

The Impact of the Marrakesh Treaty on South African Publishers

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Abstract

The significant technological advances in reading and content provision technologies since the 1978 Copyright Act in South Africa have not been considered in the expanding exemptions to Copyright nationally. The 2017 version of the amended Copyright Act was sent back to Parliament in South Africa in June of 2020, leaving the provisions for print-disabled readers proposed by the Marrakesh Treaty unimplemented, furthering marginalisation of print disabled readers in SA. A born digital workflow is proposed to facilitate the ‘mainstreaming’ of accessible format materials, and facilitate the implementation of the treaty with minimal disruption to the local publishing industry.

Keywords: Accessible publishing; Copyright act; Digital workflows; Marrakesh treaty; Print disabled

Introduction

The issue of accessibility for people with print disabilities has until recently not been a pressing business concern for South African publishers, primarily because aside from the also relatively recently developed audiobook accessible format materials are not commercially viable for production [22]. In terms of technological aids however, there have been great advances in the development of devices and software capable of providing access to materials for people with print disabilities [16], which could greatly alleviate the financial process involved with creating accessible digital materials for publishers. In Africa, traditionally associated with a lack of information resources and poverty the Marrakesh Treaty represented significant progress for accessible publishing, with specific focus on taking into account the special and specific needs of developing countries [33].

Due to gender inequality, unfavourable home conditions and schooling deficiencies childhood literacy in developed countries is often not prioritised in the manner it is in more developed countries [11], which inevitably has an effect on the size and nature of the market of adult readers. Furthermore, developing countries are more likely to have a lack of nutritional and medical support available to citizens, leading (among many other factors) to a disproportionate amount of print disabled readers being represented in developing countries [35]. While the World Blind Union estimates that less than 10% of content globally is available in accessible formats [13], in South Africa print-disabled readers have access to approximately 0.5% of books published [31], largely because the development of accessible format content is not commercially viable. While the need for accessible content is thus very real in South Africa, with an estimated 32% of the disabled population in South Africa being

visually impaired [4], the existing reading market for any non-state funded publishing in the country is relatively small due to the influences of a developing economy [11] which already challenges the viability of commercial publishing.

As challenging as the position is for publishers in South Africa, they are representative of many other markets in the developing world, facing both increasing market restraints and a larger proportion of people with print disabilities. Furthermore, South Africa has legal (and ethical) obligations to disabled citizens enshrined in the constitution to promote literacy and provide accessible literature, guidelines for which are provided in the Marrakesh Treaty. Of the 71 contracted parties to the Marrakesh Treaty 14 African countries have acceded to or ratified the treaty, including neighbouring Zimbabwe, Botswana and Lesotho [34].

Through the implementation of alternative workflow models the balance between the commercial interests of publishing industries in developing countries and the need for increased access to accessible content for print disabled readers and skills development can be explored in the context of a limited book buying and reading market.

The Marrakesh Treaty and Its Implementation

The Marrakesh treaty does not limit accessibility provisions to only those who are visually impaired, but extends the need for accessibility to any “persons who are otherwise unable, through physical disability, to hold or manipulate a book or to focus or move their eyes to the extent normally possible for reading” [14]. The purpose of the Treaty to address a broad need for access to copyrighted work through making material available to underserved readers is generally supported by publishers in South Africa [23]. They do however indicate specific concern about the application of commercial viability checks, parallel importation and the use of ‘Authorised Persons’ to make material available to a reading-impaired public without the consent of the copyright holder. While the needs of the print-disabled community in South Africa is under-served by the local publishing industry cooperation in the implementation of accessible-format production, the development of alternative digital copyright protection measures and skills allows for the South African publishing industry to be the key role players in correcting this, while also contributing to developing the reading market in South Africa.

The treaty grants permission for authorised persons to produce, supply, import and export an accessible format of a title, and will help promote access to accessible materials in shared languages internationally and locally while serving to promote literacy in print-disabled groups [29]. Access to copyright works including the provision of accessible formats for those with disabilities were part of the identified goals of the development of the existing new draft of the Copyright Amendment Bill for South Africa at the treaty summit in 2013. On the advice of the Department of Justice and Constitutional Development the Department of Trade and Industry in South Africa delayed accession to the Marrakesh Treaty until the development of a new Copyright Amendment Act [6]. The South African Copyright Amendment Bill was sent back to Parliament for consideration in June of 2020 however [21], postponing the accession to the Marrakesh Treaty further and leaving South African print disabled readers without adequate access to materials.

