



Marrakesh Treaty – cross-border exchange of formats

Ministry of Culture and National Heritage

Karol Kościński
Department of Intellectual Property and Media
Director, Attorney at Law



I. Cross-border exchange of accessible formats – general remarks

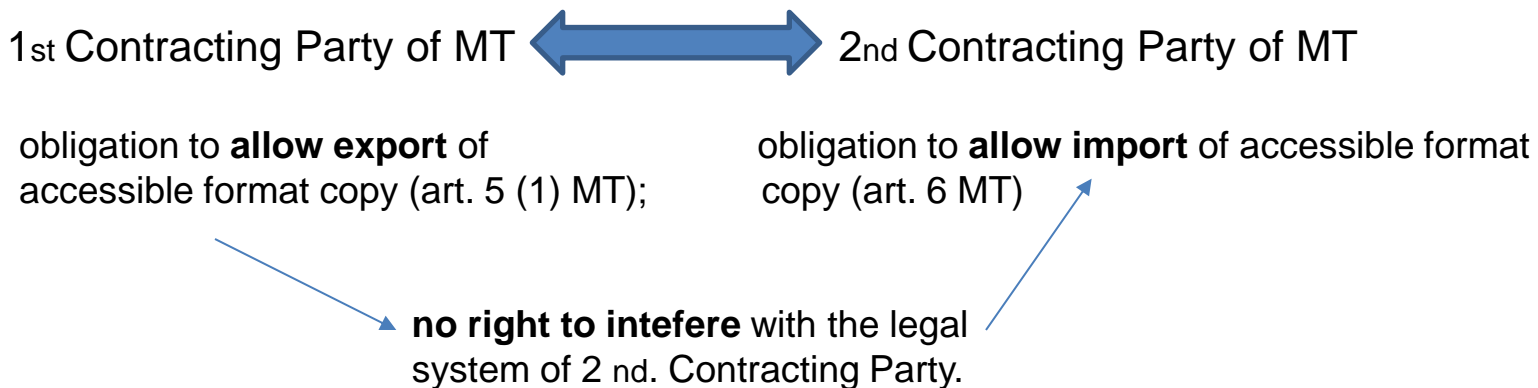
- A **key objective** of the Marrakesh Treaty - **permit the cross-border distribution of accessible format copies** (justification: high costs of production of copies/ relatively low demand for many individual titles/ exchange even more important between countries sharing the same language and culture especially if some of them have limited or no financial and technological capacity to produce copies)
- Given the principle of territoriality of copyright – in order for cross-border distribution to occur, it must be **lawful for an accessible format copy**:
 1. **to be exported (distributed or made available)** from the country in which it is made;
 2. **to be imported (distributed or made available)** into the country in which it will be used by authorized entities or beneficiary person of MT.

without the consent or permission of the copyright owner

I. Cross-border exchange of accessible formats – general remarks

Result: in MT two „**mirror**” or „**tandem**” provisions (art. 5 and 6):

particular as compared to existing copyright treaties (they together address cross – border situation rather than situations related to exploitation within the jurisdiction of one of the Contracting Parties)



II. Export of accessible formats – scope of art. 5 MT and possible implementation

➤ What are the confines of art. 5 (1) MT:

1. accessible format **copy** must be **made under a limitation or exception** or must be a copy of works statutory exempted from copyright protection (not under the licence of the rightholder – art. 4 (4) MT - indirect consequence of commercial availability clause);

2. **export must be done by authorized entity** in the 1st Contracting Party of MT to the authorized entity or beneficiary person in the 2nd Contracting Party of MT

3. the right to export formats does not depend on whether 2nd Contracting Party of MT has enacted a commercial unavailability restriction in its domestic law (otherwise authorized entities in 1st Contracting Party of MT would have to know how MT was implemented in all jurisdictions – see possible implementation of art. 6 MT)





