

EXPLANATORY MEMORANDUM TO
THE COPYRIGHT AND RELATED RIGHTS (MARRAKESH TREATY ETC.)
(AMENDMENT) REGULATIONS 2018

2018 No. 995

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Intellectual Property Office, an executive agency of the Department for Business, Energy and Industrial Strategy, and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The instrument implements Directive (EU) 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 (the “Marrakesh Directive”). The Marrakesh Directive, along with a related 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 implements the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (the “Marrakesh Treaty”). The Marrakesh Treaty is an international legal instrument which aims to improve visually impaired and print disabled people’s access to copyright works around the world. It does this by requiring its signatories to provide exceptions to copyright allowing the making of accessible format copies and the transfer of such copies across borders. This instrument amends UK law to ensure the UK’s existing copyright exceptions for disabled people comply with the Marrakesh Directive implementing the Marrakesh Treaty.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

- 5.1 The Minister of State for Universities, Science, Research and Innovation, Sam Gyimah, regarding Human Rights:

“In my view the provisions of the Copyright and Related Rights (Marrakesh Treaty etc.) (Amendment) Regulations 2018 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 This instrument meets the UK’s legal obligation to implement the Marrakesh Directive. It does so by amending the Copyright, Designs and Patents Act 1988 (the “CDPA”) and the Copyright and Rights in Databases Regulations 1997 (the “CRDR”). The Directive needs to be implemented by 11 October 2018. The Regulations (which amend the CDPA and related secondary legislation) are made under the powers contained in section 2(2) of the European Communities Act 1972.
- 6.2 The amendments made to the disability exceptions within the CDPA and to the CRDR by this statutory instrument are limited to those we consider necessary to implement provisions contained in the Marrakesh Directive. In certain circumstances, the language used in UK law is not exactly the same as that used in the Marrakesh Directive. The Marrakesh Directive and Regulation were cleared from scrutiny on 26 April 2018 by the House of Commons European Scrutiny Committee and on 20 December 2017 by the House of Lords European Union Committee.
- 6.3 Copyright and related rights are harmonised at the Union level. The Marrakesh Directive implements the EU’s obligations as a signatory to the Marrakesh Treaty. The Marrakesh Treaty’s aim is to “improve the availability and cross-border exchange of certain works and other protected subject matter in accessible formats for persons who are blind, visually impaired or otherwise print-disabled”. In turn, the Marrakesh Directive’s stated purpose is to “increase the availability of books and other printed material in accessible formats, and to improve their circulation in the internal market”. This instrument implements the Marrakesh Directive in UK law.
- 6.4 The Directive was published alongside a Regulation. That Regulation, which governs the status of cross-border exchanges of accessible copies of works between the EU Member States and countries outside the EU that are signatories to the Marrakesh Treaty, will apply in the UK on 12 October 2018.
- 6.5 The UK already provides exceptions to copyright for disabled people between Sections 31A and 31F inclusive of the CDPA (and equivalent exceptions to rights in performances in Schedule 2, paragraphs 3A to 3E inclusive of the CDPA). They 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.

7. Policy background

What is being done and why?

- 7.1 The Marrakesh Treaty is an international legal instrument which aims to improve visually impaired and print disabled people’s access to copyright works around the world. It does this by requiring its signatories to provide exceptions to copyright allowing the making of accessible format copies and the transfer of such copies across borders.

- 7.2 The UK already provides exceptions to copyright for the benefit of disabled people between Sections 31A and 31F inclusive of the CDPA (and exceptions to performers rights in Schedule 2, paragraphs 3A to 3E inclusive of the CDPA). They 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 in UK law, one which allows a disabled 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.
- 7.3 The Marrakesh Directive aims to harmonise, across the EU, copyright exceptions for those who are blind, visually impaired, or otherwise print disabled. To that end, it sets out a minimum standard for these exceptions, and changes to the UK exceptions are required to ensure UK law is compliant with EU law. These changes are set out below.
- 7.4 In line with the UK Government’s policy not to discriminate between people with different types of disabilities, where possible, changes are being made to the disability exceptions in the CDPA to cover all forms of disability which prevent a person accessing a copyright work, and all types of work, rather than just those specified in the Marrakesh Directive.
- 7.5 The current UK exceptions only apply to situations where copies of works in the particular accessible format cannot be obtained under reasonable commercial terms by, or with the authority of, the copyright owner. This means the exceptions cannot currently be relied upon if a commercial accessible format copy of a work is available. The Marrakesh Directive does not allow for the UK to retain these commercial availability restrictions, and this instrument removes these restrictions.
- 7.6 The Marrakesh Directive requires 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. These organisations are called “authorised entities”. The UK has a similar exception relating to “authorised bodies”, and many of the obligations set out in the Marrakesh Directive are already present in the CDPA. However, for consistency, this instrument transposes these obligations on authorised entities from the Marrakesh Directive directly into the CDPA.
- 7.7 The Marrakesh Directive also outlines permitted acts allowed by the exceptions, which are different to the permitted acts for the UK disability exceptions. This instrument amends the permitted acts in the CDPA so they are consistent with the acts set out in the Marrakesh Directive.
- 7.8 The exception to copyright provided for under the Marrakesh 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”). Sui generis database rights are not covered by existing disability exceptions in UK law. This instrument extends the exception to copyright provided for under the Marrakesh Directive to cover the sui generis database right, to ensure UK law is compliant with the terms of the Marrakesh Directive.
- 7.9 The Marrakesh Directive also requires that a complaints mechanism is available for users to complain when technological protection measures prevent the use of works under the exceptions, including where they have been made available in such a

