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THE MARRAKESH PUZZLE

Marketa Trimble*

I. Introduction

The Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, which was signed at the end of the WIPO Diplomatic Conference in Marrakesh on June 27, 2013 (the “Treaty”), created a remarkable puzzle for the experts who will have to implement the Treaty into national legislations.¹ The puzzle is presented by the rules that the Treaty sets out for the “Cross-Border Exchange of Accessible Format Copies.”² This article analyzes the puzzle, points out the challenges that interpreting the rules generates, and explores the possibilities for implementation that are available to countries, given their varying copyright laws. Although the article does not offer model implementation provisions that could be copied verbatim into national legislations,³ the analysis that the article

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¹ The Treaty will become effective three months after 20 countries ratify the Treaty or accede to the Treaty. Marrakesh Treaty, Article 18. As of March 3, 2014, no country has ratified the Treaty. Contracting Parties – Marrakesh VIP Treaty, WIPO, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=843 (last visited March 3, 2014).

² Marrakesh Treaty, Articles 5, 6, and 9.

³ See the Model Statute authored by Jonathan Band and Peter Jaszi. Jonathan Band, Peter Jaszi, *Model Statute for Implementation of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, available at <http://infojustice.org/wp-content/uploads/2013/09/MODEL-STATUTE-FOR-MARRAKESH-IMPLEMENTATION.pdf> (last visited March 3, 2014).

provides should assist executive and legislative experts as they seek optimal methods for implementing the Treaty, particularly the Treaty's cross-border access rules.

In the environment leading up to the Treaty, countries were more likely to conclude the Marrakesh Treaty than any other possible IP treaties because its topic⁴ remained palatable even in the atmosphere of tense relationships that have developed in the international IP arena between developing and developed countries, and in the atmosphere of growing opposition from many experts and the general public to international IP treaties.⁵ The TRIPS-plus movement that has sought to raise the level of IP protection above the TRIPS protection levels has generated criticism that grew more vociferous when the Anti-Counterfeiting Trade Agreement (“ACTA”) was negotiated; the public outcry that accompanied the ACTA negotiations resulted from perceptions (whether accurate or not) that the ACTA negotiations were unnecessarily secretive and that the adoption of ACTA would result in undesirable over-enforcement of intellectual property rights.⁶

⁴ The Treaty follows the goals of “non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in society,” and “freedom of expression, including the freedom to seek, receive and impart information and ideas.” Marrakesh Treaty, Preamble.

⁵ Dr. Ficsor suggests that with the adoption of the Marrakesh Treaty, “a quite troubled historical period of the international copyright relations seems to have ended.” Mihály J. Ficsor, *Commentary on the Marrakesh Treaty on Accessible Format Copies for the Visually Impaired*, p. 1, available at http://www.copyrightseesaw.net/archive/?sw_10_item=50 (last visited February 18, 2014).

⁶ The information that leaked from the early ACTA negotiations about the inclusion of provisions on the enforcement of IP on the internet harmed ACTA's chances of success, as various experts and the public at large expressed concerns about and opposition to the enforcement measures that were proposed in ACTA, and particularly to those measures that would have applied on the internet. Under the wave of public criticism that ensued the negotiators removed the internet enforcement provisions from the draft ACTA – but this removal still did not save ACTA's reputation.

One treaty was concluded between the dates of the conclusions of ACTA and the Marrakesh Treaty – the Beijing Treaty on Audiovisual Performances. The Beijing Treaty was in the making for many years and some critics believe it was concluded because it was “low hanging fruit” that was picked when there was a need to demonstrate some positive developments in international IP negotiations at a time when the international IP community saw little prospect of negotiating other, more ambitious treaties. Whatever other incremental progress (other than the Beijing

The Marrakesh Treaty is a different species of international IP treaty – one that is more likely than ACTA to appeal to the current sentiment that many copyright experts and some stakeholders share; this sentiment has significant public support because it opposes further strengthening of copyright protection and promotes greater emphasis on users’ interests – goals that seem to be shared by many of, if not most of, the members of the public.⁷ The Treaty does not increase the level of copyright protection that had been secured by earlier treaties;⁸ instead, it is the first international IP treaty to focus entirely on limitations and exceptions to exclusive IP rights.⁹ The Treaty neither weakens existing international copyright protections through novel

and Marrakesh Treaties) might have been achieved in international copyright negotiations in 2010 – 2014, that progress has received no publicity and has resulted in no additional international treaties.

Commentators may argue that, as the Beijing Treaty did, the Marrakesh Treaty built on existing work – the WIPO-UNESCO Model Provisions on Exceptions or Limitations for the Visually Impaired, which was adopted in 1982, and various other documents. For an overview of the activities that predated the Marrakesh Treaty see Judith Sullivan, *Study on Copyright Limitations and Exceptions for the Visually Impaired*, WIPO, Standing Committee on Copyright and Related Rights, SCCR/15/7, February 20, 2007, pp. 12 – 14. For the draft texts that preceded the Treaty see *Previous Draft Treaty Texts*, Knowledge Ecology International, <http://keionline.org/r2r/marrakesh/draft-texts> (last visited August 15, 2014). Cf. Dr. Ficsor’s *Commentary*, in which he emphasizes the positive role that the two Treaties have played in the recent development of international IP law. see Ficsor, *supra* note 5, pp. 3 – 4.

⁷ Critics who perceived the negotiations of ACTA and the TPP Agreement (the Trans Pacific Partnership Agreement) to be excessively secretive viewed the Marrakesh Treaty as a positive example to be followed in other international IP negotiations. See Letter of U.S. law professors and IP experts to the President of the United States, Members of Congress, and Ambassador Michael Froman, November 14, 2013, p. 1, *available at* <http://infojustice.org/wp-content/uploads/2013/11/Law-Professors-TPP-11142013.pdf> (last visited February 18, 2014); Jeremy De Beer, *Applying Best Practice Principles to International Intellectual Property Lawmaking*, 44(8) IIC 884 – 901, 898 (2013). See also Justin Hughes, *How The Marrakesh Treaty Was Negotiated*, *Managing Intellectual Property*, August 28, 2013, *available at* <http://www.managingip.com/Article/3248494/How-the-Marrakesh-Treaty-was-negotiated.html> (last visited on August 14, 2014) (“For the IP community, the Marrakesh Treaty – and the process by which it was achieved – are important because they show that it is possible to overcome the extremely polarised IP debates we now see around the globe.” *Id.*); Sean Flynn, *Inside Views: WIPO Treaty for the Blind Shows That Transparency Can Work (And Is Necessary)*, *Intellectual Property Watch*, June 26, 2013, *available at* <http://www.ip-watch.org/2013/06/26/wipo-treaty-for-the-blind-shows-that-transparency-can-work-and-is-necessary/> (last visited August 15, 2014). Cf. Ficsor, *supra* note 5, p. 1 (commenting on complaints about the insufficient balancing of interests in international IP negotiations prior to Marrakesh).

⁸ Marrakesh Treaty, Article 1 and the Agreed Statement concerning Article 5(1).

⁹ Justin Hughes, *The Marrakesh Treaty for the Blind – and the Future of Global Copyright*, *The Media Institute*, August 5, 2013, *available at* <http://www.mediainstitute.org/IPI/2013/080513.php> (last visited August 15, 2014). As Professor Justin Hughes mentions, some stakeholders have been concerned that the Treaty could open doors to further erosion of copyright through additional internationally-mandated exceptions and limitations. See also, e.g., William New, *Negotiators, Stakeholders Tell Tale of WIPO Marrakesh Treaty Negotiation, Look to Implementation*, *INTELL. PROP. WATCH* (Sept. 20, 2013, 11:40 PM), <http://www.ip-watch.org/2013/09/20/negotiators-stakeholders->

limitations and exceptions nor provides new rights or remedies;¹⁰ instead, it mandates that countries introduce or maintain in their national legislations the particular types of exceptions and limitations outlined in the Treaty for a specific socially desirable purpose. Other international IP treaties include provisions on exceptions and limitations;¹¹ however, no treaty before the Marrakesh Treaty had been based entirely on exceptions and limitations.¹²

In addition to being the first international IP treaty to concentrate on exceptions and limitations, the Marrakesh Treaty holds another primacy. It is the first international IP treaty to address the problem of cross-border access to copyrighted works.¹³ Although international IP treaties have existed for almost 130 years¹⁴ and have always been concluded to facilitate international regimes for IP, IP treaties before the Marrakesh Treaty aimed to secure certain standards within each signatory country; for example, the treaties stipulated the separate nature of national registered IP rights (*e.g.*, patents, trademarks)¹⁵ and operated with separate national IP rights even when the rights did not require any registration in order to be protected (*e.g.*, copyright, well-known

tell-tale-of-wipo-marrakesh-treaty-negotiation-look-to-implementation/ (last visited March 3, 2014); Kimberly Kindy, *Filmmakers' Group Tries To Reshape Treaty That Would Benefit the Blind*, The Washington Post, June 22, 2013, available at http://www.washingtonpost.com/politics/filmmakers-group-tries-to-reshape-treaty-that-would-benefit-the-blind/2013/06/22/f98e6130-d761-11e2-9df4-895344c13c30_story.html (last visited August 14, 2014).

¹⁰ Marrakesh Treaty, Agreed Statement concerning Article 5(4)(b); Article 5(4)(b), footnote 8.

¹¹ As Dr. Ficsor points out, it would be a mistake to characterize “the Marrakesh Treaty as ‘the first treaty to deal with copyright limitations and exceptions.’” Ficsor, *supra* note 5, p. 3.

