



Canadian Association of
Research Libraries

Association des bibliothèques
de recherche du Canada

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Dear Rob,

Subject: CARL comments on Canadian accession to the Marrakesh Treaty to Facilitate Access to Published Works for People who are Blind, Visually Impaired or Otherwise Print Disabled

On behalf of the Canadian Association of Research Libraries (CARL), which includes as members the 29 largest Canadian academic libraries and two federal memory institutions, I would like to thank the Government of Canada for inviting comments from stakeholders pertaining to accession by the Government of Canada to the Marrakesh Treaty.

First of all, and most importantly, CARL urges the Government of Canada to accede to the Treaty, and to do so as soon as possible.

We appreciate that there is a need first to study whether or not accession would require amendments to Canada's *Copyright Act*, and if so, to draft and pass any such amendments. Nevertheless, we wish to emphasize our support the Treaty's overall objectives and our belief that it will result in a vast improvement in access by persons with disabilities, both in Canada and in other countries, to accessible format copies of works under copyright, without harm to the interests of copyright rights holders. Therefore, we hope the Treaty will soon have the requisite ratification/accession of twenty states and thus come into force; and further, we hope that Canada will be among these first twenty, thereby demonstrating its continued leadership and commitment, which was clear during the negotiations, to a policy stance that favours equitable access for the print disabled on an international basis.

Secondly, you had asked us to outline how the existing exception for persons with print disabilities in the *Act* (Section 32) is currently exercised, and so I sent some questions to a few staff who have responsibility in this area within CARL member institutions. I received the following information from a couple of Ontario-based academic libraries, which provides a general overview and some insights:

Eligibility is determined within each institution. The majority of institutions will ask the student to do the following:

- *Self-identify (not all students realize they might have a medical condition)*
- *Make an appointment to see a disability councillor and provide current medical paperwork*
- *Councillor evaluates each student based on the medical paperwork, might ask for additional paperwork and then decides what formats/services the student is eligible for.*

That said, the Human Rights Code talks about approaching accommodation in “good faith” which means that anyone who self-identifies should be eligible for accommodation. “Eligible” user is also not well defined in the Copyright Act so there is in fact no legislation that explicitly makes the medical paperwork a requirement. There are institutions that are currently experimenting with moving towards the good faith approach, including colleges and universities in Ontario. This would require the person to self-identify and sign a declaration form. These forms have been modelled on the Saskatchewan Library and Archives form that is publically available.

As to who produces accessible formats, there are 3 models in Ontario where libraries are concerned:

- 1. All materials produced by the library accessibility services*
- 2. All materials are produced within central campus accessibility services*
- 3. Hybrid model where this work is shared*

In all cases, external services such as Accessible Content E-portal (ACE)¹ and Alternate Education Resources Ontario (AERO)² may also be utilized, as may be individual publisher connections which are established to request digitally born accessible formats for each student on an upon-request basis.

For requests for digital files of educational materials, i.e., textbooks, publishers never ask to be paid for their digital copies. But if the request comes via AERO, and for direct requests to some publishers, the publishers will require that students purchase a print copy and show the receipt. That means not only that the student is purchasing a physical artifact that they cannot use, but that disabled students may not be able to avail themselves of lower-priced second hand copies as these are not always eligible.

For educational materials beyond the core textbook, some publishers will limit what they will provide only to what is listed on a formal course reading list. This can effectively limit the disabled student from broadening their background reading and research.

Once each school gets publisher files they send them to the student. How and if these copies are then retained is a big question. Some schools don't hold on to them, others keep a collection in a dark [i.e. inaccessible] archive until the next request comes for the sake of efficiency.

I subsequently received additional information from an Atlantic-based member library in response to my same questions, and I felt these were sufficiently useful to include them here as well:

Who is entitled to make copies? If a publisher is unable to provide the title in an accessible format, the student can be advised to exercise the right to reproduce under 32(1)(a). Usually, the title is scanned and made accessible as a PDF.

In practice, who makes the copies? Often, it is the student, or our Printing Services division.

Is there a 3rd party role and does it make profit? Unfortunately, I can't speak to this. However, there can be a cost associated with 3rd party scanning. This is unfortunate, and, in my eyes, a burden for the student.

Do copies ever get exported? In terms of titles converted into accessible formats, students are advised that the file is for their personal use only. There are many protocols in place re: file transfer from the publisher to the requesting student (file is placed on a USB drive, not sent via email, etc.).

