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THE NATIONAL ASSEMBLY

ELEVENTH PARLIAMENT - FOURTH SESSION - 2016

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the Table
of the House
on Thursday
1st December 2016
in the Afternoon

REPORT OF

THE DEPARTMENTAL COMMITTEE ON DEFENCE AND FOREIGN RELATIONS

by Hon. Joseph Kiurua
ON behalf of the
Chairperson, Defence

THE RATIFICATION OF THE MARRAKESH TREATY TO FACILITATE ACCESS TO
PUBLISHED WORKS FOR PERSONS, WHO ARE BLIND, VISUALLY IMPAIRED OR
OTHERWISE PRINT DISABLED.

and Foreign
Relations

AUGUST 2016

Directorate of Committee Services,
Clerk's Chambers,
Parliament Buildings,
NAIROBI.

ABBREVIATIONS

KECOBO – Kenya Copyright Board

KPA - Kenya Publishers Associations and Association of the Blind

KUB - Kenya Union for the Blind

MVT - Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled

NGOs – Non-Governmental Organizations

PWDs – Persons living with disability

UNCRPD - the UN Convention on the Rights of Persons with Disabilities

VIPs – Very Important Persons

WBU - World Blind Union

WIPO - World Intellectual Property Organization

TABLE OF CONTENTS

ABBREVIATIONS	2
TABLE OF CONTENTS	3
CHAIRS FORWARD.....	4
EXECUTIVE SUMMARY	5
ESTABLISHMENT AND MANDATE OF THE COMMITTEE	6
MEMBERS OF THE COMMITTEE	8
COMMITTEE SECRETARIAT	9
LIST OF RECOMMENDATION	10

1.0 INTRODUCTION TO THE RATIFICATION OF THE MARRAKESH TREATY TO FACILITATE ACCESS TO PUBLISHED WORKS FOR PERSONS, WHO ARE BLIND, VISUALLY IMPAIRED OR OTHERWISE PRINT DISABLED.....	11
1.1 Outline of the Marrakesh Treaty.....	11
2.0 SUBMISSIONS REGARDING THE RATIFICATION OF THE MARRAKESH TREATY TO FACILITATE ACCESS TO PUBLISHED WORKS FOR PERSONS, WHO ARE BLIND, VISUALLY IMPAIRED OR OTHERWISE PRINT DISABLED.....	17
2.1 KENYA LAW REFORM COMMISSION.....	17
2.2 SUBMISSIONS BY THE LAW SOCIETY OF KENYA	23
2.3 SUBMISSIONS BY MR. EDWARD SIGEI, EXECUTIVE DIRECTOR OF KENYA COPYRIGHT BOARD (KECOBO)	24
2.4 SUBMISSIONS BY INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES – UNIVERSITY OF NAIROBI.....	26
3.0 COMMITTEE’S OBSERVATIONS.....	28
4.0 RECOMMENDATIONS OF THE COMMITTEE.....	29


CHAIRS FORWARD

On Tuesday, March 29th, 2016 the Leader of the Majority Party in the National Assembly tabled on the floor of the House The Marrakesh Treaty to facilitate Access to Published Works for persons who are blind, impaired, or otherwise print disabled.

The treaty was thereafter committed to the Departmental Committee on Defence and Foreign Relations to deliberate and make recommendations to the House for consideration and Ratification thereof Pursuant to section 8 of the Treaty Making and Ratification Act, 2012 and the second Schedule of the Standing orders of the National Assembly. Once ratified, the Treaty shall become ~~part of our Kenyan laws as provided for in Article 2(6) of the Constitution, which provides that~~ *“any treaty or convention ratified by Kenya shall form part of the Law of Kenya under this Constitution”*.

The Committee is thankful to the Office of the Speaker and the Clerk of the National Assembly for the logistical and technical support accorded to it during its Sittings.

On behalf of the Committee, it is therefore my pleasant duty and privilege, to lay this report on The Ratification of the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled for consideration and ratification by the House Pursuant to Section 8(4) of the Treaty Making and Ratification Act, 2012 and provisions of Standing Order 199.

