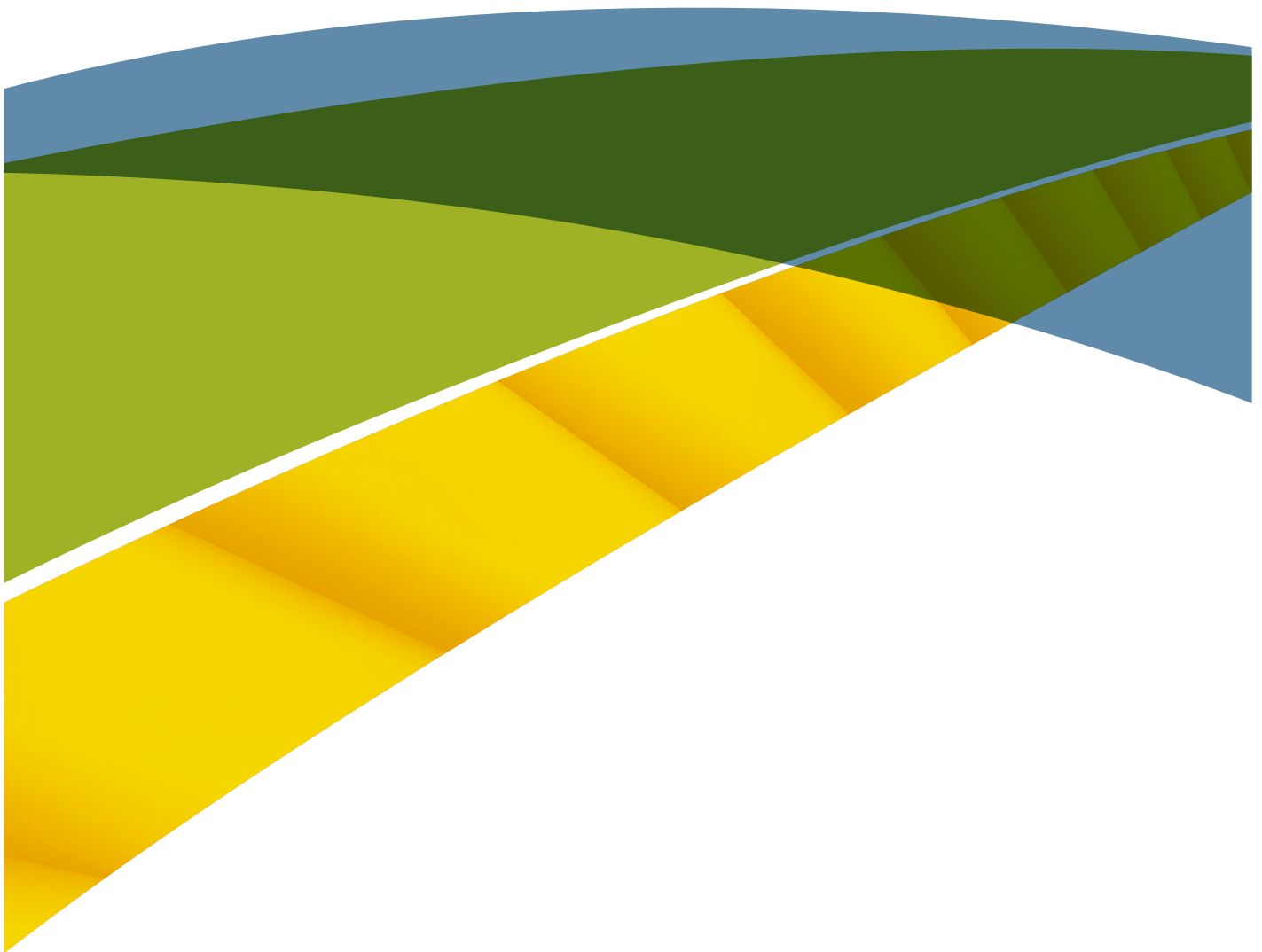




Intellectual  
Property  
Office

# Consultation on UK's implementation of the Marrakesh Treaty





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## Note to respondents

When responding, please indicate whether you are responding as an individual or on behalf of an organisation. If you are responding on behalf of an organisation, please make it clear whom the organisation represents.