Do we have any facts and figures for any of this? Our campus Centre for Students with Disabilities keeps some rough stats on items requested directly from the publisher. As mentioned, in order for students to request a text, they must be registered with the centre, and (usually) provide a

¹ ACE, a repository of accessible format texts, is a service of the Ontario Council of University Libraries' Scholars Portal.

² AERO is a web-based digital repository operated by the Ministry of Education in partnership with the Ministry of Training, Colleges and Universities.

receipt. Most major academic publishers require that these requests are made directly through the centre for students with disabilities. For example: <http://www.mheducation.ca/customer-care/disability-request/> (select college/university). At my institution, we do not distinguish between Canadian/Foreign titles when placing a request with the publisher. However, some request forms are region-specific. For example, we place requests for OUP titles (Canadian and elsewhere) through OUP Canada: http://www.oupcanada.com/permission/disability_request.php

Lastly, you asked us for comment on whether, in our view, the *Act* required amendment and if so, where and why. For this, we offer comments below in tabular format on the alignment of the Treaty articles with key sections of the *Copyright Act*.

CARL recognizes, and acts upon, the legal and moral imperative to provide equitable information access for print-disabled students, educators and researchers engaged in learning and scholarship within its member institutions. CARL also recognizes that, more broadly, this imperative applies to all print-disabled citizens, in Canada and in other countries. The spirit in which Marrakesh aims to reduce barriers to access, both within countries and across borders, should be upheld by modest revisions to Canada's *Copyright Act*.

Again, we thank the Government of Canada for its consideration of our comments.

Yours sincerely,



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Marrakesh Article 2 -Definitions	Copyright Act
(a) "works" means literary and artistic works within the meaning of Article 2(1) of the Berne Convention for the Protection of Literary and Artistic Works, in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media 11 ;	Section 5. Section 32(1) It is not an infringement of copyright... to (a) make a copy or sound recording of a literary, musical, artistic or dramatic work, other than a cinematographic work , in a format specially designed for persons with a perceptual disability;
(b) "accessible format copy" means 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. The accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons;	32.01 (1) Subject to this section, it is not an infringement of copyright for a non-profit organization acting for the benefit of persons with a print disability to make a copy, in a format specially designed for persons with a print disability , of a work and to send the copy to a non-profit organization in another country for use by persons with print disabilities in that country...
(c) "authorized entity" means an entity that is authorized or recognized by the government to provide education, instructional training, 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 12 . An authorized entity establishes and follows its own practices: (i) to establish that the persons it serves are beneficiary persons; (ii) to limit to beneficiary persons and/or authorized entities its distribution and making available of accessible format copies; (iii) to discourage the reproduction, distribution and making available of unauthorized copies; and (iv) to maintain due care in, and records of, its handling of copies of works, while respecting the privacy of beneficiary persons in accordance with Article 8.	32. (1) It is not an infringement of copyright for a person with a perceptual disability, for a person acting at the request of such a person or for a non-profit organization acting for the benefit of such a person to...
<p>CARL Commentary:</p> <ul style="list-style-type: none"> • Re a) We believe that the Treaty, like the Act, intends to exclude cinematographic works. We believe the two are adequately aligned. • Re b) The format specification in the Act seems does not seem to contradict nor to be narrower than that in the Treaty. We believe the two are adequately aligned. • Re c) While the Act does not explicitly address "authorized or recognized by the government," we feel that Section 32 aligns, as it permits exceptions to copyright for a person with a perceptual disability that requests it of another, or of a non-profit organization. • Re c) CARL believes that higher education institutions such as research universities and their libraries are already considered authorized entities. As current practice described in our letter shows, such institutions can now, and do, establish practices per items (i) to (iv) in the Treaty. Still, it may be worth clarifying in the legislation that libraries and educational institutions are authorized entities. 	