¹² *Cf.* WIPO-UNESCO Model Provisions on Exceptions or Limitations for the Visually Impaired, adopted in 1982. See Ficsor, *supra* note 5, p. 4. It is debatable whether the Marrakesh Treaty is the first treaty to *mandate* that countries introduce a *particular* exception to or limitation on copyright. Other treaties limit copyright by excluding particular subject matter from copyright protection (TRIPS Agreement, Articles 9(2) and 10(2); Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”), Article 2(8); WIPO Copyright Treaty, Articles 2 and 5) and include other provisions limiting copyright protection in a particular manner (Berne Convention, Article 10(1); WIPO Copyright Treaty, Article 7(2)).

¹³ Dr. Ficsor calls this “the reason for which the Treaty is truly exceptional and unique.” Ficsor, *supra* note 5, p. 10.

¹⁴ The tradition of bilateral IP treaties is older than the tradition of multilateral international treaties.

¹⁵ Paris Convention for the Protection of Industrial Property (“Paris Convention”), Articles 4*bis*(1) and 6(3).

marks)¹⁶ because, under the principle of territoriality, the treaties maintained separate protection for these rights under the national laws of each country.¹⁷ The treaties provided for the enforcement measures to be taken at international borders but the provisions focused on measures to be implemented in each country individually and affected only or primarily the country's own market.¹⁸ The Marrakesh Treaty is different from earlier international IP treaties because it requires countries to adopt provisions facilitating cross-border access to copyrighted works. The only other instrument that is designed to improve cross-border access to copyrighted works is the European Union ("EU") 2012 Directive on orphan works,¹⁹ which provides for the mutual recognition of orphan work status, a mutual recognition that should improve cross-border access to orphan works in some limited circumstances.²⁰

In addition to being the first treaty to focus on exceptions and limitations to copyright and to address cross-border access to copyrighted works, the Treaty is also the first treaty to focus entirely on the status of certain types of *copies* of copyrighted works; other treaties provide

¹⁶ Berne Convention, Article 5(2); Paris Convention, Article 6*bis*; TRIPS Agreement, Article 16(2).

¹⁷ The principle of national treatment is also designed to facilitate rights and remedies within each country.

¹⁸ TRIPS Agreement, Articles 51 – 60. Countries concluded treaties and adopted other international instruments that created unitary regional rights; however, these treaties and instruments do not concern copyright.

¹⁹ Directive 2012/28/EU of the European Parliament and of the Council of 15 October 2012 on certain permitted uses of orphan works ("EU Orphan Works Directive").

²⁰ According to the Directive, once a work is considered to be an orphan work under the conditions specified in the Directive (the conditions as implemented in the national laws of the member states) in one member state, the work will be considered an orphan work in other member states as well. *Id.*, Article 4. Once a work is considered an orphan work in the EU, potential cross-border access to that work from anywhere in the EU will be simplified as long as the access is provided by one of the types of organizations specified in the Directive, and as long as the organization acts while fulfilling the organization's "public-interest missions." The beneficiaries of the orphan works Directive are "publicly accessible libraries, educational establishments and museums, [...] archives, film or audio heritage institutions and public-service broadcasting organisations, established in the Member States" acting to fulfill "their public-interest missions." *Id.*, Article 1(1).

The member states must comply with the Directive by 29 October 2014. The EU Office for Harmonization in the Internal Market will assist in the mutual recognition of orphan work status by recording information about orphan works in a database that the Office will establish and manage. *Id.*, Article 3(6).

principles and minimum standards that apply to protected *works*, regardless of the format of copies in which the works are embodied. For example, other treaties provide rights to phonograms regardless of the media format (e.g., CD, DVD) or the recording format (e.g., MP3, DTS) in which the sound recordings are fixed.²¹ While in the earlier treaties the format in which a work is embodied does not play a role, the Marrakesh Treaty concerns only copies of copyrighted works that are fixed in a certain Treaty-defined format – “accessible format copies.”²² Additionally, the Treaty applies only to “literary and artistic works ... *in the form of text, notation and/or related illustrations*,”²³ which is another type of scope limitation unknown in international IP treaties prior to Marrakesh.²⁴

The unique features of the Marrakesh Treaty raise questions relating to the implementation of the Treaty into practice, and some of the features will make the implementation challenging. This article focuses on the problem of cross-border access to copyrighted works under the Treaty, and therefore analyzes in depth only two of the 22 articles of the Treaty – Articles 5 and 6, which are sometimes referred to as the “exportation provision” and the “importation provision,”

²¹ E.g., International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 1961; WIPO Performances and Phonograms Treaty, 1996.

²² Marrakesh Treaty, Article 2(b). Dr. Ficsor refers to this characteristic of the Treaty as the “format-centric nature” of the Treaty. Ficsor, *supra* note 5, p. 6.

²³ Marrakesh Treaty, Article 2(a) (emphasis added).

²⁴ While “literary and artistic works” is a term defined in Article 2(1) of the Berne Convention, “form of text, notation, and/or illustration” is a new terminology. On Treaty scope limitations made during Treaty negotiations with respect to types of works see Kindy, *supra* note 9; Paige McClanahan, *US Film Industry Tries To Weaken Copyright Treaty for Blind People*, The Guardian, June 24, 2013, available at <http://www.theguardian.com/global-development/2013/jun/24/us-film-industry-copyright-blind> (last visited August 15, 2014).

respectively.²⁵ There are many intriguing issues in the Treaty that deserve detailed analyses;²⁶ however, such analyses would be beyond the scope of this article. For example, this article does not examine the definitions of terms that are newly introduced in the Treaty, nor does it assess the compatibility of current national legislations with the requirements of the Treaty. The article also does not scrutinize policy choices that the negotiators made and does not attempt to predict the effects that the adoption of a treaty with such novel content will have on future international IP negotiations.

The purpose of the article is only to answer the question “How should a country implement the Treaty provisions regarding the cross-border exchange of copies accessible to the visually impaired?” Although it could be argued that the question addresses a minor technical issue that is overshadowed by the policy goal of the Treaty and by the more conceptual questions mentioned in the previous paragraph, the answer to the question is crucial to national experts,²⁷ who will be charged with implementing the Treaty. While the answer might be more complicated than the Treaty negotiators anticipated,²⁸ the article does not intend to second-guess the work of the

²⁵ Jonathan Band, *A User Guide to the Marrakesh Treaty*, pp. 9 – 11, available at <http://www.librarycopyrightalliance.org/bm~doc/user-guide-marrakesh-treaty-0913final.pdf> (last visited February 19, 2014). See *infra* p. ... for a comment on these descriptions of Articles 5 and 6.

²⁶ As for the difficulties with Treaty interpretation, in the absence of official minutes from or other records of the complicated Treaty negotiations interpretation of the Treaty must rely on “the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Vienna Convention on the Law of Treaties, Article 31(1). Ficsor, *supra* note 5, p. 7.

²⁷ Additionally, EU experts will have to implement the Treaty into the *acquis communautaire* once the European Union signs the Treaty. On April 14, 2014, “[t]he Council approved the signing, on behalf of the EU, of the Marrakesh treaty to facilitate access to published works for blind and visually impaired persons.” Press Release, 3308th Council Meeting, Presse 218, 8762/14, April 14, 2014.

²⁸ Cf. Sullivan, *supra* note 6, p. 119 (“It does [...] seem that [the cross-border exchange] issue needs to be addressed, but it is much more difficult to decide what the solution should be.”).

negotiators, who concluded the Treaty under significant time constraints and pressures from numerous stakeholders.²⁹

II. Operation of the Treaty (excluding the Cross-Border Exchange Provisions)

Before attempting to solve the puzzle that the Marrakesh Treaty creates with its provisions on “cross-border exchange of accessible format copies”³⁰ it will be helpful to review briefly the requirements that the Treaty sets out. For simplification, the overview in this section presents the Treaty requirements without the cross-border exchange provisions, which are discussed in detail later in this article.

The basic goal of the Treaty is straightforward: the Treaty aims to lower the transaction costs that are associated with the making³¹ and supplying³² of copies of copyrighted works in cases where the making is for, and the supplying is to, users for whom visual perception of the works in the existing formats is impossible or extremely difficult. For these users, copies of works must be converted into a special format that allows the users to perceive the content; the Braille format is one example of such special formats, which the Treaty refers to as “accessible formats.” Often

²⁹ On the situation leading up to the conclusion of the Treaty see, e.g., Brook K. Baker, *Challenges Facing a Proposed WIPO Treaty for Persons Who are Blind or Print Disabled* (Northeastern University School of Law Research Paper No. 142-2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2267915 (last visited March 3, 2014); Kindy, *supra* note 9; McClanahan, *supra* note 24; Tshimanga Kongolo, *Towards an International Legal Instrument on Exceptions and Limitations to Copyright for Visually Impaired Persons/persons with Print Disabilities - Current International Negotiations*, 34 E.I.P.R. 823 (2012). On opposition to the Treaty see Paul Harpur & Nicolas Suzor, *Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm*, 36 U. NEW S. WALES L.J. 745, 761 – 768 (2013).

³⁰ Marrakesh Treaty, Article 5.

³¹ The Treaty uses the language “to make an accessible format copy of a work,” which refers to both 1) the conversion into an accessible format (i.e., creating a master copy in an accessible format), and 2) the reproductions of the copy. Marrakesh Treaty, Article 4(2)(a). For simplification this article uses the term “making” to cover both the act of conversion of a work into an accessible format copy and the further reproductions of the copy.