South African Implementation of Provisions in the Marrakesh Treaty

In order to break the cycle of poverty and disability, accessibility programs for skills and knowledge are prioritised in the National Development Plan for South Africa [17]. Specific mention is again made in the address of the Deputy Minister for the promotion of accessible format materials at the Marrakesh summit, noting that the cost of access should not serve to further disadvantage South African citizens [20]. The promotion of fair and equal access to information for people with print disabilities is protected not only in the South African constitution, but in anti-discrimination legislation such as the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 and Social Assistance Act of 2004 [18] and should thus be promoted in the publishing industry in South Africa. Their needs should however be balanced with the requirements of a publishing industry that is facing increasing financial strain due to decreased spending on books, rampant piracy issues and a small book buying population. Current positions state that the commercial availability of titles, the use of authorised entities to distribute works without suitable permissions and exceptions to parallel importation of materials is critical to the implementation of accessibility treaties in South Africa without dramatically affecting the existing publishing industry [24]. While the implementation of a new Copyright Act in South Africa is delayed the development of structures for implementation of the Marrakesh Treaty, and other constitutional and legislative provisions for access to information need not be as more and more African Countries are providing free access to content for people with print disabilities through the implementation of the Marrakesh Treaty.

The History of the Development of the Copyright Act and Accessibility Provisions Outlined in the Marrakesh Treaty

While there have been several amendments to the South African Copyright Act No 98 of 1978 in order to improve its function and application in a developing technological context, Sect. 12 and Sect. 13 (addressing the concepts of “Fair Dealing” and “Regulations”) have not been amended to address the needs of education, libraries, the digital environment, or persons with sensory disabilities [18]. The National Policy published for public comment in 2013 did not make any provision for fair use exceptions or implement any of the suggestions of the Marrakesh treaty in terms of the promotion of accessible formats [16]. Considerations of the needs of print-disabled persons in the Marrakesh Treaty include the rights to access materials in the timeframe, with the cost and with the ease of the ‘average’ reader, highlighted by the South African deputy minister at the summit. The problem of the financial viability of the implementation of an accessible publishing processes in the local publishing industry is exacerbated by the delay in the process of ‘mainstreaming’ proposed by the Publishers Association of South Africa in 2013 (PASA; [24]).

Among other concerns about the 2015 Copyright Draft Amendment Bill were the lack of provisions for the implementation of the Marrakesh treaty and a perceived lack of support for the promotion of accessible materials specifically for educational purposes [27]. While the promotion of reading and learning materials for education purposes in all official languages is suggested as matter of urgency to alleviate the “book famine faced by people with disabilities in South Africa” [27] Sect. 13B of the 2017 Copyright Amendment Bill was considered to apply fair use provisions for educational purposes too broadly, as well as allowing for translation of works for purposes of teaching [28]. There were also concerns that the vague nature of identified ‘underserved populations’ in the Bill [28] may be used to broadly justify the implementation of copyright exceptions if ‘Authorised Entities’ are given blanket consent

to distribute copyrighted works. The educational publishing sector in South Africa, which accounts for more than half of the industry turnover, specifically would be affected by accessibility provisions that are broadly defined and overtly vague in defining copyright exemption on books.

Provisions of the Marrakesh Treaty Supported by the Copyright Amendment Bill

South Africa, in the 2017 version of the Copyright Amendment Bill sent back to Parliament by President Cyril Ramaposa in 2020, also did not broaden the definition of ‘Fair Use’ as originally intended to implement the provision of accessibility as outlined by the Marrakesh Treaty – but introduced a general exception to copyright for persons with disabilities in Sect. 19D. A similar approach was supported for exceptions for print-disabled readers in a 2018 study by the Irish government, without extending the definition of ‘fair use’ accessibility challenges of the print-disabled is addressed under a single exception [5]. The proposed Copyright Amendment Bill (2017) Sect. 19 D specifies that any material can be distributed by a person serving people with disabilities without the consent of the copyright holder of such works. The provisions outlined for removing digital protections and international distribution in this section are broadly in line with the recommendations issued by the European Union and implemented by Ireland in their 2018 Intellectual Property Law Provisions Act.