It is not necessary to respond to all the questions; you are welcome to provide answers only to those issues of most interest or relevance to you. The Government will note all responses and publish a response document in due course, but will not respond to comments on an individual basis.

The consultation will run for six weeks and the closing date for responses is 11:45pm on Tuesday 19 June 2018. A response can be submitted by email or post.

Responses should be submitted by email to [MarrakeshConsultation@ipo.gov.uk](mailto:MarrakeshConsultation@ipo.gov.uk)

Or by post to:

Marrakesh Directive Consultation  
Copyright and Enforcement Directorate, Intellectual Property Office  
4 Abbey Orchard Street  
London SW1P 2HT

## Confidentiality and data protection

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (“FOIA”), the Data Protection Act 1998 (“DPA”) and the Environmental Information Regulations 2004). If you want other information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this, if you consider information you have provided to be confidential, it would be helpful if you could explain to us why this is the case. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Intellectual Property Office (“IPO”). The IPO will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.



## Introduction

The UK has long been committed to improving access to copyright works for visually impaired people both within the UK and internationally.

Globally, many visually impaired or otherwise print disabled people are unable to access copyright works because accessible versions of those works (such as Braille copies of books) are unavailable in their country. National copyright laws do not always allow accessible format copies of works to be legally made without the permission of the copyright owner, who may be unwilling to give permission or might be untraceable. Many countries, including the UK, provide exceptions to copyright allowing the making of accessible copies for people with visual impairment and other disabilities, but this position is not consistent around the world. Furthermore, although accessible copies may be legally available in one country, export of the accessible copies could lead to infringement of copyright in the importing country. This can lead to a situation where visually impaired and print disabled people in a country without the relevant copyright exceptions are not only unable to benefit from access to copies made in their country for people with such impairment, but are also prevented from receiving accessible copies made in another country.

The Marrakesh Treaty<sup>1</sup> (“the Treaty”) aims to improve visually impaired and print disabled people’s access to copyright works around the world by requiring its members to provide exceptions to copyright allowing the making of accessible format copies and transfer of such copies across borders.

On 14 September 2016, the European Commission published a Directive and a Regulation which will implement the Treaty. The Directive and Regulation were negotiated and agreed by the Council and Parliament of the European Union on 13 September 2017. The legislation is intended to improve access to copyright works for blind or visually impaired people across the EU and third countries. It is also intended to ensure the EU is consistent with the international obligations set out by the Treaty, and that the EU is able to become a party to it.

EU Member States are required to implement the Directive by 12 October 2018 and the Regulation will come into force through direct effect on the same date. The EU intends to deposit its instrument of ratification with WIPO so that the Treaty will apply to the EU on the same date as the Directive and Regulation enter into force.

This consultation seeks views on how the UK should approach implementing the Directive, ensuring the law is implemented in a way which promotes greater availability of accessible format works, while continuing to provide adequate protection for copyright owners.

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<sup>1</sup> Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled: [http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=301016](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=301016)

## Background

### The Marrakesh Treaty

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled was negotiated by members of the World Intellectual Property Organisation (“WIPO”) and agreed in Marrakesh on 27 June 2013. The Treaty aims to improve access to copyright works for people who are blind, visually impaired or otherwise print disabled. The Treaty achieves this through international harmonisation of copyright exceptions allowing the creation and supply of accessible format versions of copyright works, under certain conditions, without infringing copyright.

Among the acts permitted by the Treaty are the making and supply of accessible format copies by organisations working on behalf of visually impaired people, known as “authorised entities”, including the export of such copies to similar organisations or individuals in another country which is party to the Treaty (Article 5 of the Treaty). A further provision ensures that all Contracting Parties must allow the import of qualifying accessible copies of copyright works where the domestic law of the exporting country permits the making of such accessible copies for export (Article 6 of the Treaty).

The Treaty also includes a number of safeguards to ensure that copyright owners continue to receive adequate protection for their works and incentives to create new works. In particular, it reaffirms existing commitments to the “three-step test” – a provision in international copyright law which operates to ensure that exceptions to copyright do not unreasonably prejudice copyright owners’ interests or undermine markets for copyright works.



## The Directive

The Directive<sup>2</sup> was published in the EU Official Journal on 20 September 2017. EU Member States must transpose the Directive into domestic legislation by 11 October 2018. The Directive aims to harmonise, across the EU, copyright exceptions for those who are blind, visually impaired or otherwise print disabled.

