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Proposal for a

COUNCIL DECISION

**on the conclusion, on behalf of the European Union, of the Marrakesh Treaty to
Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or
Otherwise Print Disabled**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

People who are blind, visually impaired or otherwise unable to access printed material ('print-disabled') must have equal access to books and printed material in order to fully and effectively participate in society. The World Health Organisation estimates that 285 million people worldwide are visually impaired: 39 million are blind and 246 million have low vision¹. The World Blind Union reports that in Europe only 5% of published books are available in an accessible format for visually impaired persons, while in developing countries – where approximately 90% of visually impaired people live – this rate is as low as 1%².

Copies of books in accessible formats ('accessible-format copies') are now usually produced and distributed at national level by specialised organisations, for example libraries for the blind, under licences or under limitations or exceptions to copyright. However, the lack of an international legal framework allowing for the cross-border exchange of accessible formats produced under a limitation or exception leads to a duplication of effort in making these, even across countries sharing the same language. This is a problem due to the costs of producing accessible format copies and the limited resources available to organisations serving the blind.

Since January 2011 the European Union has been bound by the United Nations Convention on the Rights of Persons with Disabilities. This enshrines the right of access to information (Article 21) and the right of people with disabilities to participate in cultural life on an equal basis with others (Article 30). The Convention has become an integral part of the EU legal order. Twenty-five Member States are parties to the Convention and three countries are finalising ratification.

In 2009, negotiations began in the World Intellectual Property Organisation (WIPO) on a possible international treaty introducing limitations and exceptions to copyright for the benefit of people who are blind, visually impaired or otherwise print-disabled, with the objective of facilitating the cross-border exchange of books in accessible formats.

On 26 November 2012, the Council adopted a Decision authorising the Commission to participate in these negotiations, on behalf of the European Union³. The WIPO negotiations were successfully concluded at the diplomatic conference held in Marrakesh between 17 and 28 June 2013. These led to the adoption of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled ('the Treaty') on 27 June 2013.

The Treaty establishes a set of international rules which ensure that there are limitations or exceptions to copyright at national level for the benefit of people who are blind, visually impaired, or otherwise print-disabled and enable the cross-border exchange of accessible-format copies of published works that have been made under an exception or limitation to copyright in any of the Contracting Parties to the Treaty.

¹ Fact sheet No 282, June 2012; <http://www.who.int>.

² <http://www.worldblindunion.org>.

³ Council Decision on the participation of the European Union in negotiations for an international agreement within the World Intellectual Property Organisation on improved access to books for print impaired persons; 16259/12 EU RESTRICTED.

The Council authorised the signature of the Treaty on behalf of the European Union⁴ on 14 April 2014.

With this proposal for a Council Decision, the Commission seeks authorisation from the Council, after obtaining the consent of the European Parliament, to conclude the Treaty, on behalf of the European Union.

2. LEGAL ELEMENTS OF THE PROPOSAL

2.1 The provisions of the Treaty

The Treaty's 'beneficiaries' are people who are blind, have a visual impairment or a perceptual or reading disability, or are otherwise unable, due to physical disability, to hold or manipulate a book, or focus or move their eyes to the extent that would be normally acceptable for reading.

The Treaty obliges every Contracting Party to provide, in their national copyright laws, for a limitation or exception to the rights of reproduction, distribution and making available to the public, to facilitate the availability of works in accessible formats for the Treaty's beneficiaries⁵. Contracting Parties may decide to limit such limitations or exceptions to cases where accessible format copies are not commercially available on reasonable terms to beneficiaries in their territory.

The Treaty defines 'works' as literary and artistic works within the meaning of Article 2(1) of the Berne Convention for the Protection of Literary and Artistic Works ('the Berne Convention'), in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media. By virtue of an agreed statement, this also covers audiobooks.

An 'accessible-format copy' is a copy in an alternative manner and form compared to the format in which the work has been published and which gives beneficiaries access to the work as comfortably as sighted people could access it. The accessible-format copy must be used exclusively by beneficiaries and it must respect the integrity of the original work.

