

## 7. MARRAKESH TREATY: EDUCATION GATEWAY FOR THE VISUALLY IMPAIRED STUDENTS IN KENYA

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### ABSTRACT

Visually impaired persons face numerous encumbrances regarding access to educational reading materials. This is attributable to rigid copyright regimes, taxation, logistics and limited return on investments that compel publishers to eschew publishing works in specialized formats for use by visually impaired persons. While normal students are spoilt for choice, students living with disabilities find themselves hemmed in a limited world. However, the ratification of Marrakesh Treaty by the Republic of Kenya on 2<sup>nd</sup> June 2017 and the subsequent publication of Copyright (Amendments) Bill in September 2017 is a prodigious development. The Copyright (Amendment) Bill seeks to domesticate the Treaty within the Kenyan legal framework. The Treaty limits the rights of authors in recognition of the rights of the visually impaired persons to access information. Once in force, publishers will be at liberty to publish reading materials without seeking reference to original authors. This will in effect open a world of choice for the visually impaired students and hence level the playing ground to enable them to compete favourably with other students. The proposed changes will have a great impact not only on the education sector, but also on the publishing industry, Collective Management Organizations among other entities. The paper

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<sup>1</sup> National Coordinating Agency for Population and Development, 'Kenya National Survey for Persons with Disabilities – Preliminary Report' (March 2008).

will discuss at length the merits and demerits of domestication of Marrakesh Treaty by Kenya.

**Key words:** *Marrakesh Treaty; Visually Impaired; Copyright; specialized formats; rights*

### 1. BACKGROUND PERSPECTIVES ON DISABILITY IN KENYA

According to the World Health Organization (WHO), disability affects 10% of every population (3.5% of the whole population) and an estimated 650 million people worldwide, of whom 200 million are children.<sup>1</sup> A large portion of this population includes people who suffer physical impairment, which is about 413,698 persons. The next largest group is made up of those with visual impairment (331,594).<sup>2</sup> Globally, an estimated 90% of all written materials published worldwide are unable to be accessed in a format that meets the needs of individuals who are blind or have a print disability.<sup>3</sup> Limited access to works in accessible formats is a barrier to participation in public life and restricts employment, educational and recreational opportunities for the estimated 331,594 Kenyans with a print disability.

Lamentably, these Kenyans living with disabilities face insurmountable challenges in form of open discrimination, social and cultural stigmatization, lack of adequate resources, and debasement, among others. For instance, among Agĩkũyũ people, the social stigmatisation is culturally embodied in their language. A closer look at Gĩkũyũ grammar reveals that many rules that are used in assigning meaning to objects and speech acts are dependent on status of items

<sup>2</sup> Kenya National Bureau of Statistics, 'Analytical Report on Disability Volume XIII' (2013)

<<https://www.knbs.or.ke/download/analytical-report-on-disability-volume-xiii-2/?wpdmdl=3754>> accessed 8 May 2019.

<sup>3</sup> Report of the Commerce Committee, International Treaty Examination of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled Report of the Commerce Committee (New Zealand) <[https://www.parliament.nz/resource/en-NZ/SCR\\_74562/51f51fb80a23c95c8c9719a25f31cfc49f42f127](https://www.parliament.nz/resource/en-NZ/SCR_74562/51f51fb80a23c95c8c9719a25f31cfc49f42f127)> accessed 11 February 2018.

or elements being described. Leakey elucidates how nouns, verbs and other parts of speech are constructed and deployed in speech acts.

In Gĩkũyũ language, Leakey discusses how the first three classes of nouns in Gĩkũyũ represent things that have a spirit. Leakey divides them according to the importance of the category of spirit, which they are deemed, to possess. He illustrates that Class I includes nouns that denote human beings. Humans may be removed from this class to another class (but still retain a spirit) due to scorn or hatred, or otherwise for having 'some special connection with religion, or magic.'

