

# ALIGNMENT WITH THE MARRAKESH TREATY

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**SOUTH AFRICAN  
RESEARCH CHAIR:**

Intellectual Property,  
Innovation and Development

PARLIAMENTARY PUBLIC HEARINGS ON THE CAB 13B/2017

AUGUST 12, 2021

PROF CAROLINE NCUBE

# Scope: Call for comments June 4, 2021

1. "the Committee invited stakeholders and interested parties to submit written submissions with reference to the alignment of the [Copyright Amendment Bill \[B13B-2017\]](#) ...with the obligations set out in international treaties, including ... the [Marrakesh Treaty to Facilitate Access to Published Works for Person Who Are Blind, Visually Impaired, or Otherwise Print Disabled.](#)"
2. President's letter of referral

# Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled

adopted by the Diplomatic Conference to Conclude a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities in Marrakesh, on June 27, 2013

## CONTENTS

Preamble	
Article 1:	Relation to Other Conventions and Treaties
Article 2:	Definitions
Article 3:	Beneficiary Persons
Article 4:	National Law Limitations and Exceptions Regarding Accessible Format Copies
Article 5:	Cross-Border Exchange of Accessible Format Copies
Article 6:	Importation of Accessible Format Copies
Article 7:	Obligations Concerning Technological Measures
Article 8:	Respect for Privacy
Article 9:	Cooperation to Facilitate Cross-Border Exchange
Article 10:	General Principles on Implementation
Article 11:	General Obligations on Limitations and Exceptions
Article 12:	Other Limitations and Exceptions
Article 13:	Assembly
Article 14:	International Bureau
Article 15:	Eligibility for Becoming Party to the Treaty
Article 16:	Rights and Obligations Under the Treaty
Article 17:	Signature of the Treaty
Article 18:	Entry into Force of the Treaty
Article 19:	Effective Date of Becoming Party to the Treaty
Article 20:	Denunciation of the Treaty
Article 21:	Languages of the Treaty
Article 22:	Depositary

# Status of the the Marrakesh Treaty

- Marrakesh Visually Impaired Persons Treaty (2013) WIPO entered into force on September 30, 2016. (Total Contracting Parties: 79), South Africa has not joined and a decision has been made to accede to the treaty after the amendment of the Copyright Act, introducing the required provisions. [Note BlindSA litigation & submission]
- Section 19D of the CAB seeks to domesticate the Marrakesh Treaty **and** provide for exceptions and limitations for persons with other disabilities *which is permissible under article 12 of the Treaty*

