

# A Critical Analysis of China's Implementation of the Marrakesh Treaty

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**Abstract.** Everyone has a relatively equal right to seek and access information through media and people with print disabilities should not be discriminated. To provide equal opportunity and access to information for persons with print disabilities, the Marrakesh Treaty was signed on June 27, 2013. This paper illustrates the efforts made in the newly amended Copyright Law of the People's Republic of China and shows the challenges in the implementation of the Treaty faced by China. By comparing the practices and perspectives of different Contracting Parties, this paper focuses on the gaps and the salient issues in the current implementation in China, including the gap in the cross-border exchange, the introduction of the commercial unavailability clause, and the circumvention of technological protection measures. On this basis, potential solutions with the challenges faced by China at their core are also explored in this paper to improve the legislation and refine the supporting system in China.

**Keywords:** Copyright Exception, The Marrakesh Treaty, Cross-border Exchange, Commercial Availability.

## 1. Introduction

This paper seeks to show how China incorporated the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (the Treaty) [1] into the Copyright Law of the People's Republic of China 2020 (the CLPRC 2020) [2]. It will highlight the efforts made in the newly amended CLPRC 2020 to implement the Treaty and show the difficulties and challenges faced by China in this process.

As stated by Robert Menendez, 'Individuals with disabilities should not be barred from opportunities others take for granted' [3], the Treaty aims to provide equal opportunity and access to information for persons with visual impairments or with other print disabilities (VIPs), utilising the accessible formats copies (Copies of the works in an accessible form that can be perceived by VIPs comfortably and feasibly). The principles in the Treaty have already been established in some instruments. In 1948, the United Nations General Assembly promulgated the Universal Declaration of Human Rights Preamble. The provisions on equality and freedom of information indicate that everyone has a relatively equal right to seek and receive information through any media. [4] Afterwards in 2006, the Convention on the Rights of Persons with Disabilities (CPRD) was signed, setting out the general principles of non-discrimination against persons with disabilities, including full and effective participation, equality of opportunity and accessibility. [5]

The promulgation of these instruments laid the foundation for the Treaty in 2013.

Under the current global 'book famine', the Treaty seems to offer a feasible resolution. The data show that compared with a large number of VIPs, the existing accessible format copies can be scarce, and a global 'book famine' exists. The Treaty has set obligations for the Contracting Parties to protect VIPs' equal access to works, mainly by setting limitations and exceptions for copyright, such as reproduction rights and distribution rights. In this way, accessible formats copies of works can be made available to VIPs without copyright holders' permission under certain circumstances. Meanwhile, cross-border exchange services for these beneficiaries are also advocated. Through the implementation of this content, more accessible formats copies can be produced legitimately and be accessed by VIPs, and beneficiaries or related organizations in Contracting Parties can also obtain the accessible formats copies already produced by other Parties at a lower cost.

China, as a developing country with a larger number of VIPs, is one of the first signatories of the Treaty in 2013. After several years of amending, on June 1, 2021, China's newly amended CLPRC 2020 came into effect, with some changes corresponding to the Treaty, which essentially prepared the ground for China's ratification of the Treaty. Then, in October 2021, the thirty-first session of the Standing Committee of the 13th National People's Congress in Beijing finally ratified the Treaty, which finally entered into force on May 5, 2022. It is of great significance for the progress of the protection of VIPs'

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rights in China. Nevertheless, considering the current gaps between China's implementation and the obligations set forth by the Treaty, the legislation still has a long way to go.

This paper will focus on the current situations and challenges in the implementation of the Treaty in China and try to discover the potential solutions by comparing the practices of different Contracting Parties. Firstly, this paper will illustrate the embodiment of the Treaty in CLPRC 2020, briefly addressing the improvements in this amendment and the gaps that remained during the implementation. Then, this paper will discuss the importance of filling the gap of the cross-border exchange of accessible format copies. The suitable subjects and possible supporting measures of the exchange will be explored in this paper. Furthermore, the adoption and positive impacts of the commercial availability as a pre-condition of the limitations and exceptions will be argued. In the fourth section, this paper will evaluate the premise of rules for circumventing technological protection measures (TPMs) in CLPRC 2020. Finally, the potential solutions for the current gaps in the implementation of the Treaty in China will be explored and a conclusion will be made for the future implementation.

