



December 22, 2014

President Barack Obama
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Re: Ratification Package for Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print-Disabled

Dear President Obama:

On behalf of the National Federation of the Blind (NFB), which is the oldest and largest nationwide organization of blind people in the United States, I write to urge the White House to put its full support behind U.S. ratification of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print-Disabled (the “Marrakesh Treaty”)¹, and to ensure the U.S. Department of State’s (“State”) ratification package facilitates a prompt ratification without elaborate implementing legislation.

In June of 2013, the World Intellectual Property Organization convened a diplomatic conference in Marrakesh, Morocco. The objective was to deliberate on a treaty to address the “book famine” plaguing the over three-hundred million blind, low-vision, and print-disabled people across the globe that are denied access to more than 95 percent of published works. Many blind people live in developing countries, where copying a work to make it accessible to the blind is considered a violation of copyright law. Trade to facilitate the exchange of accessible works across borders is also discouraged, as many of the same countries consider unauthorized distribution of accessible works an infringement, as well. The National Federation of the Blind was one of the key negotiators in Marrakesh, and we are proud that the conference ended with the adoption of a treaty that had enthusiastic support from the U.S. delegation, and is considered fair by a broad spectrum of stakeholders around the world, including rights holders and the ultimate consumers. The Marrakesh Treaty was adopted on June 27, 2013, and was signed by the United States on October 2, 2013. It currently has eighty-one signatories and has been ratified by four countries.²

¹ Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 28, 2013 [hereinafter Marrakesh Treaty], available at http://www.wipo.int/edocs/mdocs/diplconf/en/vip_dc/vip_dc_8_rev.pdf.

² http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=843 last accessed on September 9, 2014

The Marrakesh Treaty calls for contracting parties to adopt copyright exceptions that allow the making and distribution of accessible format copies, as well as the cross-border exchange of those works. More specifically, contracting parties should permit an “authorized entity” to convert works into an “accessible format copy” so “beneficiary persons,” like the blind, low-vision, or otherwise print-disabled, have access to those works, and to allow the importation or distribution of those works across borders. Because the Marrakesh Treaty was modeled after U.S. law, these exemptions and definitions can be found in two sections of the U.S. Copyright Act, 17 U.S.C. § 121, known as the Chafee Amendment, and 17 U.S.C. § 107, which is known as the “Fair Use Doctrine.”

Consequently, State’s ratification package should not include any implementing legislation or modifications to the Copyright Act as part of U.S. ratification. The National Federation of the Blind is not alone in this expectation: the Association of Research Libraries, American Library Association, Benetech, Creative Commons USA, and the American Council of the Blind all agree that ratification of the Marrakesh Treaty does not call for related changes to U.S. law. It should be noted that the American Bar Association officially adopted a resolution this summer urging prompt ratification of the Marrakesh Treaty. The report accompanying the resolution asserts that ratification by the U.S. need not cause amendment to our copyright code.

Despite this consensus, there are reports that some in the interagency governmental group working on the ratification package are calling for changes to the Chafee Amendment. This could be potentially very damaging: any proposed changes will impede ratification of the treaty, disrupt the status quo of the U.S.’ copyright apparatus (which most stakeholders agree is adequate and should not be disturbed), and even jeopardize the Beijing Treaty on Audiovisual Performances. We urge the White House to take action, exercise leadership in assembling the least complicated ratification package, and send such package to the Senate as soon as possible.

The Marrakesh Treaty exemptions and definitions are highly consistent with the Chafee Amendment. The Treaty calls for Contracting Parties to provide an exception in their national copyright laws to allow the reproduction and distribution of works in accessible format copies for the blind or those with print disabilities,³ and the Chafee Amendment similarly allows an authorized entity to reproduce or distribute specialized formats of previously published, non-dramatic literary works for the blind or people with other specified disabilities.⁴ Likewise, both

³ Article 4(1)(a) of the Marrakesh Treaty calls for Contracting Parties to “provide in their national copyright laws for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public as provided by the WIPO Copyright Treaty, to facilitate the availability of works in accessible format copies for beneficiary persons.”

