

**For discussion on
27 February 2018**

Legislative Council Panel on Commerce and Industry

**Copyright Exceptions for People with a Print Disability under the
“Marrakesh Treaty to Facilitate Access to Published Works for Persons
Who Are Blind, Visually Impaired, or Otherwise Print Disabled” -
Proposed Way Forward**

PURPOSE

The Government conducted a three-month public consultation exercise during May to August 2017 on areas in the relevant provisions in the Copyright Ordinance (Cap. 528) which might need to be amended to align with the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (“Marrakesh Treaty”). This paper briefs Members on the outcome of the consultation and the Government’s proposed way forward.

THE MARRAKESH TREATY

2. The Marrakesh Treaty is an international agreement concluded under the auspices of the World Intellectual Property Organization (WIPO)¹. Its main goal is to facilitate and enhance access to copyright works in accessible forms for persons with a print disability.

3. The Marrakesh Treaty requires contracting parties to provide for limitations or exceptions in their domestic laws such that persons with print disabilities (identified as “beneficiary person(s)” under Article 3 of the Treaty) and certain organizations (identified as “authorized entity(ies)” under Article 2(c) of the Treaty) may perform a range of acts in relation to certain types of copyright works for the benefit of those beneficiaries without infringing copyright if certain conditions are fulfilled.

¹ WIPO is an agency under the United Nations overseeing services and policies of intellectual property, with 191 member states. Hong Kong joins the delegation of China in attending annual meetings of the Assemblies of the Members States held by WIPO.

4. Under the Marrakesh Treaty, the copyright works covered by such limitations or exceptions are literary and artistic works in the form of text, notation and/or related illustrations, as well as audiobooks. The limitations or exceptions to be provided under domestic laws should allow the making and supplying of copies of such copyright works in an accessible format, i.e. any format that enables a beneficiary to have access to the content as feasibly and comfortably as someone who is not print disabled.

5. The Marrakesh Treaty also requires contracting parties to provide for exchange across international borders of accessible format copies of works produced as provided under the Treaty, so that contracting parties can pool their respective efforts in creating accessible formats and increase the overall number of accessible works worldwide. Specifically, the Treaty requires that the provisions should enable an authorized entity to distribute or make available such accessible copies to a beneficiary or authorized entity in another contracting party.

6. The Marrakesh Treaty was adopted by the Members States of the WIPO on 27 June 2013. It came into force on 30 September 2016 and as at 20 February 2018, 34 countries have ratified or acceded to it.² The number is expected to rise.

THE PUBLIC CONSULTATION

7. In Hong Kong, the existing Copyright Ordinance has already set out a series of exceptions to serve the needs of persons with a print disability. With the Marrakesh Treaty coming into force in September 2016, the Government considered it a suitable opportunity to conduct a review on the relevant provisions in the Ordinance. On 9 May 2017, we released a consultation paper to invite submissions from stakeholders and the general public on areas in the relevant provisions which might need to be amended to meet the requirements under the Treaty.

8. The consultation paper was uploaded on the Government's website and the dedicated webpage created by the Intellectual Property Department ("IPD") for this consultation exercise. To facilitate people with a print disability to

² China is a signatory of the Marrakesh Treaty. Upon ratification, the Central People's Government may apply the Marrakesh Treaty to Hong Kong in accordance with Article 153 of the Basic Law.

gain access to the consultation paper, copies in Braille format were made available at the Hong Kong Blind Union, the Hong Kong Society for the Blind and IPD. We also sent copies of the paper to various stakeholders such as user groups and copyright owners through different channels and encouraged them to express their views.³ We briefed the LegCo Panel on Commerce and Industry at the meeting of 16 May 2017, and attended a briefing session organized by the Hong Kong Blind Union with participation of different user groups on 8 July 2017.