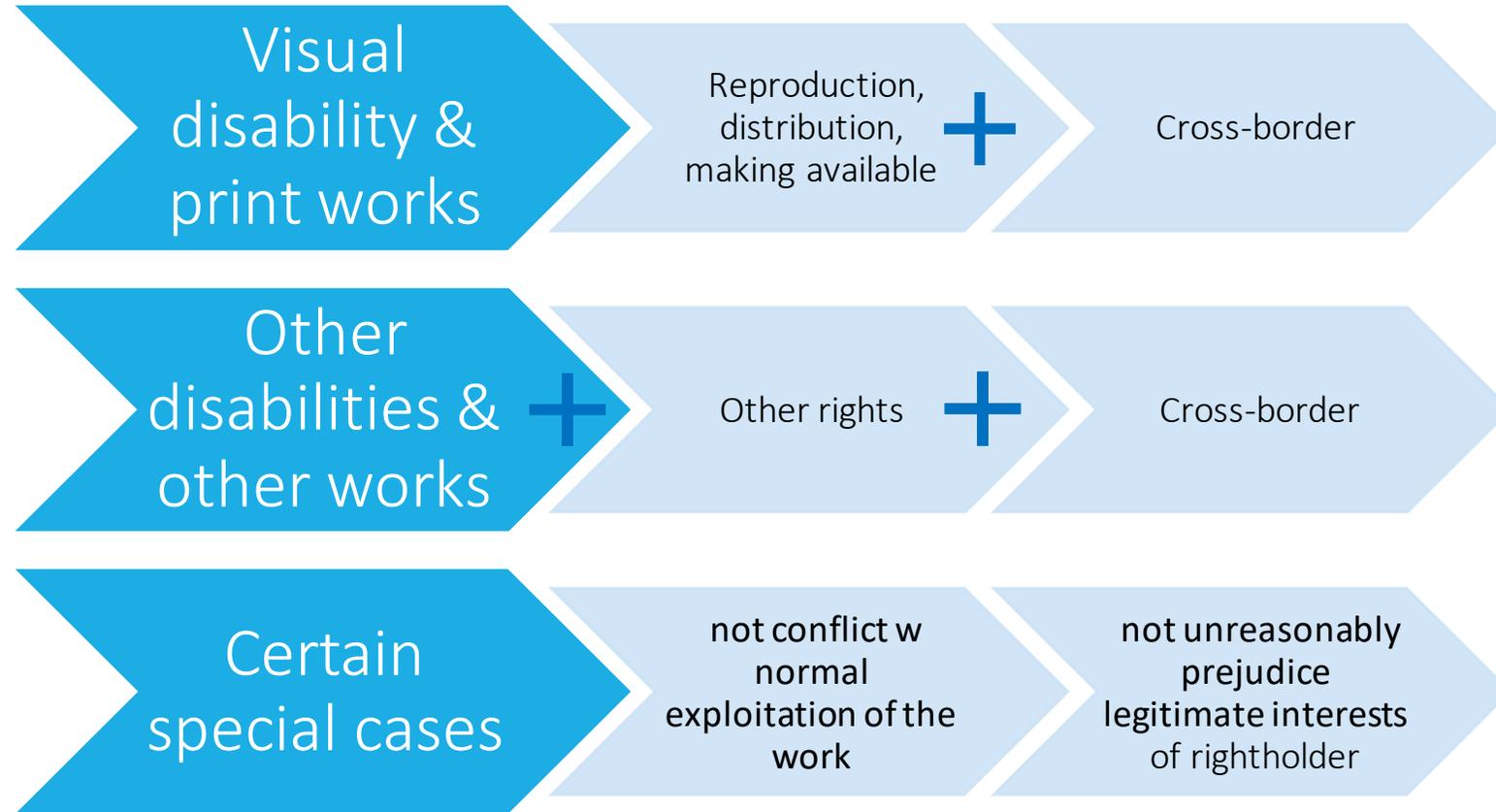
# Article 12 Marrakesh VIP Treaty

## Other Limitations and Exceptions

1. Contracting Parties recognize that a Contracting Party may implement in its national law **other copyright limitations and exceptions** for the benefit of **beneficiary persons than are provided** by this Treaty having regard to that Contracting Party's economic situation, and its social and cultural needs, in conformity with that Contracting Party's international rights and obligations, and in the case of a least-developed country taking into account its special needs and its particular international rights and obligations and flexibilities thereof.
2. This Treaty is **without prejudice to other limitations and exceptions for persons with disabilities** provided by national law.

# Article 12: Beyond Marrakesh

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# The reservations – a competent referral?

- Unclear/vague reservations that cannot be reasonably ascertained are not competently made

## 2. THE PRESIDENT'S REFERRAL

The President's letter of referral back to parliament dated 16 June 2020 introduced the disability access aspects as follows:

2. The Copyright Amendment Bill [8138-2017] ("the Copyright Bill") raises important matters that inter alia seek to accommodate the visually impaired and otherwise print disabled persons by introducing exceptions to the exclusive right of authors or their assignees preventing the reproducing or copying of their work in any manner or form. The proponents of the exception contend that without such exception, the visually impaired will have limited access to copyright literary works as such works cannot be transcribed to braille and other formats for the print disabled.