<p style="text-align: center;">Marrakesh Article 3 - Beneficiary Persons</p> <p>A beneficiary person is a person who:</p> <p style="padding-left: 40px;">(a) is blind;</p> <p style="padding-left: 40px;">(b) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or [3]</p> <p style="padding-left: 40px;">(c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading;</p> <p>regardless of any other disabilities.</p>	<p style="text-align: center;">Copyright Act</p> <p>Section 2: “perceptual disability”</p> <p>« déficience perceptuelle »</p> <p>“perceptual disability” means a disability that prevents or inhibits a person from reading or hearing a literary, musical, dramatic or artistic work in its original format, and includes such a disability resulting from</p> <p style="padding-left: 40px;">(a) severe or total impairment of sight or hearing or the inability to focus or move one’s eyes,</p> <p style="padding-left: 40px;">(b) the inability to hold or manipulate a book, or</p> <p style="padding-left: 40px;">(c) an impairment relating to comprehension;</p> <p>32.01 (8) In this section, “<i>print disability</i>” means a disability that prevents or inhibits a person from reading a literary, musical or dramatic work in its original format, and includes such a disability resulting from</p> <ul style="list-style-type: none"> • (a) severe or total impairment of sight or the inability to focus or move one’s eyes; • (b) the inability to hold or manipulate a book; or • (c) an impairment relating to comprehension.
<p>CARL Commentary: CARL believes the <i>Canadian Copyright Act</i> covers adequately the context of Beneficiary Persons described by Article 3 of the Marrakesh Treaty. The concepts of “perceptual disability” and “print disability” included in the <i>Act</i> are believed to encompass the persons intended to be the beneficiaries of the Marrakesh Treaty.</p>	

<p style="text-align: center;">Marrakesh Article 4 - National Law Limitations and Exceptions Regarding Accessible Format Copies</p> <p>1. (a) Contracting Parties shall provide in their national copyright laws for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public as provided by the WIPO Copyright Treaty (WCT), to facilitate the availability of works in accessible format copies for beneficiary persons. The limitation or exception provided in national law should permit changes needed to make the work accessible in the alternative format.</p> <p style="padding-left: 20px;">(b) Contracting Parties may also provide a limitation or exception to the right of public performance to facilitate access to works for beneficiary persons.</p> <p>2. A Contracting Party may fulfill Article 4(1) for all rights identified therein by providing a limitation or exception in its national copyright law such that:</p> <p style="padding-left: 20px;">(a) Authorized entities shall be permitted, without the authorization of the copyright rightholder, to make an accessible format copy of a work, obtain from another authorized entity an accessible format copy, and supply those copies to beneficiary persons by any means, including by non-commercial</p>	<p style="text-align: center;">Copyright Act</p> <p>Persons with Perceptual Disabilities</p> <p>Reproduction in alternate format</p> <p>32. (1) It is not an infringement of copyright for a person with a perceptual disability, for a person acting at the request of such a person or for a non-profit organization acting for the benefit of such a person to</p> <p style="padding-left: 40px;">(a) make a copy or sound recording of a literary, musical, artistic or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability;</p> <p style="padding-left: 40px;">(b) translate, adapt or reproduce in sign language a literary or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability; or</p> <p style="padding-left: 40px;">(c) perform in public a literary or dramatic work, other than a cinematographic work, in sign language, either live or in a format specially designed for persons with a perceptual disability.</p> <p>Limitation</p> <p>(2) Subsection (1) does not authorize the making of a</p>
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<p>lending or by electronic communication by wire or wireless means, and undertake any intermediate steps to achieve those objectives, when all of the following conditions are met:</p> <p>(i) the authorized entity wishing to undertake said activity has lawful access to that work or a copy of that work;</p> <p>(ii) 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;</p> <p>(iii) such accessible format copies are supplied exclusively to be used by beneficiary persons; and</p> <p>(iv) the activity is undertaken on a non-profit basis;</p> <p>and</p> <p>(b) A beneficiary person, or someone acting on his or her behalf including a primary caretaker or caregiver, may make an accessible format copy of a work for the personal use of the beneficiary person or otherwise may assist the beneficiary person to make and use accessible format copies where the beneficiary person has lawful access to that work or a copy of that work.</p> <p>3. A Contracting Party may fulfill Article 4(1) by providing other limitations or exceptions in its national copyright law pursuant to Articles 10 and 11 [4].</p> <p>4. 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 [5].</p> <p>5. It shall be a matter for national law to determine whether limitations or exceptions under this Article are subject to remuneration.</p>	<p>large print book.</p> <p>Limitation</p> <p>(3) Subsection (1) does not apply where the work or sound recording is commercially available in a format specially designed to meet the needs of any person referred to in that subsection, within the meaning of paragraph (a) of the definition “commercially available”.</p>
<p>CARL Commentary:</p> <p>We urge the Government of Canada to not opt to avail itself of provision 4 in the Treaty as it would place too much of an onus of responsibility on the Member State (and likely its “authorized entity”) of exportation to ensure not only that an accessible format copy of a work is not already reasonably available on the market in the country of importation. Given that the work of creating and providing accessible format copies is the work most often of budget- and staff-challenged charitable organizations, this would be a problematic clause.</p> <p>Re provision 5, we urge the Government of Canada to continue with non-remuneration to creators on such copies because we believe that the disabled community will, even with the Treaty, remain disadvantaged in terms of access to resources (e.g. they are less likely to be able to borrow works, buy second hand, borrow from others, or simply consult a range of library resources before committing personal resources. This adds to their personal financial burden and would also add considerable administrative overhead to the accessibility system.</p>	