³² By “supply” the Treaty refers to acts that affect the right of distribution, the right of making available to the public, and the right of public performance. Marrakesh Treaty, Article 4(1) and (2)(a).

the making of accessible format copies will result in costs that are higher than the costs that are incurred when copies are made in other formats.³³

While the Treaty cannot lower the initial production costs of accessible format copies (other than by facilitating the cross-border exchange of accessible format copies, which is discussed later in this article), it can either eliminate or lower the part of the transaction costs that arise because of the copyright protection of the works.³⁴ With lower transaction costs (which also may be lower because of a simplified copyright clearance process), specially authorized or recognized entities (“authorized entities”)³⁵ should be able to make and supply special format copies less expensively (and possibly more quickly) than if the works were subject to regular costs attributable to the copyright protection of the works. Ideally, the less expensive (and more rapid) making and supplying of accessible format copies should lead to the works being more available to visually impaired users – both because of the lower prices of the copies and because of the larger selection of works available in accessible formats.³⁶

Because the Treaty seeks to make accommodations for the visually impaired within the framework of the existing international copyright regime, the accommodations must comply with

³³ “[C]onsiderable resources are required for [the] effort of making works accessible to [visually impaired] persons....” Marrakesh Treaty, Preamble. See, e.g., Statement of Tuck Tinsley III, Ph.D., President, American Printing House for the Blind, Inc., *NII Copyright Protection Act of 1995: Hearing on H.R. 2441 and S. 1284 Before the Subcommittee. On Courts and Intellectual Property*, 104th Cong., Part 2, p. 171 (speaking about converting an elementary math textbook to Braille: “[E]diting and translating a visual textbook [...] can take up to a year to get it in understandable braille format.” *Id.*).

³⁴ On the transaction costs associated with the production of an accessible format copy see, e.g., Statement of Tuck Tinsley III, Ph.D., *supra* note 33, p. 172.

³⁵ See *infra* the definition of “authorized entities.”

³⁶ Collaterally, the implementation of the Treaty may have the effect of encouraging copyright owners to provide access to their works on reasonable terms – and perhaps earlier than they would have provided otherwise. Ficsor, *supra* note 5, p. 26. See also *infra*, p. ... Cf. Statement of Tuck Tinsley III, Ph.D., *supra* note 33, p. 172 (suggesting that the long period necessary to secure copyright permissions and licenses might be the greatest hurdle to the production of accessible format copies in some instances).

the three-step test that existing treaties mandate for copyright exceptions and limitations.³⁷

According to this test the exceptions and limitations must be “confine[d] ... 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 right holder.”³⁸ The Treaty provides for confines that should assist countries in designing limitations and exceptions that will both implement the Treaty and fulfill the three-step test.

One set of important confines is in the definitions that the Treaty provides: The limitations and exceptions introduced under the Treaty³⁹ should concern only certain works (published copyright-protected literary and artistic works “in the form of text, notation, and/or related illustrations”)⁴⁰ fixed only in the kind of special format copies (“accessible format copies”)⁴¹ that are used by the visually impaired to gain access to copyrighted works.⁴² The Treaty defines who a visually impaired person – a “beneficiary person”⁴³ – is, and also defines “authorized entities”⁴⁴ – the entities that will be instrumental in providing access to copyrighted works under

³⁷ On the insertion of references to the three-step test during Treaty negotiations see Kindy, *supra* note 9; Catherine Saez, *WIPO Negotiators Reach Breakthrough On “3-Step Test” In Treaty For Blind*, Intellectual Property Watch, June 24, 2013, available at <http://www.ip-watch.org/2013/06/24/wipo-negotiators-reach-breakthrough-on-3-step-test-in-treaty-for-blind/> (last visited August 15, 2014).

³⁸ TRIPS Agreement, Article 13; United States – Section 110(5) of the U.S. Copyright Act, Report of the Panel, WT/DS160/R, June 15, 2000. See also the Marrakesh Treaty, Article 11. On the history and interpretation of the three-step test see, e.g., Christopher Geiger, Daniel Gervais & Martin Senftleben, *The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law*, Program on Information Justice and Intellectual Property, Research Paper no. 2013-04, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2356619 (last visited March 3, 2014).

³⁹ Throughout this article the term “limitations and exceptions under the Treaty” refers to the limitations and exceptions as implemented in national legislations in accordance with Treaty requirements.

⁴⁰ Marrakesh Treaty, Article 2(a). The definition covers works “published or otherwise made publicly available in any media.” *Id.* See also *supra* note 24.

⁴¹ *Id.*, Article 2(b).

⁴² See *infra* for potential interpretation difficulties with the term “accessible format copies.”

⁴³ Marrakesh Treaty, Article 3.

⁴⁴ *Id.*, Article 2(c).

the limitations and exceptions. Authorized entities must be “authorized or recognized by the government” and must provide (on a non-profit basis) certain services that are limited by the Treaty to the “education, instructional training, adaptive reading or information access to beneficiary persons.”⁴⁵

Another set of confines concerns the manner in which the exceptions and limitations should function. The exceptions and limitations should affect “the right of reproduction, the right of distribution, and the right of making available to the public” for the purpose of facilitating access to accessible format copies by the beneficiaries;⁴⁶ countries may also introduce limitations and exceptions for the same purpose to the right of public performance.⁴⁷ The Treaty permits countries to design the functioning of the exceptions and limitations in any manner they deem appropriate (or to maintain their existing exceptions and limitations if those existing exceptions and limitations fulfill the Treaty requirements),⁴⁸ as long as the exceptions and limitations comply with the three-step test.⁴⁹ Alternatively, countries can adopt the design that is offered by the Treaty, which is compatible with the three-step test, and which allows authorized entities to make accessible format copies of copyrighted works, obtain such copies from others, and supply

⁴⁵ *Id.*, Article 2(c). *See below* for further obligations that authorized entities must meet.

⁴⁶ *Id.*, Article 4(1)(a).

⁴⁷ *Id.*, Article 4(1)(b). This article refers to the right to make available to the public with the understanding that in some countries the right at issue may be the right to perform publicly.

Although the Treaty also calls for limitations and exceptions to permit the making of changes to the original work to the extent necessary for the creation of an accessible format copy, it does not seem that these limitations and exceptions would affect the right to prepare a derivative work (the adaptation right) because the necessary changes should not likely result in the creation of a derivative work. *Id.*, Article 4(1)(a), last sentence. *See also id.*, Article 2(b), second sentence; Ficsor, *supra* note 5, p. 20.

⁴⁸ According to Sullivan, in 2007, “57 countries ha[d] been found that ha[d] specific provisions that would permit activity to assist visually impaired people unable to access the written word, or to assist people with a print disability more generally, by making a copyright work available to them in an accessible form.” Sullivan, *supra* note 6, p. 9.

⁴⁹ Marrakesh Treaty, Articles 4(3), 10, and 11. *See also supra* note 37.

the copies to beneficiaries, as long as the authorized entities 1) have lawful access to the works,⁵⁰ 2) make only such changes to the works as are necessary to create accessible format copies, 3) supply the copies “exclusively to be used by beneficiary persons,” and 4) act on a non-profit basis.⁵¹ The Treaty’s design for exceptions and limitations also includes a private copying exception for the creation of accessible format copies for personal use by a beneficiary.⁵²

A further set of confines on limitations and exceptions is discretionary; the Treaty permits countries to constrain the exceptions and limitations in two additional ways. The first additional constraint is commercial availability; a country may decide that its own exceptions and limitations apply only to works that “cannot be obtained commercially [in the country] under reasonable terms for beneficiary persons.”⁵³ The second possible constraint is remuneration; a country may decide that the making and supplying of accessible format copies under the limitations and exceptions will only be possible if subject to remuneration that will be paid to the copyright holder.⁵⁴

Finally, the Treaty requires that countries impose limiting obligations on “authorized entities.” Authorized entities must confine their “distribution and making available of accessible format copies” to beneficiaries and authorized entities; the entities must “discourage the reproduction, distribution and making available of unauthorized copies,” and while the entities must “establish

⁵⁰ See also *id.*, Article 7 (on technological measures).

⁵¹ *Id.*, Article 4(2)(a).

⁵² *Id.*, Article 4(2)(b). See also Article 7 (on technological measures).

⁵³ *Id.*, Article 4(4). A signatory country must make a notification that it intends to avail itself of the possibility. *Id.*, Article 4(4), second sentence.

⁵⁴ *Id.*, Article 4(5).

that the persons [they] serve[...] are beneficiary persons” under the Treaty and record “handling of copies of works,” the entities must also respect the privacy of the beneficiary persons.⁵⁵

There are numerous challenges that the implementation of the Treaty presents. For example, countries may struggle with the definition of “accessible format copies” that are to be “used exclusively by beneficiary persons.”⁵⁶ Materials for the visually impaired can be produced in formats that can be used not only by beneficiaries but also by non-beneficiary persons (and not only – or not mostly – by beneficiary persons – e.g., audiobooks in the MP3 format),⁵⁷ and the Treaty seems to refer to these potentially generally accessible formats.⁵⁸ Ensuring that these

⁵⁵ *Id.*, Articles 2(c) and 8.

⁵⁶ *Id.*, Article 2(b).

⁵⁷ Audiobooks may be made in formats specifically designed to be accessible for the visually impaired; such formats include or facilitate special navigation features. See, e.g., *Library of Congress Braille and Talking-Book Program Releases Bok Download App through Apple*, NLS Press Release, September 24, 2013, available at <http://www.loc.gov/nls/newsreleases/archive/2013-09-24.html> (last visited March 3, 2014); *DAISY Standard*, Daisy Consortium, <http://www.daisy.org/daisy-standard> (last visited March 3, 2014). While audiobooks in such special formats are produced specifically for beneficiaries, the audiobooks could theoretically be used by non-beneficiary persons with proper equipment as well. Access to copies in such special formats is then regulated through limitations on the access to the equipment.

