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The New Provisions on Access to Protected Works for Visually Impaired Persons – One Small Step for Copyright, One Giant Leap for People with Disabilities¹

Abstract: Due to different types of physical, intellectual or mental impairment, every sixth person in the European Union encounters obstacles related to full participation in social, cultural, artistic and economic life. Although the EU has taken several legal steps to counteract discrimination and strive for equal opportunities, disabled persons still have limited access to cultural goods such as printed material for example. However, this may soon change due to the adoption at international level of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled and, within the EU, the implementation of Regulation (EU) 2017/1563 and Directive 2017/1564. The aim of this article is to assess these legal acts within the context of their impact on ensuring equal treatment in access to works protected by copyright for people with disabilities.

Keywords: Copyright, disability, visually impaired persons, Marrakesh Treaty

1. Introduction

Due to different types of physical, intellectual or mental impairment, every sixth person in the European Union (hereafter: EU) encounters obstacles related to full participation in social, cultural, artistic and economic life². Given the aging population within the EU, it is highly likely that within the next few years the number of people

1 This paper is the result of research conducted within the project 2015/19/D/HS5/03150 “The limits of pluralism of intellectual property protection and the legal situation of disabled persons in IP law” financed by the National Science Centre, Poland.

2 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe, COM/2010/0636 final.

with disabilities will significantly increase, and therefore legal provisions will have to respond in a more positive way to the needs of those suffering impairment.

The problem of disability among EU citizens has been noticed and in response several legislative initiatives³ have been taken to counteract discrimination and strive for broadly understood equal opportunities. For example, the EU and its member states acceded to the United Nations Convention on the Rights of Persons with Disabilities signed in New York on 13 December 2006 and adopted the European Disability Strategy 2010-2020. However, this raises the question of whether, in addition to clearly perceiving the issue, the EU and member states will take specific actions to fulfil the obligations set out in the mentioned legal acts in order to meet the needs of people with disabilities so that they may participate in the social and economic life of the EU on equal terms with non-disabled people.

The involvement of disabled people in social, economic and cultural life should include among others the opportunity to participate in cultural and artistic life, both as creators and recipients of various artistic events, along with access to information, knowledge, goods and services. This participation is not only important because of the need to ensure a level playing field in society but also because of the positive impact it has on the treatment of various disabilities. This can be assured with the adoption of legal provisions. However, in my opinion, this goal should be achieved in small but consistent steps while introducing uniform and comprehensive provisions aiming at ensuring increased participation of disabled persons in all areas of life, is not possible due to its complex objective and subjective scope, resulting mainly from the various types and degrees of disability.

An important step towards ensuring equal functioning of the disabled in society is the WIPO Treaty adopted on the international forum – The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled, adopted on 27 June 2013 (hereafter: Marrakesh Treaty or the Treaty) and the follow-up EU acts: Regulation 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled (hereafter:

3 See Article 10 of the Treaty on the Functioning of the European Union (hereafter: TFEU), which require the EU to combat discrimination based on disability in defining and implementing its policies and activities, and Article 19 TFEU which gives the EU the right to take appropriate action to combat discrimination based on disability, and the Charter of Fundamental Rights, in addition to prohibiting discrimination based on disability (Article 21 of the Charter), also provides for respecting the rights of persons with disabilities to take advantage of measures to ensure their independence, social and professional integration and participation in community life (Article 26 of the Charter).

Regulation 2017/1563 or the Regulation)⁴ and Directive 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (hereafter: Directive 2017/1564 or the Directive)⁵.

The aim of this article is a short presentation of the above mentioned legal acts and their assessment within the context of their impact on ensuring equal treatment in access to works protected by copyright for people with disabilities.