Most large trees and plants fall within Class II. Additionally, epidemic diseases which are viewed as being spirit borne would, according to Leakey, normally go to class III, but for some reason may find themselves in class II. While Class III is used to denote nearly all birds, reptiles, insects, mammals, and many lesser plants, are in this class. Humans in this class have received quite a demotion and social contempt, examples of these terms include: *Ngĩa* – pauper, *Ngombo* - serf or slave, *Ndungata* (servant), *Gĩtumumu* (a blind person), *Gitaigua* (dumb), *Kionje* (physically challenged) and *Kirimu* (mentally challenged). Such cultural and linguistic nuances prove that people living with disabilities are principally regarded as 'sub humans' deserving scorn, contempt and mockery.<sup>4</sup>

## 2. CHALLENGES EXPERIENCED BY VISUALLY IMPAIRED STUDENTS

People living with disabilities in Kenya face a plethora of challenges that prevent them from enjoying the bundle of rights as contemplated in the Kenyan Constitution of 2010 (2010 Constitution), other Kenyan statutes and international

legal instruments. These challenges include legal and institutional framework, lack of adequate supportive institutions such as libraries, special schools and accompanying resources.

Brinkley acknowledges that 'blind people face challenges that most of us cannot even imagine. Without the aid of our eyes, the world would be hostile and unfamiliar.'<sup>5</sup> Matanga deprecates the poor attitude toward people with disabilities by those not suffering from such conditions, noting that this is a world phenomenon. She adds that discrimination against the disabled takes place daily throughout the world. It does not matter whether disabled individual is a resident of developed or developing country. Such 'discrimination is not based on economic status but rather it is based on negative attitudes and intolerance.'<sup>6</sup>

Suomi & Sachdeva make an interesting observation regarding blindness. They hold that 'blindness is a major accessibility hindrance to various information resources, including paper-based documents, internet, mobile telephony as well as Traditional TV.'<sup>7</sup> They conclude that visually impaired persons are 'further encumbered with innovating technology, which sometimes enables, and sometimes prevents equal access.'<sup>8</sup>

Additionally, seen from the prism of persons living with visual impairment, copyright law presents discernible challenges. Copyright owners hold what scholars refers to as 'negative rights.' Feather & Sturges explain that copyright is considered a negative right because it does not confer to someone the right to copy items, but rather it gives the owner the right to prevent others from copying without his

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<sup>4</sup> Louis S B Leakey, *First Lessons in Kikuyu* (Nairobi—East African Literature Bureau, 1959).

<sup>5</sup> Timothy L. Brinkley, *A Disciples Dilemma Series Sermons for Spiritual Growth* 246 (2013).

<sup>6</sup> Zephania Matanga, 'A Comparison of Institutional Discriminatory Practice against People with Disabilities in North America and Africa: Cases in Zimbabwe and Canada', in *New Directions in Africa*

*Education: Challenges and Possibilities* (University of Calgary Press edn. 2008).

<sup>7</sup> Reima Suomi & Neeraj Sachdeva, 'Internet Accessibility for Visually Impaired', in Maria Manuela Cruz-Cunha, Isabel Maria Miranda, Ricardo Martinho, Rui Rijo (eds.), *Encyclopedia of E-Health and Telemedicine* 250-59 (2016).

<sup>8</sup> *ibid.*

or her permission, to the chagrin of the persons living with disabilities.<sup>9</sup>

Indeed, many jurisdictions fail to recognize special needs of people living with visual impairments. Ouma & Sihanya illuminate that in Kenya, the exceptions and limitations as stipulated in Kenyan copyright regime fail to address issues of visually impaired persons.

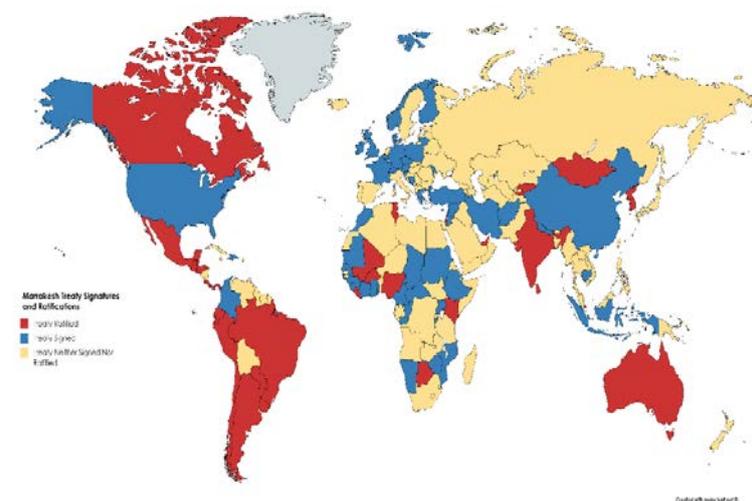
The law makes it clear that the right to control adaptation and translation of any work vests in the rights holder. This means that before any person translates a work into Braille format, for instance, such a person must obtain permission to do so from the rights holder.<sup>10</sup>