As for the use of Braille, according to a document published by the American Council of the Blind in 2002, “[g]enerally, a significant number of individuals who are legally blind [in the United States] find large print or audio texts helpful, while some 8-10 percent of the group use braille as a reading medium.” Jennifer Sutton, *A Guide to Making Documents Accessible to People Who Are Blind or Visually Impaired*, American Council of the Blind, 2002, p. 6, available at http://sabeusa.org/user_storage/govoter/ResourceClearinghouse/PDF/A%20Guide%20to%20Making%20Documents%20Accessible%20to%20People%20Who%20are%20Blind%20or%20Visually%20Impaired.pdf (last visited March 3, 2014). More people using Braille may live in developing countries, where 90% of the world’s visually impaired live. *Visual Impairment and Blindness*, World Health Organization, updated October 2013, <http://www.who.int/mediacentre/factsheets/fs282/en/> (last visited March 3, 2014).

⁵⁸ See also J.W. Roos, *Copyright Protection as Access Barrier for People who Read Differently: The Case for an International Approach*, 31 IFLA JOURNAL 52 (2005) (commenting on the similar phrase “[a format . . .] which is exclusively for use by blind or other persons with disabilities” in the U.S. Copyright Act, 17 U.S.C. § 121(d)(4)(A): “The phrase . . . is puzzling, particularly in relation to digital text. One wonders whether the ‘exclusive use’ requirement refers to the intended use of the materials or whether it suggests that the medium itself must, objectively speaking, lend itself to such exclusive use only. The latter interpretation would be downright nonsensical, given the extent to which digital text can nowadays be accessed by way of not only refreshable Braille displays, but synthetic voice also.” *Id.*, p. 58).

Cf. Ficsor, *supra* note 5, p. 14 – 15 (suggesting that the Treaty definition covers only copies “that may only become accessible to the visually impaired through making specific *alternative* format copies” and not copies that “are *ab initio* accessible equally” to beneficiary and non-beneficiary persons). Although copies may be created to serve only

formats are used exclusively by beneficiary persons may be challenging, particularly when copies will be transmitted electronically.⁵⁹ Another problem can arise when countries attempt to specify the minimum share of activities that entities must perform to qualify as authorized entities that have a sufficient volume of “primary activities or institutional obligations.”⁶⁰ The following sections leave these and other implementation difficulties aside and concentrate on the cross-border exchange provisions of the Treaty.

III. The Cross-Border Exchange Provisions

The cross-border exchange concept in the Treaty is an extension of the Treaty’s goal of lowering transaction costs associated with the making and supplying of accessible format copies. The Treaty Preamble notes that efforts and costs associated with the making of accessible format copies are unnecessarily repeated when copies are made separately in each country.⁶¹ If copies are instead permitted to flow from one country to another these duplicate efforts can be eliminated and some costs saved because the copies (at least to the extent that they are in an identical language or a language understandable to beneficiaries across multiple countries) can be made in only one country and then supplied to beneficiary persons in multiple countries.⁶²

beneficiary persons, if non-beneficiary persons can perceive the format of the copies there is nothing in the physical design of the copies that will prevent their use by non-beneficiary persons. *See also* Band, *supra* note 25, p. 5.

⁵⁹ Marrakesh Treaty, Article 2(a). *See infra* Part IV, p. ...

⁶⁰ *Id.*, Article 2(c).

⁶¹ *Id.*, Preamble.

⁶² For a discussion of the need for a cross-border exchange of accessible format copies see, e.g., Corinne Tan Hui Yun, *Moving Towards a More Inclusive Copyright Regime for the Visually Impaired*, 24 SING. ACAD. OF L. J. 433, 439 – 440 (2012).

In his comprehensive *Commentary to the Marrakesh Treaty*,⁶³ Dr. Ficsor explains that the cross-border exchange provisions were the provisions that convinced the negotiators to give the text the form of an international treaty rather than the form of a “robust recommendation.”⁶⁴ Other provisions of the Treaty, Dr. Ficsor notes, do not reach beyond the framework of the existing international treaties and would not have necessitated the force of a treaty, but the novelty of the cross-border exchange provisions prompted the need to provide “sufficiently clear regulation to facilitate trans-border movement of accessible format copies.”⁶⁵ Of course, the important benefit of concluding the Treaty was that it could *mandate* that countries introduce the exceptions and limitations for the visually impaired and the cross-border exchange of accessible format copies – something that a recommendation could have only recommended that countries do.⁶⁶

The basic premise of the Treaty cross-border exchange idea is simple: once a work is made in one country (the “source country”)⁶⁷ in accessible format copies for use by beneficiary persons in that country, authorized entities should be allowed to export the copies to other countries (the “destination countries”)⁶⁸ for use by beneficiary persons in the other countries. For example,

⁶³ Ficsor, *supra* note 5.

⁶⁴ Ficsor, *supra* note 5, p. 5.

⁶⁵ Ficsor, *supra* note 5, p. 5 (emphasis deleted).

⁶⁶ The Treaty “mandates” the exceptions and limitations only for countries that sign and ratify the Treaty, which should be countries that voluntarily adopt the Treaty and therefore voluntarily introduce the exceptions and limitations; in these cases no “mandating” would seem to be necessary to comply with the Treaty. True “mandating” occurs when countries are pressured to sign and ratify the Treaty, for example, as part of their accession to the European Union or to other organizations. Additionally, in some signatory countries accession to the Treaty may be used in national legislative processes to force the acceptance of the agenda of the exceptions and limitations over domestic opposition. *E.g.*, Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 480-481, 499 (2000) (“The relationship [of national, regional, and international developments] is increasingly complex and multidirectional.” *Id.*).

⁶⁷ The term is not a Treaty term; the term is used in this Article for the simplification of the analysis that follows. The term as used here has no relation to “source country” as used in section 104A of the U.S. Copyright Act (17 U.S.C. §104A(h)(8)) nor to “country of origin” as used in the Berne Convention, Article 5(4).

⁶⁸ The term is not a Treaty term; the term is used in this Article for the simplification of the analysis that follows.

once an authorized entity in the source country makes Braille copies of a book, the authorized entity (and other authorized entities) in the source country should then be permitted to export the Braille copies from the source country to destination countries to be used by beneficiary persons in the destination countries. Because of the cross-border flow of the copies some costs are saved: in the source country, the transaction costs associated with copyright protection are saved (fully or partially) because of the exceptions and limitations implemented in the source country in accordance with Treaty, and in the destination countries, additional costs are saved – transaction costs associated with copyright protection in the destination countries and the additional production costs that would have been incurred in the destination countries if the book would again have to be converted into Braille in the destination countries.⁶⁹

The operation of the cross-border exchange system is described in Articles 5 and 6 of the Treaty; additionally, Article 9 sets out principles for countries' cooperation in facilitating cross-border exchange. In his *User Guide to the Marrakesh Treaty*,⁷⁰ Jonathan Band refers to Articles 5 and 6 as “Export” and “Import,” respectively.⁷¹ Indeed, Article 6 contains obligations for the destination country with regard to the importation of accessible format copies; however, Article 5 also imposes obligations on the destination country in addition to discussing the source country's obligations vis-à-vis the export of copies.⁷²

⁶⁹ On the costs of producing accessible format copies and the potential cost savings if cross-border exchange is facilitated *see* Sullivan, *supra* note 6, pp. 47 and 119.

⁷⁰ Band, *supra* note 25.

⁷¹ Band, *supra* note 25, pp. 9 – 11.

⁷² “Contracting Parties shall provide that ... [an] 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.” Marrakesh Treaty, Article 5(1).

The basic principle of the cross-border exchange system is described in Article 5(1), which requires that a source country allow accessible format copies to be exported to a destination country. There are three important confines built into the provision. First, both the source country and the destination country must be parties to the Treaty.⁷³ Second, the accessible format copies must be “made under a limitation or exception or pursuant to operation of law.”⁷⁴ Third, the exportation must occur by one authorized entity to another authorized entity or a beneficiary and for a beneficiary’s use.⁷⁵

The language of the second confine raises interpretative challenges;⁷⁶ a broad interpretation of the term “pursuant to operation of law” covers all copies made lawfully, including copies made under a license from a copyright holder. However, a narrow interpretation of the term “pursuant to operation of law” excludes from cross-border exchange those accessible format copies that are made pursuant to a license from the copyright owner, even though the copies are made lawfully (the accessible format copies are made lawfully because of the license but are not made “pursuant to operation of law” because they are not made under some statutory provision or common law rule).⁷⁷ On the one hand, the narrow interpretation seems warranted: If a copyright holder is willing to license a work for the making and supplying of accessible format copies, the holder might also be willing to license the work for supplying to other countries. If the copyright holder is not willing to license the work for other countries, perhaps the copyright holder should

⁷³ See *infra* for further limitations applicable to some countries.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ On interpretation of the Treaty see *supra* note 26.

⁷⁷ Dr. Ficsor agrees with this narrow interpretation and suggests that “pursuant to operation of law” may refer to copies of works that are not protected by copyright because of unprotectible subject matter. Ficsor, *supra* note 5, p. 29.

not be subject to a domino effect arising from his licensing for one country (the source country) that would cause his work to be exported to other countries (destination countries) without his authorization.

On the other hand, excluding copies made under a license from the cross-border exchange provisions seems to lessen the incentive for countries to introduce the commercial availability constraint under Article 4(4).⁷⁸ Presumably, countries should be incentivized to introduce the commercial availability constraint; the existence of the constraint is expected to encourage copyright owners to license their works under reasonable terms for beneficiary persons – a result that countries should desire.⁷⁹ However, voluntary licensing will decrease the number of works that authorized entities will be allowed to make in accessible formats under the exceptions and limitations and therefore decrease the number of works available for cross-border exchange under the Treaty. Additionally, excluding licensed copies from the cross-border exchange system does not protect a copyright holder from the possibility that his work will become available in other countries without his authorization, because his work may be subject to exceptions and limitations under the Treaty in the other countries.