⁴ 17 U.S.C. § 121. “It is not an infringement of copyright for an authorized entity to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary work if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities.”

consider a government or nonprofit agency whose mission is to provide services to the blind an “authorized entity,” and both call for the exemption to benefit people who are blind, or have another print disability caused by a physical limitation that cannot be corrected. There is only one inconsistency: the Chafee Amendment is limited to “non-dramatic works” while the Marrakesh Treaty applies to a broader scope of works.⁵ However, this inconsistency does not need to be addressed with implementing legislation in order for the U.S. to ratify the treaty.

In the few instances where a published work is not covered by the Chafee Amendment (i.e. a dramatic work) the Fair Use Doctrine provides a mechanism for coverage. The Fair Use provision of the Copyright Act allows for the reproduction of works depending on the purpose of the use, the nature of the work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect the use will have upon the potential market for the work.⁶ Although the Chafee Amendment was written, partially, to codify the application of this exemption to specific works in specific instances, the Fair Use provision offers an alternative basis to copy works to provide access for the blind. Courts have upheld that, in the case of an institution of education or library converting works (literary, dramatic, or otherwise) into accessible digital copies for blind students, the Fair Use Doctrine does indeed apply.⁷ This application, combined with the Chafee Amendment, means the totality of the Copyright Act is fully aligned with the Marrakesh Treaty.

There is another change that could be desirable for some but is not considered necessary for ratification. The National Library Service (NLS) for the Blind and Physically Handicapped under the Library of Congress serves as the primary public library for blind Americans, offering over one hundred thousand titles in Braille and accessible audio formats. In order for NLS to participate in the cross-border exchange of books as called for by the Marrakesh Treaty, its authorizing statute would need to be amended to allow the transmittal of accessible works to non-U.S. citizens. However, this change is desirable for NLS participation; it is not necessary for ratification.

Should these unnecessary changes be suggested or implemented, there could be a significant amount of conflict. The U.S. delegation to the diplomatic conference, which was once united in its championing of the Marrakesh Treaty, could become fragmented by internal conflict over what the language should be or how the changes would apply. The Congress, which is often stuck in a bureaucratic deadlock, could use that controversy as a reason not to ratify. The international community, which once admired our copyright system and wants to align with our laws, might start to doubt the validity of the Marrakesh Treaty all together. And as mentioned before, this move might jeopardize the Beijing Treaty on Audiovisual Performances’ chance of ratification.

⁵ Article 2(a) of the Marrakesh Treaty defines “works” as “literary and artistic works within the meaning of Article 2(1) of the Berne Convention for the Protection of Literary and Artistic Works, in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media.”

⁶ 17 U.S.C. § 107

⁷ *The Authors Guild, Inc., et. al., v. HathiTrust, et. al.* case by the United States Court of Appeals for the Second Circuit, [755 F.3d 87 \(2d Cir.2014\)](#)

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As a blind person and a parent of two blind children, I know firsthand the destruction caused by the book famine, and can only imagine how bad it is in developing and least-developed countries. The world cannot afford to exclude hundreds of millions of people from works that enrich lives, further education, and share critical information. As a leader in the organized blind movement and an American, I strongly believe the U.S. must be a leader and ratify the Marrakesh Treaty. This is not likely to happen if the ratification package is unduly complex and the White House fails to exercise leadership.

We encourage the White House to contact the interagency working group about the ratification package and our concerns, and also put pressure on the Senate to promptly ratify the Marrakesh Treaty. We welcome any suggested contacts at the Domestic Policy Council that we should connect with to further this conversation, and hope you will not hesitate to follow up if there are questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark A. Riccobono", with a long, sweeping flourish extending to the right.

Mark A. Riccobono, President
National Federation of the Blind

cc: Taryn Mackenzie Williams, Associate Director, Office of Public Engagement
cc: Jennifer Poole, Senior Economist, Council of Economic Advisers