Paragraphs 19 and 20 of the letter then summarise the significance and import of the Marrakesh Treaty as follows:

19 The Marrakesh Treaty is a multilateral treaty on copyright and was adopted in Marrakesh, Morocco, on 28 June 2013. It has a bearing on the rights contained in the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty. Since first signed by India, many other countries seeking to cater for their visually impaired have signed it and enacted statutes that seek to facilitate the terms of the treaty within their relevant national statutes. Its objective is to facilitate access to published

# NO SPECIFIC COMPLAINT OR REFERRAL REGARDING S19D

merely summarises the treaty's provisions and do not expressly highlight any specific substantive issues with the disability provisions in the proposed section 19D

scope

works by visually impaired persons and persons with print disabilities. It is the first treaty to deal with copyright exceptions. It seeks to harmonize and strike a balance between the interests of rights-holders and vulnerable users, particularly the visually impaired and print disabled persons. It does this by allowing for copyright exceptions to facilitate accessible versions published books and other copyrighted works for visually impaired persons. It also requires contracting parties to include limitations and exceptions in order to allow reproduction, distribution and formats of published works designed for the visually impaired persons. It also seeks to facilitate exchange of published works between different countries.

20 The Marrakesh Treaty also includes in its definition of affected persons, persons with physical disabilities that prevent them from holding a book or any such published work if it requires holding in order for one to read. In its definition of "works" it includes works "... in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media."

Rights  
Cross-  
border

Works  
Physical  
disabilities

# No express & specific referral wrt s19D

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21: I have reservations about whether the Bills comply with the above Treaties and am therefore referring the Bills back to Parliament in order that it may consider the Bills against South Africa's International Law obligations.

## Referral

22 I have considered both the Bills, all submissions received and the process followed by Parliament in passing the Bills. Having done so, I have reservations about the constitutionality of the Bills for the following reasons:

...

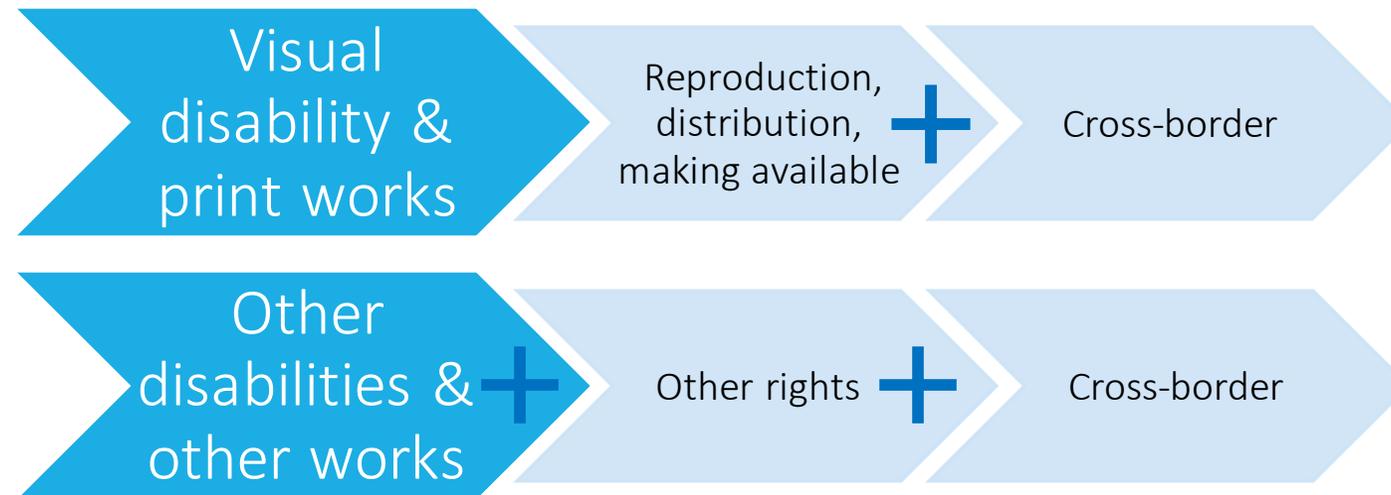
22.3 The new exceptions introduced by sections 12A, 128, 12C, 12D and 19B and 19C of the Copyright Bill are also likely to be declared unconstitutional on the basis that they are in breach of section 25(1) of the Constitution and the Three-Step test binding South Africa under international law.