## **2. Implementation of the Treaty in China: Progress Achieved in CLPRC 2020 Introduction**

In November 2020, China promulgated the newly amended CLPRC 2020 [6]. In this section, we will briefly introduce the implementation of the Treaty in this amendment and discuss the preliminary improvements China has made to implement the obligations outlined in the Treaty.

To assist VIPs to gain equal access to works, the introduction of the Treaty obligations in this amendment is mainly reflected in Articles 24 and 50 of the CLPRC 2020. In addition to reiterating the three-step test, Article 24, namely the 'fair use clause' in CLPRC 2020, has incorporated a new condition of 'providing published works for people with print disabilities in an accessible way through which they can perceive' into the legal circumstances of fair use.[7] This paragraph expands the original scope of fair use from the Braille reading version to accessible format copies to accommodate the requirements of Article 4 in the Treaty.[8] The scope of the beneficiaries also accordingly extends from the blind to VIPs. This means that, in addition to the blind, people who have visual impairments, perceptual or physical disabilities that prevent them from normal reading can benefit from this article. The direct effect is making domestic beneficiaries consistent with the scope of the beneficiaries under the Treaty and providing them with the right to reach accessible format copies by setting copyright limitations and exceptions.

A possible area of concern could be the inexact definition of works in this article. The form of 'works' in Article 24 of the CLPRC 2020 is not specific to 'the text, notation and/or related illustrations' which has been provided in Article 2 of the Treaty. Since China is a developing

country, this ambiguity can be seen as an intentional adoption of Article 12 of the Treaty. [9] Article 12 is in effect a concession by developed countries, allowing countries to set 'other limitations and exceptions' according to their domestic circumstances. The direct adoption of the broad definition of works is justified by the maximization of national interests. This means, for example, that the introduction of interpretive versions of films and television productions from other countries for domestic beneficiaries can be prospective. [10]

The other implementation is reflected in Article 50 of the CLPRC 2020, which is related to the circumvention of technological protection measures (TPMs). Paragraph 2 in this new article stipulates that TPMs can be circumvented under the circumstance of 'providing published works that cannot be obtained through normal channels for print-disabled people in an accessible way through which they can perceive for non-for-profit purposes'. [11] This provision is in part a response to Article 7 of the Treaty, which aims to provide legal exceptions for circumventing TPMs. [12] However, the applicable premise of this clause is controversial and is also deemed to be in breach of the obligations under the Treaty, which will be discussed later in this paper.

To conclude, China's implementation of the Treaty has established a legal status for the accessible format in a relatively broad way and accordingly added provisions on the circumvention of TPMs. Nonetheless, with some gaps between the current implementation and the obligations set forth by the Treaty, the implementation seems to be still in the initial stage. In the next section, I will focus on the gap in the cross-border exchange of accessible format copies, which is likely to provide an important boost to tackling the 'book famine'. Some of the controversial issues including the commercial availability clause and the circumvention of TPMs will be discussed later in this paper as well.

## **3. Cross-Border Exchange of Accessible Format Copies: A Challenge Faced by Developing Countries including China**

Under Article 5 of the Treaty, the Contracting Parties shall provide that the domestic authorised entities can distribute (or offer the availability of) accessible format produced under the operation of law to beneficiaries or authorised entities in other Contracting Parties. As can be seen, authorised entities are the main practitioners of cross-border exchange under the Treaty. Authorised entities, namely non-profit entities authorised or recognised by the government, are in charge of the collection, production, and distribution of accessible format, as well as international exchange. [13] Article 5 sets the obligation for Contracting Parties to create conditions for cross-border exchange, which is specifically expressed as creating conditions for the realisation of the corresponding rights and duties of authorised entities, beneficiaries, and their agents.