Article 5(1) requires that the source and destination countries allow 1) exportation of accessible format copies from the source country, 2) importation of the copies to the destination country, and 3) the distributing or making available of the copies in the destination country;⁸⁰ all acts can occur only to authorized entities or beneficiaries and only for beneficiaries' use. Clearly the

⁷⁸ Ficsor, *supra* note 5, p. 27.

⁷⁹ Ficsor, *supra* note 5, p. 27.

⁸⁰ E.g., on amendments that will be necessary to implement the cross-border exchange provisions in Australia see Harpur & Suzor, *supra* note 29, p. 769.

obligation of implementation rests on both countries – the source country alone cannot adopt laws that will achieve the desired result in its entirety because both countries are sovereign countries and the source country’s law cannot dictate what is legally permissible in the destination country. Therefore, both countries must adopt exceptions and limitations that facilitate a cross-border exchange under Article 5(1). As it does for the exceptions and limitations in single-country scenarios,⁸¹ for the cross-border exchange the Treaty allows countries to either design new limitations and exceptions or maintain their existing ones;⁸² however, the Treaty offers no sufficient template for countries to use when they are implementing a cross-border exchange system.⁸³

The Treaty excludes some countries from the cross-border exchange system. First, Article 5(4)(a) concerns a very small number of countries that are not bound by Article 9 of the Berne Convention;⁸⁴ for each such country the Treaty confines the acts of reproduction, distribution, and making available of accessible format copies under the Treaty to the territory of the country.⁸⁵ Article 5(4)(b) limits the acts of distribution and making available of accessible format copies in the same territorial manner for countries that are not parties to the WIPO Copyright

⁸¹ See *supra* the previous section of this Article.

⁸² Marrakesh Treaty, Articles 5(3), 5(4), 10, and 11.

⁸³ Article 5(2) does not provide a template that would lead to a complete implementation of the cross-border exchange system envisioned by the Treaty. See *infra* p. ... for a discussion of Article 5(2).

⁸⁴ For the description of the limited number of countries that Article 5(4) concerns see Ficsor, *supra* note 5, p. 32.

⁸⁵ Article 5(4)(a) seems to place the obligation on the authorized entities to ensure that the limitations concerning the particular purpose and territory are met. However, given the provision’s reference to compliance “with *its own* legal system and practices,” it is plausible that the Treaty in this case is referring to the obligation of a country (“a Contracting Party”). Article 5(4)(a) (emphasis added). See also Ficsor, *supra* note 5, p. 33.

Treaty; however, in this case an exception is made for countries that apply the three-step test even though they are not parties to the WIPO Copyright Treaty.⁸⁶

Articles 6 and 9 complement the provisions of Article 5. Article 6 requires that destination countries adopt importation provisions that will permit an importation of accessible format copies for beneficiaries “without the authorization of the rightholder.” This provision is important because of countries’ prohibitions on the importation of copies without a rightholder’s authorization (the prohibitions concern pirated copies, and they also concern grey-market copies in the cases of countries that adhere to the principle of national exhaustion for copyright)⁸⁷ and also because of border (customs) measures that countries have in place to enforce the prohibition.⁸⁸ Some countries have border measures that also apply to the exportation of copies, and such countries will have to adjust both their importation and exportation border measures rules to implement the Treaty. According to an agreed statement, countries may limit the importation of copies of works that are not commercially available on reasonable terms, and countries may also subject the importation of copies to remuneration to be paid to copyright

⁸⁶ Unfortunately, the provisions of Article 5(4)(a) and (b) refer to countries generally as “contracting parties” without specifying whether the provisions concern the source countries or the destination countries or both. Article 5(4) begins by referring in paragraph (a) to “an authorized entity ... [that] receives accessible format copies pursuant to Article 5(1)” without clarifying whether it means the entity in the source country or the entity in the destination country; both entities are mentioned in Article 5(1) and both at some point “receive[...] accessible format copies” (the entity in the source country receives copies from a manufacturer or another authorized entity, the entity in the destination country receives copies from the authorized entity in the source country). However, it is possible that Article 5(4) can be (and perhaps was intended to be) interpreted as applying to both the source country and the destination country; note that the original destination country can become a source country when accessible format copies are imported and then intended to be exported further from the original destination country to another destination country. In any event, the countries covered by Articles 4(a) and (b) should be the destination countries from which further exportations are impermissible.

⁸⁷ For the definition of the term “national exhaustion” see *infra* p.

⁸⁸ E.g., TRIPS Agreement, Articles 51-59.

holders.⁸⁹ Finally, Article 9 calls for cooperation among countries in encouraging the sharing of information among authorized entities, including the sharing of their policies and practices.⁹⁰

IV. *Challenges to the Implementation of the Cross-Border Exchange Provisions*

The major problem of the cross-border exchange system is that the system will have to operate in an environment in which the legal regimes of individual countries will continue to differ, notwithstanding the significant harmonization of national copyright laws achieved by earlier treaties and the substantial harmonization of the particular exceptions and limitations that the Treaty pursues. Although the Treaty defines its key terms, the detailed definitions of an “accessible format copy,” a “beneficiary person,” and an “authorized entity” will depend on the national laws of each country that implements the Treaty and the interpretation that the administrative agencies and courts in each country give to the national laws.

Even if countries adopt verbatim the definitions contained in the Treaty into their national legislations, interpretations of the details of the terms are likely at some point to diverge as the terms are interpreted by courts and administrative agencies of the individual countries. What might be deemed an “accessible format copy” in a source country might not necessarily comply with the definition of the same term under the laws of the destination country. Similarly, if the interpretation of who is a “beneficiary person” differs in the source and destination countries, what might be an accessible format copy subject to the permissible exceptions and limitations in the source country might not pass as an accessible format copy subject to the equivalent

⁸⁹ Marrakesh Treaty, Article 6, fn. 10, Agreed Statement Concerning Article 6.

⁹⁰ *Id.*, Article 9(1) and (2).

exceptions and limitations in the destination country. If “authorized entities” are subject to a process of authorization by a government agency it will be only the law of the particular country and the act of its government that will determine who an authorized entity is. In the Treaty itself, Article 5(4)(c) de facto recognizes that the understanding of which acts constitute distribution and making available to the public differ from country to country.⁹¹

Typically, differences between countries’ laws (countries’ statutes, common law rules, and their interpretations) generate choice of law questions, and the differences in national laws that will implement the cross-border exchange system under the Treaty will be no exception. Countries will have to decide which country’s law will be used for certain terms and which country’s law will subsequently determine the lawfulness of certain actions. For example, under Article 6 the destination country must permit the importation by authorized entities or beneficiary persons of accessible format copies for the benefit of beneficiary persons. However, if the laws of the source country and the destination country are different, which country’s laws should determine whether the copies, at the time of their importation, are in an accessible format and which persons are the beneficiaries for whose benefit the copies may be imported? The options that countries have for solving the choice of law questions are discussed in detail below.

The cross-border context will make it difficult to assess the lawful origin of accessible format copies; it will be more difficult in a cross-border context than in a purely domestic context for an authorized entity to determine that it obtained an accessible format copy in accordance with the exceptions and limitations under the Treaty.⁹² From the outset, the copy must be made and

⁹¹ See also Sullivan, *supra* note 6, p. 120.

⁹² Marrakesh Treaty, Article 4(2)(a)(i).

supplied under the Treaty's exceptions and limitations, meaning by an authorized entity, to an authorized entity or a beneficiary, and for use by beneficiaries. When copies are imported, the authorized entity in the destination country must verify that the imported copies were made and/or supplied abroad under the exceptions and limitations (once again, this is an issue that will involve a choice of law question).

The cross-border context will also complicate authorized entities' compliance with the requirement that they ensure that accessible format copies be used only by beneficiaries and only for their use.⁹³ Authorized entities in a source country must verify that they are supplying copies to authorized entities and beneficiaries in a destination country that meet the definitions of "authorized entities" and "beneficiaries" (yet another choice of law problem). The Treaty provides that countries may decide to make an assessment of whether an authorized entity possessed the required knowledge about the destination of the copies based on the entity's knowledge as it existed *before* the entity supplied the copies to the foreign authorized entities and/or beneficiaries in the destination country. If a country chooses to adopt this approach, entities must not "know or have reasonable grounds to know" that "all the accessible format copies would be used for other than beneficiary persons" "prior to the distribution or making available."⁹⁴

The fact that a cross-border exchange of accessible format copies can also occur by electronic means adds another dimension of complexity. Authorized entities may "supply [accessible format] copies to beneficiary persons by any means, including ... by electronic communication

⁹³ *Id.*, Articles 2(c)(ii) and 4(2)(a)(iii).

⁹⁴ *Id.*, Article 5(2).

by wire or wireless means,”⁹⁵ and nothing in the Treaty seems to prevent authorized entities from supplying copies by electronic communications across international borders to either foreign authorized entities or directly to beneficiaries in foreign countries. The first condition of this electronic cross-border exchange system is that authorized entities may supply accessible format copies only to countries that are parties to the Treaty.⁹⁶ Enforcement of this territorial limitation can be achieved through the use of geolocation (or geoblocking) tools;⁹⁷ the use of the tools is associated with general technical and legal questions that also arise when the tools are used in other contexts.⁹⁸ The second condition requires that the supplying be only to authorized entities and beneficiaries (also a choice of law problem). This limitation will require some additional level of verification;⁹⁹ it is unlikely that self-reporting by users can be viewed to be a sufficient safeguard of adequate identification of users as authorized entities and beneficiaries.¹⁰⁰ As for a use being by beneficiaries, when authorized entities supply accessible format copies electronically, the authorized entities will probably have to rely on their contracts with users (the

⁹⁵ *Id.*, Article 4(2)(a).

⁹⁶ For further limitations for some countries see *supra* p. ...

