

New Copyright Exceptions for Print Impaired People

Who Can, and Should, Do What

A Briefing Paper for Publishers and Users

24 February 2015

1. Introduction

This is a time of considerable change for Print Disabled People, and long-awaited copyright exceptions to facilitate the supply of accessible copies of copyright works for them are either already in place, or coming soon, in the UK and internationally. This Briefing Paper, produced under the auspices of the PA's Accessibility Action Group, is designed to set out exactly who is entitled to benefit from these changes, what copies may now be made, what obligations publishers will have in facilitating such copying, and who should now be able to do what.

2. The Marrakesh Treaty 2013

The World Intellectual Property Organisation (WIPO), the UN agency in charge of the Berne Copyright Convention, finally adopted the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or otherwise Print Impaired (the Marrakesh Treaty) in June 2013, which will soon require all Berne member states (most countries of the world) to provide copyright exceptions for print impaired people in their domestic laws, if they don't already have them.

The exceptions will authorise the making and supply of accessible copies of literary or artistic works (eg books, audio and e-books, journals or illustrations) for the benefit of Print Impaired People

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(including blind, dyslexic or otherwise reading impaired people). The Treaty will come fully into force once 20 member states have ratified it - at the time of writing only six have (India, El Salvador, Mali, Uruguay, Paraguay and the UAE), but others are expected to follow suit in 2015.

3. The UK Disability Regulations 2014

Meanwhile, the UK Parliament has now approved the Copyright and Rights in Performances (Disability) Regulations, in force since 1 June 2014, which were designed to reflect the Marrakesh Treaty, but also to extend the UK's existing 2002 exception (then only for blind and Visually Impaired People) to all Print Impaired People with relevant disabilities, including people with dyslexia, and to not for profit organisations (such as RNIB) acting on their behalf. The new Disability Regulations also apply to broadcasts and sound recordings, and apply regardless of any contract or licensing term to the contrary. The Regulations implement a recommendation of the Hargreaves Review, and also comply with existing UK anti-discrimination provisions under the Equality Act 2010. However, they were not designed as such to implement the Treaty, for which further legislation is likely.

4. Publisher Obligations

(a) under the Equality Act 2010

Since the UK's Disability Discrimination Act 1995 (now repealed and replaced by the Equality Act 2010) it has been illegal for providers of goods and services (including publishers) to discriminate against disabled people, including Print Impaired People. 'Discriminating' is widely defined as "treating less favourably", or failing to make 'reasonable adjustments' to account for the disability concerned. If necessary, a publisher must provide a "reasonable alternative method" of making its goods or services available where a physical feature makes it unreasonably difficult for Print Impaired People to use them. Publishers are not legally required to provide Accessible versions of every book published, but may rely on, for example, a reasonably accessible licensing scheme.

(b) Under the new Exceptions

Once the new Treaty and UK Regulations are both fully in force publishers will almost certainly have an obligation to do everything reasonably possible to facilitate - or at least not delay or hinder - the making and supply of Accessible copies for Print Impaired People. This may be in reasonably prompt response to direct permissions requests from Print Impaired People seeking to make their own copies, or in supplying and licensing publishers' own digital files on secure terms. Examples of what this may mean in practice will be given at appropriate points below.

5. Who May Benefit?

The definitions of those entitled to benefit from these new exceptions (“**Beneficiary Persons**”, or “**Disabled Persons**”) differ slightly, but generally both include:

- blind and visually impaired people;
- people with dyslexia;
- those with other disabilities limiting the ability to read or access published works to the same extent as people without these disabilities.

(all are often collectively referred to as **Print Impaired People**).

Copies may generally not be made for any other people, or for any other purposes, without running the risk of infringing copyright. Publishers are not legally required to make or supply Accessible copies themselves, but must not do anything to hinder or delay the making of such copies by Print Impaired People, or organisations acting on their behalf. Under the 2014 UK Regulations, any contract or licensing term inconsistent with the exception is ineffective.