Signed  Date: 30/11/2016

**THE HON. NDUNG’U GETHENJI, MP,
CHAIRPERSON,
DEPARTMENTAL COMMITTEE ON DEFENCE AND FOREIGN RELATIONS**

EXECUTIVE SUMMARY

The purpose of this report is to present to the House the consideration and ratification of the Marrakesh Treaty to facilitate Access to Published Works for persons who are blind, impaired, or otherwise print disabled that was tabled on the floor of the House on the March 29th, 2016 by the Leader of the Majority Party in the National Assembly tabled on the floor of the House and subsequently committed to the Departmental Committee on Defence and Foreign Relations for consideration.

During the consideration of the Marrakesh Treaty to facilitate Access to Published Works for persons who are blind, impaired, or otherwise print disabled, the Committee held several Sittings Pursuant to Article 118 (1)(b) of the Constitution on Public Participation and section 8(3) of the Treaty Making and Ratification Act of 2012 with representatives from the Kenya Copyright Board which is a parastatal under the State law Office, the University of Nairobi, the Law Society of Kenya and Kenya Law Reform Commission.

The Treaty will allow 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 allow for the unlocking of digital locks on e-books for the benefit of the blind.

The report concludes by recommending that the house approves the ratification of the Marrakesh Treaty to facilitate access to published works for persons, who are blind, visually impaired or otherwise print disabled as it is in Kenya's national interest.

ESTABLISHMENT AND MANDATE OF THE COMMITTEE

The Departmental Committee on Defence and Foreign Relations is established under Standing Order No. 216. Its mandate pursuant to SO 216 (5) with the following terms of reference: -

- i) *investigate, inquire into and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and Departments;*
- ii) *study the programme and policy objectives of the Ministries and Departments and the effectiveness of the implementation;*
- iii) *study and review all legislation after First Reading subject to the exemptions under Standing Order 101 A (4);*

- iv) *study and review all legislation referred to it;*
- v) *study, assess and analyse the relative success of the Ministries and Departments as measured by the results obtained as compared with its stated objectives;*
- vi) *investigate and inquire into all matters relating to the assigned Ministries and Departments as they may deem necessary, and as may be referred to them by the House or a Minister; and*
- vii) *make reports and recommendations to the House as often as possible, including recommendations of proposed legislation.*

The Committee is mandated to consider the following subjects: -

- i. Defence
- ii. intelligence,
- iii. foreign relations
- iv. diplomatic and consular services,
- v. international boundaries,
- vi. international relations,
- vii. agreements,
- viii. treaties and
- ix. conventions.

In executing its mandate, the Committee oversees the following government Ministries, departments and or agencies, namely:

- i. Ministry of Defence
 - ii. Ministry of Foreign Affairs
 - iii. The National Intelligence Service
 - iv. The State Department for East African Community Integration.
-

MEMBERS OF THE COMMITTEE

Chairperson **The Hon. Ndungu Gethenji, M.P.**

Vice Chairperson **The Hon. Elias Bare Shill, M.P.**

Members

The Hon. Adan Keynan, CBS, M.P.

The Hon. Jakoyo Midiwo, MGH, M.P.

The Hon. Katoo Ole Metito, EGH, MGH, M.P.

The Hon. Christantus Wamalwa, CBS, M.P.

The Hon. Nyiva Mwendwa, EGH, M.P.

The Hon. Gonzi Rai, MGH M.P.

The Hon. Joel Onyancha, MGH, M.P.

~~The Hon. Richard Onyonka, M.P.~~

The Hon. Wafula Wamunyinyi, M.P.

The Hon. Lekuton Joseph, OGW, M.P.

The Hon. Joseph Kiuna, M.P.

The Hon. Joseph Gitari, M.P.

The Hon. David Pkosing, M.P.

The Hon. Col (Rtd.) Ali Dido Rasso, MBS, M.P.

The Hon. Beatrice Nyaga, HSC, M.P.

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The Hon. Elisha Busienei, M.P.

The Hon. Abass S. Mohammed, M.P.

