

MARRAKESH TREATY: IPO CONSULTATION **WRITTEN RESPONSE FROM THE PUBLISHERS ASSOCIATION**

Introduction

The Publishers Association is the leading trade organisation serving book, journal, audio and electronic publishers in the UK, spanning fiction and non-fiction, academic and educational publishing. Our members include global companies such as Elsevier, Wiley, Pearson, Penguin Random House, Hachette and the University presses, as well as many independent publishing houses.

The Publishers Association is delighted to respond to the Intellectual Property Office's consultation on the UK implementation of the Marrakesh Treaty. UK publishers have been heavily involved in the evolution of the UK's approach to book accessibility and have played a key role in what has become a major success story for this country. We welcomed the Marrakesh Treaty and have long looked forward to its ratification in the UK.

Therefore, in addition to responding to the specific questions posed, our response focuses on three things. Firstly, we set out the progress the UK has made in ensuring that an increasing percentage of books are accessible to those with print disabilities. Secondly, we explain how the current UK legal framework has enabled this success. Thirdly, we provide suggestions as to how we can ensure that the UK continues to lead the world in the provision of reading materials for those with print and other disabilities.

Our Vision

We support a world where all books are accessible by design. If realised, that vision would mean that all people can access books on the same day and in the same way they are first published, irrespective of their disability. Consequently, publishers have been putting a substantial amount of resource, investment and time into ensuring that those with print disabilities are able to enjoy their content in the same way as everyone else. Making books accessible by design is critical as it is far more efficient to make sure that books are born accessible than to have to incur the cost, time and complication associated with adapting books at a later date.

Summary

- The UK has made substantial progress on achieving its vision to increase the accessibility of works for those with print disabilities. This success has been built upon the long-standing UK legal framework which contains mechanisms that both encourage books to be born accessible, and ensures that copyright does not prevent the minority that are not from being subsequently adapted where necessary
- Removing the UK's availability provision would reduce the number of born accessible books available, which would ultimately have a negative impact on those with print and other disabilities.
- We would urge the UK government to maintain this availability provision. However, if there is no legal option in the context of the Directive a to retain this provision in its current form, we believe the IPO should:
 - Ensure there is clear law and policy guidance on what changes to this legislation mean and what those with disabilities and authorized entities can and cannot do.
 - Mandate that accessibility data are made available throughout the supply chain.

- Clarify that the right amount for every copy or extract provided through the exception should be paid at a reasonable rate equivalent to the commercial market.
- Ensure lawful access means lawful access.
- Ensure the exception is only available for “necessary acts”.

Progress to date

Overall, research commissioned by the Royal National Institute for the Blind (RNIB) revealed that in 2012, 84% of the top 1,000 titles were available in Braille, audio and large print formats.¹ These top 1,000 titles are also published electronically, and the UK publishing industry has led the way in embracing the highly accessible Epub format for books. Meanwhile the Publishers Association is working on several initiatives to help publishers respond to requests on behalf of people with reading impairments, particularly visually impaired people, in order to promote initiatives to facilitate access to their material.

In the UK there has been positive ongoing cooperation for more than 10 years, for example via the PA’s Accessibility Action Group. This is a group chaired by the PA which comprises publishers, supply chain influencers and advocacy groups for those with print disabilities, including the RNIB, Jisc, Dyslexia Action, EDiTEUR and the DAISY Consortium. Equally publishers individually have very good relationship with disability charities, working with them to ensure their users have access to files in order to make a suitably accessible copy. Many publishers are investing heavily in workflows to ensure their content is born accessible. The following short case studies demonstrate the investments publishers are making in this area.

Pearson

Pearson’s goal is to make its core digital portfolio accessible to users by 2020. In order to achieve this, they are working to build accessibility into their products from the start. This means that they can provide all learners and teachers - regardless of disability - with products and features that go beyond typical textbooks or pdf versions of textbooks.

At primary level they have created the Content Accessibility Framework, which is being rolled out to all their content development teams, to help teams develop future content that adopts accessibility standards. It also gives a practical and pragmatic approach to how they should handle legacy titles. This will be a live document and which they will refresh, to ensure the guidance is up to date.

In its higher education division, Pearson is working towards embedding accessibility in its courseware and digital products, with a focus on including closed captions, transcripts and audio descriptions for videos and adding alt text to images. Products include:

- Revel: an interactive learning environment that enables teachers and learners to disaggregate content into different formats, including video, digital text, exercises, flashcards and illustrations.
- Enhanced ebooks: Epub files consisting of the book content plus additional enhancements such as end of chapter interactive multiple-choice questions with feedback, videos and sometimes links to sites of interest.
- Pearson is also looking into attaching (accessible) flyers to our enhanced ebooks which would provide clear information about the accessibility features of the product.

