

IMPROVING THE RIGHT TO READ IN CANADA: THE *MARRAKESH TREATY*, COMMERCIAL AVAILABILITY AND BEYOND

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The Marrakesh Treaty is an unprecedented treaty in international law that mandates copyright exceptions to accommodate people with print disabilities. This paper first discusses the issues that led to the development of the Marrakesh Treaty, as they manifested in Canada and around the world. Next, it critiques Canada’s implementation of the treaty, and examines steps needed in order for Canada to meet the treaty’s goals.

Le Traité de Marrakech est un traité sans précédent dans le droit international qui prévoit des exceptions au droit d’auteur en faveur des personnes souffrant de difficultés de lecture de textes imprimés. L’auteure examine premièrement les questions qui ont conduit au développement du Traité de Marrakech, tel qu’elles se manifestaient à la fois au Canada et dans le monde entier. Ensuite, elle critique la mise en œuvre par le Canada du Traité et examine les étapes qui doivent être entreprises pour que le Canada atteigne les objectifs du traité.

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1. Introduction

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled is a groundbreaking treaty—it is the first international treaty to deal with the intersection of intellectual property and human rights law, and to mandate that participating countries must have certain exceptions to their intellectual property laws.¹ The World Intellectual Property Organization (WIPO) currently administers the *Marrakesh Treaty*.

¹ *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled*, 27 June 2013, 3162 UNTS (entered into force 30 September 2016), arts 4(1)–(2) [*Marrakesh Treaty*]. See Teresa Hackett, “[The ‘Miracle of Marrakesh’—A Day of Celebration](#)” (30 September 2016), online (blog): *Electronic Information for Libraries* <<https://www.eifl.net/blogs/miracle-marrakesh-day-celebration>> [perma.cc/8EEX-NADP]; Laurence R Helfer, Molly K Land & Ruth Okediji, “Copyright Exceptions Across Borders: Implementing the *Marrakesh Treaty*” (2020) 42:6 *Eur IP Rev* 332 at 333.

Parties to the *Marrakesh Treaty* must have legal exceptions that allow government and non-profit organizations to make copies of literary and artistic works in accessible formats for people with print disabilities, without authorization from copyright holders.² The *Marrakesh Treaty* broadly defines “accessible format copy” to refer to any format that makes reading a work as comfortable for a person with a print disability as it would be for someone without one.³ Countries must also allow for the import and export of accessible format copies that were made under the relevant copyright law exception and ensure that any legal protection they provide for technological protection measures does not prevent accessible format copies from being made, distributed and used.⁴ The preamble to the *Marrakesh Treaty* acknowledges that while copyright holders are entitled to rightful compensation for their work, existing copyright law creates barriers that prevent people with print disabilities from accessing works in formats that they can read.⁵

Canada is one of over 90 parties to the *Marrakesh Treaty*.⁶ Currently, the provisions of Canada’s *Copyright Act* implementing the treaty are sections 32–32.02, along with section 27(2.1) and section 41.16.⁷ While Canada was the 20th country to accede to the *Marrakesh Treaty*, bringing it into force internationally⁸, our implementation of the treaty is still flawed and overly restrictive.

This paper will start with a brief discussion of the “book famine” faced by people with print disabilities in Canada and around the world. Next will

² See *Marrakesh Treaty*, *supra* note 1.

³ See *Marrakesh Treaty*, *supra* note 1, art 2(b). See also Laurence R Helfer et al, *The World Blind Union Guide to the Marrakesh Treaty: Facilitating Access to Books for Print-Disabled Individuals* (Oxford: Oxford University Press, 2017) at 23–24 [*World Blind Union Guide*].

⁴ See *Marrakesh Treaty*, *supra* note 1, arts 4–7, 9. See also *World Blind Union Guide*, *supra* note 3 at 38–67.

⁵ *Supra* note 1, preamble.

⁶ See “[WIPO-Administered Treaties: Contracting Parties—Marrakesh VIP Treaty](#)”, online: *WIPO IP Portal—WIPO Lex* <wipolex.wipo.int/en/treaties/ShowResults?start_year=ANY&end_year=ANY&search_what=C&code=ALL&treaty_id=843> [perma.cc/7P77-X2N9] (last visited 4 February 2023). (there are formally 92 parties to the *Marrakesh Treaty*, but 118 countries, as the 27 European Union member states joined as one party).

⁷ RSC 1985, c C-42, ss 27(2.1), 32–32.02, 41.16; “[Marrakesh Treaty Questionnaire—Canada](#)” (2017) at 1, online (pdf): *World Intellectual Property Organization* <wipo.int/export/sites/www/marrakesh_treaty/en/docs/mt_questionnaire_canada.pdf> [perma.cc/2Z45-P6F8][*Canada Marrakesh Treaty Questionnaire*].

⁸ World Intellectual Property Organization, Press Release, PR/2016/792, “[Canada’s Accession to Marrakesh Treaty Brings Treaty into Force](#)” (30 June 2016), online: *World Intellectual Property Organization* <wipo.int/pressroom/en/articles/2016/article_0007.html> [perma.cc/FF3Z-BKHC] [*WIPO Canada Accession Press Release*].

be a description of the state of accessibility-related copyright exceptions in Canada and other countries prior to the *Marrakesh Treaty*, the development of the treaty itself, and how it was implemented in Canada. The paper will then move to focusing on one major issue in Canada's current implementation of the *Marrakesh Treaty*—our “commercial availability” provisions.

Commercial availability provisions are provisions which require that, if a non-profit organization is planning to make or purchase an accessible format copy of a work under a *Marrakesh Treaty* exception, it first must check to see if the work's copyright holder has already authorized an accessible format version. If that is the case, then the organization has to forgo making accessible format copies of the work themselves and ensure that they only purchase authorized copies of that work. The *Marrakesh Treaty* allowed commercial availability provisions in order to create a “balance” between the rights of copyright holders and those of readers with print disabilities. However, in practice, these provisions have not been proven to benefit copyright holders and only disadvantage readers with print disabilities and the institutions that serve them.

This paper then examines the consequences of Canada's commercial availability provisions. *Legal consequences* result from the fact that commercial availability provisions in our *Marrakesh Treaty* exceptions have unclear terms that could potentially conflict with the treaty itself. *Societal consequences* result from how commercial availability provisions do not consider how accessible format copies are actually made, produced and distributed; and also the struggles faced by people with print disabilities when attempting to obtain these copies. Next, the paper will discuss other areas of Canada's *Marrakesh Treaty* implementation and our copyright laws in general and suggest areas that could potentially be reformed to better improve the access that people with disabilities have to the various types of works covered under the *Copyright Act*. Finally, it will briefly touch on how the *Copyright Act* currently creates a troublesome bigger picture—that its provisions pertaining to accessible format works fail to uphold our international and domestic human rights obligations to people with print disabilities. This paper proposes that we should remove the *Copyright Act*'s commercial availability provisions and further explore expanding and improving the *Act*'s accessibility-related provisions, in order to better advance the goals of the *Marrakesh Treaty* and other relevant human rights legislation.

2. Background on the *Marrakesh Treaty* Internationally and in Canada

A) People with Print Disabilities and Accessible Format Materials

The *Marrakesh Treaty* mandates copyright exceptions for the production and distribution of accessible format copies for people with print disabilities. “Print disability” is a broad term to describe disabilities that make it difficult to read mainstream printed written works. This term includes not only blindness and visual impairments, but also learning disabilities (e.g. dyslexia) and dexterity-related disabilities (e.g. arthritis, multiple sclerosis).⁹ The *Marrakesh Treaty* does not explicitly define the term “print disability”, but rather, defines “beneficiary persons” in a manner which encompasses people with various types of disabilities that could inhibit their ability to read mainstream printed works:

“A beneficiary person is a person who:

- a) is blind;
- b) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or
- c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading; regardless of any other disabilities.”¹⁰

What formats of works would be allowed to be produced under a *Marrakesh Treaty* exception? People with print disabilities read in various different ways—some use audio technologies, such as the DAISY file format, screen readers and audiobooks; others use technologies that make digital displays of work more readable by changing the font and/or magnifying its size. Individuals who are blind or have other visual impairments can also read

⁹ Michael Ciccone, “[Centre for Equitable Library Access Written Submission for the Pre-Budget Consultation in Advance of the 2020 Budget](#)” (2020) at 5, online (pdf): *Our Commons* <ourcommons.ca/Content/Committee/421/FINA/Brief/BR10595883/br-external/CentreForEquitableLibraryAccess-e.pdf> [perma.cc/2LVR-V367] [*CELA Submission*].

¹⁰ *Marrakesh Treaty*, *supra* note 1, art 3. See also *World Blind Union Guide*, *supra* note 3 at 31–38.

works printed or displayed with tactile reading systems, with braille being by far the most common.¹¹

The term “accessible format copy” is defined in Article 2(b) of the *Marrakesh Treaty* as follows¹²:

“(b) “accessible format copy” means a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability. The 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 in the alternative format and of the accessibility needs of the beneficiary persons”.