The majority of world literature has a bias towards sighted persons. Those with visual impairment suffer greatly since most of these works cannot be transformed into specialized formats without prior permission of the copyright owner. Bently & Sherman believe that this need for prior permission contributes to what they call the, 'book famine.' They point to the fact that today a paltry percentage of world literature (between 1 and 7%) is accessible to the blind, visually impaired, and print disabled persons. The death of reading materials in specialized format has come because of publishers eschewing publishing special formats owing to copyright and related logistics.<sup>11</sup>

Consequently, this has disadvantaged VIPs (the blind, visually impaired and otherwise print disabled) because they are unable to access reading materials in a form that is compatible with their condition. Inability to make these materials accessible is discriminatory and goes against the letter and spirit of the Kenyan Constitution, statutes and international legal instruments. The government has introduced a raft of measures which include promulgation of the 2010 Constitution, enabling legislations and signing or ratification of international legal instruments to help better serve the needs of VIPs.

Article 5 of the Marrakesh Treaty encourages cross border sharing of VIPs materials, but while Kenya has ratified the Treaty, her neighbours have yet to do so. Uganda and Ethiopia have only signed the Treaty while Tanzania, South Sudan, Rwanda, Burundi and Somalia have given the Treaty a wide berth. Because of this, Kenya will be able to produce or import such materials through authorized agents, but beneficiaries in Kenya are constrained in as far as cross border exchange of VIP materials are concerned.

Figure 3. Countries that have ratified Marrakesh Treaty



Source: WIPO

### 3. DISABILITY: LEGAL AND CONSTITUTIONAL FRAMEWORK IN KENYA

Kenya has made great strides towards promoting and protecting people living with disabilities. The progress is discernible through deliberate legal and institutional frameworks. The Bill of Rights in 2010 Constitution has been hailed as one of most progressive in African continent. Other disability related laws include but are not limited to: Persons with Disabilities Act Cap 133 of Laws of Kenya; Election Act 2011, Social Assistance Act No. 24 of 2013, Sexual Offence Act, and Basic Education Act 2014.

<sup>9</sup> John Feather and Paul Sturges, *International Encyclopedia of Information and Science* (2nd edn. 2003).

<sup>10</sup> Marisella Ouma & Ben Sihanya, *Kenya, in Access to Knowledge in Africa: The Role of Copyright* 93 (Claremont: UCT Pres ed. 2010)

<sup>11</sup> Lionel Bently, Brad Sherman, Dev Gangjee & Phillip Johnson, *Intellectual Property Law* (5th edn. 2018)

The 2010 Constitution recognizes and accepts the rights of people living with disabilities. Article 7 recognizes sign language, braille and other communications accessible to persons with disabilities as part of the official languages. Article 20(5)(b) obliges the court, in applying any rights under Article 43 to be guided by the principle that 'in the allocation of resources the state shall give priority to the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances including the vulnerability of particular groups or individuals.'<sup>12</sup>

Article 21 of the 2010 Constitution requires every state organisation to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights and address the needs of vulnerable groups within society, including persons with disabilities.

Article 27(4) on non-discrimination prohibits direct or indirect discrimination against any person on any ground including disability. Article 28 promotes respect and protection for human dignity of every person. Article 43 recognizes economic and social rights including the highest attainable standard of health, housing, sanitation, freedom from hunger, clean and safe water, social security, education and emergency treatment.<sup>13</sup>

Article 97(1)(c) requires the 12 nominees to the National Assembly to include persons with disabilities, while Article 98 (1) requires 2 nominees to the Senate to be persons with disabilities. Article 177(1)(c) specifically outlines how people living with disabilities will be appointed to the County Assemblies.<sup>4</sup>