9. In the consultation paper, we invited comments on the following issues: –

- (i) scope of “beneficiary person”;
- (ii) scope of “specified body”;
- (iii) types of copyright works covered by the print disability-related exceptions;
- (iv) scope of “permitted acts” which could be performed by persons with a print disability and/or specified bodies;
- (v) conditions to be met under the existing provisions;
- (vi) application of anti-circumvention of technological measures provisions; and
- (vii) cross-border exchange of accessible copies.

VIEWS RECEIVED AND PROPOSED AMENDMENTS

10. We have received a total of 12 written submissions from various respondents including user groups, copyright owners, professional bodies and individual members of the general public. In general, the respondents support the Government’s initiative to review the relevant provisions in the Copyright Ordinance with a view to aligning with the Marrakesh Treaty. They provide views and suggestions on how to amend the Copyright Ordinance and some also share their experiences in the application and use of the existing copyright exceptions relating to persons with a print disability. A summary of the views received is at [Annex](#). The key views expressed on the issues raised in the consultation paper and the Government's proposed way forward are set out below.

³ At the request of the Panel, the distribution list (covering more than 60 bodies and organizations) was provided to the Panel in June 2017 for reference.

Scope of “beneficiary person”

11. Under section 40B of the Copyright Ordinance, persons with a print disability are allowed to make a single accessible copy of certain copyright work for their personal use. For the scope of persons with print disabilities (identified as “beneficiary person(s)” under Article 3 of the Marrakesh Treaty), the existing section 40A of the Ordinance has set out a definition of “print disability”⁴ which is largely comparable with the scope of “beneficiary person(s)” contemplated by the Marrakesh Treaty, *except* that the latter further extends to persons with a perceptual or reading disability. To meet the requirements under the Treaty, we **propose** to include “perceptual or reading disability” under the definition of “print disability”, and this is in general supported by stakeholders during the consultation exercise. We also **propose** that “dyslexia” be included in the definition as an example of “perceptual or reading disability”. Such amendments would enable persons with a perceptual or reading disability, including dyslexia, to enjoy the relevant copyright exceptions, as required under the Marrakesh Treaty.

Scope of “specified body”

12. Under section 40C of the Copyright Ordinance, “specified bodies” are permitted to make and supply multiple accessible copies of certain copyright work to persons with a print disability. The definition of “specified bodies” in the existing section 40A of the Ordinance⁵ is largely comparable with the scope of “authorized entity” contemplated by the Marrakesh Treaty. Article 2(c) of the Treaty defines “authorized entity” as an entity that is authorized or recognized by the government to provide education, instructional training,

⁴ Section 40A of the Copyright Ordinance defines “print disability” in relation to a person to mean:

- (a) blindness;
- (b) an impairment of his visual function which cannot be improved by the use of corrective lenses to a level that would normally be acceptable for reading without a special level or kind of light;
- (c) inability, through physical disability, to hold or manipulate a book; or
- (d) inability, through physical disability, to focus or move his eyes to the extent that would normally be acceptable for reading.

⁵ Section 40A of the Copyright Ordinance defines “specified body” as a body of any of the following descriptions-

- (a) an educational establishment specified in section 1 of Schedule 1 [*Note: Section 1 of Schedule 1 refers to “any school, within the meaning of section 3 of the Education Ordinance (Cap 279), entirely maintained and controlled by the Government”*];
- (b) an educational establishment exempt from tax under section 88 of the Inland Revenue Ordinance (Cap 112);
- (c) an educational establishment receiving direct recurrent subvention from the Government; or
- (d) an organization which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of welfare for persons with a print disability.

adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations.

13. Some stakeholders suggest that the scope of “specified bodies” be further extended to cover private educational establishments and more non-profit-making organizations irrespective of the services they are offering (e.g. social enterprises). We are mindful that the requirement of the Marrakesh Treaty specifically refers to institutions / organizations providing services to the print-disabled on a *non-profit basis*. We do not consider it necessary or appropriate to further extend the scope of “specified bodies” to cover organizations established or conducted for profit. As regards non-profit-making organizations, the existing definition of “specified bodies” has already covered “any organization which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of welfare for persons with a print disability”. It is therefore wide enough to cover, say, a social enterprise which is non-profit-making and whose main objects are charitable.