This broad definition of “accessible format copy” covers a wide range of formats, such as braille, e-books and audio books.¹³

B) The Global Book Famine

When the contracting parties signed the *Marrakesh Treaty* in 2013, developed countries, like the Netherlands, had only 5% of all books published each year in accessible formats.¹⁴ In many developing countries, the situation was even worse—for example, at the time of the treaty’s signing, only 0.5% of books were available in accessible formats in South Africa.¹⁵ The lack of accessible format copies of books is a particular problem for developing nations because around 90% of the world’s blind or visually impaired live in these countries.¹⁶ This dearth of accessible format books has been referred to as the “book famine”. Even with the implementation of the *Marrakesh Treaty*, people with print disabilities

¹¹ See *CELA Submission*, *supra* note 9 at 5–6, 9; Canadian National Institute for the Blind, “[Copyright Act Review: A Submission from CNIB](#)” (August 30, 2019) at 3–4, online: (pdf): *Our Commons* <ourcommons.ca/Content/Committee/421/INDU/Brief/BR10129863/br-external/CanadianNationalInstituteForTheBlind-e.pdf> [perma.cc/SP9U-NG24] [*CNIB Copyright Act Review Submission*].

¹² *Supra* note 1, art 2(b).

¹³ See *World Blind Union Guide*, *supra* note 3 at 24.

¹⁴ See Permanent Missions of Brazil, Ecuador, and Paraguay to the World Trade Organization, “[Background Paper by Brazil, Ecuador and Paraguay on a WIPO Treaty for Improved Access for Blind, Visually Impaired and Other Reading Disabled Persons](#)” (11 December 2009) at 2, online (pdf): *World Intellectual Property Organization* <wipo.int/edocs/mdocs/copyright/en/sccr_19/sccr_19_13.pdf> [perma.cc/TG8K-9EDW] [*Background Paper by Brazil, Ecuador and Paraguay*].

¹⁵ See Mara Kardas-Nelson, “[The rich turn a blind eye to poor readers](#)”, *Mail & Guardian* (28 March 2013), online: <mg.co.za/article/2013-03-28-00-the-rich-turn-a-blind-eye-to-poor-readers/> [perma.cc/79DQ-6HWQ].

¹⁶ See *Background Paper by Brazil, Ecuador and Paraguay*, *supra* note 14 at 2.

have lower levels of employment and have difficulties participating in and graduating from school.¹⁷ Many individuals with these disabilities also feel alienated from their peers because they do not have the means to enjoy popular books or keep up with the news.¹⁸

C) The Book Famine in Canada

Canada acceded to the *Marrakesh Treaty* in June 2016, but people with print disabilities still struggle to obtain accessible reading materials. There are over 3 million people with print disabilities in Canada.¹⁹ This population still faces barriers in terms of career and educational opportunities. According to the Canadian National Institute for the Blind (CNIB) Foundation in 2018, Canadians with visual impairments had an employment rate of 37%, compared to 79% for those without a disability.²⁰ The full-time employment rate was even lower, at 28%.²¹ Similarly, the CNIB's surveys showed that in educational institutions, students with blindness and visual impairments struggle to find resources in accessible formats, particularly in college and university.²²

The main providers of accessible books in Canada are the Centre for Equitable Library Access (CELA), National Network for Equitable Library Service (NNELS) and the Service Québécois du Livre Adapté (SQLA), the last of which provides accessible format copies in French to residents of Quebec.²³ CELA, the largest library in Canada, has over one

¹⁷ For examples of difficulties post-secondary students face obtaining accessible materials, see Paul Harpur, *Discrimination, Copyright and Equality: Opening the e-Book for the Print-Disabled* (Cambridge: Cambridge University Press, 2017) at 13–16, 101–103, citing Paul Harpur & Rebecca Loudoun, “The Barrier of the Written Word: Analysing Universities’ Policies to Include Students with Print Disabilities and Calls for Reforms” (2011) 33:2 J Higher Education Policy and Management 153.

¹⁸ See Canada, Standing Committee on Industry, Science and Technology, *Minutes of Proceedings and Evidence*, 42nd Parl, 1st Sess, No 133 (22 October 2018), at 7 [INDU Committee Meeting].

¹⁹ CELA Submission, *supra* note 9 at 5.

²⁰ See “[CNIB Pre-Budget Consultation Submission to the House of Commons Finance Committee](#)” (2018) at 3, online (pdf): *Our Commons* <ourcommons.ca/Content/Committee/421/FINA/Brief/BR9073570/br-external/CNIB-e.pdf> [perma.cc/E88M-UQNU].

²¹ INDU Committee Meeting, *supra* note 18 at 7.

²² CNIB Foundation “[Completed Projects—Educational Outcomes Survey \(2019\)](#)” (2019), online: *CNIB Foundation* <cnib.ca/en/completed-projects?region=on#project-02> [perma.cc/QS93-777Y].

²³ See Jessica Coates et al, “[Getting Started: Implementing the Marrakesh Treaty for Persons with Print Disabilities \(Canadian Version\)](#)” (March 2018) at 14–15, online (pdf): *International Federation of Library Associations and Institutions* <repository.ifla.org/bitstream/123456789/1740/2/getting_started_faq_marrakesh_treaty_a_practical_guide_for_librarians_canada_2019%20%281%29.pdf> [perma.cc/Q58V-68QS] [*Getting Started*].

million books.²⁴ Canadians can also access over 900,000 books through Bookshare, a service from the United States.²⁵ These numbers may seem large, but are only a fraction of what is available to readers without print disabilities—it was estimated that the Amazon Kindle e-book store had over *twelve million* books as of 2021.²⁶ The book famine continues to affect Canada, even with its accession to the *Marrakesh Treaty*. Work still needs to be done in order to increase access for people with print disabilities to books and other publications in formats that they can read.

D) The State of Copyright Exceptions for Accessible Works prior the *Marrakesh Treaty*

Why were copyright exceptions considered a means to alleviate the book famine? Why did copyright holders not just produce accessible format copies themselves, or license out the right to do so? In practice, mainstream publishers rarely made accessible copies of books themselves.²⁷ Instead, non-profit organizations such as libraries and disability advocacy organizations often produced accessible format copies.²⁸ It was, and still is, often costly and onerous for non-profit organizations to communicate and negotiate with publishers and authors, but unauthorized production runs the risk of infringing copyright laws.²⁹ However, for many books, publishers were unlikely to make or allow for authorized accessible copies. In order to fix this market failure, non-profit and government

²⁴ See Karen McKay, “[CELA surpasses 1 million titles](#)” (21 September 2021), online (blog): *Centre for Equitable Library Access* <celalibrary.ca/blog/cela-surpasses-1-million-titles> [perma.cc/AB5V-PPEU].

²⁵ Bookshare, “[Books By Country](#)” (last modified 11 April 2022), online: *Bookshare—A Benetech Initiative* <bookshare.org/cms/get-started/how-find-books/books-country> [perma.cc/S7WT-5YHV].

²⁶ Derek Haines, “[How Many Ebooks Are There In The Kindle Store On Amazon?](#)” (last modified 20 May, 2022), online: *Just Publishing Advice* <justpublishingadvice.com/how-many-kindle-ebooks-are-there/> [perma.cc/2VC8-ZCJB].

²⁷ See “[EBU Position Paper on the European Commission Proposals Regarding the Implementation of the Marrakech Treaty](#)” (November 2016) at 3, online (pdf): *European Blind Union* <euroblind.org/sites/default/files/media/position-papers/EBU-position-paper-on-EC-proposals-to-implement-MarrakechTreaty.pdf> [perma.cc/89H7-TVQD] [*EBU Submission*].

²⁸ See generally Neil Jarvis, “[National Implementation of the MVT: Perspective of the Blind, Visually Impaired, or Otherwise Print Disabled](#)” WIPO/REG/CR/SIN/15/T/11 (2 June 2015); <https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_reg_cr_sin_15/wipo_reg_cr_sin_15_t_11.pdf> [perma.cc/V2M3-5CMP], Judith Sullivan, “[Study on Copyright Limitations and Exceptions for the Visually Impaired](#)” (2007) World Intellectual Property Organization Working Paper SCCR/15/7, online (pdf): <https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=75696> [perma.cc/VB6E-WUC7]; *CELA submission, supra* note 9; Harpur, *supra* note 17 at 13–14.

²⁹ See Harpur, *supra* note 17 at 102–105.

organizations needed to be allowed to produce accessible format copies without the authorization of copyright holders. Finally, copyright law differences across countries made it difficult for organizations to import and export accessible copies without worrying they could be committing legal violations.³⁰ People with print disabilities in developing nations could not obtain accessible format copies if they were unable to import them and there was no local organization that could produce them. Most people with print disabilities live in developing countries, and this population is most affected by barriers to exporting and importing accessible format copies. Indeed, this might partially explain why around 5% of books were available in accessible formats in more developed countries, but as few as 0.5% were available in these formats in developing countries.