Article 43 (1) defines economic and social rights to include right to education, while Article 53 (a) pronounces that every child has the right to free and compulsory basic education. Article 54 of the 2010 Constitution lists a plethora of rights to persons with disabilities which includes access to educational institutions and facilities with disabilities that

are integrated into society to the extent compatible with the interests of the person. They are also entitled to access materials and devices to overcome constraints arising from the persons' disability.<sup>5</sup>

This provision raises fundamental issues regarding the access of these materials for visually impaired persons in Kenya, principally because for these materials to be made accessible, they must be transformed from their original formats to special formats accessible to the visually impaired persons. Transformation of such materials into special formats requires appropriation of intellectual property rights. Article 260 defines property to include intellectual property.<sup>6</sup>

Article 11(c) as read together with Article 40(5) obligate the state to support, promote and protect the intellectual property (IP) rights of the people of Kenya. One of these IP rights is copyright.

#### 4. COPYRIGHT LEGAL FRAMEWORK IN KENYA

Development of copyright law can be traced back to 1966 when the country enacted her first *sui generis* copyright law. The copyright law has been revised variously to conform to evolving international laws. The changes that have been incorporated into the copyright law include: 1975 revision that included folklore as copyrightable work following the adoption of the Tunis Model Law on Copyright for Developing Countries; the Copyright 2001 amendments that assimilated the provisions of WIPO Copyright Treaty (1996), the WIPO Performances and Phonogram Treaty (1996) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) (1994).<sup>7</sup>

Copyright law gives a copyright owner a bundle of exclusive rights, including the rights to copy, sell, distribute, publish and make other versions of the work in different media. Any person using such works without permission from the

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<sup>12</sup> Constitution (2010) (Kenya), art. 7, 20, 43

<sup>13</sup> *ibid*, art. 27.

<sup>4</sup> *ibid*, art. 97(1)(c).

<sup>5</sup> *ibid*, art. 43, 53, 54.

<sup>6</sup> *ibid*, art. 260.

<sup>7</sup> TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

original owner is an infringer.<sup>8</sup> However, the Berne Convention provides the 'three step test' in which the exception to this rule applies. According to Bently & Sherman such exceptions must be limited to certain cases, should not conflict with a normal exploitation of work and must not unreasonably prejudice the legitimate interests of author.<sup>9</sup>

In Kenya, copyright issues are regulated under the Copyright Act of 2001 (the Act), which Ouma & Sihanya refer to as the only statute that specifically applies to copyright in Kenya.<sup>10</sup> Kamau elucidates that the Act confers copyright upon an author whose work may or may not be registered under the Act.<sup>11</sup> Nzomo exemplifies bundles of rights provided in the Act. Under sections 26 and 32 of the Act, copyright protection grants authors and owners a bundle of exclusive rights which are both economic (reproduction, publication, communication to the public, adaptation, performance/display) as well as moral (paternity and integrity). Economic rights may be transferred either by license or assignment from the author to owner, licensee or assignee.<sup>12</sup> Kamau notes that according to this law, any exploitation of these rights without prior authority of the owner constitutes infringement.<sup>13</sup>

In Kenya, just like any other jurisdiction in the world, the successful of application of these rights is attributable to the TRIPS Agreement which came into force in 1994. The agreement covers previous non-binding IP treaties including the Paris Convention (1967); Berne Convention (1971); Rome Convention (1961); the Treaty on Intellectual Property in Respect of Integrated Circuits (1989); the General Agreement on Tariffs and Trade 1994 (GATT 1994) and WTO Dispute Settlement Understanding (1994). The TRIPS

agreement obligates member states to 'promote effective and adequate protection of intellectual property rights and to ensure measures and procedures to enforce intellectual property rights do not become barriers to legitimate trade meet and enforce minimum standards.'<sup>14</sup>

## 5. KENYA AND INTERNATIONAL LEGAL INSTRUMENTS ON DISABILITY

Kenya has ratified several international legal instruments relating to the rights of people living with disabilities, such as the Universal Declaration of Human Rights of 1948 (UDHR) and the Marrakesh Treaty and UN Convention on Rights on Rights of Persons with Disabilities (CRPD) which was ratified by Kenya in May 2008. These international legal instruments are part of the laws of Kenya in line with Article 2(6) of the Constitution of Kenya 2010, which makes Kenya a monist state. The CRDP Convention obligates state parties to promote the full realization of all human rights and fundamental freedoms for persons with disabilities, without discrimination of any kind based on disability.