<p style="text-align: center;">Marrakesh</p> <p style="text-align: center;">Article 5 - Cross-Border Exchange of Accessible Format Copies</p>	<p style="text-align: center;">Copyright Act</p>
<p>1. Contracting Parties shall provide that if an accessible format copy is made under a limitation or exception or pursuant to operation of law, that accessible format copy may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party 16.</p> <p>2. A Contracting Party may fulfill Article 5(1) by providing a limitation or exception in its national copyright law such that:</p> <p>(a) authorized entities shall be permitted, without the authorization of the rightholder, to distribute or make available for the exclusive use of beneficiary persons accessible format copies to an authorized entity in another Contracting Party; and</p> <p>(b) authorized entities shall be permitted, without the authorization of the rightholder and pursuant to Article 2(c), to distribute or make available accessible format copies to a beneficiary person in another Contracting Party;</p> <p>provided that prior to the distribution or making available the originating authorized entity did not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons 17.</p> <p>3. A Contracting Party may fulfill Article 5(1) by providing other limitations or exceptions in its national copyright law pursuant to Articles 5(4), 10 and 11.</p> <p>4.(a) When an authorized entity in a Contracting Party receives accessible format copies pursuant to Article 5(1) and that Contracting Party does not have obligations under Article 9 of the Berne Convention, it will ensure, consistent with its own legal system and practices, that the accessible format copies are only reproduced, distributed or made available for the benefit of beneficiary persons in that Contracting Party's <u>jurisdiction</u>.</p> <p>(b) The distribution and making available of accessible format copies by an authorized entity pursuant to Article 5(1) shall be limited to that jurisdiction unless the Contracting Party is a Party to the WIPO Copyright Treaty or otherwise limits limitations and exceptions implementing this Treaty to the right of distribution and the right of making available to the public to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder 18, 19.</p> <p>(c) Nothing in this Article affects the determination of what constitutes an act of distribution or an act of making available to the public.</p> <p>5. Nothing in this Treaty shall be used to address the issue of exhaustion of rights.</p>	<p>32.01 (1) Subject to this section, it is not an infringement of copyright for a non-profit organization acting for the benefit of persons with a print disability to make a copy, in a format specially designed for persons with a print disability, of a work and to send the copy to a non-profit organization in another country for use by persons with print disabilities in that country, if the author of the work that is reformatted is</p> <p>(a) a Canadian citizen or permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act; or</p> <p>(b) a citizen or permanent resident of the country to which the copy is sent.</p> <p>(2) Subsection (1) does not authorize a large print book or a cinematographic work to be sent outside Canada.</p> <p>(3) Subsection (1) does not authorize a copy to be sent to a country if the organization knows or has reason to believe that the work, in the format specially designed for persons with a print disability, is available in that country within a reasonable time and for a reasonable price, and may be located in that country with reasonable effort.</p> <p>(3.1) If a non-profit organization that is relying on the exception set out in subsection (1) infringes copyright by reason only of making a mistake in good faith as to the citizenship or residency of the author of the work, an injunction is the only remedy that the owner of the copyright in the work has against the organization.</p> <p>(4) The organization making and sending the copy shall pay, in accordance with the regulations, any royalty established under the regulations to the copyright owner in the work.</p> <p>(5) If the organization cannot locate the copyright owner, despite making reasonable efforts to do so, the organization shall pay, in accordance with the regulations, any royalty established under the regulations to a collective society.</p> <p>(6) The organization making and sending the copy shall submit reports to an authority in accordance with the regulations on the organization's activities under this section.</p>