Prior to the *Marrakesh Treaty* there was an uneven patchwork of accessibility-related copyright law exceptions. While the international need for these copyright exceptions was addressed by WIPO and UNESCO as early as the 1980s, a 2007 study for WIPO found that fewer than 60 countries had legal exceptions allowing accessible copies of books to be made without authorization from copyright holders.³¹ Many of these countries had exceptions that were too narrow to address the needs of readers with print disabilities. The exceptions often limited accessible copies to a particular format, such as braille, when, in fact, people with print disabilities read in a variety of ways.³² They also frequently restricted the export and/or import of accessible copies, or did not explicitly allow for it.³³ This meant that organizations in different countries often had to produce copies of the same book in the same language, resulting in a wasteful duplication of resources that would not occur if books could be transferred between countries.³⁴ Organizations had to put excess resources towards making accessible format copies of the most popular publications and neglecting all others.³⁵ The challenges that people with print disabilities and non-profit organizations faced when producing and distributing accessible format copies made it evident that a copyright law-

³⁰ See generally, Jarvis, *supra* note 28; Manon Ress, “[CNIB on proposed WIPO treaty for reading disabled](#)” (31 October 2008), online (blog): *Knowledge Ecology International* <keionline.org/20821> [perma.cc/T74B-NM2H].

³¹ See Sullivan, *supra* note 28 at 9. See also Rishika, “[Disability Exceptions in Copyright Legislations](#)” (12 January 2015), online (blog): *The Centre For Internet & Society* <cis-india.org/accessibility/blog/disability-exceptions-in-copyright-legislations> [perma.cc/H8F7-F5NS]. While the latter source is from after the *Marrakesh Treaty* was signed, the legislation described is from before most parties implemented it and the Treaty came into force.

³² *Ibid.*

³³ *Ibid.*

³⁴ See Jarvis, *supra* note 28 at 1–2, Ress, *supra* note 30.

³⁵ Jarvis, *ibid.*

based remedy for the book famine would require exceptions that permit import and export of these copies and not simply domestic distribution. Non-profit organizations could then allocate their resources more effectively, and people with print disabilities in developing countries could have greater access to reading materials.

E) What were Canada's Copyright Exceptions for Accessible Format Works Prior to the *Marrakesh Treaty*?

Prior to implementing the *Marrakesh Treaty*, Canada had its own exceptions in the *Copyright Act* which allowed non-profit organizations to produce accessible format copies of copyright material without permission from copyright holders.³⁶ These provisions were more restrictive than the current provisions in the *Copyright Act*. Most notably, the exception explicitly excluded large print books, there were not clear provisions on importing accessible format copies from other countries when they were not authorized by copyright holders, and accessible format copies could only be exported to a foreign country if the author of the work was either a citizen or permanent resident of Canada, or a citizen or permanent resident of the destination country.³⁷ Canada's main producer of accessible format copies at the time, the CNIB, had challenges contacting and negotiating with copyright holders, as well as difficulty importing and exporting books, due to differing exceptions in various countries.³⁸ To avoid expending additional resources, the CNIB avoided making accessible format copies of works that already had such copies available in other countries, where these copies could be imported for use by Canadian readers.³⁹ However, this non-duplication policy led to its own problems, since differences in copyright laws across jurisdictions meant that it was unclear when the CNIB could import accessible format copies from another country, and when they had to duplicate the effort themselves.⁴⁰ If people with print disabilities were truly going to have increased access to books and other publications, Parliament had to reform Canada's copyright law exceptions on accessible format copies.

F) The Development of the *Marrakesh Treaty*

The need for copyright law provisions that would allow for the production of accessible format copies for people with disabilities had been recognized since at least 1985 and, as mentioned previously, there was a 2007

³⁶ *Copyright Act*, RSC 1985, c C-42, ss 32–32.01 as it appeared on 1 January 2015.

³⁷ *Ibid.*

³⁸ Ress, *supra* note 30.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

report commissioned by WIPO about this issue. The first step towards the *Marrakesh Treaty* was taken in 2008, when Knowledge Ecology International (KEI) and the World Blind Union (WBU) developed a draft treaty.⁴¹ The KEI/WBU collaboration was endorsed by Brazil, Ecuador and Paraguay, while the United States, European Union and a group of African countries each produced their own draft treaties.⁴² The United States and European Union drafts were more incremental than the current treaty—they placed greater limits on the definitions of allowed works and accessible formats, and the treaties were not intended to be binding.⁴³ In contrast, the draft treaties from the African countries and the KEI/WBU collaboration were more permissive than the current treaty, allowing even for-profit organizations to make accessible format copies without permission from copyright holders.⁴⁴

There were various negotiations leading up to the finalization and signing of the *Marrakesh Treaty*, with conflicts between stakeholders from different groups, such as members of the publishing and film industries and public interest groups. Multiple individuals advocating on behalf of people with print disabilities expressed chagrin that the negotiations were lacking in transparency and were turning to debating broader copyright issues rather than focusing on the needs of people with print disabilities.⁴⁵

⁴¹ See Wanda Noel, “[Copyright Problems Raised by the Access by Handicapped Persons to Protected Works](#)” (30 May 1985), online (pdf): UNESCO <unesdoc.unesco.org/ark:/48223/pf0000065169> [perma.cc/BY3Y-GX95]; James Love, “[WIPO SCCR 20 Comparison of proposals to address needs of people with disabilities—22 June 2010](#)” (23 June 2010), online (pdf): Knowledge Ecology International <keionline.org/wp-content/uploads/comparison_tvi_proposals.pdf> [perma.cc/NR95-EG62].

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ See KEIWashDC, “[Fredric Schroeder speaks for WBU at WIPO treaty for blind negotiations. April 20, 2013](#)” (20 April 2013), online (video): YouTube <youtu.be/pWJmLQLeO0s> [perma.cc/G5TH-AZYR] [*Schroeder video*]; KEIWashDC, “[Dan Pescod of the World Blind Union. April 19, 2013 at WIPO treaty for blind negotiations](#)” (19 April 2013), online (video): YouTube <youtu.be/0HzXikm6ZtY> [perma.cc/Y4DN-T8QK] [*Pescod video*]; KEIWashDC, “[Joseph Farrell, April 19, 2013, at WIPO](#)” (19 April 2013), online (video): YouTube <youtu.be/KDTFY_ktPzk> [perma.cc/FDP5-H95M]; KEIWashDC, “[Pranesh Prakash of CIS-India on WIPO negotiations on treaty for blind](#)” (19 April 2013), online (video): YouTube <youtu.be/sjBgVxf6Xwk> [perma.cc/M7QR-FFQ6]; KEIWashDC, “[May 13, 2013. Scott Labarre of NFB on the WIPO Treaty for the Blind](#)” (14 May 2013), online (video): YouTube <youtu.be/0ygf-sFM9mc> [perma.cc/9D45-29XH]; KEIWashDC, “[Joseph Farrell, June 20 2013 at Marrakesh Diplomatic Conference on Treaty for Blind](#)” (9 July 2013), online (video): YouTube <youtu.be/qB49OG_kTZs> [perma.cc/C7BC-DNS3]; KEIWashDC, “[Blind member of Liberia delegation, Marrakesh Treaty for the Blind, June 27, 2014](#)” (27 June 2013), online (video): YouTube <youtu.be/HS080vUqy-c> [perma.cc/69UL-9ZRY]; World Intellectual Property

One major issue was whether participating countries would be allowed to or must have “commercial availability” provisions, which would require that organizations making accessible format copies of works without authorization from copyright holders must first check whether there is a “commercially available” authorized version. Disability rights advocates criticized the concept of “commercial availability” as being a nebulous concept that would not actually benefit copyright holders and could easily be exploited to bar people with print disabilities from being able to make and obtain accessible format works.⁴⁶

For example, in a meeting leading up to the Marrakesh Negotiations, Frederic Schroeder from the WBU said:

“Frankly, if I produce a book for a 10 year old blind girl in a nation that is not a signatory to the international copyright instruments, I do not believe in any way the rights of the copyright holder are in any way compromised. If people want to steal intellectual property, there are much easier ways for them to do it.”⁴⁷

Similarly, at the negotiations in Marrakesh, Scott LaBarre from the National Federation of the Blind stated:

“If published works were truly universally available commercially to those of us who are blind or disabled, would we even be here? Of course not. Commercial availability is a very complex nebulous concept that is nowhere near real, and therefore it should not be included in this treaty either in a mandatory sense or in a manner that will chill or limit the ability of authorized entities to provide information. And it is important that we keep that in mind because we know of the nations that currently have commercial availability and we have talked to some authorized entities who specifically do not reproduce works that are even arguably available in a commercial sense.”⁴⁸

Further, disability advocates and public interest groups disagreed with the copyright holders’ demand that the *Marrakesh Treaty* exceptions must abide by the three-step test from the *Berne Convention* (see below, p.19), as they felt this only made the treaty more cumbersome.⁴⁹

Organization—WIPO, “[VIPs on the Books for the Blind Treaty: Beyan Kota, CAB Liberia](#)” (22 June 2013), online (video): *YouTube* <youtu.be/P8fO1gQ5T2Q> [perma.cc/VZ78-DJXF].

⁴⁶ *Schroeder video, supra* note 45; KEIWashDC, “[Scott Labarre. NFB Opening Statement, June 19, 2013, Marrakesh](#)” (3 July 2013), online (video): *YouTube* <youtu.be/h-a0hJxEyjk> [perma.cc/U8HZ-K6ZN] [*Labarre video*].

⁴⁷ *Schroeder video, supra* note 45..

⁴⁸ *Labarre video, supra* note 46.