Internationally and regionally, Kenya is party to various treaties and protocols relating to the protection and enforcement of intellectual property rights (IPR). These treaties and protocols are key to protection of IPR because they create common rules and regulations for the member states. Kenya is a member of the World Intellectual Property Organization (WIPO), Africa Regional Intellectual Property Organization (ARIPO) and the World Trade Organization (WTO), which implement international treaties related to IP protection and IPR disputes. Kenya is a party to the Convention establishing the World Intellectual Property

<sup>8</sup> Tad Crawford, *Legal Guide for Visual Artist: A Handbook for Painters, Sculptors, Illustrators, Printmakers, Photographers and all other Visual Artists*. (Hawthorn Books 1977) 8.

<sup>9</sup> Lionel Bently, Brad Sherman, Dev Gangjee & Phillip Johnson, *Intellectual Property Law* (15th edn. 2018).

<sup>10</sup> Ouma & Sihanya (n 10).

<sup>11</sup> Grace Wambui Kamau, 'Copyright Challenges in Digital Libraries in Kenya from Lens of a Librarian', in Adeyinka Tella & Tom Kwanya (eds.) *Handbook of Research on Managing Intellectual Property in Digital Libraries* (2017).

<sup>12</sup> Victor Nzomo, 'E- Commerce and the Law in Kenya: Copyright Implications' (*Centre for Intellectual Property and Information Technology Law Blog*, Dec. 1, 2017)

<<https://blog.cipit.org/2017/12/01/e-commerce-and-the-law-in-kenya-copyright-implications/>> accessed May 7, 2019.

<sup>13</sup> Kamau (n 21).

<sup>14</sup> TRIPS Agreement (n 17).

Organization (WIPO), which effectively established WIPO as a global forum for IP policy, services, information and cooperation. So far, WIPO has adopted twenty-six treaties on IP.

Kenya has adopted several WIPO administered treaties including: the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention); the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention)<sup>25</sup>; WIPO Copyright Treaty (WCT)<sup>26</sup>; WIPO Performances and Phonogram Treaty (WPPT)<sup>15</sup>; and the Beijing Treaty on Audiovisual Performances.<sup>16</sup> The country is a signatory to the UNESCO's Universal Copyright Convention (UCC)<sup>17</sup> and Trade Related Aspects of Intellectual Property Rights (TRIPS) which is managed jointly by WIPO and WTO. The country is also party to Lusaka Agreement that establishes ARIPO.<sup>18</sup>

The Berne Convention provides for automatic protection of copyright and prohibits formalities, such as registration, as a prerequisite to the subsistence, enjoyment, exercise, protection and enforcement of copyright.<sup>31</sup> The Convention provides for seizure of imported copies that infringe on copyrighted works of a copyright holder in accordance with the law of the respective member state. On the other hand, the TRIPS Agreement, which came into force in 1995 upon establishment of the WTO provides for minimum standards about protection of IPR including copyright, patents, geographical indications, industrial designs, trade secrets and trademarks. Member states are required to legislate on

minimum standards regarding enforcement of IPR, including effective border measures and penalties for IPR infractions. The member states are also required to ensure that the border measures are effective, that seizure, forfeiture and destruction of infringing goods are available to IPR holders' where criminal proceedings are filed, the penalties should be deterrent, and the enforcement proceedings should be affordable and prompt.

## 6. MARRAKESH TREATY

Despite the existence of local and international laws that expound the rights of the disabled, including those living with visual impairment, these persons continue to suffer imbalances and injustices without recourse. Lynette Owen agrees that despite many strides made at the international level, there were inherent challenges in that existing laws that dealt with IP that inhibited full enjoyment of disabled rights.<sup>32</sup> This realization moved the WIPO into action. He traces this development to 2008 when he writes:

'In 2008 WIPO established a 'stakeholder's platform' which brought together representatives from the international publishers and the world blind union. This platform implemented practical projects to expand the availability of accessible books in parallel with discussions, under the auspices of WIPO standing committee on copyright, on a new international treaty to enshrine minimum exceptions into international law.'<sup>33</sup>

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<sup>25</sup> The Rome Convention secures protection in performances for performers, in phonograms for producers of phonograms and in broadcasts for broadcasting organizations.