The Hon. Ibrahim Sane, M.P.

The Hon. Joyce Wanjalah Lay, M.P.

The Hon. Dennitah Ghati, M.P.

The Hon. Elijah Memusi, M.P.

The Hon. Suleiman Murunga, MP

The Hon. Jacob Macharia, MP

COMMITTEE SECRETARIAT

Senior Clerk Assistant	Mr. Oscar Namulanda Wesonga
Clerk Assistant	Mr. Douglas Katho
Clerk Assistant	Ms. Hellen Kina
Legal Counsel	Ms. Colleta Sigilai
Research & Policy Analyst	Mr. Eugene Apaa
Fiscal Analyst	Mr. Edison Odhiambo

RECOMMENDATION

The Committee recommends that the house approves the ratification of the Marrakesh Treaty to facilitate access to published works for persons, who are blind, visually impaired or otherwise print disabled as it is in Kenya's national interest.

1.0 INTRODUCTION TO THE RATIFICATION OF THE MARRAKESH TREATY TO FACILITATE ACCESS TO PUBLISHED WORKS FOR PERSONS, WHO ARE BLIND, VISUALLY IMPAIRED OR OTHERWISE PRINT DISABLED.

The Republic of Kenya joined the World Intellectual Property Organisation (WIPO) in 1971. Kenya acceded to the Berne Convention for Protection of Literacy and Artistic Works on March 11, 1993. The Convention came into force on June 11, 1993. The Convention was domesticated through the Copyright Act, Cap 130 laws of Kenya.

Kenya is also a signatory to other copyright treaties like the Universal Copyright Convention, Paris Act, and the Agreement on Trade Related Aspects of Intellectual Property Rights, WIPO Performances and Phonograms Treaty, the WIPO Copyright Treaty and the Beijing Treaty for the Protection of Audio Visual Performances.

The Treaty will allow 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 allow for the unlocking of digital locks on e-books for the benefit of the blind.

1.1 Outline of the Marrakesh Treaty

The Agreement contains 22 articles:

Article	Title	Comments
Preamble	Preamble	It sets out the reasons and aspirations of the Treaty particularly the principle of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion of society especially rights of persons with disability. The importance of the international copyright system and desiring to harmonise limitations and exceptions with a view to facilitating access to and use of works by persons with visual impairments or with print

		disabilities.
Parties	Contracting Parties	<p>(1) Any member State of WIPO</p> <p>(2) Any intergovernmental organization admitted by the Assembly</p> <p>(3) European Union is eligible to become party to the treaty.</p>
Article 1	Relations to other Conventions and Treaties	The Treaty shall not derogate from any obligations that Contracting Parties have to each other under other treaties nor take away any rights held under other treaties.
Article 2	Definition	Defines key terms as used in the Agreement.
Article 3	Beneficiary persons	<p>The Treaty provides that a beneficiary is a person who;</p> <p>a) Is blind;</p> <p>b) Has visual impairment or a perceptual or reading disability; or</p> <p>c) Is otherwise unable, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading.</p>
Article 4	National Law Limitations and Exceptions regarding accessible format copies	<p>Provides for contracting parties to provide limitations and exceptions to the right of reproduction, distribution and availability to the public.</p> <p>The exceptions or limitations can be done in its national copyright law.</p> <p>National law shall determine whether the exceptions are subject to remuneration.</p>
Article 5	Cross-border exchange of accessible format copies.	<p>Provides availability or distribution of the works by authorized persons in another contracting party.</p> <p>Also provides for authorized entity in a contracting party receiving the material to ensure compliance with its legal system and practices so that the materials are only reproduced, distributed and made available to beneficiaries within that contracting parties</p>