## The Regulation

The Regulation<sup>3</sup> will have direct effect from 12 October 2018 and will not require transposition by Member States. The Regulation aims to allow the import and export of accessible format copies in accordance with the Treaty.

## UK Disability Exceptions

The UK's exceptions to copyright for disabled people can be found between Section 31A and Section 31F inclusive of the Copyright, Designs and Patents Act 1988 ("CDPA")<sup>4</sup>. Prior to 2014, these exceptions only applied to literary, musical or artistic works and could only be used for the benefit of people who were blind or visually impaired. However, the Copyright and Rights in Performances (Disability) Regulations 2014<sup>5</sup> broadened these exceptions so that they now apply to all types of copyright works and all types of disability which prevent access to copyright works, with the aim of improving outcomes for a wide range of people who are unable to access copyright works due to their disability.

There are two separate exceptions under UK law – one which allows a beneficiary person, or someone acting on their behalf, to make an accessible format copy of a work in their possession; and one which allows authorised bodies to make and supply accessible format copies to beneficiaries.

The UK's disability exceptions only apply to situations where works in the particular accessible format copy cannot be obtained under reasonable commercial terms by or with the authority of the copyright owner.

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2 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, COM (2016) 596: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32017L1564&from=EN>

3 REGULATION (EU) 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, COM (2016) 595: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32017R1563&from=EN>

4 <http://www.legislation.gov.uk/ukpga/1988/48/contents>

5 <http://www.legislation.gov.uk/uksi/2014/1384/contents/made>

## Why is the Government Consulting?

The CDPA is at present not fully compatible with the Directive. Areas where legislation is not currently compatible, and so will need to be amended include:

- The Directive precludes Member States from limiting exceptions for visually impaired people to situations where accessible format copies are not commercially available, which is the current approach taken in the UK<sup>6</sup> (further details discussed at 2.1);
- The obligations placed on authorised entities which serve beneficiary persons need to be updated in line with those in the Directive<sup>7</sup> (further details discussed at 2.2);
- The UK's present disability exceptions allow the "making and supply" of accessible format copies<sup>8</sup>, but do not permit communication to the public or public performance of accessible format copies to the extent required by the Directive<sup>9</sup> (further details discussed at 2.3);
- The UK's present disability exceptions do not apply to the sui generis database right, but this is covered by the Directive<sup>10</sup> (further details discussed at 2.4);
- Minor changes also need to be made to provisions on technological protection measures (TPMs)<sup>11</sup> (further details discussed at 2.5).

In addition, the Directive gives Member States the option to implement a form of compensation scheme for rightholders. This consultation seeks views on whether the UK should provide for compensation, and if so, whether this should be provided through collective licensing or direct payment (discussed at 3). It also asks whether other safeguards should be introduced, to the extent permitted by the Directive. payment (discussed at 3).

These measures will be implemented by amending relevant provisions of the CDPA. Reflecting the Government's overall policy not to discriminate between people with different types of disability, we intend to apply these changes to the disability exceptions in general, to benefit all those whose disability prevents them from enjoying a work to the same degree as a person who does not have that disability,<sup>12</sup> unless there is a specific reason not to do so.

6 Copyright, Designs and Patents Act 1988 (as amended), section 31A(2)(1)(a)(c), section 31B(2), section 31B(4), and Schedule 2, sub-paragraph 3B(3).

7 Copyright, Designs and Patents Act 1988 (as amended), section 31B(6), (7), (8) and (9), section 31BA(4), section 31BB, and Schedule 2, sub-paragraphs 3B(5), (6), (7), (8) and (9), sub-paragraphs 3C(4) and paragraph 3D, and the Directive, Article 5.

8 Copyright, Designs and Patents Act 1988 (as amended), section 31A, 31B, and 31BA, and Schedule 2, paragraphs 3B, 3C and 3E.

9 The Directive, Article 3(1)(b).

10 The Directive, Article 1.

11 Copyright, Designs and Patents Act 1988 (as amended), section 296ZE (9).

12 Copyright, Designs and Patents Act 1988 (as amended), section 31A(1), and Schedule 2, sub-paragraph 3A(1).

## Impact Assessment

We have identified three groups who will be impacted by our approach to implementing the Marrakesh Treaty and the EU's implementing legislation; people with different types of disabilities (beneficiaries), UK copyright owners and authorised bodies.