The aim of Article 5 implies in the Preamble of the Treaty, i.e. considering developing countries and creating the

possibility of cross-border exchange to reduce duplication of effort and maximise access to works for VIPs. [14] With potential benefits, developing countries are likely to be actively involved in the implementation of the Treaty. Take India for example, while the Treaty was still being negotiated, this developing country had begun amending its domestic copyright law and making it correspond to the Treaty. Rules concerning cross-border exchange are also included and the Appellate Board is authorised as the entity accepting the application, which can be seen in the Copyright Act 1957 in India. [15] One likely explanation for this quick response is the opportunities given by the Treaty to obtain the accessible format copies from other Contracting Parties. The realisation of the exchange may be a timely relief to the 'book famine' from which VIPs in developing countries suffered. [16]

In contrast, China's implementation of the Treaty is still a gap in this area. It does not specify the cross-border exchange, nor does it define the scope, rights and obligations of the authorised entity. This blank may harm the import and export of the accessible format copies, due to the possibility of the abuse of Article 24 caused by the unclear subject, potential copyright disputes, etc. Meanwhile, with a large number of VIPs, it can be urgent for China to implement this content. Besides, out of a minimum obligation under the Treaty, early filling of this gap could be one of the primary tasks for China to implement the Treaty.

To fill this blank, it should be first stressed that explicit cross-border exchange rules need to be written down in law to ensure its legality. Then, the practice of other Contracting Parties may offer China lessons that merit attention. The sharper focus has been primarily put on the issues of the scope of the authorised entities and the supporting measures. For example, in Japan, the National Library of Japan has been established as the primary authorised entity. Additionally, social welfare institutions for disabled children, care homes for the elderly, and other libraries are also granted the relevant rights and obligations of authorised entities. [17] The reason for choosing a national library as the leading authorised entity is attributed to their adequate resources, manpower, and overall control. [18] Generally, cause with little profit space and public welfare nature often need to give more inputs of manpower and resources. A concept of 'philanthropic insufficiency' can offer some inspiration, that is, non-profit organizations tend to have a limited perspective because they cannot start from the overall social situation when serving a specific group. [19]

However, it is not a conflict that educational institutions or specialised libraries should also be encouraged to become authorised entities. To realise the rights of VIPs on a larger scale, subjects including social agents, intermediaries or individuals can also be encouraged to participate in this cause to fully mobilise social resources. [20]

Besides, to ensure the control and transparency of authorised entities, some requirements or regulations should be prescribed. [21] In France, examination and approval requirements for an authorised entity have been put in place. The entity has to be first examined by a Commission and then the report of examination will be

submitted to two ministries for approval. And the committee is usually composed of representatives of the visually impaired community, copyright holders, and the National Library of France to balance the interests of relevant parties. [22]

Overall, for China, one of the priorities now is to establish the legitimacy of cross-border exchange and then set up supporting institutions on this basis and many Contracting Parties can provide many practical references. [23] In the next section, further discussion will be conducted upon the controversial issue of commercial availability.

#### **4. The Introduction of the Commercial Availability: Its Suitability in the Context of China**

The concept of 'commercial availability' should be discussed. If the accessible format copy of works has already been produced by the right holders and can be reasonably obtained through the commercial channels, this copy is deemed to be commercially available.

The Treaty has provided an optional clause of commercial availability, allowing the Contracting Parties to decide for themselves whether to apply the precondition for the limitations and exceptions. Article 4 of the Treaty, also known as the 'commercial unavailability clause' states that 'a Contracting Party may confine limitations or exceptions under this Article to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market.' [24] The purpose of this Article is to protect the exclusive rights of copyright holders and to leave reasonable interest for publishers engaged in advance.