The 2017 Copyright Amendment Bill also did not expand on the problematic aspects of disability and format definitions identified in the 2015 Bill submitted [28], but did include language to empower the provisions of the Marrakesh Treaty relating to the conversion and distribution of works domestically and internationally for the purposes of use by a disabled person without permission from copyright holders, as long as it is done on a non-profit basis with a legally obtained copy of the work which gives power to the intent and function of the Marrakesh Treaty. Directive (EU) 2017/1564 prohibits commercialisation of materials recipients receive and considers commercial availability checks to impose an undue burden of access, which elaborates on the exceptions on copyright described in Directive (EU) 2017/1563 required by Member states to allow for the creation and distribution of accessible works locally and internationally [9] benefiting traditionally information poor developing countries.

While commercial availability checks would be an ideal requirement of implementation of the Treaty for the South African Publishing industry [24] it has not been supported in the Copyright Amendment Bill (2017) or in the directives issued by the European Union on the implementation of the Marrakesh Treaty. The control of parallel importation of formats by the territorial rights owners has also not been upheld in the Copyright Amendment Bill or the EU directives, these are thus unlikely outcomes in the South African implementation of the Marrakesh Treaty provisions.

Existing legislation and considerations by the Department of Trade and Industry also indicate that even if the commercial availability check of titles is not required the enforcement of the protections of rights owners will be paramount and supported through legislation. This offers publishers in South Africa the opportunity to develop a product offering that would be easier to obtain and use for a significant number of print disabled readers in South Africa than using an Authorised Entity for a conversion. The implementation of born-digital workflows and embracing non-traditional digital protection measures in the South African publishing industry could serve to greatly reduce the impact of the implementation of the Marrakesh

Treaty on the South African publishing industry, while also furthering the empowerment of print-disabled readers outlined in the constitution of South Africa and meeting the basic human right of access to information [19].

Provisions for the Protection of Accessible Titles Outlined in Legislation and Government Considerations

Chapter 13 of the Electronic Communications and Transactions Act (25 of 2002) addresses the violation of technological copyright protection measures in order to distribute (or cause to be distributed) an unauthorised copy of a book, as such it directly addresses the piracy concerns of South African publishers. Legal opinion recommends the inclusion of an exemption clause for education is required to be developed for the ECT Act to be effective at addressing the need for more educational material [25]—which is done through the Copyright Act and its amendments. Section 86 (4), preventing the distribution of unauthorised works could be applied with the copyright exceptions outlined in the Marrakesh Treaty and the current Copyright legislation in order to provide for protection against unlawful distribution of materials, although this application of the legislation is not supported by judicial process due to the lack of prosecution of copyright infringement in the country [26].

The Counterfeit Goods Act 37 of 1997 allows publishers to prohibit distribution of illegal copies of titles through the application of more stringent measures of control and stricter sentencing guidelines for offenses. It is specifically useful where the exceptions to copyright are in conflict with the promotion to access to information enshrined in the copyright legislation and constitution of South Africa [2]. Where trade, reproduction and distribution of unauthorised materials is prohibited in this legislation it supports both the publisher's authority as copyright owner and the exceptions for the promotion of information access outlined in other legislation. This is also the basis for the protections enshrined in other international copyright treaties such as the Berne Convention and the WIPO Copyright Treaties which South Africa has signed but not acceded to.

The specific exception granted to print-disabled readers in South Africa with the implementation of the Marrakesh Treaty is primarily the prohibition of the alteration of the Digital Rights Management Information as described in Article 12 of the WIPO Copyright Treaty [6] and from the legislation discussed above where applicable. This exception would empower the print-disabled community to leverage the developing technological advantages to provide access for more readers by allowing for conversion to more accessible formats through digitisation or conversion, as well as the distribution of accessible materials for print-disabled readers locally and internationally [10]. Fundamentally, the act of providing access to materials for print-disabled readers requires permissions only granted to copyright holders without special legal exemption— which is currently not protected for a significant and vulnerable section of the population in South African Copyright legislation.