⁹⁷ Marketa Trimble, *The Future of Cybertravel: Legal Implications of the Evasion of Geolocation*, 22 Fordham Intell. Prop. Media & Ent. L.J. 567, 586 ff. (2012).

⁹⁸ *Id.*

⁹⁹ This additional level of verification may fall within the scope of the Agreed Statement Concerning Article 5(2). Marrakesh Treaty, Article 5(2), fn. 8. See, e.g., NLS: That All May Read, National Library Service for the Blind, <http://www.loc.gov/nls/signup.html> (last visited March 8, 2014); Certifying Authority, National Library Service for the Blind, <http://www.loc.gov/nls/eligible.html> (last visited March 8, 2014).

¹⁰⁰ For instance, authorized entities in the destination countries could provide beneficiaries in the destination countries with unique codes and/or user names and passwords (see, e.g., the certification system of the National Library Service for the Blind in the United States, *supra* note 99) that would permit the beneficiaries to access websites offering accessible format copies from entities in the source countries, provided that the definition of beneficiaries coincides in the source countries and the destination countries (*see infra* for choice of law aspects of the implementation of the Treaty). Of course, this solution is not immune to misuse; however, the solution might bring more reliable results than self-reporting by users. On self-reporting by users *see* Trimble, *The Future of Cybertravel*, *supra* note 98, 592 – 593.

terms of service) and include in the contracts provisions permitting use of accessible format copies only for the permitted limited purpose.

The following sections analyze three types of potential tools of implementation of the cross-border exchange provisions of the Treaty into national legislation: choice of law rules, the exhaustion doctrine, and labeling. The tools are not all equally well suited for implementation, nor is their list exhaustive – there might be other tools of implementation that the following sections do not cover. Utilizing any one type of tools alone will probably not achieve a complete implementation of the Treaty, and countries will likely have to reach for several types of tools to implement the Treaty.

V. *Choice of Law Rules and the Implementation of the Cross-Border Exchange Provisions*

The implementation of the Treaty will likely require that countries address the rules for choice of applicable law. Choice of law rules are rules that determine which jurisdiction's law should apply to a certain case or issue. The rules are national rules, but certain principles and some regional instruments harmonize the rules to some extent.¹⁰¹ Based on the types of issues that the rules affect, the choice of law rules in copyright fall into three categories: choice of law rules that determine the law applicable to initial copyright ownership, choice of law rules that determine

¹⁰¹ E.g., Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). For a discussion of flexibilities and constraints that countries face when they shape their national choice of law rules see Marketa Trimble, *Advancing National Intellectual Property Policies in a Transnational Context*, 74 Maryland L. Rev. ... (2015) (forthcoming).

the law applicable to copyright infringement, and choice of law rules that determine the law applicable to other issues in copyright.¹⁰²

Of the three categories of choice of law rules that are applicable to copyright, the rules for copyright infringement are the most harmonized internationally; countries typically apply “the law of the protecting country” – the law of the country in which copyright was infringed and for which protection is sought (in some countries formulated as *lex loci delicti* – the law of the place of infringement) to copyright infringement.¹⁰³ Some experts suggest that this particular rule is mandated by the Berne Convention;¹⁰⁴ others doubt that the Convention ever intended to address choice of law.¹⁰⁵ Whether mandated by international law or not, the rule is consistent with the territoriality principle¹⁰⁶ and the need for legal certainty. As opposed to the choice of law rules for copyright infringement, choice of law rules for copyright ownership differ among countries; to determine who the initial copyright owner is, countries apply the law of the country of origin of a work,¹⁰⁷ the law of the protecting country,¹⁰⁸ or some other rule (e.g., the law of the country with the closest relationship to the work and the parties).¹⁰⁹

¹⁰² *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 90-92 (2d Cir. 1998).

¹⁰³ *Id.*, 91; Regulation (EC) No 864/2007, *supra* note 101, Article 8(1).

¹⁰⁴ *E.g.*, 2 SAM RICKETSON, JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND*, § 20.08 (pp. 1297-1298) (2d ed. 2005).

¹⁰⁵ *E.g.*, PAUL GOLDSTEIN & BERNT HUGENHOLTZ, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 129 (2010). For a discussion of the debate see also *see also* STIG STRÖMHOLM, *COPYRIGHT AND THE CONFLICT OF LAWS* (2010), p. 21; Robert Brauneis, *National Treatment in Copyright and Related Rights: How Much Work Does It Do?*, GW Legal Studies Research Paper No. 2013-103, 2013, p. 27.

¹⁰⁶ For a discussion of the effects that the territoriality principle has on choice of law rules *see* Trimble, *Advancing National Intellectual Property Policies*, *supra* note 101. See also PAUL GOLDSTEIN, P. BERNT HUGENHOLTZ, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 97 – 101 (Oxford University Press, 2d ed., 2012).

¹⁰⁷ *E.g.*, Portuguese Civil Code, Article 48.

¹⁰⁸ *E.g.*, Law of the People’s Republic of China on the Laws Applicable to Foreign-Related Civil Relations, Article 48.

¹⁰⁹ *Itar-Tass Russian News Agency v. Russian Kurier*, *supra* note 102, p. 91.

Neither the choice of law rule for copyright infringement nor the choice of law rule for initial copyright ownership provide tools for implementation of the Treaty. The rule for copyright infringement continues to be either the law of the protecting country or the *lex loci delicti*, and it will be the law of the protecting country (including the exceptions and limitations implemented in the law according to the Treaty) that will apply to acts that occur in the country.¹¹⁰ The choice of law rule for initial copyright ownership is also not a suitable implementation tool, although the rule will play a role in the functioning of the exceptions and limitations under the Treaty: determining initial copyright ownership and chain of title will be important in countries that opt to implement the Treaty's commercial availability constraint and the Treaty's remuneration constraint.¹¹¹ In countries with a commercial availability constraint it will be only the copyright holder who can make a work commercially available on reasonable terms, and in countries with a remuneration constraint it will be the copyright holder who will receive the remuneration.

The design and application of the rules governing choice of law for copyright infringement and copyright ownership will be of limited use in the functioning of the exceptions and limitations under the Treaty, choice of law questions will arise for a number of issues when the exceptions and limitations apply in a cross-border context. When copies are imported from a source country to a destination country it will be necessary to determine in the destination country whether the copies are lawful copies that may be subject to the exceptions and limitations in the destination country. Therefore, the question will arise as to which country's law should apply to the determination; the laws of *some* country must be applied in the destination country to determine

¹¹⁰ Whether acts are deemed to have occurred in a country depends on the localization of the acts. *See infra* p. ...

¹¹¹ *See supra* p. ...

whether the imported copies at the time they reach the destination country are accessible format copies, whether they were made and supplied by authorized entities, and whether they were made and supplied to authorized entities and beneficiaries and for use by beneficiaries. Similarly, upon exportation it will be necessary in the source country to determine which country's law will govern the definitions of accessible format copies, authorized entities, beneficiaries, and permissible acts once the copies depart the source country.¹¹²

There seem to be three options for choice of law in the implementation of the cross-border exchange system: 1) a country applies its own law to all issues and acts, 2) a country applies different countries' laws based on where issues arose and acts occurred, or 3) a country (a source country or a destination country) applies simultaneously the laws of both the source country and the destination country to all issues and acts in a cross-border context.

1. A Country Applies Its Own Law to All Issues and Acts

Option one means that a country would apply its own law to all issues and acts regardless of where the issues arose or will arise, and where the acts occurred or will occur. When implementing Article 6 of the Treaty concerning importation, the destination country would assess, based only on its own law, who qualifies as an authorized entity or a beneficiary person and what an accessible format copy is, and would make the assessments based on its own law even as to entities, persons, and copies in the source country.

¹¹² This determination is necessary for two reasons: first, to assess whether the authorized entity meets the requirements of the exceptions and limitations under the Treaty, and second, to determine whether any border measures concerning exportation should be taken (if the source country has border measures that apply to exportation (see *supra* p. ...)).

A destination country could not ignore the provenance of imported copies – ignoring the provenance could cause a destination country to be in violation of the Treaty; however, applying the destination country’s law to assess the lawfulness of copies’ provenance prior to their importation might be a legitimate approach, given that the Treaty does not mandate any choice of law rules. The destination country would assess issues that arose and acts that occurred abroad as if they had arisen and occurred in the destination country; for example, to determine whether an imported copy made abroad was in fact made for use by beneficiaries, the destination country would ask “Would the foreign persons, if they were residents of our country, be deemed beneficiaries under our law?” Conversely, the source country would apply only its own law to assess whether exportation was being made in accordance with the exceptions and limitations under the Treaty, i.e. whether the entities, persons, and acts in the destination country would be considered to be authorized entities, beneficiaries, and lawful acts if the entities and persons were domiciled in or the acts occurred in the source country.¹¹³

Option one has one significant advantage for choice of law in practice: courts, administrative agencies, and authorized entities would not have to search for and apply foreign law because they would apply only the law of their own country. Although courts do apply foreign law from time to time, the determination and application of foreign law can be difficult and may

¹¹³ See supra note 112 for the reasons it will be necessary in the source country to determine the lawfulness of the acts that occur in the destination country.

sometimes lead to errors that may cause results to be inconsistent with the foreign law and its application in the foreign country.¹¹⁴

A disadvantage of option one is that it leads to an extraterritorial application of national law, which could generate discord in international relations; for example, a destination country might block the importation of copies that are accessible format copies under the law of the source country (after the source country had not prevented the exportation of the copies)¹¹⁵ when the copies are not accessible format copies under the law of the destination country.¹¹⁶ Or, an entity recognized as an authorized entity in the destination country could import accessible format copies into the destination country even if the entity and the copies were not recognized as authorized entities and would not be considered accessible format copies under the law of the source country.