manner that they can be assessed by the public at a time and place of their choosing. This complaints mechanism is already provided for in the CDPA, but does not currently extend to works made available in this manner. As such, this instrument amends the complaints mechanism in relation to works and beneficiaries covered by the Marrakesh Directive.

- 7.10 The instrument also amends two sections of the CDPA unrelated to the implementation of the Marrakesh Directive. The first of these is to amend section 18(2) CDPA relating to issuing copies of works to the public, and what constitutes an infringement of the right of distribution. It does so by re-implementing Article 9 of Directive 2006/115/EC to provide greater clarity. The second is to amend section 111(3B) of the CDPA to update an outdated legislative reference. Accordingly, a reference to the current Regulation (EU) (No 608/2013) concerning the customs enforcement of intellectual property rights has been inserted.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 The Intellectual Property Office will make an informal consolidated copy of the legislation available to the public (free of charge).

10. Consultation outcome

- 10.1 The Government consulted on its plans to implement the Marrakesh Directive for 6 weeks between 8 May and 19 June 2018. The consultation paper set out proposed amendments to those areas of the CDPA which are not currently compatible with the Marrakesh Directive. It sought views on whether the UK should implement a compensation scheme for rightholders, and whether this should be through collective licensing or direct payment. It also asked whether other safeguards should be introduced, to the extent permitted by the Marrakesh Directive. It placed an emphasis on ensuring that the law is implemented in a way which promotes greater availability of accessible format works, while continuing to provide robust protection for copyright owners. The consultation paper also sought industry views on the implementation of the Marrakesh Directive in the context of the UK's exit from the EU.
- 10.2 There were 15 responses to the consultation, received from bodies identifying as authorised entities, collecting societies and organisations representing rightholders. Most respondents generally agreed with the Government's approach. The main areas where there was a divergence of views related to the removal of the commercial availability restrictions and the Government's policy options for compensation.
- 10.3 Regarding commercial availability, some respondents questioned whether the Marrakesh Directive does require deletion of the commercial availability provision. However, after considering these comments, the Government maintains its view that keeping the provision would be in breach of the Marrakesh Directive.
- 10.4 As removal of the commercial availability provision may impact on rightholders, the Government considered whether to introduce a compensation scheme, which is

permitted by the Marrakesh Directive. The consultation paper therefore asked respondents to provide economic evidence of the impact of removal of the commercial availability clauses to justify the introduction of such a scheme, as the Marrakesh Directive is clear that compensation can only be awarded if there is evidence of harm. Respondents to the consultation were unable to provide sufficient evidence of harm to rightholders that would justify introduction of a compensation scheme. The Government also considers that it would not be fair to subject UK-based entities to such requirements as those based outside the UK would not be subject to the same obligations. In light of the lack of robust evidence of harm to rightholders, and the desire for fair outcomes for authorised entities, the Government has decided not to implement any form of compensation scheme.

- 10.5 The summary of responses and Government response to the consultation will shortly be available at <https://www.gov.uk/government/consultations/uk-implementation-of-the-marrakesh-treaty>

11. Guidance

- 11.1 The Government intends to publish guidance on obligations on authorised entities and the cross-border exchange of accessible format copies

12. Impact

- 12.1 The impact on charities or voluntary bodies is not significant. The EU Regulation will have some impact on UK businesses and authorised entities who make accessible copies/works. These impacts are mainly administrative, with the instrument removing the commercial availability clause and consequently, reducing the administrative burden to authorised entities of researching the commercial availability of each title before proceeding with their own provision. There will also be other minor impacts as UK businesses and authorised entities familiarise themselves with the new regulation.
- 12.2 The impact on the public sector is likely to be positive, although we expect this to be small. The EU Regulation/this instrument will make it easier for authorised entities to communicate accessible-format copies by authorised entities, making it easier for people with disabilities to access such works.
- 12.3 A ‘de minimis’ self-certification form has been completed for this instrument, as it is estimated that the net direct impact on business falls below the £5 million annual threshold.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 A statutory review clause is included in the Regulation.

15. Contact

- 15.1 Emily Jones at the Intellectual Property Office Telephone: 01633 813708 or email: Emily.jones@ipo.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Ros Lynch at the Intellectual Property Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 Sam Gyimah at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.