<sup>26</sup> The WIPO Copyright Treaty (WCT) deals with the protection of works and the rights of their authors in the digital environment.

<sup>15</sup> The WIPO Performances and Phonograms Treaty (WPPT) deals with the rights in the digital environment.

<sup>16</sup> Beijing Treaty: The Beijing Treaty on Audiovisual Performances was adopted on June 24, 2012. It deals with the intellectual property rights of performers in audiovisual performances.

<sup>17</sup> The Lusaka Agreement was adopted at a diplomatic conference at Lusaka (Zambia) on December 9, 1976 and establishes ARIPO at Article 1 thereof.

<sup>18</sup> The UCC was concluded in 1952 under the auspices of the United Nations Education, Science and Cultural organization (UNESCO) to incorporate a greater number of countries into the international copyright community.

<sup>31</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979 S. Treaty Doc. No. 99-27 (1986).

<sup>32</sup> Lynette Owen, *Clark's Publishing Agreements: A Book of Precedents* (10th edn. 2013).

<sup>33</sup> *ibid.*

These efforts bore fruits when Marrakesh Treaty was mooted, discussed and passed. The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (the Marrakesh Treaty/the Treaty) is a multilateral treaty that was concluded on 28 June 2013 and entered into force on 30 September 2016.

The Preamble of the Marrakesh Treaty states that the Treaty was principally conceived in line with principles of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in society, proclaimed in the UDHR and the CRDP Convention. The Preamble is mindful of the fact that there is a plethora of challenges that prevent complete development of persons with visual impairments or with print disabilities, limiting their freedom of expression including, the freedom to seek, receive and impart information and ideas of all kinds on an equal basis with others, through all forms of communication of their choice as well as their enjoyment of the right to education and the opportunity to conduct research.

Article 4 expounds on national limitations and exceptions regarding accessible format copies by obligating contracting parties to provide in their copyright laws for a limitation or exceptions to rights of reproduction, distribution, and making available to the public, as provided by the WIPO Copyright Treaty (WCT), to facilitate the availability of works in accessible format copies for beneficiary persons.<sup>34</sup> The limitation or exception provided in national law should permit changes needed to make the work accessible in alternative formats.

Article 4(2) allows contracting parties to designate 'authorised entities' who will be permitted, without the authorization of the copyright holder, to make an accessible format copy of a work, obtain from another authorised entity an accessible format copy, and supply those copies to beneficiary persons by any means, including by non-commercial lending or by electronic communication by wire or wireless means.' It aims at addressing the lack of access to copyrightable works in accessible formats by providing an

international legal framework for copyright exceptions that facilitates cross-border exchange of works in accessible formats (such as braille, audio and large print) between countries party to the treaty.

The Treaty allows authorized entities (usually libraries or NGOs) in one country to send accessible format books directly to authorized entities or blind individuals in another country and allows for the unlocking of digital locks on e-books for the benefit of the blind. The Marrakesh Treaty requires member countries to provide exceptions for certain rights protected under copyright. These include the reproduction of works by certain individuals and/or Organizations for the purposes of converting them into accessible format copies exclusively for individuals with a print disability (described in the Marrakesh Treaty as 'beneficiary persons'); distribution of accessible format copies exclusively to individuals with a print disability; export of accessible format copies, for the purposes of making them available to individuals with a print disability in other member countries; and import of accessible format copies from member countries for the purposes of making them available domestically to individuals with a print disability.

To ensure compliance with these obligations, amendments are required to the Copyright Act. Specifically, they must explicitly provide for the import and export of accessible format copies between member countries. The definition of 'works' (to which section 69 exception applies) should be extended to include artistic works; expand the conditions applied to prescribed bodies in the section 69 exception to include the maintenance of due care in, and records of, its handling of copies of works. The Act must also clarify that the definition of print disability includes individuals who have a visual impairment or perceptual or reading disability, which cannot be improved to give substantially similar function as a person without such an impairment.

