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Bridging a Gap in US Implementation of the Marrakesh Treaty

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Abstract

The Marrakesh Treaty is a landmark achievement in international copyright law, providing the first user rights-based treaty focused on improving access to copyrighted works for people with disabilities. While provisions of the Treaty are based on US copyright law, there is a gap in US implementation of the law when it comes to the Treaty's provisions on technological measures. This article examines the challenges this gap presents to people with disabilities and proposes potential legislative solutions for the US Congress to achieve full compliance with the Marrakesh Treaty while addressing the global book famine.

Keywords: Marrakesh Treaty, accessibility, copyright, DMCA, digital rights management, Section 1201

This article received editorial review, but the authors chose to forego peer review, which was optional for submissions consisting of conference presentations.



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Introduction

My original research proposal was to examine how Congress might amend US copyright law to explicitly allow people with disabilities to circumvent technological protection measures (TPMs) that restrict access to digital works—similar to the European Accessibility Act's requirement that technical protections cannot prevent read aloud features. Currently, the closest protection in US law is a narrow regulation promulgated under the Digital Millennium Copyright Act (DMCA) permitting users to bypass access controls that block eBook read-aloud features. However, disability rights advocates must petition for this exemption every three years through an uncertain rulemaking process, with no guarantee of renewal.

In researching this topic, I discovered a fundamental problem: while the Marrakesh Treaty requires ratifying countries to “take appropriate measures” to ensure that TPMs do not prevent beneficiaries from enjoying the Treaty's limitations and exceptions, the US lacks any statutory provision to fulfill this obligation. Instead, Americans with disabilities remain dependent on the unpredictable DMCA exemption process.

Although I initially approached this topic from a public policy angle, the most compelling aspect of my Kraemer presentation turned out to be illustrating how the Section 1201 rulemaking process systematically disadvantages the very people it should protect.

Accessibility Barriers in Research and Education

The challenge of accessing digital copyrighted materials extends beyond simple availability. Research conducted by the Association of Research Libraries (ARL) in collaboration with the Canadian Association of Research Libraries (CARL) (2023) reveals the lived experiences of graduate students attempting to access materials for their research. As one York University student noted, “I will say not every book that I want is available. And sometimes that is unfortunate. I’d say it’s about an 80% chance the book is a yes. The newer the book, the dicier it gets.” (ARL/CARL Task Force on Marrakesh Treaty Implementation, p. 25).

This accessibility gap becomes more problematic when considering the shift from print to digital formats. While digital books offer tremendous potential for people with disabilities—including compatibility with screen readers, adjustable text size, and text-to-speech functionality—publishers of eBooks often use technological measures like digital rights management software to disable the read-aloud function of an eBook, and may prevent access to a work in eBook form by means of screen reader software.

This barrier is more than an inconvenience—it means that people with disabilities are systematically excluded from educational and research opportunities. Students with disabilities must often wait significantly longer for accessible materials, if they become available at all. This delay affects their ability to participate equally in classroom discussions, complete assignments on schedule, and engage with current scholarship in their fields. In addition to altering the academic and professional careers of people with disabilities, this problem means that the world misses out on their potential contributions.

The Marrakesh Treaty

The Marrakesh Treaty entered into force globally in 2016 and was implemented in the United States in 2018. Much of the Treaty's language was based on existing US copyright law, particularly Section 121 of the Copyright Act, known as the Chafee Amendment. Introduced in 1996 by Senator Chafee, this provision was specifically designed to end what he termed the "unintended censorship of blind students' access to current information" by clarifying that libraries and other authorized entities could produce works in specialized formats without permission from rights holders. (141 Cong. Rec. S9061, 1996).

The most significant change the US Congress made to amend US copyright law in alignment with the Marrakesh Treaty was adding Section 121A to allow cross-border sharing. In addition, Congress expanded the scope of Section 121 to broaden its coverage from "nondramatic literary works" to all literary works and written musical works, expanded the definition from "specialized formats" to the more flexible "accessible formats," and extended coverage to "eligible persons."

The Article 7 Implementation Gap

While the provisions of the Marrakesh Treaty allowing for limitations and exceptions for accessible format copies and cross-border exchange of accessible format copies were adopted into statute, Article 7 was not. Under Article 7, countries can maintain laws prohibiting circumvention of technological measures, but those laws cannot prevent people with disabilities from enjoying the treaty's exceptions. In other words, anti-circumvention laws cannot block accessibility features that would otherwise be permitted under the Treaty.

In the United States, Article 7 is implemented not through statute but through the regulatory process established by Section 1201 of the Digital Millennium Copyright Act (DMCA). The DMCA prohibits circumventing technological measures that protect copyrighted works, even for lawful purposes, but provides for a triennial rulemaking process through which the Librarian of Congress can grant temporary exemptions.

The DMCA rulemaking process creates significant challenges for accessibility advocates. Every three years, disability rights organizations must petition for exemptions, presenting evidence that technological measures are having adverse effects on legitimate uses of copyrighted works. This places the burden of proof on petitioners to demonstrate why accessibility exemptions should continue, or why new exemptions should be granted.

Case Study: The Literary Works Exemption Battle

The literary works exemption for accessibility illustrates the challenges of relying on regulatory rather than statutory solutions. In 2003, the American Foundation for the Blind (AFB) petitioned for an exemption allowing users to circumvent technological measures that block read-aloud functions and screen reader access to eBooks.

In their petition, AFB included screenshots of eBooks purchased on Amazon, demonstrating that consumers received no warning that content would be inaccessible to screen readers until after the eBooks was purchased—a common experience for people with disabilities attempting to purchase digital content.