2. The Marrakesh Treaty as a new beginning

The Marrakesh Treaty is the first international legal act, which refers to access to works for people with disabilities. Its objective scope is however very limited. In general, the beneficiaries of the Treaty are people with so-called print disability, classified according to three categories. Firstly, the Treaty applies to blind people, that is those who are totally or largely devoid of sight from birth or as the result of accident, disease or age. Secondly, the Treaty provides access to works for visually impaired persons or persons who have a perceptual or reading disability, which cannot be improved and who therefore are unable to read printed works to substantially the same degree as a person without such impairment or disability. Lack of the possibility to overcome a visual disability by wearing glasses or undergoing surgery qualifies for inclusion in this group. Moreover, this inability to correct eyesight should not be confined just to limitations and obstacles in the development of medicine and techniques to improve vision, it should also take into account financial constraints. Refusal to honour the rights of a visually impaired person simply because they lack the financial resources to benefit from correctable treatment, is not justifiable on humanitarian grounds.

The third group of beneficiaries was broadly defined and therefore it is possible to include in this category various other types of disability. It is made up of people who have any form of physical disability that makes them unable to hold or manipulate a book or to focus or move the eyes to an extent normally acceptable for reading. For the purpose of exercising the rights provided by this act, the Treaty does not require evidence of having a particular type of disability. This absence of obligation to provide formal documentary evidence of disability probably arises from the belief that formalities of any kind would cause unjustified restrictions on access to works to be imposed and secondly, that persons without any form of disability that prevents

4 OJ L 242, 20.9.2017, pp. 1-5.

5 OJ L 242, 20.9.2017, pp. 6-13.

them from reading will have no interest anyway in using the rights specified in the Treaty.

All of the above mentioned beneficiaries have the right of access to works within the meaning of Article 2 (1) of the Berne Convention for the protection of literary and artistic works⁶, but only in the form of a text, notation and/or related illustrations, whether published or otherwise made publicly available in any media through the right to convert them to an accessible format copy⁷.

The term “accessible format copy” means any work reproduced in an alternative manner or form that beneficiaries are able to acquaint themselves with, e.g. braille code, enlarged print, electronic and aural versions of a book. Some of these formats, such as e-books, are also available for use by fully abled people, therefore the Treaty expressly limits the right to make copies to only those required for the exclusive use of beneficiary persons. However, where applicable, the act of creating a copy of a work in an accessible format does not have to be performed by the beneficiaries themselves but may be undertaken by a person acting on their behalf (e.g. a parent, guardian or carer), or by non-profit making entities (providing activities for beneficiaries in education, training, adaptive reading or access to information) which are duly authorised or recognised by the relevant authorities in each country⁸.

Beneficiaries, people acting on their behalf and authorized entities when converting a work require to meet certain conditions, including the necessity of having lawful access to the work or copy thereof, and introducing to that work only such changes that are needed in connection with its conversion to an accessible format⁹. The Treaty not only allows making a copy of works in an accessible format without the consent of the rights holder, but also ensures the right to its distribution, including cross-border transfer between states that are party to the Treaty, which aims to limit the duplication of efforts to adapt the work in a way corresponding to the needs of people with print disabilities. States may however decide to limit the rights granted by the Treaty to works in a format enabling access for disabled people

6 Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, completed in Paris on 4 May 1896, revised in Berlin on 13 November 1908, completed in Berne on 20 March 1914, revised in Rome on 2 June 1928, in Brussels on 26 June 1948, in Stockholm on 14 July 1967, and in Paris on 24 July 1971, and amended on 28 September 1979.

7 Article 2 (b) of the Marrakesh Treaty defines “accessible format copy” as a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability. The accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons.

8 Article 2 (c) of the Marrakesh Treaty.

9 See more Article 4 (2) (a) (b) of the Marrakesh Treaty.

that are not available on reasonable terms on the open market¹⁰. Such limitation favours the stimulation of authors, and especially publishers and producers, to make copies of works available in accessible formats on their own initiative. This same effect may also be achieved as a result of inadequate clarification in the Treaty of some issues important to the parties involved, e.g. remuneration for using the works in connection with the restriction or exclusion of rights of entitled entities which, pursuant to Article 4 (5) of the Treaty, is left to the discretion of each state; likewise other issues such as remuneration to an author resulting from interference in his work as a result of its conversion to an accessible format. In such instances, a state may decide to either exclude or establish a low level of such remuneration thus providing an incentive for suitably adapted works to be published commercially at source.