⁴⁹ See KEIWashDC, “[May 13, 2013. James Love of KEI on WIPO treaty for blind negotiations](#)” (14 May 2013), online (video): *YouTube* <youtu.be/eOfMbASoO_k>

Despite all the challenges faced during the negotiations, the *Marrakesh Treaty* ultimately came to fruition and was signed in late June 2013. Due to the long and hard road to its actualization, the treaty is often known as the “miracle of Marrakesh”.⁵⁰ Currently, the *Marrakesh Treaty* states that parties making exceptions under the treaty must ensure their provisions follow the three-step test.⁵¹ The treaty also allows, but does not mandate, that parties can have commercial availability provisions in their exceptions.⁵² Advocates for people with print disabilities advise that countries should not include commercial availability provisions when they implement the *Marrakesh Treaty*⁵³, while groups representing copyright holders, such as publishers associations, push for them.⁵⁴

G) The Implementation of the *Marrakesh Treaty* in Canada

While Canada previously had narrower copyright exceptions for the production of accessible works, the legislation that implemented the *Marrakesh Treaty* was Bill C-11 (*An Act to amend the Copyright Act (access*

[perma.cc/NBU6-L6NH] [*Love video*]; *Schroeder video*, *supra* note 45; *Pescod video*, *supra* note 45; *Ibid*.

⁵⁰ See Barbara Martín Muñoz, “[Introduction—The Miracle of Marrakesh](#)” (June 2018), online: *European Blind Union* <euroblind.org/newsletter/2018/june/en/introduction-miracle-marrakesh> [perma.cc/RD8D-PY3E]; Hackett, *supra* note 1.

⁵¹ *Marrakesh Treaty*, *supra* note 2, preamble, art 11. This paper discusses the three-step test in greater detail in the section “*Canada’s Copyright Exceptions for people with print disabilities may be more restrictive than what the Marrakesh Treaty actually allows*”.

⁵² *Ibid*, art 4(4).

⁵³ See *World Blind Union Guide*, *supra* note 3 at 47–51, 60–61, 70–74. See also *EBU Submission*, *supra* note 27; “[New Zealand Copyright \(Marrakesh Treaty Implementation\) Amendment Bill](#)” (2019) at 2–3, online (pdf): *International Federation of Library Associations and Institutions* <ifla.org/wp-content/uploads/2019/05/assets/hq/topics/exceptions-limitations/documents/ifla-nz-marrakesh-response-final.pdf> [perma.cc/59M5-JLMP] [*IFLA New Zealand Submission*]; Jonathan Band & Krista Cox, “[Our right to knowledge: Legal reviews for the ratification of the Marrakesh Treaty for persons with print disabilities in Asia and the Pacific](#)” at 19–20 (3 December 2015), online (pdf): *United Nations Development Programme* <undp.org/asia-pacific/publications/our-right-knowledge-legal-reviews-ratification-marrakesh-treaty-persons-print-disabilities-asia-and-pacific> [perma.cc/7P29-KM9N] [*Our Right to Knowledge*].

⁵⁴ See Carlo Scollo Lavizzari & Quy Tran, “[IPA Guide to the Marrakesh Treaty](#)” (12 October 2016) at 39–40, online (pdf): *International Publishers Association* <internationalpublishers.org/images/Accessibility/IPA_Guide_to_the_Marrakesh_Treaty.pdf> [perma.cc/QZ39-DNTG]; José Borghino, “[The Marrakesh Treaty—A Rightsholder Perspective](#)” (6 March 2018) at 8–9, 15, online (pdf): *World Intellectual Property Organization* <wipo.int/edocs/mdocs/copyright/en/wipo_cr_dub_18/wipo_cr_dub_18_p4.pdf> [perma.cc/VYN9-T6H6]. See also Harpur, *supra* note 16 at 84–86.

to copyrighted works or other subject-matter for persons with perceptual disabilities)).⁵⁵

The passage of Bill C-11 was a rushed process. On 24 March 2016, the Hon. Carla Qualtrough led the first reading of the bill.⁵⁶ On 17 May 2016, members of parliament (MPs) put the bill through both its second and third readings.⁵⁷ They briefly expressed concerns about provisions pertaining to commercial availability, import and export, technological protection measures and whether to expand the bill to include exceptions for accessible format works for people who are deaf and hard-of-hearing.⁵⁸ However, most of the debate centered around procedural matters and whether further discussion of the bill should be allowed.⁵⁹ There was little opportunity to discuss issues and improve the Bill substantively. Bill C-11 spent more time in the Senate, but ultimately became law with no changes.⁶⁰

Disability advocacy organizations such as the Canadian National Institute for the Blind (CNIB) Foundation felt that, despite problems with the bill, it was better to pass it as soon as possible.⁶¹ As a result, Canada ultimately acceded to the *Marrakesh Treaty* on 30 June 2016.⁶² As the twentieth country to join, Canada's accession brought the treaty into force internationally.⁶³

Currently, the provisions of the *Copyright Act* that serve to implement the *Marrakesh Treaty* are sections 32, 32.01, 32.02, 27(2.1) and 41.16⁶⁴.

⁵⁵ Bill C-11, [An Act to amend the Copyright Act](#) (access to copyrighted works or other subject-matter for persons with perceptual disabilities), 1st Sess, 42nd Parl, 2016 (assented to 22 June 2016, SC 2016 c 4). <parl.ca/LegisInfo/en/bill/42-1/c-11> [perma.cc/W6G5-KFCV] [*Bill C-11*].

⁵⁶ *Ibid.*

⁵⁷ *Ibid*; *House of Commons Debates*, 42-1, vol 148, No 57 (17 May 2016) at 1210 [*House of Commons Debate*].

⁵⁸ See *House of Commons Debate*, *supra* note 57 at 1229.

⁵⁹ *House of Commons Debate*, *supra* note 57.

⁶⁰ See *Bill C-11*, *supra* note 55; *Debates of the Senate*, 42-1, vol 150, No 45 (8 June 2016) at 924–926; *Debates of the Senate*, 42-1, vol 150, No 54 (21 June 2016) at 1289–1291 [*21 June Senate Debate*].

⁶¹ See *21 June Senate Debate*, *supra* note 60 at 1290–1291.

⁶² See *WIPO Canada Accession Press Release*, *supra* note 8.

⁶³ *Ibid.*

⁶⁴ See *Copyright Act*, *supra* note 7, ss 27(2.1), 32–32.02, 41.16; *Canada Marrakesh Treaty Questionnaire*, *supra* note 7, at 1–3.

- Section 32 concerns the production and distribution of accessible format copies of works in Canada without authorization from their copyright holder.
- Section 32.01 contains the provisions which most explicitly reference the *Marrakesh Treaty*. It concerns the production of accessible format copies of works in Canada without authorization from their copyright holder and their export to other countries. The provision defines key terms such as “print disability” and “*Marrakesh Treaty* country”. It also includes restrictions that the Governor-in-Council can impose on non-profit organizations making unauthorized accessible format copies. These restrictions include that organizations must remunerate copyright holders or collective societies when they produce unauthorized accessible format copies of copyrighted works, make formal contracts when they participate in transactions that involve these accessible format copies, and send in reports to an authority keeping track of their activities under the copyright law exceptions.
- Section 32.02 clarifies that the term “non-profit organization” includes “a department, agency or other portion of any order of government, including a municipal or local government, when it is acting on a non-profit basis.”
- Section 27(2.1) clarifies that “a copy made outside Canada does not infringe copyright [...] if, had it been made in Canada, it would have been made under a limitation or exception under this Act.”
- Section 41.16 states that it is not a violation of the Copyright Act to circumvent a technological protection measure if this is done to make an accessible format copy, as permitted by sections 32–32.02.

While these provisions are more permissive than our previous law, they are still far from perfect, and create obstacles for people with print disabilities trying to obtain accessible format publications.

H) Issues with Canada’s Implementation of the *Marrakesh Treaty*

While our hasty implementation of the *Marrakesh Treaty* brought it into force internationally, quickening the access that people with print disabilities have to accessible format copies of books and other

publications, the rushed process also contributed to the flaws in the law that we have today. Of most significance to this paper is the fact that the *Copyright Act* bars the production and distribution of unauthorized accessible format copies if copies authorized by the copyright holder are “commercially available” in the end market and in the desired format. This limitation applies both to domestically distributed copies (section 32(2)) and to copies intended for export (sections 32.01(2)-(3.1)).⁶⁵ Various consequences flow from these “commercial availability” provisions. *Legal consequences* concern the text of the provisions, namely ambiguous phrasing and potential conflict with the *Marrakesh Treaty* itself. *Societal consequences*, meanwhile, flow from these legal consequences and involve our commercial availability provisions’ failure to acknowledge the reality of the book famine and the lack of resources available to people with print disabilities.

