement, and fulfil its international obligations under, the Marrakesh Treaty ("the Treaty") to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled (the final text of the Treaty is in Document 5076/14 ADD 1). To this end the Commission has proposed a Directive and a Regulation – these are discussed below.

2. The Marrakesh Treaty was negotiated by Members of the UN’s World Intellectual Property Organisation (WIPO), and aims to improve access to copyright works for people who are visually impaired or have print disabilities. The Treaty achieves this through the international harmonisation of copyright exceptions (acts that do not need the permission of the copyright owner) allowing for the creation of accessible format versions of copyright works (for example, Braille versions) for the benefit of visually impaired or otherwise print disabled people, under certain conditions, without infringing copyright. The Treaty also provides, in certain circumstances, for the import and export of accessible copies, made under such exceptions, between contracting parties.

3. Whilst many countries (including the UK) already have effective copyright exceptions for people with visual impairment and other disabilities, this position is not consistent around the world. Globally, many visually impaired or otherwise print-disabled people are unable to access copyright works because accessible versions of those works are unavailable in their country. Domestic laws do not always allow accessible format copies of works to be legally made without the permission of the copyright owner, who
may be unwilling to give permission or might be untraceable. Furthermore, although accessible copies may be legally available in one country, export of the accessible copies could lead to an infringement of copyright in the importing country. This can lead to a situation where visually impaired and print-disabled people in a country without the relevant copyright exceptions are not only unable to benefit from access to copies made in their country for people with such impairment, but are also prevented from receiving accessible copies already made in another country.

4. Current limitations on the cross-border exchange of accessible copies have the potential to affect adversely not only those in developing countries. For example, currently if an organisation working on behalf of blind people in Australia produces an accessible copy of a book using Australia’s domestic copyright exceptions, it may not be lawful for a sister organisation in the UK to import it or distribute it to blind people in the UK. This can lead to a duplication of work and the unnecessary use of valuable resources.

5. A Diplomatic Conference to adopt the Marrakesh Treaty took place in Marrakesh from 17 to 28 June 2013, and the final text was agreed on 26 June. The UK signed the Treaty at the Conference on 28 June. Following its ratification by 20 contracting parties, the Treaty will come into force on 30 September 2016.

6. The Treaty provides that all Contracting Parties shall make an exception in their domestic law to ensure that, under certain circumstances, accessible versions of copyright works can be made for visually impaired or otherwise print-disabled people without the need for permission from the copyright owner (Article 4 of the Treaty). The Treaty will also allow organisations working on behalf of visually impaired people to export accessible versions of works made under their national exceptions to similar organisations or individuals in another country (Article 5 of the Treaty). A further provision ensures that all Contracting Parties must allow the import of qualifying accessible copies of copyright works where the domestic law of the exporting country permits the making of such accessible copies for export (Article 6 of the Treaty).

7. The Treaty also includes a number of safeguards to ensure that copyright owners continue to receive adequate protection for their works and incentives to create new works. In particular, it reaffirms existing commitments to the “three-step test” – a provision in international copyright law which operates to ensure that exceptions to copyright do not unreasonably harm copyright owners’ interests or undermine markets for copyright works.

8. The Treaty also includes an optional provision which permits contracting parties to provide that these exceptions only apply where works in the particular accessible format cannot be obtained under reasonable commercial terms in the national market. The UK’s current exceptions for people with disabilities include such provisions, and the UK Government was instrumental in securing this optional provision in the Treaty text, in order to allow contracting parties to apply such commercial availability restrictions where they think it is appropriate to do so.

9. The proposed Directive aims to harmonise, across the EU, copyright exceptions for the benefit of visually impaired people, so that such exceptions are fully compatible with the terms of the Treaty.
10. The proposed Regulation aims to allow the import and export of accessible format copies in accordance with the terms of the Treaty. Through this allied intervention, the European Commission aims to make EU legislation fully compatible with the Marrakesh Treaty.

SCRUTINY HISTORY

11. In relation to the Marrakesh Treaty, the Department for Business, Innovation and Skills submitted EM 14617/14 relating to the Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the WIPO Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled. This was submitted on 6 November 2014.

12. The Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the World Intellectual Property Organisation Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled (Doc 14617/14) has been held under scrutiny by both the House of Lords European Union Committee (in its letter of 15 October 2015), and the House of Commons European Scrutiny Committee (in its letter of 14 October 2015).