II. Export of accessible formats – scope of art. 5 MT and possible implementation

- Easiest way of implementation - **enact into copyright regime a limitation or exception that is tailor-made for purpose of implementing art. 5 (1) MT.** (example of UE legislation in this regard)

MT in art. 5 (2) provides some further not-binding guidelines

1. underlines that copies exported to authorized entities must be used exclusively by beneficiary persons (if exporting authorized entity knows or has reasonable grounds to know that they will be used by sighted persons, such activity falls outside the scope of exception under MT – significance of authorized entities policy in this regard – code of conduct ?)
2. authorized entity exporting the format directly to the beneficiary persons must follow its practices listed in art. 2 lit c. tiret i) – iv)

II. Export of accessible formats – scope of art. 5 MT and possible implementation

Art. 5(2) MT is a result of balance and pattern how to implement art. 5 (1) MT in the way consistent with international obligations:

1. on one hand **does not propose imposing any burdensome requirements or standards** on authorized entity that wants to export formats

(such entity sets „safety” procedures on its own – may voluntarily employ further measures to confirm that the individuals whom they serve are beneficiaries/ may have the same procedures for internal and international exchange or distribution of copies etc.)

2. on the other hand **ensures that transfer of copies is made in accordance with the conditions set forth in the MT**





II. Export of accessible formats – scope of art. 5 MT and possible implementation

- MT in art. 5 (3) seems to provide some flexibility or challenge in the possible implementation (similar as art. 4(3) MT)

Contracting Party may introduce “other” exceptions and limitations to their copyright domestic systems – they must comply with the requirements of art 5(4) MT, art. 10 MT (general principles on implementation) and art. 11 MT (the three-step test).

Such laws should clearly define the conditions under which export is authorized.

III. Protection against widespread re-export of formats – art. 5 (4) MT

- Art. 5 (4) a) MT addresses the situation of Contracting Party which is not bound by the three step – test for the reproduction right under art. 9(2) Berne Convention (Berne Convention Gap)
- Art. 5 (4) b) MT addresses the situation of Contracting Party which did not implement the three step – test for the distribution and making available right under art. 10 WCT or exceptions and which limitations in its copyright are not three-step-test compliant without adoption of WCT (for example by implementation of art. 4 (2) MT). (WCT Gap)

In such cases Contracting Party must ensure that exploitation occurs only for the benefit of beneficiary persons in its own jurisdiction (no possibility of further export of received formats by authorized entities established in this Contracting Party to any other Contracting Party or any third country).





IV. Import of accessible formats – scope of art. 6 MT

- What are the confines of art. 6 MT ?
1. The same circle of entities (beneficiary persons/ their agents/ authorized entities) that can under art. 4 MT make a accessible format copy should be allowed to import such a copy for the benefit of beneficiary person (**the right to create carries with it the right to import**).

If the Contracting Party enacted a commercial unavailability restriction in its domestic law under 4 (4) MT or included the provisions on remuneration under 4 (5) MT, it may apply them also to importation of copies.

2. Article 6 MT does not require that the imported copy originate in a Contracting Party of MT (Contracting Party may permit importation of copies from countries that have not ratified the MT – helpful to achieve objectives of MT).



V. Conclusions

1. Art. 5 and 6 MT are crucial to the effective implementation and operation of the Treaty in international environment.
2. Together with art. 4 MT they may result in establishing a global network for diffusing of accessible format copies across borders for beneficiary persons (without regard to the financial/ technological capacity of the countries in which they live).
3. From perspective of beneficiary persons the issue of significant importance is existence and scope of exceptions or limitations in copyright regimes that allow them to share copies directly (even without cross-border effect).



Thank you for your attention

Karol Kościński

Department of Intellectual Property and Media

Director, Attorney at Law

Ministry of Culture and National Heritage of the Republic of Poland

ul. Krakowskie Przedmieście 15/17

00-071 Warszawa

Phone : +48(22) 42-10-136 | Fax: +48(22) 827-34-58

@: kkoscinski@mkidn.gov.pl | www.mkidn.gov.pl