Types of copyright works covered by the print disability-related exceptions

14. This issue involves the types and forms of copyright works from which “accessible copies” may be made, conditions on the source of such copyright works, and the forms which “accessible copies” can take.

- (a) Types and forms of copyright works from which “accessible copies” may be made: The works covered by the Marrakesh Treaty are literary and artistic works in the form of text, notation and/or related illustrations, as well as audiobooks. In terms of “types”, the current exceptions for persons with a print disability under sections 40A to 40F of the Copyright Ordinance apply to four types of copyright works, i.e. literary, dramatic, musical or artistic work. While some respondents suggest that exceptions be further provided to allow the making of accessible copies from films and TV programmes, we are mindful that films and TV programmes are *outside* the scope of the Marrakesh Treaty and would not pursue such additions for the time being. However, regarding the “forms” these works may take, we **propose** that the law be amended to extend the applicability of such

provisions to the abovementioned four types of printed copyright works in audio form, such as audiobooks specifically, to align with the Marrakesh Treaty.

- (b) Conditions on the source of copyright works for making accessible copies: To align with the Marrakesh Treaty, and with the support of the respondents in general, we **propose** that the law be amended to allow the making of accessible copies from printed works that are published or otherwise made publicly available in any media. This will help clarify that the copyright works from which multiple accessible copies could be made need not be confined to the “commercial publication” of such works, but can be printed works that are published or otherwise made publicly available in any media.
- (c) Forms which “accessible copies” may take: “Accessible copies” of copyright works are versions of works which provide improved access to those works for persons with a print disability. The current range of forms of accessible copies set out in section 40F(3) of the Ordinance is in line with the requirement under the Marrakesh Treaty.⁶ After taking into account the feedback received, we consider that the existing definition is appropriate and sufficient to cover the different formats made accessible to the print-disabled.

Scope of “permitted acts” by persons with a print disability and/or specified bodies

15. As mentioned in paragraphs 11 and 12 above, persons with a print disability are allowed to make a single accessible copy of certain copyright works for their personal use and specified bodies are permitted to make and supply multiple accessible copies to persons with a print disability. The above scope of permitted acts (i.e. making and supplying of accessible copies to the beneficiaries permitted under the existing provisions) are largely comparable to the requirement under Article 4(1)(a) of the Marrakesh Treaty. However, we

⁶ Section 40F(3) of the Copyright Ordinance provides that accessible copies may be in the form of (a) a sound recording; (b) a Braille, large-print or electronic version of the work; or (c) any other specialized format of the work. Article 2(b) of the Marrakesh Treaty defines “accessible format copy” as 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.

see room for improvement by clarifying that “supply”⁷ of accessible copies to the print-disabled *includes* “distribution” and “making available to the public” of such copies. This is supported by the respondents in general, and we **propose** that the law be amended to make such clarification, so as to align with the requirements of the Treaty.

16. As regards the need for an additional exception to the right of public performance (which is not a mandatory requirement under the Marrakesh Treaty), we have examined the views provided by individual respondents, and consider that the exceptions or permitted acts under the existing sections 43 and 76 of the Copyright Ordinance (which cover public performance in educational establishments or organizations established for charitable purpose) should have been sufficient to address the needs of beneficiary persons for the time being.

Conditions for existing exceptions

17. At present, the exercise of exceptions in sections 40B and 40C of the Copyright Ordinance is subject to a number of conditions, e.g. a person with a print disability or the specified body is required to make accessible copies from a master copy of certain copyright work possessed by them which is not an infringing copy.⁸ The above conditions are comparable to the conditions provided under Article 4(2) and 4(4) of the Marrakesh Treaty. The respondents generally agree that these conditions are reasonable and instrumental to balance the rights between copyright owners and users. Some stakeholders, however, ask whether the print-disabled may make accessible copy from copies to which they have lawful access (e.g. borrowed books). To align with the Marrakesh Treaty and to clarify the existing condition, we **propose** that the law be amended so that the maker of an accessible copy is

⁷ The use of the word “supply” of accessible copies could be found in sections 40B(4), 40C(1), 40C(4) and 40C(6) of the Copyright Ordinance.