¹ RNIB (2012) Accessibility of top 1,000 titles of 2012

Elsevier

Elsevier provide an accessible format for 100% of their journal and book titles. All of the books they have published since 2007 are developed in XML first, meaning that they can create accessible HTML and Epub versions of their content with usability features designed for the widest population.

The investment Elsevier makes in its accessible products ensures those with visual impairments can enjoy the same reading experience as everyone else. For example, by providing maths formulas in the XML format, equations can be converted into a text to speak format, meaning that someone who was print disability is able to get a meaningful depiction of a maths equation rather than just the label of the graphic.

Elsevier has won international awards for the quality and clarity of the descriptive information it provides about the accessibility of its products and services. An example of this information can be found [here](#).

Meanwhile the increase in availability of audiobooks and ebooks has also increased the accessibility of published content. Ebooks allow for reflowable and resizable text, text-to-speech, and in many cases text and audio synchronisation. Meanwhile audiobooks provide a vital way of increasing access for those with visual impairments and is an area in which publishers are increasingly investing in.

Figures from two large publishers indicate the investment it makes to ensure its publications are born accessible:

Publisher 1

- In 2017 they published over 3,000 individual titles as ebooks and are scheduled to published around 2,850 in 2018.
- They published 600 titles as audio editions in 2016, over 800 in 2017, and are scheduled to publish over 1,000 in 2018, an increase in output of 82% over the three-year period.
- The average price of an ebook is approximately £4.99, and for their audio downloads is £7.99, making them accessible to the majority of people.

Publisher 2

- It has invested to ensure products are 'accessible by design'.
- For its five flagship products this requires an investment of over £380k per annum on accessibility.
- Accessibility-related improvements and updates account for between 5-20% of total development capacity across its products and services
- To ensure all its books are available each year in the Epub format requires an additional investment of £20k per annum.
- To ensure all the embedded videos in its publications are accessible requires an investment in the region of £75k per annum on closed captioning for multimedia assets.
- It is currently piloting ways to add image descriptions to the c. 1m images published each year.

UK Approach and the Marrakesh Treaty

As these examples show, publishers are well placed to produce accessible versions of their products and have active forward-looking programmes in place that will ensure that this activity can continue. However, these programmes and policies were introduced in the context of the current long-standing UK legal framework. This framework contains mechanisms that both encourage books to be born accessible, but also ensures that copyright does not prevent the minority that are not from being subsequently adapted where necessary. Specifically, it only enables such adaptations to be made if an accessible version is not already available. This creates a commercial incentive for publishers to ensure their publications are born accessible.

Crucially for the purposes of this consultation, the UK's current approach in this regard was fully supported by the Marrakesh Treaty. We would therefore encourage the UK government to adopt a position whereby its overarching goals for the implementation of the Marrakesh Treaty in the UK is for this to be done in a way that is as faithful to Marrakesh as possible and that also seeks to maintain the current policy approach which is demonstrably working. The UK's success in accessible publishing is due not only to the current policy framework, but also to the cordial collaboration amongst all stakeholders, and we encourage the UKIPO to find ways to focus on encouraging all stakeholders to communicate and share information better so as to ensure that books are not just born accessible but that they are also easily discoverable.

Answers to consultation questions

Approach to implementation

1.1 Do you agree or disagree with our approach? If there are specific aspects which you think require different treatment, please identify these and provide evidence on the impact the proposal would have on you as an organisation or as a beneficiary person

We agree with this approach however the accessible product must match the disability (i.e. there is no need to adapt an audio book accessible for people who are deaf or partially deaf if they are able to read textual books).

UK Availability Provision

The UK's availability provision encourages publishers to ensure books are accessible by design safe in the knowledge that their investment in this accessible product would not then be undermined by a blanket copyright exception. This provision has proved vital in the functioning of the UK's current accessibility system, which, as outlined above, has already seen considerable improvements in the provision of material for those with print disabilities. For the success of the current system to continue in the future we believe that the UK can and should retain the current commercial availability exemption as Marrakesh allows, even if that means taking a wider interpretation of the EU's Directive than is suggested in this consultation.

For example, the Marrakesh Treaty specifically allows member states to adopt a commercial availability exception. As Article 4 states:

A Contracting Party may confine limitations or exceptions under this Article to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market. Any Contracting Party availing itself of this possibility shall so declare in a notification deposited with the Director General of WIPO at the time of ratification of, acceptance of or accession to this Treaty or at any time thereafter.