MINISTERIAL RESPONSIBILITY

13. The Secretary of State for Business, Energy and Industrial Strategy has primary responsibility for policy in respect of this Treaty, and for the implementation of its provisions in the UK. Ministers from other Government Departments will also have an interest in these measures and departments have been consulted in preparing this document as appropriate.

INTEREST OF THE DEVOLED ADMINISTRATIONS

14. The Treaty does not include matters falling within the responsibility of the devolved administrations. However, devolved administrations have been copied into this Explanatory Memorandum.

LEGAL AND PROCEDURAL ISSUES

Proposed Regulation

i. Legal Basis

15. The substantive legal basis is Article 207 of the Treaty on the Functioning of the European Union (TFEU).

16. On 11 August 2015, the European Commission requested the opinion of the Court of Justice of the European Union on whether the EU has exclusive competence to conclude the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.
17. On 08 September 2016, the Advocate General’s Opinion (AGO) on the question referred by the Commission was published. The AGO found that the EU has exclusive competence to ratify the Treaty, and that it should be ratified on a joint non-discrimination (Article 19, TFEU), common commercial policy (Article 207, TFEU), legal base. The final Judgment of the CJEU is awaited, and expected around the end of the year.

18. We do not consider a sole Article 207 (TFEU) legal base to be sufficient for the proposed Regulation. As the AGO has found, the Marrakesh Treaty also pursues one of the aims referred to in Article 19(1) (TFEU), namely to combat discrimination based on disability. The final choice of legal base will need to be determined following the Opinion of the Court of Justice.

ii. **European Parliament Procedure**

19. The ordinary legislative procedure applies under Article 207(2) (TFEU).

iii. **Voting Procedure**

20. The Council acts by qualified majority (Article 16(3) TEU).

iv. **Impact of the proposed Regulation on UK law**

21. The main copyright legislation in the UK, the Copyright, Designs and Patents Act 1988 (CDPA), already provides exceptions for people with disabilities. The CDPA was amended in 2014 by the Copyright and Rights in Performances (Disability) Regulations 2014\(^1\). These amendments build on previous copyright exceptions provided in UK law for visually impaired people, and extend the exception to benefit all those whose “disability prevents the person from enjoying [a] work to the same degree as a person who does not have that disability”\(^2\).

22. The exceptions in UK law allow for the creation of accessible format copies of copyright works, and recordings, by a disabled person (in lawful possession or use of the whole or part of a work), provided accessible format copies are not available “commercially available on reasonable terms by or with the authority of the copyright owner”. UK law also envisages persons, or authorised entities, acting on behalf of the disabled person, creating accessible format copies, again provided such copies are not commercially available. An authorised body is defined as an “educational establishment” or “a body that is not conducted for profit”\(^3\), and is required to keep records of the copies it makes, and the persons to whom such copies are supplied. Supply of copies between authorised entities is also envisaged under the CDPA.

23. The structure of UK law is already broadly compatible with the provisions of the Marrakesh Treaty.

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\(^1\) The Copyright and Rights in Performances (Disability) Regulations 2014 is available at: http://www.legislation.gov.uk/ukdsi/2014/9780111112694

\(^2\) Copyright, Designs and Patents Act 1988 (as amended), Section 31A(1), and Schedule 2, Section 3A(1)

\(^3\) Copyright, Designs and Patents Act 1988 (as amended), Section 31F(5)
24. The proposed Regulation would have direct effect, but may still require amendment of the CDPA\(^4\). In particular, Article 4 of the proposed Regulation states that an authorised entity “may import or otherwise obtain or access and thereafter use, in accordance with the national legislation pursuant to Directive […], an accessible format copy that has been distributed communicated or made available to beneficiary person or to authorised entities, by an authorised entity in a third country that is party to the Marrakesh Treaty”. It may be necessary for the UK to revisit the definition of “authorised entity” given in the CDPA.

v. Application to Gibraltar

25. Implementation of the Treaty by the EU may result in the application of the provisions of the Treaty to Gibraltar in so far as the Treaty relates to the provision of services.

vi. Fundamental Rights Analysis

26. The provisions of the Treaty engage Article 26 of the Charter of Fundamental Rights of the European Union on integration of persons with disabilities in so far as the Treaty provisions relate to participation by persons with a disability in cultural life. In the opinion of the Minister, the Treaty respects Article 26 of the Charter of Fundamental Rights.