Accessible format copies made under a limitation or exception to copyright may be exported by 'authorised entities', defined as government institutions or other organisations that provide education, instructional training, adaptive reading or information access to blind, visually impaired, or otherwise print-disabled persons on a non-profit basis. These entities must ensure that they only distribute accessible formats to beneficiaries, that they discourage the reproduction, distribution and making available of unauthorised copies and that they maintain due care in, and records of, their handling of the copies.

Contracting Parties may only allow accessible format copies to be exported, if they ensure that relevant limitations or exceptions to the rights of reproduction, distribution and making available to the public are subject to the 'three-step test'. This means that either they must be a party to the WIPO Copyright Treaty (WCT) or they must otherwise ensure that the relevant limitations or exceptions are limited to certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

⁴ Council Decision 2014/221/EU of 14 April 2014 on the signing, on behalf of the European Union, of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled. (OJ L115, 17.4.2014, p. 1.)

⁵ Contracting Parties may also provide for a limitation or exception to the right of public performance and, according to the attached agreed statement, to the right of translation to the extent allowed by the Berne Convention.

The Treaty clarifies that, to the extent a Contracting Party permits a beneficiary or an authorised entity to make an accessible-format copy of a work, it should also permit accessible-format copies to be imported.

Contracting Parties are obliged to take appropriate measures, if necessary, to ensure that when they provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures, this legal protection does not prevent the beneficiaries from enjoying the limitations and exceptions provided for in the Treaty.

The Treaty also requires Contracting Parties to protect the privacy of beneficiaries and to cooperate in order to facilitate the cross-border exchange of accessible-format copies. WIPO will set up an information access point to assist authorised entities in identifying one another with a view to working together. The Treaty also encourages authorised entities to provide information on their policies and practices to interested parties and to members of the public.

The Treaty confirms that Contracting Parties are free to determine the appropriate method of implementing the Treaty within their own legal system and practice. However, they must comply with existing international obligations under the Berne Convention, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WCT. The Treaty recognises that the Contracting Parties may maintain or implement other limitations and exceptions for beneficiaries and people with other disabilities, outside the scope of the Treaty.

Articles 13 to 22 contain administrative and procedural provisions that are very similar to those in other WIPO Treaties in the field of copyright (e.g. WCT).

The Treaty will enter into force once twenty Contracting Parties have ratified it.

The European Union may become a party to the Treaty, having made the declaration during the Marrakesh diplomatic conference, that it is competent in respect of, and has its own legislation binding on all its Member States on matters covered by this Treaty and that it has been duly authorised, in accordance with its internal procedures, to become party to the Treaty. The European Union signed the final act of the diplomatic conference on 28 June 2013 and signed the Treaty on 30 April 2014 in Geneva.

2.2 The legal bases

In light of the Treaty's subject matter, and as with Council Decision 2014/221/EU authorising the signature of the Treaty, the Council's decision on the conclusion of the Treaty should be based on Articles 114, 207, and 218(6)(a)(v) of the Treaty on the Functioning of the European Union (TFEU).

The Treaty's central provisions (Articles 5, 6 and 9) aim to ensure the cross-border exchange of accessible-format copies between the Contracting Parties of the Treaty, including between the EU and third countries. This exchange falls under the TFEU provision on the common commercial policy.

Authors' rights affected by the exceptions and limitations required by the Treaty (the right of reproduction, the right of distribution and the right of communication to the public including the right of making available) were harmonised at EU level by Articles 2-4 of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society⁶. An exhaustive list of exceptions or limitations to those rights is set out in Article 5(2) and 5(3) of this Directive. Recital 32 makes it clear that Member States cannot introduce different or additional exceptions to these rights in their national law. The

⁶ OJ L 167, 22.6.2001, p. 10.

exceptions or limitations should be exercised in accordance with Article 5(5) (the ‘three-step test’), also emphasised in recital 44.

