

UNDERSTANDING THE MARRAKESH TREATY IMPLEMENTATION ACT

What is the Marrakesh Treaty?

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, was adopted on June 27, 2013 by the member states of the World Intellectual Property Organization (WIPO). Prompting its adoption was the widespread recognition of the problem known as a “book famine,” the situation where very few books are published in formats that are accessible to those who are blind and visually impaired. The goal of this treaty is to increase access to printed materials for these persons around the world.

The Marrakesh Treaty requires its contracting member nations to create limitations and exceptions to copyright law that will make it easier for those with these kinds of print disabilities to access printed works in accessible formats such as Braille and digital audio files. It also establishes rules for the exchange of such accessible format copies across borders.

On September 30, 2016, the Marrakesh Treaty entered into force with 20 member states. Currently 71 countries are covered by the Marrakesh Treaty, according to WIPO. When the United States deposits its instrument, the number of treaty members and coverage among nations of the world will rise.

If the United States already signed the treaty in 2013, what does it mean to “implement” it five years later?

The United States signed the Marrakesh Treaty as a contracting party on October 2, 2013, but needed to take additional steps to amend its national law before becoming a treaty member. Signing a treaty as a contracting party is not the same as joining a treaty and being bound to its obligations. The United States Congress has to evaluate whether any changes are needed to U.S. law to comply with the treaty’s terms, and the Senate has to provide its advice and consent to join any treaty. The United States can only join a treaty after our national laws have been amended to comply with the treaty’s obligations.

That is what the Marrakesh Treaty Implementation Act (MTIA) does — it revises the Copyright Act to meet the terms of the Marrakesh Treaty. This legislative process took five years partly because legislation in general tends to move slowly, and also because Congress consulted with various stakeholders, including those representing the blind communities, the publishing sector, and the library communities, on the proposed legislative language. The Copyright Office and other U.S. government agencies also provided input to Congress during this process.

Isn't there already an exception in the Copyright Act for the blind or people with disabilities?

Yes. A specific exception already exists in the copyright law. This is section 121 of the Copyright Act (sometimes called the "Chafee Amendment"), which is titled "Limits on exclusive rights: Reproduction for blind or other people with disabilities." One of the primary users of this section is the Library of Congress's National Library Service for the Blind and Physically Handicapped (NLS). Established in 1931, NLS currently provides free braille and talking books to people with temporary or permanent low vision, blindness, or a physical disability that prevents them from reading or holding printed materials. Through a national network of cooperating libraries, NLS circulates books and magazines in braille or audio formats, delivered by postage-free mail or downloads. Under section 121, and with the permission of authors and publishers of works not covered by that provision, NLS selects books and magazines for full-length publication in braille, ebraille, and digital audio format. In addition to NLS, there are other organizations and companies in the United States that provide similar materials to this population under section 121.

What changes does the Marrakesh Treaty Implementation Act make to section 121?

The MTIA amends section 121 so that its terms are consistent with the Marrakesh Treaty, and in turn these amendments will prove even more helpful to the blind, visually impaired, and print disabled. Before the MTIA, section 121 already allowed "authorized entities" to reproduce or distribute copies of previously published "nondramatic literary works" in "specialized formats exclusively for use by blind or other persons with disabilities." The MTIA amends several of these terms and provides new definitions, but leaves the fundamental activity the same. Specifically, the MTIA:

- Expands the types of works allowed to be copied from nondramatic literary works to all literary works, plus musical works fixed in the form of text or notation.
- Changes the term "specialized formats," the definition of which was limited to specific technologies, to "accessible formats," which is defined more broadly as an "alternative manner or format" that allows an eligible person to have access to a work that is equivalent to a person without a disability. The Senate Report accompanying the MTIA adds that "accessible formats" includes related illustrations integrated with the text or notation.
- Updates the beneficiaries of section 121, which were originally termed "blind or other persons with disabilities," to "eligible person," which is defined as someone who is either blind, has a "visual impairment or perceptual or reading disability" rendering them unable to read printed works "to substantially the same degree as a person without an impairment or disability," or has a physical disability making

them unable to hold or manipulate a book or focus or move their eyes to read. Additionally, the Senate Report states that a condition making one an “eligible person” must be “determined by a competent authority possessing experience in making such determinations.”

What are the new exportation and importation provisions?

Because section 121 is focused on limitations and exceptions for activities taking place within the United States, additional provisions were needed to address the important cross-border aspects of the Marrakesh Treaty. The MTIA adds a new section 121A to address the importing and exporting of accessible format copies to eligible persons. Specifically:

- Authorized entities (defined in section 121 as nonprofit or governmental entities with a primary mission to serve eligible persons) may **export** works in accessible formats to either another authorized entity in a country that has signed the Marrakesh Treaty, or an eligible person in such a country.
 - Note: At this time, the NLS will not be able to export materials under section 121A because another provision of the U.S. Code limits its activities to the United States.
- Authorized entities, eligible persons, and agents of eligible persons may **import** works in accessible formats.
- Authorized entities engaged in either export or import under section 121A must establish and follow their own practices to:
 - Make sure they are only serving eligible persons;
 - Limit the distribution of accessible format copies to eligible persons;
 - Discourage the further reproduction and distribution of unauthorized copies;
 - Maintain due care in, and records of, the handling of copies of works by the authorized entity, while respecting the privacy of eligible persons; and
 - Make publicly available the titles of all of its accessible format works, as well as information on its policies, practices, and overseas authorized entity partners.

Final Note: The Marrakesh Treaty Implementation Act was signed by President Trump on October 10, 2018. The United States will now engage in the preparation of the documents to present to WIPO formally acceding to the treaty. After the United States’ official deposit of its treaty instrument with WIPO, its obligations under the Marrakesh Treaty will enter into force 90 days later.