The EU Directive says that members should not be allowed to impose additional requirements, such as the “prior verification of the commercial availability of works in accessible formats”, which only obliges member states not to add further burden to authorised entities, such as a prior check. However, if authorised bodies know that a born accessible version is available, there is no need for a prior verification or for any additional check to be undertaken. As we explain further later in this document, it is not consistent with Marrakesh and the Berne Three Step Test to introduce an exception that allows the making of versions of works protected by copyright when such versions are already available. If, as it would appear, the policy issue is not about those with print disabilities having access to books but in fact about those with print disabilities having access to data about such books, then, as again we propose later, there are other practical ways of tackling this issue without putting at risk the ecosystem that creates the very object that Marrakesh seeks to promote.

Publishers already make and are working to improve the VIP status of work available via metadata, packaging and online information. For example, Pearson is looking into including accessibility product metadata for its aggregators, retail partners and customers to use, so they can discover and learn which of our products comply to accessibility standards across catalogues and websites. Elsevier already does this.

However, a lot of this information is currently lost in the retail channel where third parties (including major companies such as Amazon) do not include the accessibility metadata even when it is provided to them. Therefore the prior verification issue could be addressed by ensuring distributors and retailers keep this information within the metadata available to consumers. By failing to do so, they are penalising both publishers and visually impaired readers as their books cannot be found and read.

Other Countries

We understand that the UK believes that for legal reasons, it has no choice about retaining the availability exception. However, we understand that were the UK Government to take a broader interpretation of the Directive, they would not be alone. For example, we have been informed that France is planning on keeping its current provision which states that the disability exception only applies where a person with a disability is “prevented to access the works in the format under which the author has made it available to the public”. Therefore, we would question the IPO’s categorisation of this as a “mandatory change” to the UK law.

Impact of current UK approach

The UK’s current interpretation would create a paradoxical situation where an authorised entity might create a non-navigable text file from a print book when a rich Epub file is available, offering a much poorer reading experience to the person with print disabilities.

2.1.1 If you are a commercial publisher of accessible format copies, how many have you sold, or made available in the last year? If possible, can you provide the average price of these the formats in which they are available.

Although in the short time available for this consultation, we are not able to provide an overall figure of the number of titles that are sold or made available by UK publishers as a whole, we note the RNIB statistic quoted above which suggested that 84% of the top 1000 books are already accessible. This a number that is only likely to increase given the increase in ebook sales in the last six years since this research was conducted.

In addition to this overall number (which will include the very many born accessible works), we have received some indications from a number of publishers about the number of requests they process from intermediaries for electronic files. One academic publisher said that in 2017 they fulfilled over 1,000 requests in the UK. Another academic publisher processed 10,000 requests for content in 2016, either directly or through close partnerships with third parties. Meanwhile an educational publisher made 2,000 works accessible through the RNIB library in 2017. It has not been possible to find information on the average price of these copies. However, for context the average price of an academic/professional book was £19.75 in 2016 and the average price for physical school books was £8.72.

It is important to point out that that the number of requests would be likely to rise if the commercial availability provision was removed. This would significantly increase the cost to publishers to service such requests and may actually slow down the process of providing such files.

Does your organization, business or industry currently experience any administration costs relating to the ‘commercial availability’ provision? Please explain the source of these costs and provide a monetary value along with evidence on how this has been calculated?

This information has not been possible to gather in the time available. However, under a system where the majority of content is born accessible, there would be almost no administration costs on businesses, as this would be subsumed in wider book production costs. Under a system where publishers are less incentivized to make their own content accessible, then this would likely see an increase in administration costs as outlined above.

2.13 What impact would removing the ‘commercial availability’ provision have on your organization, business or industry? What evidence is there for the impact? Please explain the impact and provide evidence on the costs and benefits to support this.

The most likely impact of removing the commercial availability provision would be to reduce the number of born accessible books available. The effects of this would not only (or primarily) be felt by publishers but also by those relying on access to such works. The reason why it would have this effect is because if the Directive is implemented in the way proposed, publishers may feel forced to withdraw their accessibility programmes for fear that they would become unsustainable.

Publishers believe it is important that this does not happen, not just for reasons of quantity but also quality. The publishing industry has the technological expertise and ability to invest in technological advances, which many charities may not have, and so are best placed to make to produce accessible formats. And as the organization that first created the work and/or holds the relationship with the author(s), publishers are the organisations that are best placed creatively, pedagogically, legally and operationally to optimize, adapt and distribute the best possible accessible version.

Why do publishers believe that the proposed approach might have these effects?

Given that the Directive specifically incorporates the three-step test, publishers would hope such a situation can be avoided, with the availability exception being the best way of guaranteeing this.