Article 7 provides that a technological protection measure, such as a copy or access control, cannot prevent a beneficiary person from enjoying the exceptions provided under the Treaty, even when a country prohibits

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<sup>34</sup> WCT (n 26).

circumvention of technological protection measures in its general copyright legislation.

## 7. PROPOSED AMENDMENTS TO THE COPYRIGHT ACT

Kenya adopted the Marrakesh Treaty on 27 June 2013 and subsequently ratified the Treaty on 2 June 2017. As per Article 4(1) of the Marrakesh Treaty, this law is applicable and enforceable in Kenya as is, beginning on 2 September 2017 when the Treaty took effect.

Plans are underway to align and modify Copyright Act of 2001 with the Treaty and the Copyright (Amendments) Bill currently before Parliament. Proposed amendments introduce a raft of changes to the current law which in its current form does not adequately address the needs and expectations of visually impaired persons. Kenya's copyright law does not provide for any exceptions, limitations or modifications to the Act of 2001 or its Regulations to allow production of printed works in accessible formats, without requiring permission from the copyright holder in accordance with Article 4(1) of the Marrakesh Treaty.

Article 4(1) of the Treaty obligates contracting parties to align their copyright laws to reflect exceptions that allow production of printed works in accessible formats without requiring permission from the copyright holder. In view of this, Government of Kenya published Copyright (Amendment) Bill of 2017.<sup>35</sup>

There are substantial changes that will come into force once the Bill comes into law. The Bill seeks to bring into line the Copyright Act with Marrakesh Treaty and other various copyright international standards in various ways.<sup>19</sup> The proposed Copyright Amendment Bill provides amendments that seek to align the Copyright Act with 2010 Constitution as well as domesticate Marrakesh Treaty.<sup>37</sup> The Bill seeks to provide accessible educational and instructional materials to persons who are blind. It goes further to define '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 permitting the person to have access as feasibly and comfortably as a person without visual impairment or other print disability.<sup>20</sup>

Such accessibility will be done by way of producing such materials in specialized formats. 'Specialized formats' are defined to mean braille, audio, or digital text or any other media which is exclusively for use by visually impaired or other persons with disabilities, and with respect to print instructional materials, including large print formats when such materials are distributed exclusively for use by visually impaired or other persons with disabilities. The Bill recognizes the role of 'authorised entity', who will be authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. This includes government institutions or non-profit organizations that provide the same services to beneficiary persons as one of its primary activities or institutional obligations. The Bill creates several exceptions that permit reproduction and distribution of materials in formats for use by visually-impaired persons. The Bill also introduces an entire schedule to the Act that contains provisions relating to fair dealing, general exceptions and limitations. The amendments introduce a new section 26C. This section has conformed to the requirements of Article 4 of Marrakesh Treaty. The new section explicitly states that notwithstanding the provisions of section 26:

It shall not be an infringement of copyright for— (a) an authorized entity to reproduce or to distribute copies or sound recordings of a previously published, literary work if such copies or sound recordings are reproduced or distributed in specialized formats exclusively for use by visually impaired or other persons with disabilities; or (b) to make, import, distribute, end or share accessible format copies by a beneficiary person or authorized

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<sup>35</sup> Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, art. 4(1), June 27, 2013, 52 I.L.M. 1312 (2013).

<sup>19</sup> Spoor & Fisher, 'Kenya: Important Changes to Copyright Law' (Nov. 20, 2017), <<http://www.polity.org.za/article/kenya-important-changes-to-copyright-law-2017-11-20>>.

<sup>37</sup> Marrakesh Treaty, (n 35).

<sup>20</sup> The Copyright (Amendment) Bill (2017) Cap. 211.

entities or persons acting on behalf of a beneficiary person, including the circumventing any technical protection measures that may be in place, subject to the terms and conditions set out under Regulations. (2) Copies or sound recordings to which this section applies shall— (a) not be reproduced or distributed in a format other than a specialized format exclusively for use by visually impaired or other persons with disabilities; (b) bear a notice that any further reproduction or distribution in a format other than a specialized format is an infringement; and (c) include a copyright notice identifying the copyright owner and the date of the original publication.<sup>39</sup>

Once these amendments sail through, Parliament will have ‘domesticated’ the Treaty, something that a common law country like Kenya needs to do to ensure that its treaty obligations become law.<sup>40</sup>

#### 8. MERITS OF THE PROPOSED AMENDMENTS

The proposed amendments have clear humanitarian and social development dimensions and its main goal is to create a set of mandatory limitations and exceptions for the benefit of the blind, visually impaired and otherwise print disabled (VIPs). This means that people living with visual impairment have an opportunity to enjoy their inalienable rights within the maxims of equity and principles of human rights, non-discrimination and equal opportunities.