3. Legal Consequences

A) The definition of “commercial availability” is vague

As discussed in the “The Development of the *Marrakesh Treaty*” section, advocates for people who are blind or visually impaired were concerned that commercial availability provisions would be unclear, and that they would cause organizations to err against making accessible format copies out of caution. Unfortunately, Canada’s provisions show that these concerns had merit. Canada’s *Copyright Act* exception for accessible copies has commercial availability provisions, section 32(2) and section 32.01(1), which pertain to domestic distribution and export, respectively.⁶⁶ For the purpose of section 32(2), “commercially available” is defined in section 2(a) of the *Copyright Act* as follows:

“commercially available means, in relation to a work or other subject-matter,

- a) available on the Canadian market within a *reasonable time* and for a *reasonable price* and may be located with *reasonable effort*, or
- b) for which a license to reproduce, perform in public or communicate to the public by telecommunication is available from a collective society within a *reasonable time* and for a *reasonable price* and may be located with *reasonable effort*; (accessible sur le marché)”(emphasis added)⁶⁷

⁶⁵ *Copyright Act*, *supra* note 7, ss 32(2), 32.01(2)-(3.1).

⁶⁶ *Copyright Act*, *supra* note 7, ss 32(2), 32.01(1).

⁶⁷ *Copyright Act*, *supra* note 7, s 2(a).

Meanwhile, section 32.01(2) includes a definition of commercially available which is similar to the section 2(a) definition used in section 32(2):

“(2) Paragraph (1)(b) [the provision which allows the export of unauthorized accessible format copies] does not apply if the work or other subject-matter, in the format specially designed for persons with a print disability, is available in the other country within a *reasonable time* and for a *reasonable price* and may be located in that country with *reasonable effort*” (emphasis added).⁶⁸

The term “reasonable” is used throughout these definitions, but the nature of “reasonable time”, “reasonable price” and “reasonable effort” have yet to be clarified by any jurisprudence. Additionally, a determination of whether the price of an authorized accessible format copy and the time and effort required to obtain it are “reasonable” would very much be affected by the facts of a situation. Many factors could go into determining whether an authorized accessible format is “commercially available” under the *Copyright Act*’s definitions, such as the specific format of the accessible copy, the nature of the original work, the location of the copy, the nature of the entity that produced the copy, and the location and resources of the person who needs the copy.⁶⁹ For non-profit organizations that would be dealing with many types of books and publications and readers from many different backgrounds, it would be incredibly cumbersome to not only check whether an authorized accessible format copy exists in the first place, but to also try to figure out whether the particular individual who needs it could obtain it for a “reasonable price”, in a “reasonable” time and with “reasonable” effort.⁷⁰ This process would be even more difficult when it comes to exporting accessible format copies, which could require contacting organizations in the destination country and understanding the circumstances of readers resident there. Canada’s responses to a survey sent from WIPO to *Marrakesh Treaty* parties indicate that Canadian non-profit organizations should be able to rely on their foreign counterparts to do commercial availability checks when they plan to export.⁷¹ Unfortunately, this policy could pose another problem—Canada would be imposing its commercial availability provisions onto nations which may not have analogous provisions in their own law, which could conflict with those jurisdictions’ sovereignty.⁷²

⁶⁸ See *Copyright Act*, *supra* note 7, s 32.01(2).

⁶⁹ See *EBU Submission*, *supra* note 27, at 3–4.

⁷⁰ See *IFLA New Zealand Submission*, *supra* note 53 at 2–3; *Our Right to Knowledge*, *supra* note 53 at 19–20.

⁷¹ *Canada Marrakesh Treaty Questionnaire*, *supra* note 7 at 2.

⁷² *World Blind Union Guide*, *supra* note 2 at 55.

The burden on Canadian non-profit organizations making accessible format copies is slightly alleviated by the fact that if they export an unauthorized copy to another *Marrakesh Treaty* country, and the copyright holder claims authorized commercially available copies exist in that country, then the onus is on the copyright holder to prove their claim.⁷³ However, for many organizations, having to deal with legal proceedings could be too costly and time-consuming. Organizations could decide to avoid any risk of legal troubles and forgo making accessible format copies of any works where commercial availability searches lead to even ambiguous results. This caution could end up hindering the access that people with print disabilities have to books and other printed materials—the exact opposite of what the *Marrakesh Treaty* hopes to achieve.

4. Canada’s Copyright Exceptions for people with print disabilities may be more restrictive than what the *Marrakesh Treaty* actually allows

Marrakesh Treaty exceptions must abide by the “three-step test” from the *Berne Convention*,⁷⁴ which states that exceptions:

- 1) Can only apply to “certain special cases” (cannot be overly broad)
- 2) Cannot conflict with “normal exploitation” of a copyright holder’s work (cannot take a real or substantial source of income away from copyright holders)
- 3) Cannot “unreasonably prejudice the legitimate interest” of copyright holders (cannot do disproportionate harm to copyright holders).

The *Marrakesh Treaty* also allows contracting countries to impose restrictions in their copyright exceptions for accessible format copies. Most notably, contracting countries can mandate that organizations are only permitted to make unauthorized accessible format copies if there is no authorized “commercially available” version of the work in that format, or that they have to pay remuneration to rightsholders for making these copies.⁷⁵ It is important to note that the *Marrakesh Treaty* does not demand that countries include any restrictions and having such

⁷³ *Ibid.*

⁷⁴ *Berne Convention for the Protection of Literary and Artistic Works* (9 September 1886), 828 UNTS 221 art 9(2) (amended 28 September 1979, amended version entered into force 19 November 1984) [*Berne Convention*]; *Marrakesh Treaty*, *supra* note 2, preamble, art 11. See also P Bernt Hugenholtz & Ruth Okediji, “[Conceiving an International Instrument on Limitations and Exceptions to Copyright](#)” (7 March 2012), online (pdf): SSRN <papers.ssrn.com/sol3/papers.cfm?abstract_id=2017629> [perma.cc/3DXM-BZ3L] for further analysis and explanation of the three-step test.

⁷⁵ *Marrakesh Treaty*, *supra* note 2, arts 4(4)-(5).

provisions in their copyright law does not guarantee compatibility with the three-step test.⁷⁶

Section 32.01(2) only allows the export of accessible format copies not authorized by copyright holders if there is not an authorized accessible format copy that is “commercially available” (as defined by the Act) in the destination country. However, the *Marrakesh Treaty* only explicitly permits parties to place restrictions on the import of unauthorized accessible copies, but not the export.⁷⁷ Thus, the export restrictions in the commercial availability provisions of Canada’s *Copyright Act* may make our implementation narrower than the standard set by the *Marrakesh Treaty*.

A) Societal Consequences

There are societal consequences that flow out of the legal consequences just discussed, including the following:

1) Our commercial availability provisions fail to consider that there are rarely authorized accessible copies of copyrighted works readily available to most people with print disabilities

Unauthorized accessible format copies are generally created because there are inadequate authorized copies. There is no indication that publishers have been incurring any significant loss due to the production of unauthorized accessible copies, nor has there been any other demonstrated justification for them.⁷⁸ The main reason why individuals and institutions do not purchase authorized accessible copies is not because they are using unauthorized copies. Rather, even purportedly “commercially available” copies may be difficult to find, no longer in print, or do not properly accommodate the needs of a reader with print disabilities.⁷⁹

Commercial availability provisions ignore the reality that publishers rarely produce or authorize accessible format copies that are fully usable to readers with print disabilities. A commonly described issue is that audio format copies may be marketed as “accessible” but may lack features which allow users to change the speed of the narration, bookmark pages, navigate

⁷⁶ *Marrakesh Treaty*, *supra* note 2, art 5. See also *World Blind Union Guide*, *supra* note 3 at 70–74.

⁷⁷ *World Blind Union Guide*, *supra* note 3 at 55.

⁷⁸ See generally Helfer, *supra* note 1, *EBU Submission*, *supra* note 27.

⁷⁹ See *EBU Submission*, *supra* note 27 at 3–5; CNIB *Copyright Act Review Submission*, *supra* note 11 at 3–4. KEIWashDC, “[Marcus Low gives CSC opening statement at Marrakesh Diplomatic Conference, June 19, 2013](#)” (19 June 2013), online (video): [YouTube <youtu.be/Aoo7A43RitY>](https://youtu.be/Aoo7A43RitY) [perma.cc/AC2R-2PT9] [*Marcus Low video*].

the book, or read the book on any platform of their choice.⁸⁰ Additionally, even if an accessible format copy is fully usable to some individuals with print disabilities, it may not be usable by others. For example, a large print book may not have font large enough for a particular reader, or a braille book may be printed using contracted (grade 2) braille, which uses contracting and abbreviations unique to the writing system, whereas a reader may only know how to read using uncontracted (grade 1) braille, where words are fully transcribed.⁸¹ Thus, in practice it is often impossible to accommodate the needs of all readers with print disabilities by relying on accessible format copies authorized by copyright holders. Non-profit organizations need to be allowed to make their own accessible format copies for readers who cannot use the copyright holders-authorized copies.

As discussed above (p.7), this lack of accessible material has a serious, detrimental effect on those individuals with reading impairments, in the form of lower educational achievements and employment opportunities. Consequently, there is an impact on Canada's general economy due to a reduction in potential productivity. Further, individuals can stay up-to-date on news and social activities like sports and entertainment through reading, helping them foster a sense of community. Reading allows individuals to improve their intellectual abilities, raises their sense of self-esteem and provides a source of private contemplation and relaxation.⁸² The lack of opportunities to read likely leads to an increase in mental health and addiction issues for visually impaired people, since those individuals are denied access to materials that could substantially improve their quality of life.⁸³

⁸⁰ CNIB Copyright Act Review Submission, *supra* note 11; Marcus Low video, *supra* note 79.

