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MARRAKESH TREATY IMPLEMENTATION ACT

JUNE 4, 2018.—Ordered to be printed

Mr. GRASSLEY, from the Committee on the Judiciary,
submitted the following

R E P O R T

[To accompany S. 2559]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 2559) to amend title 17, United States Code, to implement the Marrakesh Treaty, and for other purposes, having considered the same, reports favorably thereon, without amendment, and recommends that the bill do pass.

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I. BACKGROUND AND PURPOSE OF THE MARRAKESH TREATY
IMPLEMENTATION ACT

A. BACKGROUND

The Marrakesh Treaty to Facilitate Access to Published Works for Persons by Visually Impaired Persons and Persons with Print Disabilities (hereinafter the “Marrakesh Treaty”) concluded at Marrakesh, Morocco, on June 28, 2013, under the auspices of the World Intellectual Property Organization. The Marrakesh Treaty was negotiated to address the global shortage of books and other texts in accessible formats such as Braille, large print, specialized digital

audio files, and other alternative formats. The treaty aimed to address this problem by providing, with appropriate safeguards, that copyright restrictions should not impede the creation and distribution of such accessible format copies, and by fostering the exchange of such copies internationally. The Marrakesh Treaty was signed by the United States on October 2, 2013.

The Obama Administration submitted the Marrakesh Treaty package to the U.S. Senate on February 10, 2016, and the proposed implementation package on February 12, 2016. On February 26, 2016, the Senate Committee on the Judiciary and the Committee on Foreign Relations hosted a staff briefing where representatives from the U.S. Department of State, U.S. Patent and Trademark Office, and U.S. Copyright Office discussed the treaty and proposed implementing legislation.

Subsequently, staff of the Senate Committee on the Judiciary and Committee on Foreign Relations encouraged the National Federation of the Blind, the Library Copyright Alliance, and the Association of American Publishers to negotiate and propose language that could be supported by all interested stakeholders, the copyright community, public interest groups, the U.S. Patent and Trademark Office and the U.S. Copyright Office. S. 2559, the Marrakesh Treaty Implementation Act, is the product of these negotiations, discussions, and vetting with all the interested parties.

B. PURPOSE

The amendments of title 17 in S. 2559 are intended to implement the United States obligations under the Marrakesh Treaty.

1. Revision of section 121 and relevant terminology in both sections

Insofar as section 121 does not explicitly authorize activities for the purpose of importing or exporting accessible format copies as permissible under the Marrakesh Treaty, a new section 121A has been added to address those issues without substantially changing the terms of section 121 as they apply to purely domestic activities involving the making, reproduction and distribution of accessible format copies. However, several amendments have been made to section 121 in order to conform certain terms and provisions of section 121 to the language of the Marrakesh Treaty for purposes of clarity and consistency.

One such amendment changes the term “blind or other persons with disabilities” and its definition in the previous section 121(d)(2) to “eligible person” as that term is defined and used in the Marrakesh Treaty to describe the kind of individuals intended to be the beneficiary recipients and users of accessible format copies. In making this change for purposes of clarity and consistency in identically describing such individuals under both sections, the reference in section 121’s prior definition to “individuals who are eligible or may qualify in accordance with” the legislation which authorizes appropriations for the Library of Congress National Library Service for the Blind and Physically Handicapped was dropped as unsuitable for the purpose of defining such individuals in section 121A because the Marrakesh Treaty contains no similar requirement for determining whether such individuals “are eligible or may qualify” as such beneficiaries “in accordance with” a particular national law.

Nevertheless, it is the intention and expectation of Congress that, under the identical defining provisions in section 121(d)(2) and section 121A(f)(1) and consistent with the basic concepts, practices, and regulations related to legislation applicable to the National Library Service for the Blind and Physically Handicapped, an individual will be considered to be an “eligible person” as defined by section 121(d)(2) and correspondingly section 121A(f)(1) based on having one or more of the qualifying conditions referenced as determined by a competent authority possessing experience in making such determinations. It is also anticipated that authorized entities, either individually or in coordination, will rely on competent authorities with appropriate experience to determine the eligibility of persons the authorized entities serve under section 121A(c)(1).