3. Regulation No. 2017/1563 and Directive 2017/1564: further EU steps for the better good

Recognizing the necessity to provide access to works for people with disabilities that prevent them from reading standard printed materials, the Treaty was negotiated by the European Commission (hereafter: the EC)¹¹ in the name of the EU as a whole, and the EC was duly authorized to sign the act¹² which took place on 30 April 2014. Subsequently, on 21 October 2014, the EC presented a proposal for a Council decision on the conclusion of the Marrakesh Treaty on behalf of the EU¹³.

However, the EC proposal failed to obtain the required majority in the Council with some member states¹⁴ expressing doubt on the exclusive competence of the EU in this matter. Consequently, the EC submitted a request to the Court of Justice (hereafter: CJ) calling for an opinion on EU competence in respect the Marrakesh Treaty and a clear answer to the question of whether the EU possessed the exclusive competence to conclude the Treaty. The CJ confirmed the opinion presented in this case by the Advocate General Nils Wahl¹⁵, and acknowledged that the EU did indeed possess the exclusive competence to conclude the Treaty¹⁶.

10 Article 4 (5) of the Marrakesh Treaty.

11 Council Decision on the participation of the European Union in negotiations for an international agreement within the World Intellectual Property Organisation on improved access to books for print impaired persons; 16259/12 EU RESTRICTED.

12 Council Decision 2014/221/UE of 14 April 2014 on the signing, on behalf of the European Union, of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled, OJ EU L 115/1.

13 COM/2014/0638 final – 2014/0297 (NLE).

14 The Czech Republic, France, Lithuania, Hungary, Romania and the United Kingdom, presented the view that it is not within the EU exclusive competence to sign the Marrakech Treaty.

15 The Opinion of Advocate General Nils Wahl in case 3/15 presented on 8.09.2016.

16 The CJ Opinion in case 3/15 of 14.02.2017, ECLI:EU:C:2017:114.

Ahead of obtaining the CJ's opinion in this case, the EC began work on legislative proposals for implementation of the appropriate provisions in EU law in accordance with the Treaty. These proposals were presented on 14 September 2016, as the drafts of future Regulation 2017/1563 and Directive 2017/1564.

The aim of Regulation 2017/1563 is to provide and define the rules of export and import for non-commercial purposes of copies in accessible formats for the use of beneficiaries, as agreed between the EU and third states party to the Treaty¹⁷. On the other hand, the purpose of Directive 2017/1564 is to improve the availability of copies of works in accessible formats and to ensure the circulation of such copies on the internal market. Regulation 2017/1563 will apply in the case of exchanging copies of works between an entity from within the EU and a country outside this area that is party to the Treaty. In many aspects however, the Regulation refers to the provisions implementing Directive 2017/1564¹⁸ of the member state from which the parties share or obtain access to works in accessible format. The national rules implementing Directive 2017/1564 will also regulate access to such works for beneficiaries domiciled in the EU. Therefore, they will apply both in domestic and cross-border relations, i.e. within the EU and internationally.

Although the provisions of Regulation 2017/1563 and Directive 2017/1564 are formulated to accord with the content of the Treaty, they nevertheless contain certain modifications.

Firstly, the EU acts extend the circle of beneficiaries indicated in the Treaty to encompass people who, while not affected by visual or other physical disabilities, have impairments in perception or reading ability¹⁹, including dyslexia or other limitations of learning ability (autism, reduced intellectual functioning and the like), which make it impossible for them to read printed works to substantially the same degree as a person without such limitation²⁰.