However, in addition to the proposed removal of this exception, one aspect of the Directive that particularly gives rise to this concern, is the wording in article 3 (1b). This gives an authorised entity the ability to “communicate, make available, distribute or lend and accessible format copy to a beneficiary person or another authorised entity on a non-profit basis for the purpose of exclusive use by a beneficiary person”. Alongside the removal of the commercial availability of the provision, Article 3 (1b) could, it would seem, allow authorised entities to make thousands of accessible copies of a work, undercutting the investment publishers make in producing accessible format copies and thereby disincentivising publishers from making books are accessible from the start. It would also

create wider concern and uncertainty amongst publishers about whether others without disabilities might get access to these copies, thus further undermining the core market for the work.

In short, the impact of removing the commercial availability provision should not only, or even primarily, be seen through the lens of economic harm to publishers. Rather, it is the potential it has to reduce the number of born accessible works for visually impaired people that should be of primary concern from a policy perspective. This would run counter to the aim of not just current UK law, but also the Marrakesh Treaty and the legislation that is the subject of this very consultation .

Obligations on authorised entities

2.2.1 Do you agree or disagree with our approach? If so, please explain and provide evidence on the impact this would have on you as an organisation or as a beneficiary person.

If the commercial availability provision is not retained in UK law, then the requirements on authorised entities must be crafted in as tight a way as possible so as to ensure compliance with the three-step test. However, the UK is the world's leading book exporter and as such, those of us working in its publishing industry understand the cross-border context that underpins Marrakesh and can see the merits of harmonised law in this regard. Before commenting further, we would welcome further dialogue with Government about the practical implications of the changes they propose.

2.2.2 Do you think there are other alternatives to ensuring authorised entity obligations are compatible with the Directive? If so, please explain and provide details of your proposal.

We would welcome further discussions around this point.

Acts to which the exception applies

2.3.1 Do you agree or disagree with our approach? If so, please explain and provide evidence on the impact this would have on you as an organisation or as a beneficiary person.

As explained above, publishers do have significant concerns about the current drafting of Article 3(1b) of the Directive. However, we believe these can be addressed whilst still widening this out to other rights as is proposed here.

Sui generis database right

2.4.1 Do you agree or disagree with our approach? If so, please explain and provide evidence on the impact this would have on you as an organisation or as a beneficiary person.

We agree with this approach.

Technological protection measures

2.5.1 Do you agree or disagree with our approach? If so, please explain and provide evidence on the impact this would have on you as an organisation or as a beneficiary person.

We agree with this approach in theory but would welcome further discussion around this depending on the outcome around the commercial availability provision.

2.5.2 If changes are made to the complaints mechanism in Section 296ZE of the CDPA, should this be in relation to all forms of disability, or just for visual impairments and print disabilities?

We would welcome further discussion around this depending on the outcome around the commercial availability provision.

Compensation schemes

3.1.1 Will the changes to the UK disability exception, in particular the removal of the commercial availability provisions, result in lost sales? If so, how? Is it possible to estimate the economic impact this may have? Will any impacts be such as to justify payment of compensation to rightholders?

As mentioned above, we believe that the impact of removing the commercial availability provisions should not just be measured in terms of its effect on rightholders, but also on those with disabilities. However, in response to the question asked we have sought what information we can in the very short time frame provided for this consultation,.

One large publisher estimated that even a 20% reduction in purchases due to the removal of the provision would lose annual turnover close to £13 million and licensing income of £150,000. This would then have a substantial knock on effect on other stake holders, such as retailers, and, crucially, authors. Such a loss of sales is likely to be felt across all publishers and would reduce the investment in born accessible works.

The Publishers Association believes that retaining the commercial availability provision is far preferable to a compensation scheme. In this way, each publisher can create the right production and licensing framework for their type of product and the nature of their business and it is that which will achieve the best range of accessible works. However, if the UK does decide to remove the commercial availability provision a compensation scheme would be appropriate given the undoubted loss to rightholders. We would welcome the opportunity to work with the IPO, collective licensing organizations and other stakeholders on devising such a compensation scheme.

Compensation via collective licensing

3.2.1 If the Government were to make provision for compensation, should it be delivered through collective licensing?

If the Government does make provision for compensation, we would be open to this to being delivered through collective licensing.

3.2.2 What potential issues (if any) do you foresee with the use of collective licenses to provide compensation to rightholders?

We have been liaising closely with the Copyright Licensing Agency (CLA) in recent weeks and would welcome a joint conversation with the Government and the CLA to explore how the compensation scheme could work in practice.