Article 5(3)(b) of Directive 2001/29/EC provides for an optional exception or limitation to authors’ rights for uses, for the benefit of people with any disability, which are directly related to the disability and are of a non-commercial nature, to the extent required by the specific disability. Unlike the Treaty, this Article is not limited to any particular disability and Member States are free to choose whether they implement this limitation or exception. It is settled case-law that any discretion which Member States enjoy when they make use of any of the exceptions or limitations under Article 5 of Directive 2001/29/EC must be exercised within the limits imposed by EU law⁷.

Finally, Article 6 of Directive 2001/29/EC provides comprehensive legal protection for technological measures used by right holders and Article 6(4) provides that Member States must ensure that beneficiaries of certain exceptions or limitations benefit from those exceptions where technological protection measures are in place, in the absence of voluntary agreements. Articles 3, 4, 7, 10 and 11 of the Treaty affect these provisions of EU law.

As a result, it is considered that:

- a) the cross-border exchange of accessible-format copies with third countries is a predominant element of the Treaty, therefore its relevant articles fall under the common commercial policy (Article 207 TFEU); and
- b) the articles of the Treaty on mandatory exceptions or limitations fall within the scope of EU law, affect or alter the scope of the common rules, namely those in Directive 2001/29/EC and in any event are within an area which is already largely covered by EU rules (Article 114 TFEU)⁸.

The Commission is therefore submitting a proposal for a Council Decision on the conclusion of the Treaty. In accordance with Article 218(6)(a)(v) of the TFEU, the European Parliament has to give its consent before the Decision is adopted.

⁷ See e.g. case C-145/10, *Eva Maria Painer*, paragraph 104.

⁸ See case C-114/12 *Commission v. Council* judgment of 4 September 2014.

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COUNCIL DECISION

on the conclusion, on behalf of the European Union, of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 114 and 207, in conjunction with Article 218(6)(a)(v) thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament⁹,

Whereas:

- (1) Since 22 January 2011, pursuant to Council Decision 2010/48/EC¹⁰, the European Union has been bound by the United Nations Convention on the Rights of Persons with Disabilities, whose provisions have become an integral part of the Union legal order.
- (2) On 26 November 2012, the Council authorised the Commission to negotiate, on behalf of the European Union, an international agreement within the World Intellectual Property Organization on improved access to books for print-impaired persons.
- (3) The negotiations were successfully concluded at the diplomatic conference held in Marrakesh between 17 and 28 June 2013. The Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled (the 'Marrakesh Treaty') was adopted on 27 June 2013.
- (4) In accordance with Council Decision 2014/221/EU,¹¹ the Marrakesh Treaty was signed, on behalf of the European Union as regards matters falling within the Union's competence, on 30 April 2014, subject to its conclusion at a later date.
- (5) The Marrakesh Treaty establishes a set of international rules which ensure that there are limitations or exceptions to copyright at national level for the benefit of people who are blind, visually impaired, or otherwise print-disabled. The relevant copyright provisions have been harmonised by Union law, as they affect the functioning of the internal market. The Treaty will also enable the cross-border exchange of copies of published works that have been made in an accessible format under limitations or exceptions to copyright, and therefore also falls within the area of commercial policy.

⁹ OJ C , , p. .

¹⁰ Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities. (OJ L23, 27.1.2010, p. 35.)

¹¹ Council Decision 2014/221/EU of 14 April 2014 on the signing, on behalf of the European Union, of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled. (OJ L115, 17.4.2014, p. 1.)

The Treaty will facilitate access to published works for its beneficiaries in and outside the European Union.

(6) The Marrakesh Treaty should be approved on behalf of the European Union,

HAS ADOPTED THIS DECISION:

Article 1

The Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled is hereby approved on behalf of the European Union.

The text of the Marrakesh Treaty is attached to this Decision.

Article 2

The President of the Council is hereby authorised to designate the person(s) empowered to deposit, on behalf of the European Union, the instrument of ratification provided for in Article 19 of the Marrakesh Treaty in order to express the Union's consent to be bound by the Treaty.

Article 3

This Decision shall enter into force on the day of its adoption.

Done at Brussels,

*For the Council
The President*