⁸ These conditions are as follows:

- (a) To exercise the exceptions, a person with print disability or a specified body is required to make accessible copies from a master copy of certain copyright work possessed by them which is not an infringing copy;
- (b) At the time when the accessible copy is made, the maker or the specified body has to be satisfied that copies in a form that is accessible to persons with a print disability cannot be obtained at a reasonable commercial price after making reasonable enquiries;
- (c) For a specified body relying on the exceptions under section 40C, it has the further obligation to notify the relevant copyright owner of its intention to make and supply accessible copies of copyright works or that it has already performed such acts, within a reasonable time either before or after performing such acts, unless it cannot ascertain the identity and contact details of the relevant copyright owner after making reasonable enquiries; and
- (d) The specified body should also make a record as soon as practicable of any accessible copy made or supplied pursuant to section 40C and retain such record for 3 years.

required to have “lawful access to” a copyright work, rather than “possessing” a copy of the work as such.

18. Some user groups have expressed that, at the logistical level, they may not have access to up-to-date contact information of the copyright owners / publishers and sometimes face difficulties in obtaining timely response to their enquiries. Some also look forward to more guidance on the meaning of “reasonable enquiries” and “reasonable commercial price” in the existing conditions. We have engaged some user groups and representatives from the publishing industry for further discussion, and will continue to foster communication between copyright owners / publishers and user groups on the scope and application of the exceptions, so as to encourage co-operation among them in a practical manner to facilitate access to copyright works for the print-disabled. Representatives from the publishing industry have indicated their readiness to work on enhancing the transparency on the availability of accessible copies and increasing the industry’s efficiency in handling requests from user groups. We will also prepare FAQs for easy reference by relevant stakeholders to facilitate their compliance with the conditions.

Application of anti-circumvention of technological measures provisions

19. Under the Copyright Ordinance, a person who circumvents a technological measure⁹ applied to a copyright work or performance may attract legal liability. Article 7 of the Marrakesh Treaty requires contracting parties to take appropriate measures as necessary to ensure that the legal protection against the circumvention of such technological measures would not prevent beneficiary persons from enjoying the limitations and exceptions provided for in the Treaty. In this regard, we understand from the respondents providing comments on this issue that they have not experienced or observed any particular difficulties arising from technological measures applied to the copyright works concerned when using the copyright exceptions. Accordingly, no amendment is required.

⁹ A technological measure used for copyright protection is any measure that acts as a barrier to prevent infringement of a copyright work, which may include access control measures or copy control measures. Examples include the encryption of copyright works placed on websites so that only authorized persons could gain access to such works by using a password.

Cross-border exchange of accessible copies

20. Articles 5 and 6 of the Marrakesh Treaty provide for cross-border exchanges of accessible format copies made pursuant to the exceptions, i.e. exporting such copies to or importing such copies from other contracting parties for use by beneficiaries. The consultation paper has stated our intention to allow imports and exports of accessible copies in line with the Marrakesh Treaty, so as to enhance global diffusion of such copies and benefit the print-disabled community. This is in general supported by the respondents. Some respondents raise the need to consider attaching relevant conditions to such an exception, e.g. to confine the provision of accessible copies to the personal use of the print-disabled in other jurisdictions and no further transfer should be permitted.