Based on this evidence, the Librarian of Congress granted the first accessibility exemption, acknowledging that circumvention was "likely to be the most reasonable means of meaningful access to works that are published in e-book format." (U.S. Copyright Office, Library of Congress, 2003). However, because DMCA exemptions sunset after three years, disability rights organizations faced ongoing uncertainty about whether this protection would continue.

The 2010 rulemaking cycle demonstrated the precarious nature of this system. Despite recommending renewal of the exemption in previous cycles, the Register of Copyrights recommended against renewal in 2010, citing the statutory requirement that proponents demonstrate evidence "de novo" for each rulemaking cycle. The Register's recommendation even framed the process as a "battle," noting that petitioners must "wage this battle anew every three years." (U.S. Copyright Office, Library of Congress, 2010).

Fortunately, the Librarian of Congress rejected the Register's recommendation and renewed the exemption, pointing to the lack of opposition and the broad societal benefits of accessibility. However, this near miss highlighted the fundamental instability of relying on regulatory exemptions for what should be considered basic accessibility rights.

Systemic Constraints of the Current System

The DMCA rulemaking process builds in several structural barriers to effective accessibility protections:

- **Burden on Petitioners:** Advocates must repeatedly invest resources in preparing detailed petitions, gathering evidence, and participating in lengthy proceedings every three years, with no guarantee of success.
- **Classes of Works Limitation:** The DMCA requires exemptions to apply to "particular classes of works," preventing comprehensive accessibility exemptions for all users with disabilities.
- **Sunset Provisions:** The automatic expiration of exemptions after three years creates uncertainty and can result in loss of protections if no organization files for renewal, as we saw with the video game accessibility exemption in 2024.
- **Trafficking Prohibition:** Even when circumvention exemptions exist, the DMCA's prohibition on trafficking in circumvention tools can make it difficult for users to access the technologies needed to exercise their exemption rights.

Shakeups in the Library of Congress and Copyright Office

Shortly before the 2025 Kraemer Copyright Conference, the administration abruptly removed Librarian of Congress Dr. Carla Hayden and Register of Copyrights Shira Perlmuter. In response, some members of Congress introduced legislation to clarify that appointment and removal of the Librarian should remain a congressional prerogative, raising questions about whether a congressionally appointed Librarian could continue to conduct executive functions like Section 1201 rulemaking.

International Approaches

Canada's copyright law includes a specific exemption to circumvention prohibitions for the purpose of making works perceptible to persons with perceptual disabilities. This approach eliminates the uncertainty and burden associated with periodic regulatory review.

The European Accessibility Act (EAA), which entered into effect in 2025, requires eBooks and e-readers sold in EU markets to be accessible and specifically prohibits digital rights management from preventing assistive devices from reading eBook text aloud. Additionally, the EAA mandates that accessibility metadata be provided to consumers before purchase, addressing the problem that AFB demonstrated in its 2003 rulemaking petition.

The EAA's requirements for multinational publishers operating in EU markets may have positive spillover effects for users in other countries, including the United States, as publishers develop accessible formats to comply with European requirements.

Potential Legislative Solutions

Throughout multiple rulemaking cycles, both the Register of Copyrights and the Librarian of Congress have consistently called for congressional action to address accessibility challenges through statutory rather than regulatory means.

Several approaches could address the implementation gap in U.S. copyright law:

- **Statutory Accessibility Exception:** Congress could create a permanent accessibility exception similar to fair use (Section 107) or library exceptions (Section 108), providing clear statutory authority for accessibility-related activities without time limitations.
- **Permanent DMCA Exemption:** Section 1201 already includes several permanent exemptions for specific purposes, including one for nonprofit libraries, archives, and educational institutions conducting acquisition research. A similar permanent exemption could be created for accessibility purposes, bringing U.S. law into closer alignment with the approach taken by Canada and the European Union.
- **DMCA Amendment:** As a practical matter, circumvention cannot be performed if the tools needed to undertake the circumvention are not available. An amendment to the DMCA's anti-circumvention provision could be accompanied by an amendment to the anti-trafficking provision.
- **Classes of Works Reform:** The current requirement that exemptions apply only to "particular classes of works" could be modified to allow for more comprehensive accessibility protections based on user needs rather than content categories.
- **Regulatory Requirement:** Following the EAA model, Congress could require that digital rights management systems not interfere with accessibility features, placing the burden on content providers rather than users.

The Path Forward: Advocacy and Action

For more than 20 years the Copyright Office has suggested that "Congress should fix this." During the discussion, Kraemer participants discussed the following strategies for addressing accessibility challenges:

- **Local Engagement:** Members of Congress consistently respond to issues affecting their districts. Libraries should invite representatives to tour facilities, meet with students who face accessibility challenges, and understand how federal policy affects local constituents.
- **Coalition Building:** Organizations like AARP represent significant constituencies that face accessibility challenges and have substantial political influence. Building broader coalitions beyond traditional library and disability rights groups can amplify advocacy efforts.

- **Story Collection:** Personal narratives about the impact of accessibility barriers on education, research, and career advancement can be powerful tools for policy advocacy. These stories should be collected systematically and shared strategically with policymakers.
- **Professional Development:** Libraries should develop institutional capacity for licensing negotiations that prioritize accessibility, working with publishers to include accessibility requirements in contracts while advocating for broader policy solutions.

I look forward to working with fellow advocates and copyright experts to address these challenges through public policy. In the meantime, librarians are increasing the availability of accessible materials through [license agreements for e-resources](#).

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