There is uncertainty over the overall impact, although we believe the main impact will be to UK copyright owners and UK authorised bodies. Unlike the Treaty and Directive, the UK exceptions cover all types of disabilities – any physical or mental impairment which prevents a person from accessing a copyright work – and all types of work, and as such the impact of the Treaty and Directive is likely to be minimal to beneficiaries. We are uncertain about the overall impact on UK copyright owners and UK authorised bodies, and the impact could vary depending on the following:

1. The market for commercially available accessible works and the extent to which the market is affected by the current commercial availability clause in UK law.
2. The nature of any potential compensation scheme for UK copyright owners, should the impact of removing the commercial availability provision be significant enough to merit one.

In Parts 2.1 and Part 3 we have set out potential implications of removing the commercial availability clause and possible compensation schemes, and as part of this consultation we want to assess any impact this may have. In order to make this assessment we would welcome economic evidence from affected stakeholders.

We will publish a full Impact Assessment after consultation, using the evidence gathered, to set out the potential impacts, and this will be published alongside domestic implementation.

## 1. Approach to implementing the Directive and Regulation

The Marrakesh Treaty and the EU's implementing legislation aim to benefit those who are blind, visually impaired or otherwise print disabled, by improving access to certain types of works. However, the UK disability exception covers all types of disabilities which prevent a person from accessing a copyright work and covers all types of works.

Reflecting the Government's overall policy not to discriminate between people with different types of disability, we intend to apply changes to the disability exceptions in general, rather than providing separate provisions for people with visual impairment or print disabilities and people with other disabilities, unless there are good reasons not to do so.

This would mean that an authorised body serving people who are deaf or hearing impaired will be able to use the exception in the same way, and be subject to the same obligations, as a body serving people who are blind or visually impaired. The outcome would be that people with different disabilities will be treated equally, as would the organisations serving them.

This approach would have particular benefits where a single authorised body serves people with different types of disability, or with multiple disabilities; for example, an organisation serving people with both hearing and visual impairment.

In line with this approach, most of the changes set out below will apply to the UK's disability exceptions as a whole. This would include changes to the acts permitted under the exceptions and the obligations on authorised entities acting in the UK. However, any provisions connected to the transfer of copies from other countries which are party to the Treaty will need to apply only to copies made for visually impaired or print disabled people, reflecting the scope of the Treaty and the EU's implementing legislation.

### Approach to implementation

- 1.1 Do you agree or disagree with our approach? If there are specific aspects which you think require different treatment, please identify these and provide evidence on the impact the proposal would have on you as an organisation or as a beneficiary person.

## 2. Mandatory Changes

### 2.1 Commercial Availability

Currently, Sections 31A, 31B and Schedule 2, paragraphs 3A and 3B of the CDPA contain 'commercial availability' restrictions, which put an onus on the beneficiary person, or those acting on their behalf (including authorised bodies), to pre-verify that copies in the same accessible format are not already available on the commercial market<sup>13</sup>. The intention behind these provisions is to ensure that commercial markets in accessible format copies are not undermined by the disability exceptions.

However, the Directive does not permit Member States to provide commercial availability restrictions<sup>14</sup>. Instead the Directive provides for other market safeguards, including:

- a. The option for Member States to provide schemes to compensate for any harm the exception may cause to rightholders;
- b. The requirement that domestic exceptions of Member States apply only in certain special cases which do not conflict with the normal exploitation of the work, and do not unreasonably prejudice the legitimate interest of the right holder; and
- c. An obligation on the European Commission to assess any negative impact the EU legislative acts have on commercial markets, 6 years after the date of entry into force<sup>15</sup>.

To ensure compliance with the Directive, commercial availability provisions must be removed from the UK's disability exceptions. However, other market safeguards, including compensation schemes, are permitted, and are considered in parts 3 and 4 of this consultation paper.

On 25 October 2016, the Intellectual Property Office published a 'Call for Views' on the European Commission's draft legislation to modernise the European copyright framework, including the proposed Regulation and Directive implementing the Marrakesh Treaty<sup>16</sup>.