Current Limitations to Accession to the Marrakesh Treaty

As identified by Ouma (How can African countries benefit from the Marrakesh Treaty, 2015) the issues with implementation of the provisions in the Marrakesh Treaty can be summarised as: ensuring that access to copies are for print-disabled readers exclusively; to provide for access to technology to facilitate the use of digital products for print-disabled readers; and to address the materials already available digitally which employ digital protection measures which prevent access for print disabled readers. The Marrakesh Treaty addresses the first and

third limitations by the identification of Authorised Entities as: Libraries; Charity Organisations; Not for profit Organisations; Schools and; Government Institutions/agencies, in line with the majority of exceptions provided for in the existing Copyright legislation and Treaties in South Africa [8]. These Authorised Entities would be permitted to remove the digital protection measures in order to convert any materials to accessible formats on the condition that: (1) the authorized entity wishing to undertake said activity has lawful access to that work or a copy of that work; (2) the work is converted to an accessible format copy, which may include any means needed to navigate information in the accessible format, but does not introduce changes other than those needed to make the work accessible to the beneficiary person; (3) such accessible format copies are supplied exclusively to be used by beneficiary persons; and (4) the activity is undertaken on a non-profit basis [20]. While the legislation defining an ‘Authorised Entity’ in South Africa is vague, there is existing infrastructure for the use of authorised bodies in the conversion and distribution of books in South Africa, in both academic [4] and trade sectors [22].

Commercial viability described in Article 4 (4) requirements to Authorised Entities to determine if an accessible version of a work is available for sale before the provision of such material and is of specific concern in South Africa. Conditions of access in South Africa already places undue strain on the print disabled community to access materials [15] and authorised entities are limited to state-run institutions who offer remuneration to publishers [22]. Similarly the payment of royalties to copyright holders or authors on the conversion of the work is also dependent on local legislation according to the Treaty, and is opposed by other member nations and organisations [12]. Based on the application of copyright exceptions under current legislation it is unlikely that this provision for commercial viability checks will be implemented by the South African government. The authority to convert any work which is already available in digital form without compensation to the rights holders presents a large economic challenge to the South African publishing industry [24].

Digital Workflow as a Possible Solution

The lack of commercial viability checks, use of Authorised Entities to remove Digital Rights Measures and the further expansion of the ‘fair use’ clauses in current legislation and lack of remuneration guidelines in the implementation of the Marrakesh Treaty is likely to undermine the development of materials by publishers who produce materials for print-disabled readers, as argued by the Publisher’s Association of South Africa [23]. While publishers are in support of the implementation of provisions for the promotion of accessible materials for a print-disabled South African reading population it is suggested that this be done through the process of ‘mainstreaming’: promoting the concept of born-digital works as accessible alternatives to traditional print media [24]. In order for South African publishers to overcome the associated limitations of having converted versions of materials distributed without compensation to a print-disabled audience through the Authorised Entities created by the Marrakesh treaty it is suggested that a “born-digital” workflow be implemented. Through the implementation of digital-first workflows for product offerings the publishers in South Africa can address the two largest challenges introduced by the implementation of the Marrakesh Treaty: potential commercial threat and the threat of piracy.

The theorised commercial threat presented by the Marrakesh Treaty primarily assumes that the print-disabled population is being currently served by the local publishing industry, which is unlikely considering the limited materials available in accessible formats [15]. More likely is that the larger portion of the print-disabled market is currently being forced to either

undertake undue expense, commit unreasonable time, or to commit acts of copyright infringement to access materials that they have a constitutional right to [4]. The potential commercial threat posed by the Marrakesh Treaty also assumes product comparison between the materials made available by Authorised Entities and the materials offered by the publisher, where legislation would clearly protect any features of the book not required for accessibility if converted—as conversion is limited by law to only that which is required to make the title accessible to an intended reader.