6. What kind of copies may be made?

The Treaty and UK Regulations limit copying to formats intended exclusively for Print Impaired People, known as “**Accessible Copies**” The wording differs slightly, but both Treaty and UK Regulations include the following limitations and conditions:

- accessible copies may only be made from lawful copies, or via lawful access (supply direct from the publisher would probably be licensed, and therefore ‘lawful’);
- conversion to accessible formats must be limited to those changes strictly necessary for that purpose;
- accessible copies must be supplied exclusively for the benefit of beneficiary persons;
- copying and supply may only be done on a not-for-profit basis
- “Intermediate copies” can be stored and shared on the same basis - see 8 below.

Copyright will not be infringed if all the above conditions are complied with.

7. Are there any other Limitations or Conditions?

Yes. There is also an important extra condition in the UK Regulations; the UK exceptions do not currently apply to UK copying if licensed accessible versions are already available commercially ‘on reasonable terms’. This is also included in the Marrakesh Treaty, but only as an option for member states. This option was envisaged by negotiators as a possibility (not a requirement) for those ratifying states which already had such a provision in their national laws. It is hoped that-both nationally and internationally- exceptions and licences will be needed less and less as mainstream publishing technology becomes more accessible.

8. Who may now make Accessible copies?

- **Print Impaired People themselves** may make single copies directly, for their own personal use, free of charge, without infringing copyright, subject to the limitations set out in 5 or 6 above; or
- **People acting on their behalf** (in the case of the Marrakesh Treaty), including a primary caretaker or caregiver, for the personal use of the beneficiary person; or
- **An organisation acting on their behalf** such as a school or library on a non-commercial basis, or another not-for-profit organisation acting on their behalf, such as RNIB (known in the Marrakesh Treaty as “**Authorised Entities**” or under the UK Regulations as “**Authorised Bodies**”) may make either single copies or multiple copies for collective use (but, under UK regulations only if licensed accessible copies are not otherwise already commercially available “on reasonable terms”). Authorised entities are entitled by law to store and share “Intermediate copies” with other authorised entities that meet the criteria for supplying the copies under the copyright legislation (S31BA 1,2).
- **Publishers themselves.** Publishers may authorise such copying on behalf of their authors, and of course make and supply Accessible copies themselves in response to permissions requests, provided they have the relevant rights relating to Print Impaired (or Print Disabled, or in some older contracts, Print Handicapped) People in their author contracts. Most UK author contracts currently include such subsidiary rights, often on a zero-cost, and zero-royalty, basis (although direct conversion costs may probably be re-charged if reasonable). UK Publishers are increasingly able to supply digital files suitable for conversion into Accessible copies, usually on secure licensing terms, and it is hoped that cross-border supply under schemes such as TIGAR will rapidly develop under implementation of the Marrakesh Treaty.

9. Who may Accessible copies be supplied to?

Both the Treaty and UK Regulations limit supply of Accessible copies strictly to either:

- Beneficiary Persons or Disabled Persons (as defined in 5 above), or
- Other Authorised Entities or Authorised Bodies (defined in 8 above, and 10 below).

10. Are there any other obligations on Authorised Entities or Bodies?

Yes. Under Article 2 (c) of the Treaty, **Authorised Entities** must establish and follow their own practices:

- to establish that the persons they serve are Beneficiary Persons;
- to limit all distribution and making available of Accessible Copies to Beneficiary Persons or Authorised Entities acting on their behalf;
- to discourage the reproduction, distribution and making available of unauthorised copies; and
- to maintain due care in, and records of, their handling of copies of works, while respecting the privacy of the beneficiary persons concerned.

In addition, **Authorised Bodies** under the UK Regulations must ensure that accessible copies include:

- a statement that they are made under the Regulations (under new s.31B);
- a sufficient acknowledgment (unless impossible for practical or other reasons); and
- preservation of any Technical Protection Measures, or replacement with equivalent TPMs, so far as reasonably practicable (unless the copyright owner agrees otherwise).