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13 Copyright, Designs and Patents Act 1988 (as amended), section 31A(2)(1)(a)(c), section 31B(2), section 31B(4), and Schedule 2, sub-paragraphs 3A(2)(c) and 3B(3).

14 Recital 14 of the Directive – "in view of the specific nature of the exception provided under this Directive, its specific scope and the need for legal certainty for its beneficiaries, Member States should not be allowed to impose additional requirements for the application of the exception, such as the prior verification of the commercial availability of works in accessible format, other than those laid down in this Directive...".

15 The UK will conduct a post implementation review 5 years from the date the Directive and Regulation comes into force.

16 <https://www.gov.uk/government/news/call-for-views-modernising-the-european-copyright-framework>

Through the call for views, we sought to gain evidence on the impact of the commercial availability clause in UK law, what its removal would mean in terms of the number of accessible format copies available to visually impaired people, and the costs to commercial markets. The call for views ended on 6 December 2016 and provided little economic evidence on the impact of the commercial availability clauses, and none that would allow us to monetise costs and benefits. The European Commission did not prepare an impact assessment to accompany its legislation.

The December 2016 call for views identified support for commercial availability restrictions among groups representing rightholders, who argued that such provisions help to protect commercial markets. There was opposition among groups representing visually impaired people, who argued that these restrictions place unreasonable burdens on organisations which make accessible format copies, and that their removal would not affect commercial markets as these organisations have no incentive to make copies when they are already available commercially.

It remains unclear what impact removing commercial availability will have on the UK's disability exception, and on rightholders. As part of this consultation we want to assess any impact this may have, and in order make this assessment we would welcome economic evidence from affected stakeholders.

### Commercial availability

2.1.1 If you are a commercial publisher of accessible format copies, how many have you sold, or made available, in the last year? If possible, can you provide the average price of these copies, and the formats in which they are available?

2.1.2 Does your organisation, business or industry currently experience any administration costs relating to the 'commercial availability' provision? Please explain the source of these costs and provide a monetary value along with evidence on how this has been calculated.

2.1.3 What impacts would removing the 'commercial availability' provision have on your organisation, business or industry? What evidence is there for the impact? Please explain the impact and provide evidence on the costs and benefits to support this.

## 2.2 Obligations on authorised entities

The Directive, like the Treaty, requires Member States to have exceptions to copyright that allow certain organisations to make accessible copies of books and similar works and provide them to visually impaired and print disabled people. In the Directive and Treaty such organisations are called "authorised entities".

Section 31B of the CDPA provides an exception which takes a similar approach to the Treaty/Directive, permitting "authorised bodies" to make accessible copies of works and provide them to disabled people, under certain conditions.

In our view, the current definition of “authorised body” at Section 31F CDPA, together with the Section 31B (10) requirement that such bodies cannot profit from making accessible format copies, is consistent with the definition of “authorised entity” at Article 2(4) of the Directive so does not require amendment.

Article 5 of the Directive (in line with Article 2 of the Treaty) provides that an authorised entity should establish and adhere to its own practices, to ensure that it:

- a. Distributes, communicates and makes available accessible format copies only to beneficiary persons or other authorised entities;
- b. Takes appropriate steps to discourage the unauthorised reproduction, distribution, communication to the public and making available to the public of accessible format copies;
- c. Demonstrates due care in, and maintains records of, its handling of works or other subject-matter and of accessible format copies thereof; and
- d. Publishes and updates, on its website if appropriate, or through other online or offline channels, information on how it complies with the obligations laid down in points (a) to (c);

The CDPA currently provides slightly stricter obligations on authorised entities. In particular, the following provisions appear to go beyond the obligations set out in the Directive, so will need to be amended or deleted:

- Section 31B(6), (7), (8) and (10);
- Section 31BA(4);
- Section 31BB (in its entirety);
- Schedule 2, sub-paragraph 3A(3)
- Schedule 2, sub-paragraphs 3B(5), (6) and (9);
- Schedule 2, sub-paragraph 3C(4); and
- Schedule 2, paragraph 3D (in its entirety).

Many of the obligations which are set out in the Directive are already present in the CDPA. However, for consistency with the Directive and clarity for users of the exception, our preferred approach would be to simply transpose the obligations in Article 5 from the Directive into the CDPA.