2. A Country Applies Different Countries' Laws Based on Where Issues Arose and Acts Occurred

Option two would result in a country's laws being applied strictly territorially: Whether a copy is an accessible format copy under the Treaty that can be exported from a source country and imported into a destination country would be determined (in both the source country and the destination country) 1) under the law of the source country as to the provenance of the copy prior

¹¹⁴ On problems associated with the application of foreign law in general see, e.g., Th. M. De Boer, *Facultative Choice of Law: The Procedural Status of Choice-of-Law Rules and Foreign Law*, Recueil des Cours, Hague Academy of International Law, 1996, pp. 304 – 307 and 317 - 322.

¹¹⁵ E.g., see *supra* p. ... on border measures applying to exportation.

¹¹⁶ It is more likely that the discrepancy in the status of the copies would result from different interpretations of beneficiaries and authorized entities in the source country and the destination country rather than from a disagreement about which formats are “accessible formats.”

to its crossing the border into the destination country, and 2) under the law of the destination country as to the copy's further supply in the destination country.

The advantage of option two is that under this option national laws are applied in concert with the principle of territoriality, which is deemed to be one of the defining principles of intellectual property law,¹¹⁷ and with the general understanding that a country's laws ought to apply primarily within the country's own territory.¹¹⁸ Option two promotes legal certainty because parties know that a particular country's law will always govern all issues arising and acts occurring in that country, regardless of the country in which decisions are made.

Option two would serve well the Treaty's aim to facilitate a smooth cross-border movement of accessible format copies even in situations in which the national laws of the source and destination countries that implement the exceptions and limitations of the Treaty are different. Only copies that could be legally exported from the source country and also legally imported into the destination country would be exported and imported; authorized entities in the source country could make accessible format copies for use by beneficiary persons in the destination country, even when those persons would not be beneficiaries under the law of the source country. Because the relevant exceptions and limitations in both countries would have to comply with the three-step test,¹¹⁹ the countries could presume that the exceptions and limitations met the test if they relied on each other's laws.

¹¹⁷ *Supra* note 106.

¹¹⁸ Trimble, *Advancing National Intellectual Property Policies*, *supra* note 100.

¹¹⁹ See *supra* p. ... for the three-step test requirements.

Option two's disadvantage is that authorized entities will need to keep abreast of the laws of the destination countries to which they supply accessible format copies; whether or not authorized entities comply with their obligations under their own country's laws¹²⁰ would be, for cross-border exchange cases, judged by the laws of both their country and the destination countries to which the entities have supplied copies. Of course the determination and application of foreign law raises the challenges mentioned earlier.

3. A Country Applies the Laws of Both the Source Country and the Destination Country to All Issues and Acts

Option three is a maximalist approach; its use would result in the simultaneous application of both the source country's and the destination country's laws to all issues and acts in a cross-border context. For a copy to be exported and imported, the copy would have to comply with the requirements for an accessible format copy under both countries' laws, and both countries' laws would apply to the determination of whether entities and persons involved in a cross-border exchange are authorized entities and beneficiaries, and whether all acts are in accordance with the definitions of making and supplying.

Option three would compound the problems that exist under options one and two – it would lead to an extraterritorial application of countries' laws and require the application of foreign law.

The result would be that the country with the more restrictive implementation of the exceptions

¹²⁰ Marrakesh Treaty, Article 2(c)(ii) and (iii).

and limitations under the Treaty (whether the source or the destination country) would de facto dictate the applicable law in cross-border exchanges between the countries.

4. *Variations of the Three Options*

Additional variations of the three options exist; for example, in options two and three the foreign country's law could be replaced with the provisions of the Treaty. Instead of applying a foreign country's law, courts, administrative agencies, and authorized entities would apply the law of the Treaty itself to issues arising and acts occurring abroad. This approach would eliminate the problem of determining foreign law, although optional provisions of the Treaty would generate new problems, and the direct application of Treaty language might be as difficult as the application of foreign law. The approach would also not eliminate concerns about international discord because foreign countries could object to their laws not being respected and applied; a country might accept the fact that a foreign court has held the country's laws inapplicable because the court applied its own country's law, but the country might object if the foreign court replaced the country's national law with the provisions of a treaty – even if it is a treaty to which the country acceded. Of course, foreign countries will not object to the application of the Treaty if in fact the Treaty is directly applicable (self-executing) in the countries and to the extent that the Treaty has not been (totally or partially) implemented into their national laws by national provisions.¹²¹

Another variation of the three options would be to use different choice of law options for different issues and acts. For example, a country could decide to implement a different option for

¹²¹ See *infra* *Conclusions* for a note on potential direct applicability of the Treaty.

importation than for exportation; it might implement option two for importation and therefore apply the foreign source country's law to determine whether copies that are being imported are indeed accessible format copies made and supplied according to exceptions and limitations in the source country. The same country might then implement option one for exportation and determine, based only on its own law, whether the issues arising and acts occurring in the foreign destination country following the exportation comply with the requirements of the cross-border exchange system.

VI. *Copyright Exhaustion and the Implementation of the Cross-Border Exchange Provisions*

Because the Treaty concerns not *works* but particular *copies*, the exhaustion principle, which also concerns particular copies, would seem to be a possible implementation tool. However, the Treaty negotiators, or at least some of them, were not in favor of using the exhaustion principle as a vehicle to achieve the goals pursued by the Treaty; this sentiment found its way into Article 5(5) of the Treaty, according to which “[n]othing in [the] Treaty shall be used to address the issue of exhaustion of rights.”¹²² While the Treaty abstains from addressing copyright exhaustion in any manner, it does not prohibit countries from using the exhaustion principle to implement the Treaty; the Treaty allows countries to achieve its implementation by any “appropriate

¹²² According to the chief U.S. negotiator of the Treaty, Professor Justin Hughes, the language of Article 5(5) was drawn directly from Article 6 of the TRIPS Agreement and was “intended to signal the same level of separation between the treaty’s obligations and any resolution of the question of international exhaustion, a very controversial issue among the different delegations.” Email from Justin Hughes to Marketa Trimble (August 13, 2014, [11:59 am]) (on file with author).

method” consistent with the three-step test, and introducing a limited exhaustion principle might qualify as such a method.¹²³

Under the principle of exhaustion (also known as the “first sale doctrine”),¹²⁴ a copyright holder’s right of distribution is exhausted with respect to a particular copy upon the first lawful sale (or other transfer of ownership) of the copy (or the first sale authorized by the copyright holder).¹²⁵ Some countries apply the principle of national exhaustion, which requires that the first authorized sale of the copy occur domestically, in the territory of the country of exhaustion; other countries apply the principle of international exhaustion, according to which any authorized sale exhausts the distribution right to the particular copy, regardless of the location in the world where the sale occurred. Countries of the European Union apply an EU-wide exhaustion principle in which an authorized sale anywhere in the EU exhausts the distribution right in all EU countries.¹²⁶

¹²³ Marrakesh Treaty, Articles 4(3), 5(3), 5(4), 10, 11, and 12.

¹²⁴ 17 U.S.C. §109(a).

¹²⁵ Sullivan points out that in some countries exhaustion is triggered only by sales “by or with the consent of the owner of the rights.” Sullivan, *supra* note 6, p. 63. In the United States, the first lawful sale of a lawful copy exhausts copyright. 17 U.S.C. §109(a).

¹²⁶ *E.g.*, Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version), Article 4(2); Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, Article 4(2). Because of difficulties in the interpretation of the U.S. Copyright Act, the United States seemed for a time to have a split rule, with the principle of international exhaustion applying to U.S.-made copies and the principle of national exhaustion applying to foreign-made copies. In 2013 the U.S. Supreme Court interpreted the U.S. Copyright Act to provide for international exhaustion of copyright regardless of the place of manufacture of the copies. *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S.Ct. 1351 (2013).

For a recent overview and analysis of various countries’ implementations of the exhaustion doctrine *see* Shubha Ghosh, *The Implementation of Exhaustions Principles: Lessons from National Experiences*, University of Wisconsin Legal Studies Research Paper, No. 1248, February 3, 2014, available at <http://ssrn.com/abstract=2390232> (last visited February 24, 2014).

The exhaustion principle applies to all physical copies; exceptions have been made for copies of computer programs, which have a commercial rental right that survives the first sale of a copy, and, similarly, cinematographic works and phonograms enjoy the commercial rental right under certain conditions.¹²⁷ Whether exhaustion applies to digital copies has been disputed; the Court of Justice of the European Union confirmed in *UsedSoft*¹²⁸ that exhaustion in digital copies exists in the European Union, at least in some circumstances,¹²⁹ while in the United States, the U.S. Copyright Office has spoken against the introduction of digital exhaustion.¹³⁰

The exhaustion principle could assist countries with a partial implementation of the Treaty's cross-border exchange system in the following manner: A country could introduce a limited international exhaustion principle according to which an authorized sale of an accessible format copy in one Treaty country would exhaust the distribution right in that particular copy in all Treaty countries, but only with respect to the distribution of the copy to authorized entities and beneficiaries and only for use by beneficiaries. An "authorized sale" in this case would be a sale

¹²⁷ TRIPS Agreement, Articles 11 and 14(4); WIPO Copyright Treaty, Article 7; Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version), Article 4(2); 17 U.S.C. §109(b) (commercial "rental, lease, or lending").

¹²⁸ *UsedSoft GmbH v. Oracle*, CJEU, C-128/11, July 3, 2012.

¹²⁹ "[T]he downloading of a copy of a computer program and the conclusion of a user licence agreement for that copy form an indivisible whole. Downloading a copy of a computer program is pointless if the copy cannot be used by its possessor. [...] It makes no difference, in a situation such as that at issue in the main proceedings, whether the copy of the computer program was made available to the customer by the rightholder concerned by means of a download from the rightholder's website or by means of a material medium such as a CD-ROM or DVD." *Id.*, par. 44 and 47. After the CJEU decision in *UsedSoft* at least one European court held that the exhaustion principle does not apply to digital copies of books (e-books). Landgericht Bielefeld, 4 O 191/11, March 5, 2013.