21. Taking into account the views received, we **propose** that the law be amended to allow cross-border exchange of accessible copies as a new permitted act. In this connection, we also **propose** the following:

- (a) In order to boost the availability of accessible copies and benefit a wider print-disabled population, we are inclined to allow exchanges with authorized entities including not only those from a contracting party to the Marrakesh Treaty, but also those from any economy which is a member of the World Trade Organization¹⁰ (164 members at present).
- (b) To avoid abuse, we will introduce appropriate conditions making reference to those conditions for the existing exceptions in the Copyright Ordinance (see footnote 8 above). Based on the feedback received, the conditions governing the imports and exports of accessible copies would tentatively include the following:
 - (i) For exports of accessible copies, the specified body in Hong Kong should confirm with the authorized body in the importing jurisdiction the identities of the beneficiaries receiving the accessible copies to ensure that such cross-border exchange of accessible copies would only benefit the intended beneficiaries;

¹⁰ Members of the World Trade Organization shall provide for the minimum standards of protection and enforcement for intellectual property rights covered under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

and that, prior to such exports, the specified body exporting the accessible copies did not know (or did not have reasonable grounds to know) that such copies would be used other than by the intended beneficiaries. Prior to exporting any accessible copies, the specified body should ask the authorized entity in the importing jurisdiction to confirm that accessible copies of such works cannot be obtained at reasonable commercial price in that jurisdiction.

- (ii) For imports of accessible copies, the local specified body could be required to take appropriate measures, prior to imports, to satisfy itself that the accessible copies of the relevant copyright works cannot be obtained at a reasonable commercial price in the local market.

When formulating the conditions, we will further discuss with stakeholders and draw references to other jurisdictions with similar exceptions governing cross-border exchanges.

WAY FORWARD

22. To take forward the above proposals, we will prepare a bill to amend the Copyright Ordinance and aim to introduce it into the Legislative Council in the 2018-19 session. Along the way we will continue to engage relevant stakeholders to thrash out the relevant details where necessary. In formulating the proposed amendments, we will bear in mind the guiding principles as identified at paragraph 35 of the consultation paper.¹¹

¹¹ The three broad guiding principles are as follows:

- (a) a fair balance between protecting the legitimate interests of copyright owners and the public interest of facilitating and enhancing access to copyright works in accessible forms for persons with a print disability, should be maintained;
- (b) any copyright exception to be introduced must be fully compliant with our international obligations such as the “three-step test” requirement under Article 13 of the TRIPS Agreement of the World Trade Organization; and
- (c) any proposed amendment to the Copyright Ordinance must be sufficiently clear and certain so as to afford a reasonable degree of legal certainty.

ADVICE SOUGHT

23. Members are invited to comment on the proposed legislative amendments and the proposed way forward.

Commerce and Economic Development Bureau
Intellectual Property Department
February 2018

**Copyright Exceptions for People with a Print Disability under the
“Marrakesh Treaty to Facilitate Access to Published Works for Persons
Who Are Blind, Visually Impaired, or Otherwise Print Disabled”**

Summary of Views Received during the Consultation Exercise

A. Overall
<i>Users¹:</i> <ul style="list-style-type: none">• Support amending the relevant provisions of the Copyright Ordinance (“Ordinance”) to align with the Marrakesh Treaty. <i>Others²:</i> <ul style="list-style-type: none">• Support the proposal towards improving access to published works for the print-disabled.
B. Scope of “beneficiary persons”
<i>Users:</i> <ul style="list-style-type: none">• Support the proposed expansion of the scope of “beneficiary person” to cover persons with a “perceptual or reading disability” in accordance with the definition under the Marrakesh Treaty.• The term “perceptual or reading disability”, as adopted in the Marrakesh Treaty, is sufficiently clear. Dyslexia is a clear example which can be included in the definition to facilitate understanding. So long as the formulation adopted in the Marrakesh Treaty is followed, it is not necessary and not practical to list all possible types of such disability in the legislation. <i>Copyright owners:</i> <ul style="list-style-type: none">• No objection to the proposed expansion of the scope of “beneficiary persons” so long as it is confined to people with a “perceptual or reading disability”. Dyslexia may be included as an example. <i>Others:</i> <ul style="list-style-type: none">• Support the proposed expansion to cover persons with a “perceptual or reading disability”. One respondent considers the description of “perceptual or reading disability” may not be clear. Another respondent, however, believes that the description has allowed a certain degree of flexibility to cover new/reclassified types of perceptual or reading disability.
C. Scope of “specified body”
<i>Users:</i> <ul style="list-style-type: none">• Some support that the existing definition of “specified body” should be aligned with the Marrakesh Treaty. Some suggest that the definition be expanded to include organizations interested in providing services for persons with a print disability, and institutions such as private educational institutions and social enterprises. <i>Copyright owners:</i> <ul style="list-style-type: none">• Should the definition of “specified body” need to be expanded for meeting the

¹ Including organizations providing services to persons with print disabilities and educational establishments.