The amendment similarly changes the term “specialized formats” and its definition in the previous section 121(d)(2) to “accessible formats” and a definition in keeping with the Marrakesh Treaty.

While the Marrakesh Treaty applies to copyrighted works in text or notation, it provides that accessible format copies of protected works should include “related illustrations.” In keeping with the treaty, it is Congress’ intent that accessible format copies made pursuant to section 121 and/or section 121A include illustrations that are integrated with the text or notation being rendered into an accessible format. For example, where a textbook includes graphs, maps, or tables of information, the accessible format version of the textbook may include presentations of that information in as accessible a way as possible; where a book includes photographs or illustrations accompanying the text, the accessible format copy may include suitable descriptions of the photographs and illustrations. If illustrations, graphs, maps, tables, or photographs included in a text subject to sections 121 and/or 121A are also separately copyrighted works, they are subject to section 121 and/or section 121A to the same extent as the copyrighted works in which they are embodied.

It is understood that authorized entities may introduce such changes in a copyrighted work as are necessary to make the work accessible in the alternative format, taking into account the accessibility needs of the persons concerned. Such changes include, but are not limited to, differences in format or presentation. Nonetheless, such changes should not alter the meaning or substance of the text. It is also Congress’ intent that sections 121 and 121A permit the preparation of an accessible format copy of part of a work, such as when a student with a print disability is assigned one or a few chapters from a book and the authorized entity does not need to render the entire book in the accessible format. This amendment of section 121 and the addition of section 121A is not meant to alter authorized entity practices in this respect.

2. New section 121A

New section 121A is intended to implement the obligations of the United States under the Marrakesh Treaty to permit the exportation and importation of accessible format copies of copyrighted works for use by eligible persons, that is persons who are blind or other persons with print disabilities.

As such, the terms used in the new section 121A, particularly “authorized entity” and “eligible persons”, are intended to apply extraterritorially. The text of the statute, its references to the Marrakesh Treaty and this legislative history provide the “affirmative indication” of extraterritorial application that the Supreme Court has looked for in its review of other Federal legislation. *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 265 (2010). In establishing section 121A, Congress has taken “account of the legitimate sovereign interests of other nations,” *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004), in that it is still a matter for other Parties to the Marrakesh Treaty to establish their own national rules for the importation or exportation of accessible format copies.

For purposes of the exportation or importation of accessible format copies under section 121A, section 121A(c) requires an authorized entity to “establish and follow its own practices” to broadly ensure that its creation, acquisition, and distribution of accessible format copies serves the eligible persons that both the statute and the Marrakesh Treaty are intended to benefit while avoiding infringement of the works concerned. The practices required under section 121A(c) can be established by each authorized entity to meet that provision’s stated objectives in whatever manner is suitable to the authorized entity’s own particular circumstances, including, but not limited to, the amount of section 121A activity in which it is engaged and the adaptability of its regular administrative activities. Accordingly, there are no uniform requirements for the section 121A(c) “practices” other than their intended objectives and section 121A neither creates a new cause of action nor a basis for regulation by any Federal agency with respect to such authorized activities. An organization or entity that fails to establish and follow its own practices under section 121A(c) would not be authorized under section 121A to conduct the activities in subsections (1) and (2) of that section. At the same time, in establishing section 121A, Congress did not conduct a comprehensive analysis of the title to determine whether the same or similar activities might be permitted under section 121 or any other copyright exception or limitation. Finally, an organization that establishes the required practices to qualify for section 121A is under no obligation to apply the practices to the organization’s other activities in relation to copyrighted works and section 121A(c) implies no new obligations in relation to the organization’s other activities.

II. HISTORY OF THE BILL AND COMMITTEE CONSIDERATION

A. INTRODUCTION OF THE BILL

On March 15, 2018, Senator Grassley introduced S. 2559, the Marrakesh Treaty Implementation Act. Senators Feinstein, Corker, Menendez, Leahy, Hatch, and Harris were original cosponsors. The bill was referred to the Committee on the Judiciary.

On March 18, 2018, the Committee on the Judiciary and the Committee on Foreign Relations hosted a staff briefing on the Marrakesh Treaty and the proposed implementing legislation. Representatives from the U.S. Department of State, the U.S. Patent and Trademark Office, and the U.S. Copyright Office presented the

Administration's views on both the Marrakesh Treaty and proposed implementing legislation.