Secondly, the EU legislator chose not to include in Directive 2017/1564 the optional provision of the Treaty relating to prior verification of the availability of a work in the appropriate format on the market which, according to Article 4 (4) of the Treaty²¹, should be investigated by beneficiaries, persons acting on their behalf or by authorised entities, before physically performing the act of making a copy of the work in accessible format²². The withdrawal of this requirement was due to

17 See recital 5 of the preamble to Regulation 2017/1563.

18 See Articles 3 and 4 of Regulation 2017/1563.

19 The Marrakech Treaty refers to people with limited ability to perceive or read, which results from the limits of visual function (Article 3 (b) of the Marrakech Treaty).

20 Article 2 (2) (c) of Regulation 2017/1563 and Article 2 (2) (c) of Directive 2017/1564.

21 See more: L.R. Helfer, M.K. Land, R.L. Okediji, J.H. Reichman, *Facilitating Access...*, pp. 122-123.

22 See Article 4 (4) of the Marrakesh Treaty, which allows the contracting parties to create an exception or a restriction of copyright only if the market is not able to offer the beneficiaries the opportunity to purchase the copies of works in an accessible format at a reasonable price.

doubts related to the practical application of such provision, concerning for example the manner of prior availability of the work, potential exclusion of the possibility of making a copy of the work available on the market in another form of accessible format, and affordability of the copy.

However, although the use of works already available on the market in accessible formats is financially attractive and limits the waiting time for obtaining a particular work, in practice this may not be that significant due to linguistic differences that exist between member states and third countries. Therefore, given that in the majority of cases this would mean reproducing a particular work in multiple languages, the actual incidence of cross-border exchange of adapted works is likely to be quite small. In addition, such exchange would have to take place on the basis of national provisions (only harmonised by Directive 2017/1564) due to the lack of uniform rules applicable throughout the EU. This in fact may adversely affect the cooperation of relevant entities in cross-border exchange which, due to differences in the content and application of national provisions, could serve to limit the ability of beneficiaries to access adapted works.

Another point worth mentioning, is that neither Regulation 2017/1563 or Directive 2017/1564 address the provision contained in Article 7 of the Treaty²³ relating to the prohibition of restricting access to works by rights holders by way of applying technological measures that prevent access to and reproduction of a work. The obligation to introduce measures necessary to ensure the rights against such circumvention in relation to the use of works for the non-commercial benefit of people with disabilities, already exists in Article 6 (4) of Directive 2001/29²⁴. However, national provisions limiting the use of technological reproduction measures should also refer to the new provisions aimed at implementing Directive 2017/1564. Otherwise achievement of the aims provided for in Regulation 2017/1563 and Directive 2017/1564 will be significantly jeopardised.

4. Final remarks

The Marrakesh Treaty opened a new chapter in the debate on the legal situation of persons with disabilities in intellectual property law, namely on access for people with print disabilities to works protected by copyright. It imposed the obligation to provide exceptions and limitations to copyright and related rights in order to create and distribute copies of works in formats accessible for people who, because of their

23 On the bases of Article 3 (5) of Directive 2017/1564, Member States have only to ensure that the exception referred to in Article 3 (1) cannot be excluded by contractual provisions.

24 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.06.2001 pp. 10-19.

disability, are not able to read the traditional printed form, and also to allow cross-border exchange of these copies²⁵.

The Treaty as well as the EU acts aimed at its implementation in EU law, undoubtedly constitute a significant and valuable contribution in providing access to printed materials²⁶ for people with disabilities that prevent them from reading, and thus promote respect for their inherent dignity²⁷. By limiting the scope of copyright protection, people with print disabilities attained the right of access to works in alternative accessible formats, a right which they did not have under any previously applicable legal act.

In assessing the adopted legal acts, one needs to take into account the fact that the content of the Treaty reflects a compromise between the position of rights holders defending limited access to their works and representation of the needs of access to such works by people with disabilities²⁸. Therefore, the very fact of accepting a treaty which aims at providing access to works for persons that, due to impairment, cannot benefit from general exceptions and limitations from the exclusive rights of the rights holder, is highly satisfactory. The real consequences of the adoption and application of the Treaty, Regulation 2017/1563 and Directive 2017/1564, is that it may not lead to access to works for people with print-disability that is an absolute equal to that enjoyed by fully able-bodied persons. The EU legislator was aware of this fact and in the preamble to Directive 2017/1564 it is not stated that this act should provide equal rights on access to works, only rights that are “substantially equivalent” to those of a person free of such impairment²⁹.