19D not listed

# Alignment with the Marrakesh Treaty/Implied reservations

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1. That the definition of 'accessible format copies' includes more than print/text works covered by the Marrakesh Treaty;
2. That the definition of disabilities that is too broad and goes beyond the definition of 'beneficiary person' in the Marrakesh Treaty;
3. That the provisions do not contain a definition of works covered and authorised entities nor does it contain adequate cross-border provisions.



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Definitions – CAB	Comment
<p><b>‘accessible format copy’</b> means a copy of a work in an alternative manner or form, which gives a person with a disability access to the work and which permits such person to have access as feasibly and comfortably as a person without a disability;’</p>	<p>Marrakesh definition: b) "accessible format copy" means a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability.</p> <p>The accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons;</p> <p>The CAB definition uses much of the same language except that it uses ‘person with a disability’ instead of beneficiary person because it covers all disabilities. However, it omits the highlighted portion which it includes in s19D(1)’s conditions (a) –(c).<sup>12</sup></p>

Definitions CAB	Marrakesh Treaty
No definition because not limited	'Works' means literary and artistic works within the meaning of Article 2(1) of the Berne Convention for the Protection of Literary and Artistic Works, in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media [includes audio-books]
<p>'person with a disability' means a person who has a physical, intellectual, neurological, or sensory impairment and who requires the work to be in a format that enables that person to access and use the work in the same manner as a person without a disability;</p> <p style="text-align: center;"></p>	<p>A 'beneficiary person' is a person who:</p> <ul style="list-style-type: none"> <li>(a) is blind;</li> <li>(b) has a visual impairment or a perceptual or reading disability which 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</li> <li>(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; regardless of any other disabilities.</li> </ul> <p><b>The CAB definition of a person with a disability includes all the above. See, for example, in table 3 below the list of countries that have a similarly broad definition.</b></p>

CAB	Marrakesh Treaty
<p>No def of authorised entity nor usage of the term instead uses the terminology;            "Any person as may be prescribed and that serves persons with disabilities...'</p> <p>Comment: this is broad enough to capture 'authorised entity' and further detail can be provided in regulations. However, for ease of understanding &amp; cross-border cooperation, may be more in alignment to use 'authorized entity' and to</p> <ol style="list-style-type: none"> <li>1. include the Marrakesh definition in the CAB.</li> </ol> <div data-bbox="471 742 624 892" style="text-align: center;">  </div>	<p>Authorised entity "authorized entity" means an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations</p> <p>An authorized entity establishes and follows its own practices:</p> <ol style="list-style-type: none"> <li>(i) to establish that the persons it serves are beneficiary persons;</li> <li>(ii) to limit to beneficiary persons and/or authorized entities its distribution and making available of accessible format copies;</li> <li>(iii) to discourage the reproduction, distribution and making available of unauthorized copies; and</li> <li>(iv) to maintain due care in, and records of, its handling of copies of works, while respecting the privacy of beneficiary persons in accordance with Article 8.</li> </ol>

<p>CAB</p>	<p>Marrakesh Treaty : cross border provisions art 5</p>
<p>* Comment on previous slide; note options in 5(2) and 5(4)</p> <p>Amend Section 19D(3) to read: (3) A person with a disability or a person that serves persons with disabilities, <b><u>including an authorised entity</u></b>, may, without the authorisation of the copyright owner export to or import from another country any legal copy of an accessible format copy of a work referred to in subsection (1), as long as such activity is undertaken on a non-profit basis by that person, <b><u>provided that prior to the distribution or making available the person did not know or have reasonable grounds to know that the accessible format copy would be used for other than for persons with disability.</u></b></p>	<p>(1) <b>shall</b> provide that if an accessible format copy is made under a limitation or exception or pursuant to operation of law, that accessible format copy may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party</p> <p>2. <b>may</b> fulfill Article 5(1) by providing a limitation or exception in its national copyright law such that:</p> <p>(a) authorized entities shall be permitted, without the authorization of the rightholder, to distribute or make available for the exclusive use of beneficiary persons accessible format copies to an authorized entity in another Contracting Party; and</p> <p>(b) authorized entities shall be permitted, without the authorization of the rightholder and pursuant to Article 2(c), to distribute or make available accessible format copies to a beneficiary person in another Contracting Party;</p> <p>provided that prior to the distribution or making available the originating authorized entity did not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons</p> <p>3. <b>may</b> fulfill Article 5(1) by providing other limitations or exceptions in its national copyright law pursuant to Articles 5(4), 10 and 11</p>