⁸¹ For more information on uncontracted and contracted braille, see "[Uncontracted \(Grade 1\) Braille Explained](#)" (2014), online: Royal National Institute of Blind People <rnib.org.uk/braille-and-other-tactile-codes-portal-braille-codes/uncontracted-grade-1-braille-explained> [perma.cc/7C58-2PWW] and "[Contracted \(Grade 2\) Braille Explained](#)" (2014), online: Royal National Institute of Blind People <rnib.org.uk/braille-and-moon-tactile-codes/braille-codes/contracted-grade-2-braille-explained> [perma.cc/6VFG-RLYH].

⁸² See Claire Creaser & Debbie Hicks, "[Assessing the Impact of Reading for Blind and Partially Sighted Adults](#)" (2012), online (pdf): Royal National Institute for the Blind <readingagency.org.uk/news/RNIB%20-%20Impact%20of%20reading%20report.pdf> [perma.cc/9RQ9-H9CE].

⁸³ See Docia L Demmin & Steven M Silverstein, "Visual Impairment and Mental Health: Unmet Needs and Treatment Options" (2020) 14 *Clinical Ophthalmology* 4229 at 4233.

B) Commercial availability provisions hinder bulk transfers of accessible format publications between institutions

Commercial availability provisions limit bulk exchanges between libraries, educational institutions and non-profit organizations, which the *Marrakesh Treaty* is meant to facilitate.⁸⁴ A commercial availability search to even determine if an accessible copy of a particular book is available in a certain region, language and format can be time-consuming. This issue is exacerbated by several factors. One is that Canada's provisions have unclear definitions of "commercial availability". This ambiguity makes it challenging for organizations to discern how much time and resources they should devote to searching for accessible format copies authorized by copyright holders and whether a particular authorized accessible format copy would qualify as "commercially available" (see the section "*The definition of "commercial availability is vague" above*" for elaboration on this topic). A second factor is that there is no comprehensive database of accessible format copies, and publishers rarely make catalogues of their accessible format books.⁸⁵ Multiplying this effort to dozens, hundreds, or even many thousands of books can bring large book transfers to a halt. International transfers of books could be nearly impossible in some cases, due to the further hurdles placed by our law on import and export of accessible format copies (see the section "*The definition of "commercial availability is vague" above*" and the section "*Most parties have much less restrictive implementations of the Marrakesh Treaty than Canada does" below*").

1) Most parties to the *Marrakesh Treaty* do not have commercial availability provisions like Canada, meaning that our laws could obstruct the exchange of accessible format copies across borders

Most other jurisdictions—including large producers of books such as the United States and the European Union—do not require that organizations engage in commercial availability checks.⁸⁶ According to the most recent update by the International Federation of Library Associations (IFLA), out of the 122 countries that are members of the *Marrakesh Treaty*, only

⁸⁴ See "[World Blind Union \(WBU\) and Knowledge Ecology International \(KEI\)—Meeting on a WIPO Treaty for Blind, Visually Impaired and Other Reading Disabled Persons](#)" (25 July 2008) at 12, online (pdf): *Knowledge Ecology International* <keionline.org/misc-docs/tvi/meeting_report.pdf> [perma.cc/2QP8-HQHU] at 12; Hackett, *supra* note 1; Jarvis, *supra* note 28 at 3.

⁸⁵ See *EBU Submission*, *supra* note 27 at 3–5. *Getting Started*, *supra* note 23 at 16–17.

⁸⁶ See Helfer, *supra* note 1 at 337; "[Marrakesh Monitoring Report—January 2022 Update](#)" (28 January 2022), online (pdf): *International Federation of Library Associations*

23 of them have provisions that bar organizations from making accessible format copies if there are commercially available copies authorized by the copyright holder.⁸⁷ Most of these countries have either not ratified the treaty, have acceded to or ratified it but have not begun the process of reforming their laws, or are currently in the process of amending their laws.⁸⁸ Thus, the number of countries that require organizations to do commercial availability checks before making accessible format copies could potentially decrease in the future. Only seven countries with commercial availability provisions—Argentina, Canada, Israel, Japan, Liberia, Malawi and Singapore—have ratified the *Marrakesh Treaty* and have amended their laws to conform with it.⁸⁹ Of these seven countries, most do not have provisions that explicitly bar exports when a work is commercially available in the destination market. Canada’s unique implementation of the *Marrakesh Treaty* could cause difficulties when it comes to trading accessible format books between countries. As discussed in the section “*The definition of “commercial availability” is vague*”, Canada’s commercial availability provisions would not only make transfers difficult for Canadian organizations, but could also increase burdens on foreign ones, since the latter may have to assist our own organizations with checking for commercial availability in their own country. Canadian organizations having greater difficulty importing and exporting accessible format copies would have consequences for readers with print disabilities both inside and outside of Canada. Canadians would have a harder time importing accessible format books, especially as most countries which produce books in our official languages do not have the same restrictions in their laws as we do. On the flip side, readers with print disabilities in other countries—especially developing countries, where most people with print disabilities live—would not be able to receive as many accessible format books from Canada. Ultimately, Canada’s commercial availability provisions hinder the *Marrakesh Treaty*’s goal of helping to end the book famine, not only in Canada itself, but on an international scale.

5. Issues Beyond Commercial Availability

While this paper focuses on commercial availability provisions, they are not the only problematic aspect of how the *Copyright Act* handles accessible format works for people with disabilities. This section will discuss other accessibility-related areas of Canada’s *Copyright Act* that merit further study and reform.

and Institutions <repository.ifla.org/bitstream/123456789/1861/1/Marrakesh%20Monitoring%20Report%20Update%20January%202022.pdf> [perma.cc/TB2Z-H43E] [*Marrakesh Monitoring Report*].

⁸⁷ *Marrakesh Monitoring Report*, *supra* note 86.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.* See also Helfer, *supra* note 1 at 337.

A) Sections 32.01(4)-(7)—Provisions that May Further Restrict the Implementation of the *Marrakesh Treaty*

Sections 32.01(4)-(7) of the *Copyright Act* allow the Governor-in-Council to impose regulations that would require non-profit organizations to:

- remunerate copyright holders or (in the event they cannot contact the copyright holder) collective societies when they produce unauthorized accessible format copies of copyrighted works;
- make formal contracts in a specific form and with certain contents when they participate in transactions with other organizations that involve accessible format copies produced under the section 32 and section 32.01 exceptions; and
- send in reports to an authority that keeps track of their activities under the above-mentioned *Copyright Act* exceptions

Currently, these provisions are not in effect, but could still potentially make organizations more cautious about producing accessible format copies under the exceptions in the *Copyright Act*. In the event that any of the provisions in sections 32.01(4)-(7) are ultimately enforced, they could minimize the number of copies they make using the exception or be unwilling to collaborate with other organizations to try to reduce their administrative burden. As discussed previously, there is no evidence that copyright holders are being harmed by non-profit organizations making accessible format copies of their works without their authorization. Thus, remunerating copyright holders or collective societies would only burden non-profit organizations, not only with the fees they have to pay but also in terms of the costs of finding and contacting the copyright holder or collective society whom the *Copyright Act* mandates they compensate. Further, though it may benefit organizations to make contracts for their transactions involving accessible format copies, if regulations mandate forms or contents of these contracts that are too narrow, they could potentially make transfers less, not more, effective, especially if the prescribed form and contents do not reflect how these agreements are carried out in practice. Finally, having non-profit organizations send in reports on the accessible format copies they produce to a governmental authority would create a double standard against these organizations, as such reports are not generally required in the publishing industry in Canada. Overall, if regulations were made regarding section 32.01(4)-(7) and these provisions were enforced, they are only likely to create more barriers to accessibility.

B) Exceptions For People who are Deaf and Hard-of-Hearing

Canada's *Copyright Act* also has exceptions for people with disabilities other than print or vision-related disabilities. In fact, section 32, which concerns exceptions that apply domestically, also includes exceptions regarding accessible works for people who are deaf or hard-of-hearing. This provision uses the term "perceptual disability", which is defined in section 2 of the *Copyright Act* to include hearing-related disabilities.⁹⁰

Additionally, section 32 also includes subsections that specifically refer to sign language:

"32 (1) It is not an infringement of copyright for a person with a perceptual disability, for a person acting at the request of such a person or for a non-profit organization acting for the benefit of such a person to [...]

(b) **translate, adapt or reproduce in sign language a literary or dramatic work, other than a cinematographic work**, in a format specially designed for persons with a perceptual disability;

(b.1) provide a person with a perceptual disability with, or provide such a person with access to, a work or other subject-matter to which any of paragraphs (a) to (b) applies, in a format specially designed for persons with a perceptual disability, and do any other act that is necessary for that purpose; or

(c) **perform in public a literary or dramatic work, other than a cinematographic work, in sign language, either live or in a format specially designed for persons with a perceptual disability**" (emphasis added).

However, section 32.01, the section which allows for the export of accessible format works in Canada, only applies to people with *print* disabilities, which are defined in section 32.01(8). The following table comparing the definitions of perceptual disability from section 2 and print disability from section 32.01.⁹¹

⁹⁰ *Copyright Act*, *supra* note 7, s 2.