On April 18, 2018, the Committee on Foreign Relations held a hearing on the Marrakesh Treaty. Testimony was received from the Honorable Manisha Singh, Assistant Secretary, Bureau of Economic and Business Affairs, U.S. Department of State; Mr. Scott Labarre, Legal Counsel, National Federation of the Blind; Mr. Allan Adler, Executive Vice President and General Counsel, Association of American Publishers; and Mr. Jonathan Band, Counsel, Library Copyright Alliance, in support of the Marrakesh Treaty and S. 2559.

On April 18, 2018, the Committee on the Judiciary held a hearing on Oversight of the U.S. Patent and Trademark Office. Testimony was received from Andrei Iancu, Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office. In response to questions from Chairman Grassley, Director Iancu testified in support of the Marrakesh Treaty and S. 2559.

B. COMMITTEE CONSIDERATION

The Committee considered S. 2559 on May 10, 2018. The Committee voted to report the Marrakesh Treaty Implementation Act, without amendment, favorably to the Senate. The Committee proceeded by roll call vote as follows:

Tally: 20 Yeas, 0 Nays, 1 Not Present

Yeas (20): Grassley (R-IA), Hatch (R-UT), Graham (R-SC), Cornyn (R-TX), Lee (R-UT), Cruz (R-TX), Sasse (R-NE), Flake (R-AZ), Crapo (R-ID), Tillis (R-NC), Kennedy (R-LA), Feinstein (D-CA), Leahy (D-VT), Durbin (D-IL), Whitehouse (D-RI), Klobuchar (D-MN), Coons (D-DE), Blumenthal (D-CT), Hirono (D-HI), Harris (D-CA).

Nays (0):

Not Present (1): Booker (D-NJ)

III. SECTION-BY-SECTION SUMMARY OF THE BILL

Section 1. Short title

This section provides that the legislation may be cited as the "Marrakesh Treaty Implementation Act."

Section 2. Implementation amendments

This section makes adjustments to U.S. copyright law in order to implement the Marrakesh Treaty.

The section amends section 121(a) of title 17, United States Code, to broaden the scope of accessible works for eligible persons to include previously published musical works that have been fixed in the form of text or notation.

The section defines "accessible format" to mean an alternative manner or form that gives an eligible person access to the work when the copy or phonorecord in the accessible format is used exclusively by the eligible person to permit him or her to have access as feasibly and comfortably as a person without such disability.

The section defines "eligible person" to mean an individual who, regardless of any other disability, (A) is blind; (B) has a visual impairment or perceptual or reading disability that cannot be im-

proved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or (C) is otherwise unable through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading.

This section also creates a new section 121A to deal with the export and import provisions of the Marrakesh Treaty.

New section 121A(a) provides that notwithstanding the provisions of sections 106 and 602, it is not an infringement of copyright for an authorized entity, acting pursuant to this section, to export copies or phonorecords of a previously published literary work or of a previously published musical work that has been fixed in the form of text or notation in accessible formats to another country when the exportation is made either to (1) an authorized entity located in a country that is a Party to the Marrakesh Treaty, or (2) an eligible person in a country that is a Party to the Marrakesh Treaty, if prior to the exportation of such copies or phonorecords, the authorized entity engaged in the exportation did not know or have reasonable grounds to know that the copies or phonorecords would be used other than by eligible persons.

New section 121A(b) provides that notwithstanding the provisions of sections 106 and 602, it is not an infringement of copyright for an authorized entity or an eligible person, or someone acting on behalf of an eligible person, acting pursuant to this section, to import copies or phonorecords of a previously published literary work or of a previously published musical work that has been fixed in the form of text or notation in accessible formats.

New section 121A(c) provides that in conducting activities under subsection (a) or (b), an authorized entity shall establish and follow its own practices, in keeping with its particular circumstances, to (1) establish that the persons the authorized entity serves are eligible persons; (2) limit to eligible persons and authorized entities the distribution of accessible format copies by the authorized entity; (3) discourage the reproduction and distribution of unauthorized copies; (4) maintain due care in, and records of, the handling of copies of works by the authorized entity, while respecting the privacy of eligible persons on an equal basis with others; and (5) facilitate effective cross-border exchange of accessible format copies by making publicly available (A) the titles of works for which the authorized entity has accessible format copies or phonorecords and the specific accessible formats in which they are available and (B) information on the policies, practices and authorized entity partners of the authorized entity for the cross-border exchange of accessible format copies.