A Marrakesh Treaty contracting state may choose to enact only those exceptions and limitations provided for in the treaty as has been done by the following:

<extract from Scoping Study, 2019 SCCR/38/3>

Exceptions	Number of Countries	WIPO member states [yellow: Marrakesh Treaty is in force pursuant accession or ratification]
Exception for persons with visual disabilities only limited to print/text works [Marrakesh Scope only]	24	Argentina, Armenia, Azerbaijan, Belarus, Brazil, Bulgaria, Cameroon, China, Democratic People's Republic of Korea, Georgia, Grenada, Indonesia, Kazakhstan, Lao People's Democratic Republic, Mauritius, Nicaragua, Panama, Paraguay, Peru, Philippines, Rwanda, Ukraine, Uruguay, Vietnam

Marrakesh Only



# NARROW SCOPE: BOOK FAMINE ONLY

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- Other disabilities are not covered e.g. aural/hearing, cognitive
- Other works (not print or text) are not covered e.g. audio-visual works for which a person who is hard of hearing or deaf may need text/subtitles to understand
- The treaty acknowledges that states have policy space and the legal right to go beyond its narrow scope - article 12
- Examples of assistive technologies that can be used for other works and disabilities
  - Audio (visual) description
  - Simple language versions
  - Automated adaptation technologies

# Article 12 Marrakesh VIP Treaty

## Other Limitations and Exceptions

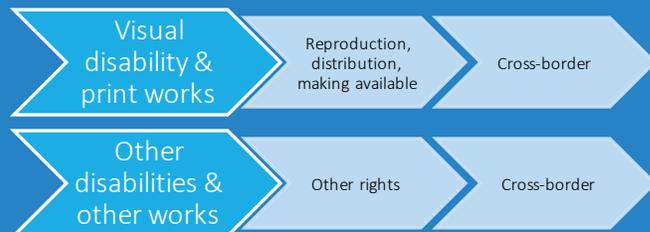
1. Contracting Parties recognize that a Contracting Party may implement in its national law **other copyright limitations and exceptions for the benefit of beneficiary persons than are provided** by this Treaty having regard to that Contracting Party's economic situation, and its social and cultural needs, in conformity with that Contracting Party's international rights and obligations, and in the case of a least-developed country taking into account its special needs and its particular international rights and obligations and flexibilities thereof.
2. This Treaty is **without prejudice to other limitations and exceptions for persons with disabilities** provided by national law.

# Policy space

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- State parties have freedom to implement their 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 (articles 10 – 11) .
- Accordingly, states' copyright legislation looks very different in terms of how the exceptions and limitations are written - See Scoping Study for WIPO SCCR, 2019
- May go beyond works, rights and beneficiary person, covered in treaty (article 12)