The discussed legal acts are, however, an attempt to improve the current situation and prove the need to move towards implementation of the principle of equal treatment. Requiring all member states to set up the legal systems seeking to meet

25 L. Zemer, A. Gaon (in: Copyright, disability and social inclusion: the Marrakesh Treaty and the role of non-signatories, “Journal of Intellectual Property Law & Practice” 2015/10, p. 849) points out that the Marrakesh Treaty has a historical dimension for three reasons. As the first international legal act in the field of copyright it refers to exceptions and restrictions on copyright, raises the issue of access to works for people with disabilities, and regulates cross-border access to works protected by copyright.

26 R.M. Hilty, K. Koklu, A. Kur, S. Nerisson, J. Drexler, S. von Lewinski, Position paper of the Max Planck Institute for Innovation and Competition concerning the implementation of the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print-Disabled, *International Review of Intellectual Property and Competition Law* 2015, p. 709.

27 E.J. Martinez Calvo, The role of libraries in the implementation of the Marrakesh Treaty for persons with a print disability, <http://library.ifla.org/913/1/070-calvo-en.pdf>, p. 8.

28 S. von Lewinski, *The Marrakesh Treaty...*, *op. cit.*, p. 125; see also C. Sganga, Disability, Right to culture and copyright: which regulatory option? “*International Review of Law, Computers & Technology*” 2015/29, p. 97.

29 Recital 7 of the preamble to the Directive 2017/1564.

the needs of some disabled to access to information and culture, which they must comply with by 11 October 2018³⁰, may be important but is only the first step towards improving the access to works for people with disabilities³¹.

The introduction of specific provisions to a state's legal systems may, hopefully, result in actions aimed at enabling disabled persons suffering health problems that limit their ability to use traditionally printed material, to acquaint themselves with a wider variety of works thus improving the currently bad situation in this regard, although of course, the extent of this improvement cannot be clearly predicted. The new provisions will probably play a much greater role in the process of balancing the access to works than the current Article 5 (3) (b) of Directive 2001/29/EC, which member states could, but were not forced to implement in their respective national legal orders. The generally formulated content of Article 5 (3) (b) of Directive 2001/29/EC and its optional nature caused that the present conditions of access to intellectual works for people with disabilities differ significantly from existing needs in this area. Likewise, Directive 2017/1564 also contains very general provisions and therefore member states have considerable leeway in implementing the Directive's aim by adopting national provisions which, taking into account the experience gained so far with regard to providing access to works for the disabled within the EU, can only be assessed negatively. That is why the member states now have an important role to play in the process of facilitating access to works for people with disabilities by precisely formulating the content of national legislation, thus eliminating the generalised nature of exceptions which invariably leads to the occurrence of shortcomings.

It would also be appropriate for the member states to introduce adequate mechanisms for submitting complaints and claims by beneficiaries in cases of improper performance of duties by authorised entities. The adoption of such a provision in national legislation, which was in fact proposed for introduction by the European Parliament in the process of adopting Directive 2017/1564, would likely increase effective access to works for persons with print disabilities. In addition, member states should set out in detail the terms and conditions of the system for reimbursement of the costs related to copy making.

As an advocate of equal treatment of persons with disabilities, which must necessarily take place at the rights holders' and authors' expense, I firmly believe that the provisions should be the beginning of the discussion on the rights of disabled people, not the goal itself.

30 Regulation 2017/1563 will apply from 12/10/2018; Member States have until 11.10.2018 to implement the provisions of Directive 2017/1564.

31 Recital 15 to Directive 2017/1564.

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