### Obligations on authorised entities

2.2.1 Do you agree or disagree with our approach? If so, please explain and provide evidence on the impact this would have on you as an organisation or as a beneficiary person.

2.2.2 Do you think there are other alternatives to ensuring authorised entity obligations are compatible with the Directive? If so, please explain and provide details of your proposal.

## 2.3 Acts to which the exception applies

Article 3(1)(b) of the Directive states that the exception should allow an authorised body to "... make ...communicate, make available, distribute or lend an accessible format copy to a beneficiary person or another authorised entity". 'Communication to the public' is also referenced in the obligations of authorised entities under Article 5(1) (a) and (b) of the Directive.

By comparison, the disability exception at Section 31B of the CDPA permits authorised bodies to "make and supply copies". The term "supply" does not appear in the list of restricted acts in Chapter II of the CDPA, and although it is likely to cover the acts referred to in the Directive, this is not clear.

Therefore, we propose to amend the permitted acts so they are consistent with those set out in the Directive and with the terminology used in Chapter II of the CDPA.

### Acts to which the exception applies

2.3.1 Do you agree or disagree with our approach? If so, please explain and provide evidence on the impact this would have on you as an organisation or as a beneficiary person.

## 2.4 Sui Generis database right

The exception to copyright provided for under the Directive applies not only to copyright and related rights, but also to the sui generis database right established by Directive 96/9/EC ("the Database Directive"). The database right is an EU-only right granted to the maker of databases for which there was substantial investment in obtaining, verifying or presenting the contents.

Existing disability exceptions provided for under UK law do not currently apply to the database right. As such, changes will need to be made to UK law in order to apply these exceptions to the database right. Although the Directive only covers accessible-format copies created for the benefit for people who are blind, visually impaired or otherwise print disabled, it is the Government's preferred approach that such a change would apply to accessible format copies made for any form of disability.

### Sui generis database right

2.4.1 Do you agree or disagree with our approach? If so, please explain and provide evidence on the impact this would have on you as an organisation or as a beneficiary person.

## 2.5 Technological Protection Measures

Technological Protection Measures (TPMs) are often used to protect copyright works. An example is the copy protection which is usually applied to commercial DVDs.

TPMs play an important role in enabling rightholders to offer content to consumers in different ways, as well as protecting against unlawful copying. EU and UK law protects the right of rightholders to use TPMs to protect their work, and circumvention of such technology is illegal.



However, the use of TPMs can sometimes act as an unjustified barrier preventing people from benefiting from copyright exceptions which they would otherwise be entitled to use. In order to help mitigate this issue, Article 7 of the Treaty provides that contracting parties shall make appropriate measures to ensure that any legal protection or legal remedies against circumvention of effective technological measures do not prevent beneficiary persons from accessing accessible format copies. This provision has been implemented by Article 3(4) of the new Directive.

The UK already provides for a complaints mechanism where TPMs prevent people from benefitting from a copyright exception<sup>17</sup>, and this mechanism is consistent with the rules around the protection of TPMs granted by Directive 2001/29/EC<sup>18</sup>. In line with this Directive, the UK's complaints mechanism does not apply where copyright works are made available in such a way that they can be accessed by the public at a time and from a place of their choosing<sup>19</sup>, for example where a literary work is made available on the internet.

However, the new Directive provides that measures taken by Member States to enable beneficiaries of the new exception to make use of the copyright works protected by TPMs should apply even in cases where such works are made available in such a way that they can be accessed by the public at a time and from a place of their choosing. The UK will need to amend its existing complaints mechanism so that it is consistent with this provision in the Directive. This provision applies only to accessible format copies of books and similar works made for visually impaired people, and the mechanism will remain unchanged in relation to the wider disability exception and for other copyright exceptions in the CDPA.

### Technological protection measures

2.5.1 Do you agree or disagree with our approach? If so, please explain and provide evidence on the impact this would have on you as an organisation or as a beneficiary person.

2.5.2 If changes are made to the complaints mechanism in Section 296ZE of the CDPA, should this be in relation to all forms of disability, or just for visual impairments and print disabilities?

<sup>17</sup> Copyright, Designs and Patents Act 1988, Section 296ZE

<sup>18</sup> 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, Article 6.

<sup>19</sup> Copyright, Designs and Patents Act 1988, sub-section 296ZE(9), implementing paragraph 4 of Article 6(4) of Directive 2001/29/EC.