¹³⁰ DMCA, Section 104 Report, U.S. Copyright Office, August 2011, p. xx, *available at* <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf> (last visited February 24, 2014). In a 2013 decision the U.S. District Court for the Southern District of New York rejected the proposition that exhaustion under the current U.S. Copyright Act applied to the digital copies at issue in the case because the digital copies were the result of unlawful reproduction. *Capitol Records, LLC v. ReDigi Inc.*, 934 S.Supp.2d 640, 655-656 (S.D.N.Y. 2013).

without the consent of the copyright holder but would be a lawful sale under the exceptions and limitations under the Treaty.¹³¹

The introduction of the limited international exhaustion principle would require countries opting to introduce the principle to amend their copyright exhaustion rules, regardless of which exhaustion principle they currently follow – the principle of international or of national exhaustion. Countries would have to make three types of amendments: First, the exhaustion of the right to distribute accessible format copies would have to attach to the first lawful distribution of a copy made and supplied under the exceptions and limitations under the Treaty. Second, the right to distribute accessible format copies would exhaust only as to the distribution of the copies to authorized entities and beneficiaries and only for use by beneficiaries. Third, the right to distribute accessible format copies would exhaust internationally, but only if the first lawful distribution occurred in a Treaty country; therefore, countries that adhere to the principle of international exhaustion would have to limit the operation of the principle for accessible format copies by the country of first distribution (and by entities and persons and by purpose), while countries that adhere to the principle of national exhaustion (or EU-wide exhaustion) would have to introduce the principle of limited international exhaustion for accessible format copies (again, limited by the country of first distribution, by entities and persons, and by purpose).¹³²

¹³¹ See *supra* p. ... for the narrow interpretation of the term “pursuant to operation of law” and the resulting limitation on the subject of the exceptions and limitations under the Treaty.

¹³² Judith Sullivan predicted that the implementation of a cross-border exchange “may be particularly complicated where countries do not provide international exhaustion of rights...” Sullivan, *supra* note 6, p. 11.

A limited international exhaustion rule would result in the mutual recognition of countries' exceptions and limitations under the Treaty. Applying the law of the country of the first authorized sale to determine whether a copy could be subject to cross-border exchange under the Treaty resembles an approach similar to the EU's Orphan Works Directive, which provides for mutual recognition of the orphan work status.¹³³ In the case of the cross-border exchange system under the Treaty, this approach would mean that the destination country would recognize the source country's exceptions and limitations; the destination country would deem a copy that was sold under the exceptions and limitations of the source country to be lawfully made and supplied in the source country and permitted to be imported to the destination country where the copy would also be permitted to be distributed by authorized entities, to authorized entities and beneficiaries, and for use by beneficiaries.

The main problem with the use of the exhaustion principle as a tool to implement the Treaty is that the coverage of the principle does not coincide with the coverage of the exceptions and limitations under the Treaty. First, the exhaustion principle concerns only the right of distribution to the public; it does not affect the right of making available to the public and the public performance right,¹³⁴ which must also be covered by the exceptions and limitations under the Treaty. Second, the principle applies to physical copies (with the above-mentioned exceptions for computer programs, cinematographic works, and phonorecords) but it might not apply to all digital copies in all countries; however, the Treaty's cross-border exchange provisions apply to

¹³³ EU Orphan Works Directive, Article 4. See also *supra* note 20.

¹³⁴ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, Article 3(3).

the electronic exchange of both physical and digital copies. Therefore the exhaustion principle seems less well suited to be a Treaty implementation tool than choice of law option two that is described in one of the sections above (a country applying different countries' laws based on where issues arise and acts occur) which, in fact, resembles the workings of a limited international exhaustion principle.

VII. *Labeling and the Implementation of the Cross-Border Exchange Provisions*

When a legal regime concerns particular copies of works, one possible approach to the implementation of the regime might be the use of labeling. Labeling requires that copies subject to the legal regime be marked with a mark or notice affixed to each individual copy that remains affixed to the copy throughout the copy's physical life. Labeling provides the information necessary for a holder of the copy to enjoy the regime, and for users, copyright owners, and law enforcement agencies to identify a copy as covered by the regime and to distinguish the copy from other copies that do not benefit from the regime. In a digital environment a digital watermark serves the same purpose that a label or notice does on a physical copy; a digital watermark remains embedded in the digital copy throughout the copy's existence.¹³⁵

Countries could require a special mark or notice to be affixed to an accessible format copy to identify the particular copy as made and distributed according to the exceptions and limitations under the Treaty; such a mark would facilitate the copy's movement across international

¹³⁵ "A digital watermark is information that is imperceptibly and robustly embedded in the host data such that it cannot be removed. A watermark typically contains information about the origin, status, or recipient of the host data." Frank Hartung, Martin Kutter, *Multimedia Watermarking Techniques*, Proceedings of the IEEE, Vol. 87, No. 7, July 1999, p. 1079.

borders.¹³⁶ The mark or notice would serve an important informational purpose: notifying authorized entities and beneficiaries of the presumably lawful source of the copy and creating a presumption that the copy may be exported from the source country to a destination country. Based on the mark or notice affixed to an imported copy the authorities of the destination country could presume that the copy is an accessible format copy eligible for a cross-border exchange under the law of the source country – a useful presumption if the destination country chooses choice of law option two or option three. Of course, for maximum efficiency countries would agree to recognize each other’s marks or notices (or introduce a single uniform mark or notice) and allow the supplying of the copy in the destination country based on the mark or notice affixed in the source country; this practice would be consistent with choice of law option two.

The labeling approach addresses one important problem: the identification of possibly infringing copies. Particularly in a regime where accessible formats include formats that could potentially be used by non-beneficiaries¹³⁷ it may be difficult to identify whether a copy is an accessible format copy under the Treaty that throughout the chain of title was supplied to authorized entities or beneficiaries and was for use exclusively by beneficiaries. With marks or notices affixed to the copy this determination could be made more easily (even if only as a presumption), which would serve well in both domestic and cross-border contexts. Of course, labeling is not immune

¹³⁶ The U.S. Copyright Act requires a special notice to be affixed to copies and phonorecords in a “specialized format.” 17 U.S.C. §121(b)(B).

¹³⁷ For a discussion of accessible formats see *supra* notes 56 - 58 and the accompanying text.

to misrepresentation and misuse; however, additional legal protections could strengthen the functioning of the labeling regime.

VIII. *Conclusions*

The implementation of the Treaty will vary country by country, depending on the current legal regime in a country; some countries will have to introduce exceptions and limitations for the visually impaired into their legislation for the first time, while other countries will merely have to amend their existing laws to meet all the requirements of the Treaty. Some countries may choose to copy Treaty language verbatim into their national legislation (this is the possibility proposed in one existing model implementation statute);¹³⁸ other countries may try to rely on the direct applicability of the Treaty, although it seems that only a portion of the Treaty text might lend itself to direct applicability, even in countries whose legal systems make this type of treaty self-executing.

Technology and markets may drive solutions that will facilitate the cross-border exchange of accessible format copies. The fact that the Treaty is adopted might on its own be sufficient impetus for copyright holders to consider licensing their works on a greater scale and on commercially reasonable terms for the purpose of making and supplying copies in formats suitable for the visually impaired. By implementing the commercial availability constraint countries may further encourage voluntary licensing by copyright holders, who might

¹³⁸ Band & Jaszi, *supra* note 3 (proposing an approach to implementation that “may be the most politically feasible for countries that do not already have an exception for the print disabled in domestic law”; *id.*, p. 1).

increasingly be willing to license their works internationally or at least multinationally.¹³⁹

Technology will continue to make the production of accessible format copies and their supplying easier and less costly,¹⁴⁰ and the closure of the digital divide, if it occurs one day, will help to provide greater access to works in formats that the visually impaired can perceive.¹⁴¹

It is important to note that even though the implementation of the Treaty provisions on the cross-border exchange of accessible format copies will be challenging, the challenges do not diminish the significance of the Treaty as a commendable pursuit of a socially desirable and important goal. The Treaty negotiators were working under significant time constraints and pressure from various stakeholders, and it is unquestionable that the negotiators were working to achieve an optimal result in an extremely complex environment that, as environments of all international negotiations do, called for many compromises. If the negotiators at the end of the negotiations described the conclusion of the Treaty as the “Marrakesh miracle,”¹⁴² it should not be surprising that the Treaty is associated, as many miracles tend to be, with a puzzle.

¹³⁹ Sullivan, *supra* note 6, pp. 122 – 123. “Licensing might be a better approach to deliver international exchange of accessible formats...” *Id.*, p. 135.

¹⁴⁰ E.g., TacRead, Dell Social Innovation Challenge, <http://www.dellchallenge.org/projects/tacread> (last visited March 3, 2014); Denise Chow, *12-Year Old Invents Braille Printer Using Lego Set*, *livescience.com*, February 18, 2014, <http://www.livescience.com/43455-lego-braille-printer.html> (last visited March 3, 2014).

¹⁴¹ Sullivan, *supra* note 6, pp. 129 – 130 (discussing “built-in” accessibility).

¹⁴² Ficsor, *supra* note 5, p. 2; Catherine Saez, *Miracle in Marrakesh: “Historic” Treaty for Visually Impaired Agreed*, Intellectual Property Watch, June 26, 2013, available at <http://www.ip-watch.org/2013/06/26/miracle-in-marrakesh-historic-treaty-for-visually-impaired-agreed/> (last visited August 15, 2014).