		jurisdiction.
Article 6	Importation of Accessible format copies.	Provides for the right of beneficiary persons or their representatives or authorized persons who can make accessible copy of works to import an accessible format copy without authority of the rights holder.
Article 7	Obligations concerning technological measures.	Provides for contracting parties to put in place adequate legal protection and effective remedies against circumvention of effective technological measures.
Article 8	Respect of privacy.	Provides for contracting parties to protect privacy of beneficiary persons equally as others.
Article 9	Cooperation to Facilitate Cross-border Exchange.	Provides for contracting parties to endeavor to foster cross-border exchange of accessible format copies by encouraging voluntary sharing of information to assist authorized entities in identifying one another.
Article 10	General principles of implementation.	Provides for contracting parties to adopt measures necessary to ensure application of the treaty. Parties can fulfil their rights and obligations through limitations and exceptions.
Article 11	General obligations on limitations and exceptions.	Provides for contracting party in coming up with measures to ensure implementation of the treaty on obligations on limitations and exceptions, the parties shall comply with obligations under- 1. Berne Convention; 2. Agreement on Trade-Related Aspects of Intellectual Property Rights and; 3. WIPO Copyright Treaty.
Article 12	Other Limitations and Exceptions.	Provides for contracting party to implement in its national law other copyright limitations and exceptions other than provided under the treaty taking into account their economic status, social and cultural needs.

		For least developed countries their special needs
Article 13	Assembly	Provides for each contracting party to have an Assembly, which shall deal with maintenance and development of the Treaty.
Article 14	International Bureau	Provides for International Bureau of WIPO to perform administrative tasks concerning the Treaty.
Article 15	Eligibility for becoming party to the Treaty	Provides for eligibility for becoming party to the treaty. It includes; any member state of WIPO; any intergovernmental organization admitted by the Assembly; the European Union.
Article 16	Rights and obligations under the Treaty	Provides that each contracting party shall enjoy all the rights and obligations arising from the treaty.
Article 17	Signature of the Treaty	Provides that the treaty shall be open for signature at the diplomatic Conference in Marrakesh and thereafter at the headquarters of WIPO by any eligible party for one year after its adoption.
Article 18	Entry into force.	Provides that the treaty shall enter into force three months after 20 eligible parties referred to in Article 15 have deposited their instruments of ratification or accession.
Article 19	Effective date of becoming party to the treaty	It provides that the 20 parties referred to under Article 19 shall be bound from the date the treaty enters into force. For the other eligible parties under Article 15, from the expiration of the three months from the date on which it has deposited instruments of ratification or accession with the DG of WIPO.
Article 20	Denunciation of the treaty	Provides that any Contracting Party may denounce the treaty by notification addressed to the DG of WIPO.
Article 21	Language of the treaty	Provides that the treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish. The DG of WIPO can on request of an interested party establish the official text in any other language.
Article 22	Depository.	Provides that the DG WIPO is the depository of this treaty.

1.2 Objects and Subject Matter of the Marrakesh Treaty

The Treaty will facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (MVT). It has a clear humanitarian and social development dimension 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).

1.3 Constitutional Implications

The Marrakesh Treaty does not propose any amendments to the Constitution.

1.4 National Security Interest Affected

~~The treaty does not have an effect on the National Security interest~~

1.5 Obligations imposed on Kenya by the Marrakesh Treaty

The Marrakesh Treaty requires that Contracting Parties fulfill two main obligations when implementing the Treaty at the national level, although they may do so according to their own legal systems. The first is to provide for a limitation or an exception to copyright in order to allow “beneficiaries” and “authorized entities” to undertake any changes needed to make a copy of a work in an accessible format for persons with a print disability. The second is to allow the exchange across borders of those accessible copies produced according to the limitations and exceptions provided in the Marrakesh Treaty, or in accordance with the operation of law.

1.6 Requirements for the Implementation of the Marrakesh Treaty

The Treaty requires the amendment of the Section 26 of the Copyright Act, Cap 130 Laws of Kenya.

1.7 Process leading to adoption of the Marrakesh Treaty

The Treaty was adopted on Friday 27th June 2013. It will enter into force on 31st November 2016 after being ratified by Canada, which would be the 20th WIPO member agreeing to be bound by its provision. Fifty one (51) member states have already signed the treaty. The Cabinet approved the ratification of the Treaty on 31st October 2013.

1.8 Proposed Text of any reservations:

There is no provision for reservation.