New section 121A(d) provides that nothing in this section shall be construed to establish (1) a cause of action under this title or (2) a basis for regulation by any Federal agency.

New section 121A(e) provides that nothing in this section shall be construed to limit the ability to engage in any activity otherwise permitted under this title.

New section 121A(f) provides that (1) the terms “accessible format”, “authorized entity”, and “eligible person” have the meanings given those terms in section 121 and (2) the term “Marrakesh Tre-

ty” means the Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities concluded at Marrakesh, Morocco, on June 28, 2013.

IV. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The Committee sets forth, with respect to the bill, S. 2559, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

MAY 24, 2018.

Hon. CHUCK GRASSLEY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2559, the Marrakesh Treaty Implementation Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Stephen Rabent.

Sincerely,

KEITH HALL,
Director.

Enclosure.

S. 2559—Marrakesh Treaty Implementation Act

Under current law, copies or phonorecords of a previously published nondramatic literary work may be reproduced and distributed in specialized formats for use by people who are blind or have another disability without infringement of the work’s copyright. S. 2559 would expand that exemption to include all literary works and previously published musical works in text or notation. The bill also would expand which specialized formats could be reproduced and distributed under the exemption and would expand the groups of people who could receive such copies. Under certain circumstances, S. 2559 also would allow the export or import of those copies.

Using information from the Copyright Office, CBO estimates that implementing the bill would have no significant effect on the federal budget because that office would not be required to undertake any rulemakings to implement the bill.

Enacting S. 2559 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting S. 2559 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

CBO has not reviewed S. 2559 for intergovernmental or private-sector mandates because section 4 of the Unfunded Mandates Reform Act excludes from the application of that act any legislative provisions that are necessary for the ratification or implementation of international treaty obligations. CBO has determined that the bill falls within that exclusion.

The CBO staff contact for this estimate is Stephen Rabent. The estimate was reviewed by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

V. REGULATORY IMPACT EVALUATION

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of S. 2559.

VI. CONCLUSION

The Marrakesh Treaty Implementation Act, S. 2559, will help give people with print disabilities, here in the United States and all over the world, greater access to books and other texts in accessible formats such as Braille, large print, specialized digital audio files, and other alternative formats.

VII. CHANGES TO EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 2559, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

TITLE 17—COPYRIGHTS

* * * * *

CHAPTER 1—SUBJECT MATTER AND SCOPE OF
COPYRIGHT

Sec.

121. Limitations on exclusive rights: Reproduction for blind or other people with disabilities.

121A. *Limitations on exclusive rights: reproduction for blind or other people with disabilities in Marrakesh Treaty countries.*

* * * * *

**§ 121. Limitations on exclusive rights: Reproduction for
blind or other people with disabilities**

(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for an authorized entity to reproduce or to distribute *in the United States* copies or phonorecords of a previously published, [nondramatic] literary work *or of a previously published musical work that has been fixed in the form of text or notation* if such copies or phonorecords are reproduced or distributed in [specialized formats] *accessible formats* exclusively for use by [blind or other persons with disabilities] *eligible persons*.

(b)(1) Copies or phonorecords to which this section applies shall—

(A) not be reproduced or distributed *in the United States* in a format other than [a specialized format] *an accessible format* exclusively for use by [blind or other persons with disabilities] *eligible persons*;

(B) bear a notice that any further reproduction or distribution in a format other than [a specialized format] *an accessible format* is an infringement; and

(C) include a copyright notice identifying the copyright owner and the date of the original publication.

(2) The provisions of this subsection shall not apply to standardized, secure, or norm-referenced tests and related testing material, or to computer programs, except the portions thereof that are in conventional human language (including descriptions of pictorial works) and displayed to users in the ordinary course of using the computer programs.