	<p>(7) The Governor in Council may make regulations</p> <p>(a) requiring a non-profit organization that seeks to send a copy outside Canada to, before doing so, enter into a contract with the recipient non-profit organization with respect to the use of the copy;</p> <p>(b) respecting the form and content of such contracts;</p> <p>(c) respecting any royalties to be paid under subsections (4) and (5);</p> <p>(d) respecting to which collective society a royalty is payable in relation to works or classes of works for the purposes of subsection (5);</p> <p>(e) respecting what constitutes reasonable efforts for the purposes of subsection (5); and</p> <p>(f) respecting the reports to be made, and the authorities to which the reports are to be submitted, under subsection (6).</p>
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CARL Commentary: CARL supports Treaty provision 1. We believe that it is important that authorized entities in Canada could supply directly to a beneficiary party in another country, and this seems to be currently precluded by the Act. CARL would like to see 32.01 (1) extended to include eligible individuals as recipients of copies, i.e. "...and to send the copy to **an eligible individual** or a non-profit organization in another country for use by persons with print disabilities in that country,..." Our members believe that it should be possible for a person with a disability to obtain for himself or herself (perhaps with help) an accessible format copy by requesting it directly from an organization in another country. We favour this because, while many persons with disabilities in the world may have access to the services of an "authorized entity" within their own country through which to arrange access to an accessible format copy, many others may not, but may have the ability, through the Internet, to locate and have sent directly to themselves an accessible format copy from a source in another country.

CARL would urge the Government to consider removing clauses pertaining to author nationality. CARL would urge the Government to consider that the market assessment of commercial availability rest with the importer, not the exporter. Such provisions do not align with the Treaty, which has as its goal to enable to cross border exchange of alternate formats so as to reduce duplication in effort and reduce administrative burden, thereby allowing as efficient and cost-effective delivery of alternate formats to qualified individuals as possible.

CARL would urge the Government to remove the reference to royalties. See comments above under Article 4, provision 5.

<p style="text-align: center;">Marrakesh</p> <p style="text-align: center;">Article 6 - Importation of Accessible Format Copies</p> <p>To the extent that the national law of a Contracting Party would permit a beneficiary person, someone acting on his or her behalf, or an authorized entity, to make an accessible format copy of a work, the national law of that Contracting Party shall also permit them to import an accessible format copy for the benefit of beneficiary persons, without the authorization of the rightholder [10].</p>	<p style="text-align: center;">Copyright Act</p> <p style="text-align: center;">Infringement of Copyright</p> <p>27. (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.</p> <p>Secondary infringement</p> <p>(2) It is an infringement of copyright for any person to...</p> <p>(e) import into Canada for the purpose of doing anything referred to in paragraphs (a) to (c),</p> <p>a copy of a work, sound recording or fixation of a performer’s performance or of a communication signal that the person knows or should have known infringes copyright or would infringe copyright if it had been made in Canada by the person who made it.</p> <p>Clarification</p> <p>(2.1) For greater certainty, a copy made outside Canada does not infringe copyright under subsection (2) if, had it been made in Canada, it would have been made under a limitation or exception under this Act.</p>
<p>CARL Commentary: Section 27 (2.1) of the <i>Canadian Copyright Act</i> may cover this situation adequately, given the clarification and the exception that is Section 32. Still, it could worth adding a clause under 32(1), as a non-infringing activity such as “d) import a work in a format specially designed for persons with a perceptual disability.”</p>	

<p style="text-align: center;">Marrakesh</p> <p style="text-align: center;">Article 7 – Obligations Concerning Technological Measures</p> <p>Contracting Parties shall take appropriate measures, as necessary, to ensure that when they provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures, this legal protection does not prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty [11].</p>	<p style="text-align: center;">Copyright Act</p> <p style="text-align: center;">Technological Protection Measures and Rights Management Information</p> <p>41.16 (1) Paragraph 41.1(1)(a) does not apply to a person with a perceptual disability, another person acting at their request or a non-profit organization acting for their benefit if that person or organization circumvents a technological protection measure for the sole purpose of making a work, a performer’s performance fixed in a sound recording or a sound recording perceptible to the person with a perceptual disability.</p> <p>(2) Paragraphs 41.1(1)(b) and (c) do not apply to a person who offers or provides services to persons or organizations referred to in subsection (1), or manufactures, imports or provides a technology, device or component, for the purposes of enabling those persons or organizations to circumvent a technological protection measure in accordance with that subsection, to the extent that the services, technology, device or component do not unduly impair the technological protection measure.</p>
<p>CARL Commentary: The Treaty provision seems to be adequately addressed in the above wording in the Act. The final clause of (2) ‘to the extent...’ may merit consideration of deletion.</p>	