Commercial threat also suggests that print-disabled readers are more likely to apply for accessible materials through an Authorised Entity rather than purchase the materials commercially, which seems unlikely if a product is available at a suitable price; in a suitable format and with less administrative procedure. The availability of accessible format materials would thus go a long way towards manifesting the intent of the Marrakesh Treaty and its application to provide fair and equal access to materials for print-disabled people.

The threat of piracy presented by the Marrakesh Treaty implementation for publishers is in both the unauthorised distribution of materials and the associated limitation of DRM in digital products, which limits the distribution of files in accessible formats [10]. The implementation of digital-first workflow models will enable publishers to provide materials to a larger market than is currently being served possibly without the associated Digital Rights which limit access for print-disabled readers.

Implementing Digital Workflow Methods as Possible Solution to a Changing Market

The first change to the traditional publishing model implements the consideration of platform availability and product offering as early as commissioning stage according to Electronic Book Works [7]. By including digital development expenses for every title publishers will include currently underserved markets in their product development, as was suggested by PASA [24]. In terms of skills development practical knowledge of digital product offerings should be prioritised even in editorial staff, in order to streamline the production process. The conversion of titles to appropriate formats can be done in-house, or outsourced and will have specific cost implications either way. Although the long-term cost of skills development to produce titles can be considered an investment in the long-term sustainability of the company (or potentially, industry) the initial investment can be significant.

Where processes are outsourced cost is often the primary motivation for publishers [3]. As an outsourced function the digital production field in South Africa is currently not a frequently used service—despite potential benefit of strategic local supply chain management. Proof reading will also comprise of product testing, and it is in this area that increased development of digital skills in the traditionally editorial fields will also be beneficial in the reduction of time and cost associated with development. Once the final proofs have been compiled the content can then be exported to all platforms identified in the commissioning stage simultaneously. This workflow would thus address the primary requirements of the print-disabled community by providing an identical, accessible format title at the same cost as a print-accessible version.

The DRM restrictions placed on digital content in South Africa by the majority of publishers restricts access to content which is already digitally available and would not be supported by the existing application of the Marrakesh Treaty. An option being promoted in Germany (a country also complying to EU conventions on implementation of the Marrakesh Treaty) is the

inclusion of ‘soft’ DRM, or the application of a digital ‘watermark’ to titles that identify the purchaser or intended user of a title. Without applying restrictions on the use of a title the publishers promote accessibility of titles and reading in general [1], while also providing identifying information on the intended reader in case a copyright breach occurs. The application of legislation discussed above should further serve to protect publishers from copyright infringements in electronic products created without traditional ‘Hard’ DRM.

Conclusion

The implementation of the provisions of the Marrakesh Treaty presenting a possible threat to the publishing industry should not discourage publishers from embracing the development of titles that are accessible to a print-disabled population. Accessible formats are not solely intended for blind readers—broadening the commercial viability of implementing accessible publishing practices in the digital age. While parallel importation does pose a possible threat to the local publishing industry it also presents opportunity for a larger (global) market [10]. There are exceptions to copyright legislation for changes made for titles converted by an authorised entity, but there are also limitations to what can be done with source files obtained in non-accessible formats—certain features, images and quality control will provide an opportunity for publishers to remain in the market viably.

With the correct and consistent application of legislation to enforce copyright for publishers in the country, and the inclusion of digital provisions in the workflow of traditional publishing houses the implementation of accessibility provisions can contribute to the growth of a thriving local publishing sector. A born-digital publishing promotion project coordinated by the government and publishing associations of the Netherlands serves as a model for implementation of accessible publishing principles [32].

Where there has been evidence of capacity building for developing countries in accessible publishing offered by the WIPO Accessible Books Consortium (Nepal, Sri Lanka and India) it has been shown to greatly increase access to books in indigenous languages as well [30], another critical area of disadvantage that vulnerable citizens of South Africa face. Through the application of ‘born digital’ technologies and alternative DRM provisions on titles developed now the publishing industry can avoid significant disruption from the implementation of Marrakesh Treaty guidelines, further promote reading, access and skills development and better serve the print-disabled community in South Africa as they are constitutionally required to do.

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