Compensation via direct payment

3.3.1 If the Government were to make provision for compensation, should it be delivered in the manner described above?

We would welcome further discussions around this point.

3.3.2 What potential issues (if any) do you foresee with the use of this approach to provide compensation to rightholders?

We would welcome further discussions around this point.

Retention of the commercial availability clause for certain types of disability

4.1.1 What would be the impact on you or your organisation of retaining a commercial availability clause in relation to accessible format copies made for types of disability not covered by the Directive?

As we set out in answer to question 1.1, we support the principle of extending the Marrakesh Treaty to disabilities not covered by this Directive. However as explained earlier in this submission, it is the UK's commercial availability that has enabled such a positive environment for accessible works for those with print disabilities. The same applies to other accessible formats.

4.1.2 Is there evidence to justify retaining this provision in relation accessible format copies made for types of disability, or in relation to types of work, not covered by the Directive?

Given the strong track record of improving the provision of VIP works in the UK, retaining the commercial availability provision is particularly important in relation to other types of disabilities where more progress is needed.

Other measures

4.2.1 Is there scope to provide additional requirements on use of the disability exception which are consistent with the three-step test? Would such an approach help to minimise potential harm to rightholders?

When considering this question, it is important to keep in mind that the purpose of the Marrakesh Treaty is to enable those with print disabilities to be able to access content and support the creation of accessible versions of works when none already exist. The current commercial availability provision has been successful in enabling this. However, if there is no legal option in the context of the Directive and Regulation to retain this provision in its current form, then we would be keen to work with the IPO to look at other ways of ensuring that the UK accessibility success story continues by ensuring the system still incentivises the greatest number of high quality accessible works.

We would very much welcome the opportunity to take this conversation forward. However, for the time being, we propose five ways that could help the IPO achieve this objective.

1. Clear Law and Policy Guidance

At a recent meeting, the IPO indicated that publishers need not be concerned about the impact of the new legislation and that protections remain. Publishers are concerned that this is not currently the case. However, if it is, then in order to ensure that publishers can confidently maintain their accessible book programmes, the IPO should not only ensure that the law itself is clear (thus leaving no room for later dispute or disagreement) but also issue very clear guidance about what the changes do and don't mean and what those with disabilities and authorized entities can and cannot do.

2. Better Metrics and Data

Noting that the key concern expressed in the EU Directive appears to be the verification of the accessibility status of a work, the IPO should work with all stakeholders to mandate that accessibility data and metrics are made available throughout the supply chain.

3. Sustainable funding models

In order to ensure that successive generations of beneficiaries can benefit from the exception whilst still maintaining consistency with the three step test, it should be clear that the provisions around "lawful access" are accompanied by clarity that the right amount for every copy or extract provided through the exception should be paid at a reasonable rate equivalent to that which is set on the commercial market. At present, Article 3 1 (b) in particular causes concern in this regard and we are concerned that this could be interpreted in a manner that is not consistent with the three-step test. Collective licensing could provide a model here.

4. Lawful Access

We are pleased to note that the Directive refers to the concept of “lawful access”. However, steps should be taken to ensure that lawful access means lawful access. There are several references to “lawful access” in UK copyright exceptions but one is contained in the UK’s private copying exception could serve this purpose. The exceptions states:

(2) /28B Personal copies for private use

(1) The making of a copy of a work, other than a computer program, by an individual does not infringe copyright in the work provided that the copy—

(a) is a copy of—

(i) the individual’s own copy of the work, or

(ii) a personal copy of the work made by the individual,

(b) is made for the individual’s private use, and

(c) is made for ends which are neither directly nor indirectly commercial.

(2) In this section “the individual’s own copy” is a copy which—

(a) has been lawfully acquired by the individual on a permanent basis,

(b) is not an infringing copy, and

(c) has not been made under any provision of this Chapter which permits the making of a copy without infringing copyright.

5. Necessary Acts

Finally, we believe that more should be done to ensure the exception is only available for “necessary acts”. Articles 1 and 2 already make clear that the exception can only be used where it is necessary to do so. If a book is already accessible in the relevant format, for example a textual format for a hearing impaired reader, then what can be the policy justification for enabling someone to make another one without the rightsholders consent?

In short, the current framework ensures that the exception is targeted at the policy objective and thus only used when really necessary and in a fair, lawful and clear manner. The Marrakesh Treaty enables the UK to maintain this successful framework. In that context, Publishers, who already work well with other stakeholders in this area, would like their efforts post Marrakesh to be focused on discussing publishing opportunities rather than policy issues with the disability community. We believe that such an outcome is achievable and look forward to working with the IPO and all other stakeholders to make this a reality.

The Publishers Association

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