⁹¹ *Copyright Act*, *supra* note 7, ss 2, 32.01(8).

Table 1.

Perceptual disability, section 2	Print disability, section 32.01(8)
<p>perceptual disability means a disability that prevents or inhibits a person from reading or hearing a literary, musical, dramatic or artistic work in its original format, and includes such a disability resulting from</p> <p>(a) severe or total impairment of sight or hearing or the inability to focus or move one's eyes,</p> <p>(b) the inability to hold or manipulate a book, or</p> <p>(c) an impairment relating to comprehension; (<i>déficience perceptuelle</i>)” (emphasis added).</p>	<p>print disability means a disability that prevents or inhibits a person from reading a literary, musical, artistic or dramatic work in its original format and includes such a disability resulting from</p> <p>(a) severe or total impairment of sight or the inability to focus or move one's eyes;</p> <p>(b) the inability to hold or manipulate a book; or</p> <p>(c) an impairment relating to comprehension. (<i>déficience de lecture des imprimés</i>)</p>

As shown above, the *Copyright Act*'s definition of “print disability” is the same as that of “perceptual disability” but excludes those who are deaf or hard-of-hearing. This means that, for example, it may not be possible to distribute a video interpreting a live performance in sign language outside of Canada without permission from the copyright holder. The *Copyright Act* would likely need provisions that allow people who are deaf and hard-of-hearing and their allies to internationally distribute accessible format copies made under its exceptions, akin to how it allows accessible format works for people with print disabilities to be exported. In order to best improve how the *Copyright Act* accommodates people who are deaf or hard-of-hearing, we should consult these communities and research exceptions from other jurisdictions in order to provide accessible formats that work for them.

C) Exceptions for Works Beyond Printed Works

The exceptions in the *Copyright Act* do not allow for accessible format copies of cinematographic works to be made without authorization from copyright holders. Cinematographic work is defined in Canada's *Copyright Act* as “any work expressed by any process analogous to cinematography, whether or not accompanied by a soundtrack” and in the *Berne Convention* as “assimilated works expressed by a process analogous to cinematography”.⁹² These definitions are intentionally broad and can

⁹² *Copyright Act*, supra note 7, s 2; *Berne Convention*, supra note 74, art 2(1).

encompass filmed videos, animations and live broadcasts.⁹³ The lack of exceptions for cinematographic works would negatively affect multiple kinds of disabilities. People who are deaf or hard-of-hearing often need cinematographic works to have closed captioning or embedded sign language interpretation, while those who are blind or have visual impairments may require audio descriptions of visuals.

A further issue with the lack of exceptions for cinematographic works is that this could restrict the ability of non-profit organizations to make accessible copies of webpages and software. While discussion on the *Marrakesh Treaty* has been focused on books and other texts that have been conventionally published, the treaty mandates that exceptions include all literary and artistic works, categories which would include webpages and software in most cases. Indeed, the *World Blind Union Guide to the Marrakesh Treaty* states that the treaty is technologically neutral and encompasses “born digital” works such as “e-books, wikis, electronic records and webcomics”.⁹⁴ Canadian law treats the code of computer programs such as video games as literary works, while their final products, depending on their features, are not single copyrightable works, but rather compilations of copyrightable components, such as text, sounds, graphics and videos.⁹⁵ Many webpages and software programs contain videos and other media that could fall under the definition of “cinematographic works”, so the *Copyright Act*’s current exclusion of cinematographic works from its accessibility-related exceptions means that it may not be possible to fully and legally convert these programs into accessible formats without permission from copyright holders. Cinematographic works and computer programs that contain them are becoming more and more commonly used for educational and instructional purposes, making it increasingly vital that everyone can experience them in accessible formats.

During the *Marrakesh Treaty* negotiations, advocates pushed for it to mandate exceptions for cinematographic works and multiple countries do have them. While advocates pointed out that, in practice, these exceptions would be used to make accessible format copies of educational materials, since mainstream films often already have authorized copies with accessible

⁹³ “Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)” (1978), *World Intellectual Property Organization Publication No. 615(E)* at 15

[No. 615€].

⁹⁴ *World Blind Union Guide*, *supra* note 3 at 22–23.

⁹⁵ See “[Intellectual property rights in software in Canada](#)” (2022), online (pdf): *Canadian Intellectual Property Office* <ic.gc.ca/eic/siTe/cipointernet-internetopic.nsf/eng/wr05067.html> [perma.cc/NXL3-GUY7]. Note that computer programs can also contain components that can receive intellectual property protection besides copyright, such as patent, trademark and industrial design protection.

features, the treaty ultimately excluded cinematographic works due to lobbying from the film industry.⁹⁶ However multiple countries have made copyright exceptions that either explicitly allow accessible format copies of cinematographic works or are phrased in a such a broad manner that could permit them, and there is no evidence that these exceptions have caused harm to copyright holders.⁹⁷ Thus, there is precedent for Canada to expand our exceptions to include cinematographic works.

D) Exceptions for Non-Profit Organizations Only: Too Narrow a Solution?

Canada's provisions and the *Marrakesh Treaty* more broadly relegate the creation of accessible format copies to "exceptions" and acts of charity by non-profit organizations. This is an ableist view that treats accommodating people with print disabilities as "special" rather than the norm.⁹⁸ There have been multiple more radical propositions as to how to ameliorate this issue and further take down barriers set up by copyright law. One proposal is for laws to allow organizations to make accessible format copies without authorization from copyright holders on a for-profit basis. In his book *Discrimination, Copyright and Equality: Opening the e-Book for the Print-Disabled*, Paul Harpur, a law professor at the University of Queensland specializing in disability rights, suggested that expanding exceptions to include for-profit and not just non-profit activities would help to dispel the notion that goods and services for people with print disabilities are something separate from the broader commercial sphere.⁹⁹ Additionally, this could create greater market competition for accessible format copies, which could push publishers to make authorized accessible format copies of their own, or improve upon the copies that they are currently producing.¹⁰⁰ Copyright laws that permit organizations to make accessible format copies of works for profit without permission from copyright holders are not unheard of—for example, India's copyright law allows organizations to do so under a compulsory license, and there is no indication that this has had a negative impact on copyright holders.¹⁰¹ Another proposal suggests that instead of having exceptions, copyright laws should mandate that copyright for a literary work is only granted if the work is produced in an accessible format. For example, in a submission

⁹⁶ See *Love video*, *supra* note 49.

⁹⁷ See Rishika, *supra* note 31.

⁹⁸ See Harpur, *supra* note 17 at 78–79, 209–210, 238–240.

⁹⁹ See Harpur, *supra* note 17 at 78–79, 209–210, 238–240.

¹⁰⁰ See Harpur, *supra* note 17 at 78–79, 209–210, 238–240.

¹⁰¹ See [The Copyright Act 1957](#), Act No. 14 of 1947, ss 31B, 52(zb) (India), online (pdf): *Copyright Office—Government of India* <copyright.gov.in/documents/copyrightrules1957.pdf> [perma.cc/M3FP-NGYL].

for the review of the *Copyright Act*, the CNIB Foundation recommended that:

“[...] section 3, Copyright in works, be amended to include the addition of 3(2) so that 3(2) reads:

3 (2) For the purpose of this Act, a copyright cannot be granted to a literary work unless the production of such a work is done in an alternate format for persons with a print disability.”¹⁰²

Though this proposed reform goes far beyond the scheme envisioned by the *Marrakesh Treaty*, it shows an alternative to the current regime, one where the production of accessible format copies is treated as default and not an “exception”.

6. The Bigger Picture: Canada’s Implementation of the *Marrakesh Treaty* may Conflict with Our Human Rights Obligations

The *Marrakesh Treaty* should be interpreted in light of both domestic and international human rights treaties, given that its purpose is to increase access for people with print disabilities to written works. The following sections will give a brief overview of the treaty’s intersection between domestic human rights legislation in Canada and international human rights treaties and examines how Canada’s implementation may not live up to the standards set by these laws.

A) Domestic Human Rights Obligations

Multiple sources have argued that government institutions have an obligation under s 15 of Canada’s *Charter of Rights and Freedoms* to increase access to accessible format copies of documents for people with print disabilities. Section 15 states that government institutions must make laws that respect the “equality rights” of people in Canada and specifically mentions people with both mental and physical disabilities as a protected class:

“15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

¹⁰² CNIB *Copyright Act Review Submission*, *supra* note 11 at 2.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

In their submission to Parliament’s 2018 review of the *Copyright Act*, the CNIB wrote:

“Under Section 15 of the Canadian Charter of Rights and Freedoms, all citizens are guaranteed equal rights regardless of factors such as disability. This includes the right to access books and information—and all the opportunities for education, employment and community participation they lead to.”¹⁰³:

Further, in *Discrimination, Copyright and Equality: Opening the e-Book for the Print-Disabled*, Paul Harpur discussed the relationship between accessible format works and Canadian human rights laws such as s 15 of the *Charter*. He highlights the case *Jodhan v Canada*, where the plaintiff was a blind woman who found that many Canadian federal government websites, such as the federal government job bank and the online census, were not in formats that were accessible to people with print disabilities.¹⁰⁴ Jodhan faced numerous obstacles on these websites—she could not submit forms, as there was not a mechanism that allowed her to review the information she had input, and she was unable to navigate the websites without the assistance of a sighted individual.¹⁰⁵ Jodhan initiated a lawsuit against the federal government of Canada, arguing that the inaccessibility of the websites violated her equality rights under s 15(1) of the *Charter*.¹⁰⁶ The Federal Court ruled in Jodhan’s favour and while the Government of Canada appealed, the Federal Court of Appeal affirmed the lower court’s judgment on this issue.¹⁰⁷ Harpur concludes that although publishers cannot be forced to make or license their works in accessible formats, *Jodhan* indicates that in Canada, public institutions such as libraries, universities and schools, have an obligation to provide publications in accessible formats for people with print disabilities.¹⁰⁸ He further notes that Canadian jurisprudence on s 15 of the *Charter* and disability rights shows that institutions have a positive duty to accommodate people with disabilities and provide services that are accessible to them. Harpur states

¹⁰³ CNIB *Copyright Act Review Submission*, *supra* note 11 at 3.