(c) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a publisher of print instructional materials for use in elementary or secondary schools to create and distribute to the National Instructional Materials Access Center copies of the electronic files described in sections 612(a)(23)(C), 613(a)(6), and section 674(e) of the Individuals with Disabilities Education Act that contain the contents of print instructional materials using the National Instructional Material Accessibility Standard (as defined in section 674(e)(3) of that Act), if—

(1) the inclusion of the contents of such print instructional materials is required by any State educational agency or local educational agency;

(2) the publisher had the right to publish such print instructional materials in print formats; and

(3) such copies are used solely for reproduction or distribution of the contents of such print instructional materials in **[specialized formats]** *accessible formats*.

(d) For purposes of this section, the term—

(1) *“accessible format” means an alternative manner or form that gives an eligible person access to the work when the copy or phonorecord in the accessible format is used exclusively by the eligible person to permit him or her to have access as feasibly and comfortably as a person without such disability as described in paragraph (3);*

(2) *“authorized entity” means a nonprofit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities;*

[(2) “blind or other persons with disabilities” means individuals who are eligible or who may qualify in accordance with the Act entitled “An Act to provide books for the adult blind”, approved March 3, 1931 (2 U.S.C. 135a; 46 Stat. 1487) to receive books and other publications produced in specialized formats;]

(3) *“eligible person” means an individual who, regardless of any other disability—*

(A) is blind;

(B) has a visual impairment or perceptual or reading disability that cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or

(C) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to

the extent that would be normally acceptable for reading; and

(4) “print instructional materials” has the meaning given under section 674(e)(3)(C) of the Individuals with Disabilities Education Act¹; and.

[(4) “specialized formats” means—

[(A) braille, audio, or digital text which is exclusively for use by blind or other persons with disabilities; and

[(B) with respect to print instructional materials, includes large print formats when such materials are distributed exclusively for use by blind or other persons with disabilities].

§ 121A. *Limitations on exclusive rights: reproduction for blind or other people with disabilities in Marrakesh Treaty countries*

(a) *Notwithstanding the provisions of sections 106 and 602, it is not an infringement of copyright for an authorized entity, acting pursuant to this section, to export copies or phonorecords of a previously published literary work or of a previously published musical work that has been fixed in the form of text or notation in accessible formats to another country when the exportation is made either to—*

(1) an authorized entity located in a country that is a Party to the Marrakesh Treaty; or

(2) an eligible person in a country that is a Party to the Marrakesh Treaty, if prior to the exportation of such copies or phonorecords, the authorized entity engaged in the exportation did not know or have reasonable grounds to know that the copies or phonorecords would be used other than by eligible persons.

(b) *Notwithstanding the provisions of sections 106 and 602, it is not an infringement of copyright for an authorized entity or an eligible person, or someone acting on behalf of an eligible person, acting pursuant to this section, to import copies or phonorecords of a previously published literary work or of a previously published musical work that has been fixed in the form of text or notation in accessible formats.*

(c) *In conducting activities under subsection (a) or (b), an authorized entity shall establish and follow its own practices, in keeping with its particular circumstances, to—*

(1) establish that the persons the authorized entity serves are eligible persons;

(2) limit to eligible persons and authorized entities the distribution of accessible format copies by the authorized entity;

(3) discourage the reproduction and distribution of unauthorized copies;

(4) maintain due care in, and records of, the handling of copies of works by the authorized entity, while respecting the privacy of eligible persons on an equal basis with others; and

(5) facilitate effective cross-border exchange of accessible format copies by making publicly available—

(A) the titles of works for which the authorized entity has accessible format copies or phonorecords and the specific accessible formats in which they are available; and

- (B) *information on the policies, practices, and authorized entity partners of the authorized entity for the cross-border exchange of accessible format copies.*
- (d) *Nothing in this section shall be construed to establish—*
 - (1) *a cause of action under this title; or*
 - (2) *a basis for regulation by any Federal agency.*
- (e) *Nothing in this section shall be construed to limit the ability to engage in any activity otherwise permitted under this title.*
- (f) *For purposes of this section—*
 - (1) *the terms ‘accessible format’, ‘authorized entity’, and ‘eligible person’ have the meanings given those terms in section 121; and*
 - (2) *the term ‘Marrakesh Treaty’ means the Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities concluded at Marrakesh, Morocco, on June 28, 2013.*

