

## **Report on cross-border exchange of accessible format copies for visually impaired persons : existing barriers and possible solutions**

### **Summary and recommendations**

The High Council for Literary and Artistic Property is an independent advisory board, in charge of advising the Minister of Culture and Communication on matters concerning literary and artistic property. It is also an observatory, making sure that author's rights and related rights are exercised and enforced. For this dual purpose, the Council can get involved in any matter relating to literary and artistic property and to its technological, economic and legal context. In 2013, the CSPLA entrusted Ms Catherine Meyer-Lereculeur, task officer from the Inspectorate-General of cultural affairs, with a mission about cross-border exchange of accessible format copies for visually impaired persons. Ms Catherine Meyer-Lereculeur submitted her report to the CSPLA on 21 October 2013, which is summarized as follows.

*1) Both the diversity of substantive rules of domestic laws regarding copyright exception for people with a disability and the uncertainty about the regime of cross-border distribution of adapted works create a situation of legal insecurity, which has so far impeded the development of such exchanges.*

1) The production of accessible format copies and their dissemination to people with visual impairments are governed by national laws that define the scope of the exclusive rights and the possible exception granted to people with a disability. These laws are currently very different : not only the scope of the exception varies from one country to another, but only a minority of countries around the world provide such an exception.

2) Cross-border exchange of accessible format copies, which are situations involving - by definition - a foreign element, are not covered by national legislation alone, but are protected under international rules of copyright established by the Berne Convention, the TRIPS Agreement and the WIPO copyright treaty.

3) The Berne Convention establishes minimum standards of protection, defined by the exclusive rights that should be granted to authors and by exceptions that may limit these rights. The exception for people with a disability is thus authorized by the Convention and the treaties, in so far as it fulfils the conditions of the three-step test. However, the Convention sets no substantive rule on the cross-border exchange of copies which is based on national exceptions to copyright.

4) In the absence of such explicit international rule, cross-border exchange of copies is a matter of conventional rules of private international law, which determines which national law is to be

applied, among two competing laws. In this case, the conflict-of-law rules set in article 5.2 of the Berne Convention confer jurisdiction to the law of the country where protection is claimed.

5) These conflict-of-law rules, reflecting the territoriality principle of intellectual property rights, is now widely considered to confer jurisdiction to the law of the country of the country for which protection is claimed. The regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) recognises such an interpretation at European level. This interpretation is adopted as well by the « The conflict -of-law principles in the field of intellectual property », a soft law instrument published under the *aegis* of the Max Planck Institute, for both ordinary law and exceptions.

6) The conflict-of-law rules laid down in the Berne Convention should, in theory, solve some of the issues raised by cross-border exchange of copies. As a result, when a work that has been converted to an accessible format copy in another country is disseminated in France, the French law applies to this dissemination. On the contrary, when a work converted in France is disseminated in another country, the law of this latter is to be applied (e.g., the law applicable to the dissemination in Belgium of a work converted in France is Belgian law). However, in practice, these issues are far from solved, for the rule of article 5.2 is subjected to varying interpretations, both internally and internationally, that may lead to designate another applicable law. The question of applicable law and its impact on how an exception to the exclusive rights may be invoked is not new : it has been the subject of case-law in France and Belgium, in cases where Google argued for the application of the exception of fair use under U.S. law.

7) In the absence of internationally harmonised substantive rules, and of uniform interpretation of article 5.2 of the Berne Convention, the legal regime for cross-border exchange is somewhat unclear. Moreover, this uncertainty is increased by the difficulty in interpreting the material content of a national law, in particular concerning the scope of existing exceptions to the distribution and making available rights, as well as the scope of the conditions for the exhaustion of the distribution right.

8) Such uncertainties turn into a risk that the distribution of accessible format copies in a third country is characterised as an infringement (even in the area of criminal law, for States whose legislation does not distinguish commercial uses from other uses), which makes the position of cross-border exchange very difficult from a legal point of view and has hitherto hindered its development. In practice, such exchange is very limited, thus further limiting the supply available for visually impaired persons.

9) In view of the fact that the adoption of conventional conflict-of-law rules relating to intellectual property in the WIPO or the WTO is highly unlikely, the harmonisation of the substantive rules seems to be the most suitable solution from a legal point a view.

*II) The Treaty adopted on 28 June in Marrakech by the 184 members of the WIPO, despite its imperfections, is a major step in creating a binding legal framework.*

10) First, the Treaty does not only require States to establish an exception in their national copyright law for persons with visual impairments, but provides also the mandatory content of such an exception, *i.e.* the acts covered by the exception (reproduction right, distribution right and right of making available to the public) and the definition of final beneficiaries. Thus, the Treaty makes an international harmonisation of legislations possible, leaving no further room for interpretation disputes about conflict-of-law rules. If the law of country A is identical to that of country B, no matter which one is applicable.

11) Second, by requiring States to introduce into their legislation a provision *expressly* authorizing the dissemination in B country, of works converted to an accessible format copy in country A (by distribution or making available copies), without the consent of the rightholders, the Treaty offers

the opportunity of escaping the uncertainty about the legality of cross-border exchange. It puts an end to discussions relating to cases in which prior authorization of rightholders is required for both « exports » as « imports » (terms used for ease of reference), by eliminating the matter about the conditions for the exhaustion of the distribution right.

12) Finally, the main merit of the Treaty is that it fosters the development of cross-border exchange, by creating a framework more protective for copyright than current legal uncertainty. Although rightholders may register a degree of reservation on some of its aspects, which could be seen less protective of their interests, the Treaty lays down rules whose compliance with shall be verified and whose violation could be sanctioned. Without such rules, cross-border exchange could grow out of control. Despite its imperfections, the Treaty is therefore a safe « net » for both rightholders and organizations and individuals beneficiaries.

### **Recommendations**

The third part of the report analyzes possible solutions and makes a number of recommendations.

The adoption of the Marrakech Treaty expands the range of solutions that promote cross-border diffusion in a legal framework for the protection of author's rights. Solutions based on international and European harmonisation will only be implemented in the medium term. Nevertheless, France can help achieve them in the short term with independent solutions of harmonisation. These solutions are based on two complementary approaches : France should at the same time, firstly, take the initiative for the adoption of bilateral agreements, and secondly, amend the intellectual property code.

- **Proposal 1: Ensure that the Treaty is signed and ratified by France as soon as possible ;**
- **Proposal 2: Encourage our European partners to do the same ;**
- **Proposal 3 : Work through the European bodies to achieve a prompt implementation of the Treaty obligations in the Union legal order ;**
- **Proposal 4: Conclude several bilateral agreements to develop cross-border exchange, starting with the French-speaking and the English-speaking countries ;**
- **Proposal 5: Amend as soon as possible the article L. 122 -5 (7 °) of the intellectual property code by implementing the provisions of the Treaty of Marrakech.**