Some Contracting Parties with mature markets, including Japan, Canada and Australia, have introduced the commercial unavailability clause. By comparison, this option is not introduced into the CLPRC 2020 in China. According to Paragraph 12 of Article 24, when producing accessible format copies for beneficiaries, relevant organizations are not required to meet the test for the 'commercial availability'. [25] And only the 'three-step test' agreed in the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) is considered. It verifies if the case meets fair use standards, to fall into the category of fair use. [26]

The relatively conservative attitude shown by China can be explained by some concerns. Typical concerns include the high cost of the test of commercial availability, cumbersome procedures, and unnecessary delays of them. It is commented that authorised entities may have a 'strong incentive' to search for commercially available versions of accessible formats due to the high cost of producing on their own. [27] The enthusiasm of the authorised entities to produce the copies can be affected. The vague legal standards of 'commercial availability' also hinder the realisation of the rights of the beneficiaries under the Treaty. Besides, the different implementation status of Contracting Parties under cross-border exchanges is a concern as well. [28] Given these

considerations, the test also gives many of the Contracting Parties pauses. [29]

Nonetheless, facing with other issues, it is also advisable for China to introduce the commercial unavailability clause in the long run. [30] Generally, the proportion of VIPs in developing countries is much larger than the developed countries due to inadequate medical and nutritional conditions while the accessible format copies hardly meet this market demand adequately. [31] Meanwhile, the economic disadvantage of the 'vulnerable' VIPs and the relatively limited resources of a developing country have led to an unprofitable and precarious state for the publishers involved. This illustration could refer to South Africa, which is similarly a developing country. Data provided that only around 0.5% of published books are available to print-disabled readers in South Africa, resulting from the dilemma faced by the publishers. [32] It indicates that it is probably more necessary to find a balance between the interests of publishers, copyright holders and VIPs in a developing country. [33] Some scholars also agree that the inclusion is corresponding more to the requirements of economic theories such as market failure. [34]

The explanation for the theories is the dual nature of exclusive rights and public rights reflected by intellectual property. The insufficient protection of creators' exclusive rights can weaken creators' creative incentives, which divert private input in the market to other directions. [35] On the contrary, over-protection of exclusive rights reduces public access to the works. Furthermore, the 'crude' implementation may defeat the Treaty's original purpose, which initially aims to transfer the cost of making and communicating accessible formats copies to governments. [36] Hence, the 'commercial unavailability clauses' should be considered more carefully, whether for the benefit of either party or the stable development of the market.

Regarding the introduction of the clause, the practice of some other Contracting Parties can be learned. In Japan, the National Diet Library of Japan provides a relatively complete bibliographic retrieval service for commercial availability test thus authorised entities can investigate commercially available works in the market easily. In Australia, some scholars suggested 'combining the lodgement of the works available in accessible formats with the operation of the Master Copy Catalogue', and it could motivate the copyright holders to upload the existing commercially available formats on their initiative to the catalogue. [37] A database can assist the institutions and beneficiaries to a large extent. [38]

In contrast, China's implementation can be more challenging without a supporting system in place. The resource integration between organizations that should be the subject, such as the Braille library has not yet been organised as well. Without these supports, the blind implementation of commercial availability can cause fair use applicable subjects to face investigation deadlock. Therefore, supporting measures for its implementation should be developed first. With certain authorised entities, a complete database or retrieval system of accessible format copies can be built in the future. In the initial stage, the lessons offered by Australian can be learned.

Copyright holders or publishers are encouraged to upload or register their accessible format copies which are commercially available. By registering, the commercial availability of their works can be recognised officially. This helps to reduce the cost of test of commercial availability, and also gives legal protection to the right holders who actively protect their rights.

Besides, more compromise solutions like compensations as offset may be possible alternatives. Moreover, in the exploratory phase, transparent procedures such as open discussions and hearings could also be considered. The UK and New Zealand have conducted consultations on the confirmation of this clause and its alternatives. Collecting opinions and evidence from different parties may yield stronger and more informed results. [39]

In a word, the adoption of the 'commercial unavailability clause' could be advisable for long-term development in China. Though the objective situation suggests that it is not realistic to introduce the clause directly, a supporting system can be built first and alternatives may be considered as well.