# WIPO MEMBER STATES - BEYOND MARRAKESH



<extract from Scoping Study, 2019 SCCR/38/3>

Exceptions	Number of Countries	WIPO member states [yellow: Marrakesh Treaty is in force pursuant accession or ratification;*EU ratification]
Exception for <b>all disabilities</b> (*does not specify disability)	28	Austria*, Belgium*, Bosnia and Herzegovina, Croatia, Czech Republic*, Ecuador, Estonia,* Gabon, Germany*, Hungary*, India, Israel, Italy*, Liechtenstein, Malta,* Mexico, Montenegro, Netherlands*, Poland*, Republic of Moldova, Romania, Sao Tome and Principe, Serbia, Slovakia*, Slovenia*, Switzerland, Republic of Macedonia, Turkey
Exception for persons with <b>aural disabilities</b>	25	Australia, Bahamas, Belize, Cabo Verde, Chile, Cote d'Ivoire, Denmark, Fiji, Greece*, Ireland,* Jamaica, Japan, Liberia, Lithuania,* Luxembourg,* Malaysia, Mongolia, New Zealand, Niue, Norway, Saint Vincent and the Grenadines, Thailand, Uganda, United Kingdom, United States of America
Exception for persons with <b>cognitive/mental disabilities</b>	22	Albania, Argentina, Australia, Belize, Cabo Verde, Canada, Fiji, France,* Ireland, Japan, Latvia,* Lithuania, Malaysia, New Zealand, Niue, Philippines, Saint Vincent and the Grenadines, Singapore, Spain, Thailand, United Kingdom, Uruguay
Exception for persons with <b>physical disabilities</b>	19	Argentina, Australia, Belize, Cote d'Ivoire, Denmark, Dominican Republic, Fiji, France, Ireland, Latvia, Lithuania, Malaysia, New Zealand, Niue, Saint Vincent and the Grenadines, Spain,* Thailand, United Kingdom, Uruguay
Exception for persons with <b>visual disabilities beyond print/text works/works not specified</b>	72	Albania, Australia, Austria, Bahamas, Belize, Bosnia and Herzegovina, Cabo Verde, Canada, Chile, Colombia, Cook Islands, Cote d'Ivoire, Croatia,* Czech Republic, Denmark, Ecuador, El Salvador, Estonia, Fiji, Finland, France, Gabon, Germany,* Greece, Hungary, Iceland, India, Ireland, Israel, Italy, Jamaica, Japan, Kuwait, Kyrgyzstan, Latvia, Liberia, Liechtenstein, Lithuania, Luxembourg,* Malawi, Malaysia, Malta, Mexico, Mongolia, Montenegro, Netherlands, New Zealand, Nigeria, Niue, Norway, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania,* Saint Vincent and the Grenadines, Sao Tome and Principe, Serbia, Seychelles, Singapore, Slovakia,* Spain, Sweden, Switzerland, Thailand, The former Yugoslav Republic of Macedonia, Turkey, Uganda, United Kingdom, United States of America

# Support for s19

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- Supported by all submissions so far received in the public comment process, albeit with some concerns raised about the alignment issues, which have been addressed in this presentation
  - e.g. Dr Joel Baloyi (UNISA), Michelle Woods (WIPO)
- Generally well received in opinion pieces and other commentary published elsewhere e.g.
  - "A salutary aspect of the Bill is the introduction of section 19D, which provides for exceptions to the author's exclusive rights in favour of persons with disability"...
  - "Importantly, (so it will be assumed) it meets the three-step test. Subject to it being completely in conformity with the MVT it can pass muster." ...
  - " this exception into our law, while being perfectly legitimate, generally accepted, and in keeping with international norms, is being held up and stymied ..." [Copyright Blind Spot](#) Prof Owen Dean, 14 April, 2021.

# Conclusion

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- referral did not expressly raise any specific matters in relation to the proposed s19D, not included in enumerated list.
- S19D, like provisions in the copyright laws of many Marrakesh Treaty contracting states, in which the treaty is in force, go beyond the treaty by providing exceptions and limitations beyond the treaty's narrow scope, as is permitted by article 12.
- Some recommendations have been made pertaining to authorised entities and cross border exchanges of works to more closely align the CAB to the Marrakesh Treaty.
- Further, discussions at international level have been focused on the broader concerns of other disabilities and other works beyond those provided for by the Marrakesh Treaty. It is therefore prudent for South Africa to take the broader approach.
- More importantly, the country is bound by both the constitution and the CRPD to ensure equal access to copyright protected works (not only print/text works) for persons with disabilities (not only visual disabilities).

# Some references

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Caroline B Ncube, Blake E Reid and Desmond O Oriakhogba '[Beyond the Marrakesh VIP Treaty: Typology of copyright access-enabling provisions for persons with disabilities](#)'. J World Intellect Prop. 2020; 1– 17. 2.

Laurence R. Helfer et al., Copyright Exceptions Across Borders: Implementing the Marrakesh Treaty, 42 *European Intellectual Property Review* 332-340 (2020)

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