11. Are Accessible Copies to be supplied free of charge?

Not necessarily. The UK Regulations specify (new Section 31A (3)) that any sum charged “must not exceed the cost of making and supplying the copy”, and Article 4.5 of the Treaty leaves it to member states, so that “ it shall be a matter for national law to determine whether limitations or exceptions under this Article are subject to remuneration”. Most UK publishers currently charge only direct conversion costs, if at all.

12. May Accessible Copies be supplied cross-border?

Not under the UK Regulations, which apply only to copies made and supplied in the UK. However, under the current CLA print disability licence, still extant for those who hold one, licensed accessible copies of that part of Licensed Material which is within the UK repertoire can be distributed to Authorised Persons outside the UK but within the EU.

However, the Marrakesh Treaty, when it comes into force, will specifically provide (in Articles 5 and 6) for Cross-Border Exchange of Accessible Copies as follows:

- Art. 5 - Contracting States shall provide that any Accessible Copies lawfully made under national law may be distributed or made available by an Authorised Entity:
 - to a Beneficiary Person or
 - to another Authorised Entity

-in another Contracting State (i.e. cross-border, but only between states ratifying the Treaty), provided they did not know (or have reasonable grounds to know) that the Accessible Copies would be used for other than Beneficiary Persons.

- Art.6 - Similarly, Authorised Entities in one Contracting State may import such Accessible Copies from other Contracting States, with the same proviso.

In our view, these provisions are very likely to impose direct obligations on publishers who are asked for licences or to supply accessible files, at least to do all they reasonably can to avoid delaying or hindering such cross-border supply in a way which may amount to discrimination, and it may be that cross-border supply will increasingly develop under the auspices of a range of schemes, such as TIGAR and similar Trusted Intermediary schemes, administered by WIPO itself, with more direct publisher involvement.

13. Are there any limitations or flexibilities on Cross-Border supply?

Yes. There is one key limitation: the **Berne Convention 3-step Test**. The Berne 3-step Test (in Art.9 (2) of the Convention) limits copyright exceptions:

- to certain special cases;
- which do not conflict with normal commercial exploitation of the work, and
- do not unreasonably prejudice the legitimate interests of the rightholder.

Authorised Entities receiving Accessible Copies in States not bound by the Berne Convention 3-step test must limit copying, distributing or making available to Beneficiary Persons in that state.

In addition, there is provision for a degree of national flexibility in Article 10:

- 10.2: Nothing shall prevent Contracting Parties from determining the appropriate method of implementing the provisions of this Treaty within their own legal system and practice;

- 10.3: Contracting Parties may fulfill their rights and obligations under this Treaty through limitations or exceptions specifically for the benefit of beneficiary persons, other limitations or exceptions, or a combination thereof, within their national legal system and practice. These may include judicial, administrative or regulatory determinations for the benefit of beneficiary persons as to fair practices, dealings or uses to meet their needs consistent with the Contracting Parties' rights and obligations under the Berne Convention, other international treaties, and Article 11.

14. Technical Protection Measures

Under the Marrakesh Treaty, Contracting States must make sure that any legal protection against circumvention of technological measures does not prevent the enjoyment by Beneficiary Persons of the exceptions under the Treaty. The UK already had such a provision under its existing exception for Visually Impaired People, but its terms were somewhat archaic and have never been tested in practice - they may now need to be updated. The UK Regulations now provide that if an accessible copy is made of a work which is in copy-protected electronic form the accessible copy must (as far as reasonably practicable) incorporate the same or equally effective copy protection (unless the copyright owner - or, presumably, an exclusive rightsowner - agrees otherwise). Hopefully any significant access issues will be settled promptly once the Regulations and Treaty are both in force.