### 3. Compensation Schemes

The Marrakesh Treaty provides an optional provision which allows its Contracting Parties to implement a form of remuneration in national laws<sup>20</sup>. The Directive also allows Member States the option to provide schemes to compensate for any harm caused to rightholders by the use of the exception by authorised entities operating in their territory (“compensation schemes”).

However, according to Article [...] only certain types of compensation schemes are permitted – they should not require payments by beneficiary persons; should only apply to uses by authorised entities in a country operating such a scheme; and should not require payments from authorised bodies operating in another Member State or third countries. When determining the level of compensation, regard should be given to the non-profit nature of the activities of the authorised entity; the public interest objectives by the Directive; the interest of the beneficiaries of the exception; the possible harm to rightholders; and the particular circumstances of each case. Where the harm to the rightholder is minimal, no obligation for payment of compensation should arise.

The UK does not currently provide for compensation in its disability exceptions, as it considers rightholders’ interest to be sufficiently protected via a number of safeguards, including a commercial availability clause. With the removal of the UK’s commercial availability clause, however, we want to consult on whether the future disability exception should contain a scheme to compensate for any harm the exception may cause for rightholders.

We have identified three potential policy choices for compensation (which may be provided alone or in combination with other safeguards set out in part 4):

1. No compensation scheme;
2. Compensation via collective licensing;
3. Compensation via direct payment;

#### 3.1 No compensation scheme

Under this policy option we would not implement any form of compensation scheme. As mentioned above, the ‘call for views’ in December 2016 provided little economic evidence of costs to rightholders from removing the commercial availability clause. Without this information, it is not evident that harm to copyright owners arising from the exception will be such that a compensation scheme is necessary.

It is clear from the Directive that compensation must be in relation to any harm incurred by rightholders and if any harm is minimal then no compensation is due. This suggests that harm must be above a minimal threshold before compensation is justified.

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<sup>20</sup> Article 4(5), Marrakesh Treaty – “It shall be a matter for national law to determine whether limitations and exceptions under this Article are subject to remuneration”

The Directive also states that compensation schemes should only apply to authorised entities in the country operating such a scheme and should not require payments by authorised entities established in other Member States or third countries. This could lead to an outcome where authorised entities based within the UK are treated less favourably than those based outside the UK.

In view of the above, we believe there would need to be clear evidence of harm to rightholders, in particular evidence of harm to commercial markets in accessible format copies, to justify the introduction of a compensation scheme in the UK. We would welcome evidence of costs and benefits in responses to this consultation.

### No compensation scheme

3.1.1 Will the changes to the UK disability exception, in particular the removal of the commercial availability provisions, result in lost sales? If so, how? Is it possible to estimate the economic impact this may have? Will any impacts be such as to justify payment of compensation to rightholders?

## 3.2 Compensation via collective licensing

Should the consultation produce evidence that justifies compensation, we have identified two possible ways that compensation could be provided. The first of these is to provide compensation via a collective licensing scheme.

Prior to the implementation of the Copyright and Rights in Performances (Disability) Regulations 2014, the UK disability exception permitted licensing schemes. The Copyright Licensing Agency (“CLA”) operated such a scheme which in practice meant that accessible format copies were created under license rather than through the exception. The Regulations in 2014 removed the possibility for licensing over the exception on the grounds that it was an unjustified burden on authorised bodies, and rightholders were sufficiently protected by other measures, including the commercial availability restrictions.

One option for compensation would see the return of a collective licensing requirement which will take precedent over the disability exception. Under this approach, accessible format copies will need to be created under licence if one were available, and this would be the means via which fair compensation is payable. This would apply to authorised bodies rather than individuals creating an accessible format copy for a beneficiary person.

In addition, it may be seen as disproportionate to require all authorised entities in the UK to hold a collective licence to compensate rightholders when they will not all be engaging in activity which causes harm to those rightholders.

### Compensation via collective licensing

3.2.1 If the Government were to make provision for compensation, should it be delivered through collective licensing?

3.2.2 What potential issues (if any) do you foresee with the use of collective licenses to provide compensation to rightholders?