¹⁰⁴ Harpur, *supra* note 17 at 260–266, 272–273; *Jodhan v Canada*, 2010 FC 1197 at paras 1–4 [*Jodhan FC*]; *aff’d* 2012 FCA 161 [*Jodhan FCA*].

¹⁰⁵ See *Jodhan FC*, *supra* note 104 at para 108.

¹⁰⁶ See *Jodhan FC*, *supra* note 104 at para 75.

¹⁰⁷ See *Jodhan FC*, *supra* note 104 at para 179; *Jodhan FCA*, *supra* note 104 at para 185.

¹⁰⁸ *Harpur*, *supra* note 17 at 266.

that this jurisprudence can be applied to the book famine and how people with print disabilities have a right to read:

“The right to read arguably has robust protection under Canadian Charter jurisprudence. The *Jodhan* litigation provides strong support for the right to read and the right to be free from digital disablement. The interaction between the *Charter* and anti-discrimination laws in Canada means that anti-discrimination laws must be read in a way that complies with the *Charter*. Article 15 of the *Charter* has been read widely to recognise a right to read online material. The wide reading of *Charter* article 15 reflects the expansive approach to reasonable accommodations under Canadian anti-discrimination laws. The Canadian Supreme Court has read the right to reasonable accommodations widely and requires inclusive design to be considered throughout the design and manufacture of systems [...] Libraries that provide services as a government entity or within education spheres attract a positive duty to reduce the creation of barriers to persons with disabilities. This duty requires libraries to consider how their E-Library platforms can be rendered accessible to persons with print disabilities. This will likely encourage libraries to pressure E-Library providers to enable disability access, and should also motivate libraries to seek out E-Libraries that are already fully accessible. Arguably, the combination of the recognition of the right to read under the *Charter* and the operation of the existence of this greater protection enhances the capacity of persons with disabilities to exercise their right to read.”¹⁰⁹

However, Harpur warns that anti-discrimination lawsuits and constitutional challenges are an incredibly costly and time-consuming type of litigation, especially for people with print disabilities, who often have fewer resources than members of the general public.¹¹⁰ Thus, people with print disabilities should not have to shoulder the burden of reminding the government of the *Charter* obligations to them that it must uphold. Rather, the government should proactively ensure that it is living up to its obligations and develop laws that reduce barriers to accessible reading materials as much as possible.

B) International Human Rights Obligations

The *Marrakesh Treaty*'s preamble outlines its underlying principles and starts by referencing the *Universal Declaration of Human Rights (UDHR)* and the *United Nations' Convention on the Rights of Persons with Disabilities (CRPD)*.¹¹¹ A full discussion of the historical development of

¹⁰⁹ Harpur, *supra* note 17 at 272–273.

¹¹⁰ Harpur, *supra* note 17 at 300–311.

¹¹¹ *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3, Annex I (entered into force on 3 May 2008 [CRPD]); *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 [UDHR].

these international human rights treaties, their intersection with Canadian law and their potential to achieve greater access for individuals with print disabilities is a very rich area, one that is beyond the scope of this paper. However, of particular interest is the fact that Article 30(3) of the *CRPD* explicitly mentions that intellectual property laws create accessibility barriers, and that they should not inhibit access to cultural materials for persons with disabilities.¹¹² More broadly, the *UDHR* and the *CRPD* also enumerate various rights which involve literacy.¹¹³ These rights are the rights to:

- Freedom of expression and access to information (*UDHR* article 19, *CRPD* article 21)
- Education (*UDHR* article 26, *CRPD* article 24)
- Work and employment (*UDHR* article 23, *CRPD* article 27)
- Participation in public and social life (*CRPD* article 29), and
- Enjoyment of cultural life and scientific, literary and artistic works (*UDHR* article 27, *CRPD* article 30).

Additionally, the *Marrakesh Treaty* overlaps with other human rights treaties that Canada is party to, such as the *United Nations Convention on the Rights of the Child* (CRC), the *International Covenant on Civil and Political Rights* (ICCPR), and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).¹¹⁴

Full realization of all the above-mentioned rights in the *UDHR*, *CRPD* and other treaties would require literacy and therefore accessible format reading materials for people with print disabilities. Copyright exceptions for accessible format copies should thus be drafted and implemented

¹¹² See *CRPD*, *supra* note 111, art 30(3).

¹¹³ See *UDHR*, *supra* note 111, arts 19, 23, 26, 27, 29; *CRPD*, *supra* note 111, arts 21, 24, 27, 29, 30.

¹¹⁴ *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 arts 13, 17, 23, 30–31 (entered into force on 2 September 1990); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 arts 1.1, 6, 13, 15.1 (entered into force 3 January 1966); *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 arts 18.1, 19 (entered into force 23 March 1976). See also Kellie Magnus, “[The Marrakesh Treaty: Rights Holders’ Perspective](#)” (23 November 2015) at 3–4, online (pdf): *World Intellectual Property Organization* <wipo.int/edocs/mdocs/copyright/en/wipo_cr_kin_15/wipo_cr_kin_15_t4-main1.pdf> [perma.cc/3NEN-8EGD]; Helfer, *supra* note 1; *World Blind Union Guide*, *supra* note 3 at 2–4; Harpur, *supra* note 17 at 91–92, 181, 238–240; *Our Right to Knowledge*, *supra* note 53 at 9–11.

keeping in mind the goals of human rights treaties such as the UDHR and CRPD. Canada's restrictive implementation of the *Marrakesh Treaty* could fall short of both the treaty itself and our obligations under international human rights treaties. To better uphold its purpose, we must reform our implementation of the *Marrakesh Treaty* and remove provisions—such as commercial availability provisions—that hinder people with print disabilities from obtaining accessible format copies.

7. Conclusion and Future Steps

The commercial availability provisions in sections 32 and 32.01 of the *Copyright Act* could cause Canada's implementation of the *Marrakesh Treaty* to fall short of the treaty itself and of our human rights obligations both domestically and internationally. To better uphold the *Marrakesh Treaty's* purpose, parliament should reform the *Copyright Act* to eliminate these provisions. Commercial availability provisions harm readers with print disabilities and have not been demonstrated to benefit copyright holders. Removing the commercial availability provisions would allow for more variations of accessible format copies to be made, so that libraries, schools and other non-profit organizations could better accommodate the needs of readers with print disabilities. This would also hasten transfers of accessible format books by Canadian organizations, whether they are transferring books domestically or abroad—the latter being important since Canada imports books from jurisdictions like the United States and the European Union and exports books to the developing nations where most individuals with print disabilities live.

Removing commercial availability provisions is not the only step Canada can take to improve how the *Copyright Act* treats accessible format copies for people with disabilities. There are various other accessibility-related issues that should be subject to further investigation and reform. More work should be done to reform Canada's implementation of the *Marrakesh Treaty* so that the *Copyright Act* cannot restrict non-profit organizations making accessible format copies under its exceptions. There should not be laws that can force these organizations to remunerate copyright holders, make contracts for the exchange of books in a certain form, or record their transactions for submission to the government. Research can also examine how Parliament might expand the accessibility-related exceptions of the *Copyright Act* beyond the standard set by the *Marrakesh Treaty*, to allow international distribution of accessible format copies for people who are deaf or hard-of-hearing and to have our exceptions include cinematographic works. Finally, stakeholders should discuss more radical reforms to normalize the production of accessible format works, such as allowing for-profit companies to make accessible

format works without permission from copyright holders, or restructuring the *Copyright Act* so that copyright holders must authorize format works to be made in order to obtain copyright.

Canada must work towards removing the obstacles that people with disabilities encounter when trying to obtain media in accessible formats. Ending the book famine is not solely a matter of copyright law, but rather a human rights issue in which copyright is merely one piece of the puzzle. The way our *Copyright Act* treats accessible format copies must comply with the standards set by international and domestic human rights legislation. Canada must uphold our obligation to people with disabilities to ensure that they have equal access to freedom of expression, education, information, employment and social and cultural life. Removing the commercial availability limitations on the production and distribution of accessible format copies for people with print disabilities would eliminate one barrier, moving us closer to achieving the goals set by the *Marrakesh Treaty* and other human rights legislation.

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