The Proposed Directive

i. Legal Basis

27. The substantive legal basis is Article 114 (TFEU). As discussed above in paragraphs 15 to 18 in relation to the proposed Regulation, the proposed Directive should also have an Article 19(1) (TFEU) legal base, as the Marrakesh Treaty aims at combating discrimination based on disability.

ii. European Parliament procedure

28. The ordinary legislative procedure applies under Article 114(1) TFEU.

iii. Voting procedure

29. The Council acts by qualified majority (Article 16(3) TFEU).

iv. Impact of the proposed Directive on UK law

30. Note the discussion above in paragraphs 21 to 24. The proposed Directive suggests at Recital 11 that “Member States should not be allowed to impose additional requirements for the application of the exception, such as compensation schemes, such as […] the prior verification of the commercial availability of accessible format copies\(^4\). This suggests that the UK would need to amend the structure of the disability exceptions in the CDPA, to remove the ‘commercial availability’ clause. The structure of UK law would otherwise seem unaffected by the proposed Directive.

v. Application to Gibraltar
31. See paragraph 25 above.

vi. Fundamental Rights Analysis
32. See paragraph 26 above.

APPLICATION TO THE EUROPEAN ECONOMIC AREA
33. The proposed Regulation and Directive are relevant to the European Economic Area.

SUBSIDIARITY
34. To the extent the proposals are based on the premise that the EU is exclusively competent in this area, the principle of subsidiarity has no application. The Union has exclusive competence in relation to the common commercial policy (Article 207 TFEU).

POLICY IMPLICATIONS
35. On 23 June, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.

36. The UK has long been committed to improving access to copyright works for visually impaired people both within the UK and internationally, and the Government’s decision to sign the Treaty at the Diplomatic Conference affirms this commitment. Implementation of the Treaty will mean visually impaired people around the world have greater access to books with organisations such as the RNIB (Royal National Institute of Blind People) being able to send copies of works to other countries.

37. An important feature of the current UK copyright exceptions for disabled people is that they are limited to situations where they appropriate accessible format work is not available commercially, on reasonable terms. This ensures there is an incentive for publishers to produce own accessible format copies of works, and establishes a well-functioning market in accessible format copies.

38. The proposed Directive and Regulation appear to preclude the ability of the UK to limit the creation of accessible format copies to situations where they are not commercially available on reasonable terms. When the Treaty was negotiated, the UK Government was pleased to have secured an optional provision which provides that contracting parties may limit application of the exception to works which cannot be obtained commercially under reasonable terms where they think it is appropriate to do so. Any Contracting Party that avails itself of this limitation must notify WIPO to that effect.
39. The Commission's proposal appears to preclude Member States from availing themselves of this option. The Government will need to consider the impact of this on the UK's existing exceptions for disabled people, and whether removal of a commercial availability provision will disincentivise publishers from providing accessible format copies of their works.

CONSULTATION

40. The Marrakesh Treaty, and disability exceptions in the UK, have been a subject of debate for several years. The Government has consulted extensively with stakeholders and will continue to do so using a range of channels, both formal and informal.

IMPACT ASSESSMENT

41. The European Commission has not prepared an impact assessment to accompany these proposals. They argue that this is in line with their better regulation guidelines as there is no discretion over the over the policy content (as they are implementing international obligations previously agreed). This argument is questionable, however, as the Treaty provides discretion to Contracting Parties to introduce or maintain commercial availability or remuneration requirements, and the Commission has chosen not to implement these options, or permit Member States to do so.

42. The UK Government will publish its own impact assessment when these proposals are transposed into domestic law. However, broadly speaking we expect that Blind, Visually Impaired, or Otherwise Print Disabled people and organisations serving their needs on a non-profit basis will benefit via enhanced access to works, with the resulting enhanced benefits to society in terms of cohesion and inclusion. The availability of books in formats that are accessible to print-disabled persons is estimated to be between 7 percent and 20 percent despite advances in technology.

43. There may be some limited costs to businesses and rights holders in terms of compliance with new regulations. Furthermore, if the UK is no longer able to limit the creation of accessible format copies to situations where they are not commercially available on reasonable terms, then authors, and commercial publishers, of accessible format copies may be negatively affected, and we will need to consider the impacts of such an approach.

FINANCIAL IMPLICATIONS

44. There are no financial implications arising from these proposals.

TIMETABLE

45. The proposals will be presented by the Commission at the Intellectual Property Council Working Party on 3-4 October 2016. Negotiations will continue under the Slovak Presidency and will be picked up by the Maltese Presidency in 2017.
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