1.9 Whether Expenditure of Public Funds will be incurred in implementing the Marrakesh Treaty:

No additional expenditure of Public funds is foreseen in the implementation of the Marrakesh Treaty

2.0 SUBMISSIONS REGARDING THE RATIFICATION OF THE MARRAKESH TREATY TO FACILITATE ACCESS TO PUBLISHED WORKS FOR PERSONS, WHO ARE BLIND, VISUALLY IMPAIRED OR OTHERWISE PRINT DISABLED.

2.1 KENYA LAW REFORM COMMISSION.

The Hon. Josephine Sinyo, a commissioner with the Kenya Law Reform Commission made the following submissions before the committee.

That, the Marrakesh treaty was signed on 28th June 2013 in Morocco. To date, it has been ratified by these countries: India, El Salvador, United Arab Emirates, Uruguay, Mali, Paraguay, Singapore, Argentina, Mexico, Mongolia, the Republic of Korea, Australia, Brazil, Peru, the Democratic People's Republic of Korea, Israel, Chile, Ecuador, Guatemala and Canada. It has been signed by over 60 countries including Kenya which signed it on the 28th June 2013.

More than 90% of all published material is not accessible to the blind or partially sighted. We need to be able to produce these materials in accessible formats, such as Braille, large print or audio editions, but the current copyright rules do not allow this.

This limits the number of books to which blind students can have access to further their studies and training. World Blind Union (WBU), an organization bringing together all organizations of unions of the blind globally, has led the international campaign in partnership with WIPO to achieve the development of the Marrakesh Treaty and put an end to the current thirst for books.

As alluded above, the Marrakesh Treaty has been ratified by 20 countries, the number needed for it to enter into force and allow for an increase of materials in accessible formats through cross-border sharing and the increased production of books in more countries.

The treaty comes into force three months after the 20th ratification, which will be September 30th, 2016. The focus is still on getting every country in the world to ratify the treaty to increase the amount of available accessible books and to ensure that all blind and print disabled people can benefit from the treaty's provisions.

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (MVT) is the latest addition to the body of international copyright treaties administered by WIPO. It has a clear humanitarian and social development dimension 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).

~~It requires Contracting Parties to introduce a standard set of limitations and exceptions to copyright~~
rules in order to permit reproduction, distribution and making available of published works in formats designed to be accessible to VIPs, and to permit exchange of these works across borders by organizations that serve those beneficiaries.

The Treaty clarifies that beneficiary persons are those affected by a range of disabilities that interfere with the effective reading of printed material. The broad definition includes persons who are blind, visually impaired, or reading disabled or persons with a physical disability that prevents them from holding and manipulating a book.

Only works "in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media", including audio books, fall within the scope of the MVT regime.

Another important element is the role played by authorized entities, which are the organizations in charge of performing the cross-border exchange. The rather broad definition of the term encompasses many non-profit and government entities. They are either specifically authorized or "recognized" by the government as entities that provide many functions including education and information access to beneficiary persons. Authorized entities have the duty to establish and follow their own practices in several areas, including establishing that the persons they serve are

beneficiary persons, providing services only to those persons, discouraging unauthorized uses of copies, and maintaining "due care" in handling copies of works.

The MVT has a clear structure and provides for specific rules regarding both domestic and cross-border limitations and exceptions.

First, it requires Contracting Parties to have a limitation or exception to domestic copyright law for VIPs. The rights subject to such limitation or exception are the right of reproduction, the right of distribution, and the right of making available to the public. Authorized entities may, on a non-profit basis, make accessible format copies, which can be distributed by non-commercial lending or by electronic communication. The conditions for this activity include having lawful access to the work, ~~introducing only those changes needed to make the work accessible, and supplying the~~ copies only for use by beneficiary persons. VIPs may also make a personal use copy where they have lawful access to an accessible format copy of a work. At the domestic level, countries can confine limitations or exceptions to those works that cannot be "obtained commercially under reasonable terms for beneficiary persons in that market." Use of this possibility requires notification to the WIPO Director General.