## **5. The Premise of Circumvention Rules: A Critical Issue in the Digital Sector of China First Section**

In the digital era, TPMs are important means of copyright protection. It is widely recognised in modern society that the general exception to copyright infringement for VIPs should be extended to digital distribution, otherwise it might lead to their disenfranchisement of them. [40] However, TPMs, as a measure of protecting exclusive rights, may hinder the application of traditional fair use. In the Treaty, to remove the obstacles caused by TPMs to the production of accessible formats copies, Article 7 imposes an obligation on Contracting Parties to ensure that the legal protection of TPMs does not impede the beneficiaries' legal interests under the Treaty. The modalities of implementation are left to the discretion of the Contracting Parties. [41]

As described in section 2, to undertake the obligations, CLPRC 2020 establishes the legal circumstances of circumvention of TPMs. For manufacturing accessible format copies, conditions for circumventing TPMs include 'not for profit' and 'the works is not available through normal channels'. For the understanding of 'normal access', reference may be made to the commercial availability in section 4, since the 'normal access' usually means commercial access.

Given Article 50, CLPRC 2020 seems to release a relatively conservative signal on the premise of circumventing TPMs. It does not give full rights to beneficiaries or authorised entities to circumvent the TPMs. It is undeniable that the incorporation of this new article can be a positive starting point, providing a balance between the interests of copyright holders and the public interest to access works. In Yang's report, it is believed that it is a positive implementation of the obligations of the Treaty and that the balance to which this article contributes is also complimented. [42] Critics question that the precondition of 'works cannot be obtained

through normal channels' should be removed, so as not to make this precondition clause be used against the aforementioned clause on fair use of accessible format version, thereby reducing the scope of application of Article 24. [43]

Considering CLPRC 2020 as a whole, the self-consistency of the legal logic of this provision may be questionable and may be contrary to the spirit of the Treaty. It means that the law protects the exclusive rights of works that have been set up with TPMs and can be obtained through normal channels, hence precluding fair use. Article 24 does not set a relevant commercial availability clause for fair use, while the circumvention of TPMs needs to meet the condition of availability. Accordingly, the provision of this premise seems to make it more difficult for the production of the accessible format version from a legal level, narrowing the scope of rights provided in Article 24. [44] Perhaps the serious outcome of this article is that TPMs could even be used as a means of circumventing fair use because of the enormous costs of commercial availability investigations. Meanwhile, this also contravenes the requirement of the Treaty that TPMs should not interfere with the enjoyment of treaty rights by beneficiaries.

Furthermore, this premise can be a violation of the spirit of the Treaty. Turning to the Beijing Treaty on Audiovisual Performances, the notes to the treaty already indicates that the right holders cannot take TPMs to prohibit the beneficiaries from enjoying exceptions or limitations under their domestic law, and this spirit should be consistent with the subsequent Treaties including the Treaty. [45] Therefore, it is not appropriate to use TPMs as a restriction of the scope of fair use. Taking the Treaty as a minimum for implementation, Contracting Parties should fulfill their basic obligations.

To sum up, in light of the foregoing, whether or not CLPRC adopts a 'commercial unavailability' clause, the premise of TPMs circumvention rules should be considered for removal, as it is redundant or 'preclude' exceptions and limitations provided by the law. The discussion in this section indicates that there are still many gaps to be filled in China's implementation of the Treaty. The next section, therefore, moves on to discuss or summarise the potential solutions.

## **6. Potential Solutions Proposed with the Challenges Faced by China at Their Core**

### **6.1 Define the Authorised Entities: Scope, Rights and Obligations**

To promote the distribution, production and exchange of domestic and international copies of accessible formats, CLPRC 2020 should confirm the scope and legal status of authorised entities. In the field of civil law, 'absence of legal prohibition means freedom'. [46] Without the applicable restriction of subject for the fair use in this field, all organizations in society may be able to exploit this provision. [47] Meanwhile, the absence of a legally authorised entity responsible for the boycott may lead to

chaos in the market of accessible format copies, and infringement situations such as piracy may exist.

As for the scope of the authorised entities, the National Library and other dominant authorised organizations should be clarified as authorised entities, due to their manpower and rich resources. Social entities that meet the standards should also be expected to participate in this cause, including other libraries, intermediaries, and other social organizations. Regulating the entities involved through simple procedures, such as setting thresholds and filing, clearly arouses enthusiasm for social participants more widely and saves procedural costs. Then, set their rights and obligations with the rights and obligations stipulated in the Treaty as the minimum.