### 3.3 Compensation via direct claims by rightholders

This policy choice would allow rightholders to seek compensation from an authorised entity, in the form of damages, if they can demonstrate they have suffered harm from the actions of the authorised entity. Such an approach would mean that authorised entities would not need to hold collective licences in order to operate, and most authorised entities, in particular those which do not produce accessible format copies in competition with commercially-available copies, will be unaffected. But an authorised entity which produces accessible format copies which are already available on the market in the same form, to an extent that damages the commercial market for those copies, may face a claim for compensation in relation to the damage caused. In practice, such a provision is unlikely to be used, but it could act as an incentive to authorised entities to respect commercial markets in accessible format copies.

#### Compensation via direct payment

3.3.1 If the Government were to make provision for compensation, should it be delivered in the manner described above?

3.3.2 What potential issues (if any) do you foresee with the use of this approach to provide compensation to rightholders?

## 4. Other Potential Safeguards

Should the Government opt not to introduce a compensation scheme for rightholders, it may be possible to provide additional safeguards for rightholders. Such measures could include:

1. Retention of the commercial availability clause for certain types of disability;
2. Other measures consistent with the Berne “three step test”.

### 4.1 Retention of the commercial availability clause for certain types of disability

As the Directive only applies to visual impairment and print disabilities, the UK would retain discretion as to how it applies the exception to other forms of disability. This means that the UK could choose to partially retain its existing provisions on commercial availability provided these were only in relation to accessible format copies made for people with other types of disability.

As already stated, the Government will seek to treat all forms of disability equally, unless there is a good justification not to do so. As such, the Government would only consider this course of action where there is sound evidence to support taking a different approach with regards to types of disability or types of work not covered by the Directive.

### Retention of the commercial availability clause for certain types of disability

4.1.1 What would be the impact on you or your organisation of retaining a commercial availability clause in relation to accessible format copies made for types of disability not covered by the Directive?

4.1.2 Is there evidence to justify retaining this provision in relation accessible format copies made for types of disability, or in relation to types of work, not covered by the Directive?

## 4.2 Other measures consistent with the Berne “three step test”

Article 11 of the Treaty and Article 3(3) of the Directive provide that the exceptions must be compliant with the ‘Berne three step test’. This provides that exceptions to copyright shall only be provided in certain special cases which do not conflict with a normal exploitation of the work or other subject matter or unreasonably prejudice the interests of rightholders. It may be possible to set out additional requirements consistent with the three step test in the UK’s implementation.

### Other measures

4.2.1 Is there scope to provide additional requirements on use of the disability exception which are consistent with the three step test? Would such an approach help to minimise potential harm to rightholders?

4.2.2 Is there a risk that such an approach would result in greater legal uncertainty for authorised bodies?

## 5. Cross-Border Exchange of Accessible Format Copies

The Marrakesh Treaty provides that, if an accessible format copy is made under an exception in one Contracting Party, that accessible format copy may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party<sup>21</sup>. Similarly, Contracting Parties are obliged to permit the importation of accessible-format copies from other Contracting Parties, provided the making of such a copy complied with their national laws<sup>22</sup>.

These provisions have been implemented into EU law by Article 4 of the Directive in relation to exchange of copies between EU Member States and by the Regulation in relation to exchange of copies between EU Member States and third countries.

<sup>21</sup> Article 5 of the Treaty.

<sup>22</sup> Article 6 of the Treaty.

It is our view that the CDPA is already compliant with our obligations around the cross-border exchange of accessible-format copies. The CDPA does not place restrictions on the export of copies, and Section 27 provides that imported copies do not infringe copyright if their making would not have infringed copyright in the UK.

However, in view of the commitments under the Treaty, we may wish to expressly provide rules on cross-border exchange of accessible format copies.

### Cross-border exchange of accessible format copies

5.1 What are your views on this proposed approach?

5.2 Are there any areas in which the existing legislation creates a barrier to the exchange of accessible format copies? If so, what changes will be needed to overcome them?

## 6. EU-Exit Implications

On 23 June 2016, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.

The Directive and Regulation will enter into force before the UK leaves the EU. The Government intends that the UK will remain party to the Treaty following EU exit, and will ratify the Treaty in its own name at the appropriate point to ensure a smooth transition.

The Government is interested in hearing any views on the implementation of this legislation in the context of the UK's exit from the EU. If you would like to express your views on these issues, please do so in your response.



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