Second, the MVT requires Contracting Parties to allow the import and export of accessible format copies under certain conditions. Regarding importation, when an accessible format copy can be made pursuant to national law, a copy may also be imported without rights-holder authorization. With reference to exportation, accessible format copies made under a limitation or exception or other law can be distributed or made available by an authorized entity to a beneficiary person or authorized entity in another Contracting Party. This specific limitation or exception requires the exclusive use of the works by beneficiary persons, and the MVT also clarifies that, prior to such distribution or making available, the authorized entity must not know or have reasonable grounds to know that the accessible format copy would be used by others.

The MVT leaves Contracting Parties the freedom to implement its provisions taking into account their own legal systems and practices, including determinations on "fair practices, dealings or uses", provided they comply with their three-step test obligations under other treaties. The three-

step test is a basic principle used to determine whether or not an exception or limitation is permissible under the international norms on copyright and related rights. It includes three elements, any exception or limitation:

- (1) Shall cover only certain special cases;
- (2) Shall not conflict with the normal exploitation of the work; and
- (3) Shall not unreasonably prejudice the legitimate interests of the rights-holder.

There is no requirement to be a member of any other international copyright treaty to join the MVT; membership is open to Member States of WIPO and to the European Community. However, Contracting Parties that receive accessible format copies and do not have obligations to comply with the three-step test under Article 9 of the Berne Convention must ensure that accessible format ~~copies are not redistributed outside their jurisdictions. Also cross-border transfer by authorized~~ entities is not permitted unless the Contracting Party in which the copy is made is a party to the WIPO Copyright Treaty or otherwise applies the three-step test to limitations and exceptions implementing the MVT.

The MVT requires WIPO to establish an "information access point" to allow voluntary sharing of information facilitating the identification of authorized entities. WIPO is also invited to share information about the functioning of the Treaty. In addition, Contracting Parties undertake to assist their authorized entities engaged in cross-border transfer arrangements.

The Treaty establishes an Assembly of the Contracting Parties whose main task is to address matters concerning the maintenance and development of the Treaty. It also entrusts to the Secretariat of WIPO the administrative tasks concerning the Treaty.

How does the Marrakesh Treaty relate to the UN Convention on the Rights of Persons with Disabilities (UNCRPD)?

The Marrakesh Treaty is the second international treaty specifically dealing with persons with disabilities rights, the first being the UNCRPD. The Marrakesh Treaty will help to implement several articles of the UNCRPD, by removing the copyright law barriers to accessible information and culture. Articles 9, 21 and 30 of the UNCRPD are particularly relevant in this context.

What is the Significance of this Treaty to Persons with Visual Disabilities?

- This Treaty will help to end the “book famine” print disabled people still face;
 - It will speed up the creation and implementation of national copyright exceptions for print disabled people in the many countries which still do not have these;
 - It will allow repositories of accessible books, often housed in libraries or blind persons’ organisations, to be shared across national borders. This is vital. At present there is duplication of effort and cost when two such organisations in different countries, but sharing the same language, both make the same book accessible. The Treaty will allow such organisations to pool resources, save money and therefore produce and share a greater number of accessible format Books.
-

What should National Governments do to implement the Treaty?

- Speedily sign and ratify it;
- Amend or enact national copyright law to include appropriate limitations and exceptions in line with the Treaty;
- Prepare an action plan to implement the Treaty, working with blind people’s and other disability organisations and other relevant stakeholders such as libraries;
- Where possible, provide financial resources to authorised entities and other statutory institutions to help implement the provisions of the Treaty.

Will this Treaty damage the interests of authors, publishers or other copyright holders?

No. There are many safeguards in the Treaty text to ensure that rightsholders’ interests are protected. For instance, the organisations that can use the Treaty-such as blind people’s organisations and libraries- are carefully defined. So too accessible format works and the Treaty’s beneficiaries (print disabled people). What is more, the Treaty text clearly states that the Treaty only allows the making and sending of accessible format books on a not-for profit basis. No organisation can use the Treaty to compete with publishers in the open market.