### **6.2 Clarify the Legality of Cross-border Exchange and Promote International Collaboration**

The rights and obligations of authorised entities defined by the law also provide the basis for cross-border exchange. On the basis of confirming the legality of cross-border exchange, the authorised entity has the legal status to communicate with other authorised entities abroad. Explicit official authorisation also assists to mitigate the differences and confusion that exist in international exchanges. [48] Though the cross-border exchange has not yet become flourishing in the world, the rise of many exchange networks has positive significance. [49] China should also actively participate in these international exchange networks.

To be specific, as for the supporting mechanism, some scholars have mentioned the Accessible Books Consortium (ABC), an international coalition of public and private sectors led by the World Intellectual Property Organization. It can be an advisable choice for China to be involved in the ABC. By joining the ABC, it is possible for China to have access to training on the production and distribution of accessible formats and ABC Global Book Services including global online catalogues. Currently, over 730,000 titles in 80 languages accessible formats have been included by it. [50] If the expectation is for the legally authorised entities in China to be involved in the ABC, certain obligations need to be fulfilled, such as submitting their own collection information and accepting transmission requests, which also puts forward requirements for the construction of collection system and legal system in China.

### **6.3 Guarantee the Circumvention of TPMs within a Reasonable Range**

As discussed in Section 5, the premise of the TPMs clause should not be accepted. The balance between the exclusive rights of the copyright holders under the TPMs and the rights of the beneficiaries under the Treaty should be concerned.

TPMs should not hinder the production of legal copies of accessible formats, and it is also critical to protect copyright from infringement by subjects other than VIPs. A combination of obligations and measures may be more realistic. First, the development of relevant technologies including electronic library systems, managed by

designated or authorised entities (such as the National Library), should ensure that accessible format copies are accessible only to VIPs. [51] Related systems such as unified registration, examination and approval of VIPs people can also be adopted. With regard to the collection of accessible format copies, it may be more efficient for the copyright holders to actively transfer a version of the works that circumvents TPMs to the specific entity. It is worth learning from the German copyright law, which requires the copyright holders to accept the obligation of circumventing TPMs to VIPs. [52] Additionally, to protect the relatively weak copyright opposition, strengthen supervision and non-public welfare exception liability, corresponding downstream relief measures also merit attention. For instance, the burden of proof can be reversed to the library party in the litigation procedure. [53]

#### **6.4 Explore Commercial Availability and Other Alternatives**

In the above discussion, we believe that the commercial availability clause can be necessary for long-term market balance. However, China's existing supporting systems and legal provisions are not sufficient to implement the clause. The current attitude of China also shows a low possibility of including this clause in the short run due to the substantively difficult operation of the prerequisite.

In practice, supporting system construction and more modest alternatives to commercial availability are more worth exploring. Concerning the supporting system, the development of technologies mentioned above also plays an important role. For instance, an electronic platform, where copyright holders upload their commercially available copies in accessible formats, can help reduce the cost of commercially available testing. The specific practice in Australia can be learned, where the lodgement of the works available in accessible formats is combined with the operation of the Master Copy Catalogue. [54] Many practices of alternatives to the introduction of 'commercial availability' are already available in other countries. They involve paying fair compensation and using statutory licensing rather than fair use in specific areas, such as education. [55]

#### **7. Conclusion**

Considering the large number of VIPs in the world, the existing accessible format copies are insufficient, leading to a global 'book famine'. To overcome the 'book famine' and create benefits for VIPs, China has further implemented the Treaty in the CLPRC 2020. Faced with some challenges, gaps remain during the implementation. To effectively guarantee VIPs' equal rights to access the information, some potential solutions can be considered. First, the clarification of the authorised entities and the cross-border exchange is important. Second, taking advantage of relative technologies, electronic library and catalogues of domestic accessible format copies can be developed, which offers support to the future improvement of legislation and create the basis for international collaboration. Besides, domestic supporting

systems should also be further built, which can be learned from external practices. To further implement the obligations under the Treaty, active practice and exploration are believed to provide a basis for future refinement of laws and systems.

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