² Including a professional body and individual members of the general public.

requirement of the Marrakesh Treaty, any newly-added category has to be clear and specific for easy identification.

Others:

- Some consider the existing definition sufficient. One respondent suggests that the definition be expanded to cover all non-profit-making organizations which make “accessible copies” in a non-profit-making manner.

D. Types of copyright works covered by the print disability-related exceptions

Users:

- Agree that the scope of copyright works covered by the exceptions should be extended to cover other copyright works which are published or otherwise made publicly available in any media and should not be restricted to “commercial publications” of copyright works.
- Some consider that the scope should be extended to cover films and television programmes.
- One respondent considers that the Chinese term 「便於閱讀文本」 may mislead people into thinking that only text files are included.
- Some consider the present wording “any other specialized format of the work” (under the existing section 40F(3)(c) of the Copyright Ordinance) to be sufficiently broad to cope with future technology developments. One respondent suggests using the definition of “accessible format copy” under the Marrakesh Treaty rather than providing a list of different formats/versions.

Copyright owners:

- No objection to extend the scope of copyright works covered by the exceptions to works which are published or otherwise made publicly available in any media.

Others:

- Agree that the scope of copyright works covered by the exceptions should be extended to cover other copyright works which are published or otherwise made publicly available in any media.
- One respondent suggests including a scene model in the definition of “accessible copies”.

E. Scope of “permitted acts”

Users:

- The term “supply” in the legislation should be clearly defined to allow “distribution” and “making available to the public”, so as to facilitate the supply of accessible copies in a wider array of manners.
- Some express reservations about providing for an additional exception to the right of public performance. Some, however, support the idea and suggest defining the scope of exceptions allowed under the right of public performance in the legislation.

Copyright owners:

- Agree that “supply” should be clarified with reference to “distribution” and “making available to the public”, provided that the legislation should expressly provide such acts are permitted solely within the scope of the exceptions under the Marrakesh Treaty.

Others:

- Some support providing for an additional exception to the right of public performance but suggest confining the exception to non-ticketed performances with the beneficiaries as the main target audience. One respondent thinks it unnecessary to provide for such an additional exception.

F. Conditions to be met under the existing provisions

Users:

- Support retaining the existing conditions to balance the rights of copyright holders and the wider society.
- Some suggest that a person with a print disability who has borrowed a book from a legitimate source should be treated as possessing a master copy of the copyright work.
- One respondent suggests providing reference guidelines on “reasonable enquiries” and “reasonable commercial price”.
- One respondent suggests measures such as establishing a clearing house for obtaining permission for making accessible copies; or setting a timeframe for copyright owners to provide response.

Copyright owners:

- Agree that the existing conditions should be retained.

Others:

- Agree that the existing conditions should be retained.

G. Application of anti-circumvention of technological protection measures (TPM) provisions

Users:

- No particular difficulties arising from TPM applied to the copyright works concerned when using the copyright exceptions.

Others:

- Support the provision of suitable exceptions for the print-disabled or the specified bodies to circumvent TPM if the copyright owner fails to provide access to copyright works.

H. Cross-border exchange of accessible copies

Users:

- Agree in general that cross-border exchanges of accessible format copies should be allowed. Most consider that suitable conditions should be imposed to guard against abuse.

Others:

- Some agree that cross-border exchanges of accessible format copies should be allowed. One respondent considers that the conditions imposed should be comparable to those applied elsewhere.