The Treaty creates a new weapon to fight illiteracy among VIPs. Access to knowledge opens the door to education, employment, and a fruitful and independent personal life for the visually impaired persons. The development will enable beneficiaries to fully benefit from technological innovations and user-friendly systems which are revolutionizing the world of Visually Impaired Persons:

such as user-friendly system that offers around-the-clock access to talking books, daily newspapers, weekly magazines and the like...A second generation, web-

based multimedia streaming service, known as TAB2read.com is also under development. TAB2read.com is available via the Internet on computers, smartphones and tablets, and allows ‘people to read through their eyes, ears and fingers one at a time or all at once,’ the legislator explained.’<sup>21</sup>

The ratification of the Marrakesh Treaty and subsequent amendment to the copyright act will have positive social, economic and cultural impacts on Kenya. Individuals with a print disability are expected to be the primary beneficiaries. It is likely to improve access to education, enhance participation in public life, provide greater autonomy and independence, and improve health outcomes.

#### 9. RECOMMENDATIONS FOR REVIEW OF LAW AND POLICIES RELATING TO AUDIO-VISUAL SECTOR IN KENYA

The country should create awareness on the proposed Copyright Amendment Bill among the citizenry, particularly the people and organization dealing with welfare of visually impaired persons. The owners of copyrightable works should also be sensitized on the proposed laws to avoid conflict with publishers who may end up being contracted to produce and distribute reading materials in ‘special formats.’

It is important that the government of Kenya consider extending a form of compensation for the owners of copyright through the registered Collective Management Organization (CMO). In line with the economic rights as encapsulated in the 2010 Constitution, Vision 2030 and Jubilee’s government manifesto, it is incumbent to ensure that ‘education for all’ is realized not only by normal students but also by those living with disabilities.

The government should allocate in its annual education budget adequate amount to take care of production of reading materials in ‘special format’ as per the requirements of the Marrakesh Treaty. This role can be carried out by the Kenya Institute of Curriculum Development (KICD) in

<sup>39</sup> *ibid*, sec. 26C.

<sup>21</sup> Catherine Jewell, ‘Removing Barriers to Literacy: How the Marrakesh VIP Treaty Can Change Lives’, *WIPO Magazine* (Feb. 2015).

collaboration with the Kenya Institute of Special Education (KISE).

Kenya should provide a platform with exception to the circumvention prohibition to allow an authorized entity to make and transform copyrightable materials into accessible formats. This will require the rights holders to avail to all authorized entities keys to open the digital lock as per Article 7 of Marrakesh Treaty.

The administration of the tax regime, however well-meaning, could be a big hindrance to the welfare of people living with disabilities such as visually impaired persons. To avert such bottlenecks, the government should give tax incentives as well as tax breaks for importers of materials for the blind. This will encourage and accelerate production of reading materials for the blind in Kenya and beyond.

## 10. CONCLUSION

Undeniably, the Kenya government has portrayed commitment in terms of ratification of international treaties and conventions. However, the implementation has been hampered by lack of a documented framework for implementation. Sessional paper No. 14 of 2012 cites that one of the challenges related to access and equity in the provision of education and training to children with special needs is the slow implementation of guidelines on SNE policy and inclusive education (GOK, 2012). Article 189(2) of the 2010 Constitution provides that national and county governments should co-operate in the performance of functions and exercise of powers. The national and county governments should work together on initiatives to enhance access to education for visually impaired students. Collaboration and establishment of linkages among stakeholders in the education sector with other service providers is important. It is hoped that this would ensure a conducive environment for learners with disabilities to participate in quality learning. From the foregoing, it is apt to conclude that there are several opportunities that could be tapped by various stakeholders to improve access but there still remain challenges that need to be addressed to enable all children with disabilities benefit fully from free education offered by the government

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