

# REGIONAL DEVELOPMENTS

## THE MARRAKESH TREATY AND AFRICAN COPYRIGHT LAWS: LESSONS FOR THE AFRICAN REGION FROM *BLIND SA v MINISTER OF TRADE, INDUSTRY AND COMPETITION*

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### 1 Introduction

Globally, the advancement of digital technology has allowed for access, management, dissemination, and utilisation of copyrighted literary information and works. However, in spite of such technological progress, persons with print and visual disabilities in Africa are denied access mainly because there are no exceptions in national copyright laws allowing them access to works protected by copyright.<sup>1</sup> The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (Marrakesh Treaty)<sup>2</sup> requires state parties to ensure that their copyright legislation does not unreasonably bar access to books by persons with print and visual disabilities.<sup>3</sup> The Marrakesh Treaty has been given effect in South Africa by the decision of the Constitutional Court in *Blind SA v Minister of Trade, Industry and Competition (Blind SA)*.<sup>4</sup> The Constitutional Court held that the conferment

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- 1 J Band & K Cox 'National implementations of the Marrakesh Treaty by countries that have ratified or acceded to the Treaty' (2021) 6 <https://www.arl.org/wp-content/uploads/2021/01/2021.01.15-MarrakeshTreaty.pdf> (accessed 4 December 2022).
- 2 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, WIPO Doc. VIP/DC/8, 27 June 2013 (entered into force 30 September 2016).
- 3 Article 30(3) of the UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution/ adopted by the General Assembly, 24 January 2007, UN Doc A/RES/61/106 (CRPD).
- 4 *Blind SA v Minister of Trade, Industry and Competition & Others* Case CCT 320/21 [2022] ZACC 33.

of exclusive rights of literary works to copyright-holders under domestic legislation without taking into account the rights of persons with print and visual disabilities to have access to those materials amounts to unfair discrimination under the Constitution of the Republic of South Africa, 1996 (the Constitution).<sup>5</sup> In reaching its decision, the Court took into account international obligations under the Marrakesh Treaty.

Several African countries have copyright laws that violate the rights of persons with print and visual disabilities and do not conform to the Marrakesh Treaty.<sup>6</sup> While this article is not a commentary on the copyright laws of individual countries in Africa, the paper will give illustrations, including using Kenya and Nigeria, on how the non-conformity of domestic legislation to the Marrakesh Treaty violates the rights of persons with print and visual disabilities in the region. The aim of this commentary is to use the decision of the Constitutional Court of South Africa in one sense to critically comment on the case and in another sense to use the case as a positive lesson for other jurisdictions and a source of persuasive jurisprudence. The commentary is divided into five sections. The first section is the introduction. Section two gives an overview of the Marrakesh Treaty's key legal and policy innovations and its relationship to international human rights. In section three, the decision in *Blind SA* is analysed. Section four reflects on lessons that can be drawn from *Blind SA* for ensuring the rights of persons with print and visual disabilities in the African region. Section five is the conclusion.

## 2 Marrakesh Treaty

The Marrakesh Treaty specifically addresses the problem of book famine. The phrase 'global book famine' was coined in the United Kingdom (UK) by the UK Royal National Institute of Blind People as part of its 'Right to Read' campaign.<sup>7</sup> In the Global South, where 90 per cent of persons with print and visual disabilities reside, the book famine is very severe due to national copyright laws that prohibit literary materials from being adapted into accessible formats. Particularly, only less than one per cent of published materials in developing countries are available in accessible formats.<sup>8</sup>

The Marrakesh Treaty was adopted on 27 June 2013 by the member states of the World Intellectual Property Organization (WIPO).<sup>9</sup>

5 Constitution of the Republic of South Africa, 1996.

6 Band & Cox (n 1) 6.

7 L. Ayoubi 'The Marrakesh Treaty: Fixing international copyright law for the benefit of the visually impaired persons' (2015) 13 *New Zealand Journal of Public & International Law* 256.

8 L. Helfer et al 'Copyright exceptions across borders: Implementing the Marrakesh Treaty' (2020) 42 *European Intellectual Property Review* 333.

9 Ayoubi (n 7) 256.

On 30 September 2016, the Marrakesh Treaty entered into force with 20 member states. The goal of the Marrakesh Treaty is to increase access to printed materials for persons with print and visual disabilities around the world.<sup>10</sup> It aims at limiting rights-holders' exclusive rights in favour of persons with disabilities. The Marrakesh Treaty requires its contracting member nations to create limitations and exceptions to copyright law that will make it easier for those with print and visual disabilities to access printed works in accessible formats such as Braille and digital audio files. It also establishes rules for the exchange of such accessible format copies across borders.<sup>11</sup>

Overall, the Marrakesh Treaty aims to reconcile the rights of copyright owners with those of persons with disabilities in accordance with the Convention on the Rights of Persons with Disabilities (CRPD).<sup>12</sup> Article 30(3) of the CRPD obliges state parties to ensure that laws protecting intellectual property (IP) rights do not constitute unreasonable or discriminatory barriers to access by persons with disabilities. Closely related to the right of accessibility is the concept of reasonable accommodation, which is significant to persons with print and visual disabilities. The CRPD defines reasonable accommodation as necessary and appropriate modification and adjustments that may be employed to ensure that persons with disabilities enjoy or exercise on an equal basis with others, all human rights and fundamental freedoms.<sup>13</sup> Therefore, by mandating exceptions to copyright law, the Marrakesh Treaty is building upon the CRPD's principle of reasonable accommodation, which essentially requires states to take positive measures to adapt literary works into accessible format copies to enable the effective participation of persons with print and visual disabilities in the literary society.<sup>14</sup>

### 3 Facts of *Blind SA* case

The case began in the High Court of South Africa.<sup>15</sup> It involved Blind SA, a non-profit organisation, which was acting in the interest of persons with print and visual disabilities and the public in general. Blind SA challenged the constitutionality of certain provisions of the Copyright Act arguing that the law did not include provisions designed to ensure that persons with print and visual disabilities can access works under copyright. The applicant (Blind SA) argued that the requirement for members of the public to obtain the consent of copyright owners before converting any works into formats suitable for the use by persons with print and visual disabilities was discriminatory and unconstitutional. Blind SA took the view that the

10 Preamble of the Marrakesh Treaty.

11 Article 5-6 of the Marrakesh Treaty.

12 CRPD (n 3).

13 Article 2 of the CRPD.

14 JL Pretorius et al *Employment equity law* (2001, 2021 Update) chap 7, para 7.1.

15 *Blind SA v Minister of Trade* (2021) ZAGPPHC 871.

Copyright Act needed to be amended immediately to allow for an express exception that permits the production of literary works in accessible format copies that are suitable for use by persons with print and visual disabilities.<sup>16</sup> The legislative process to amend the Copyright Act had endured since 2015. The amendment was by way of the Copyright Amendment Bill (CAB),<sup>17</sup> which Parliament passed on 28 March 2020. Through section 19D, the CAB under the heading '[g]eneral exceptions regarding protection of copyright work for persons with disability' sought to allow for the conversion of copyright works into accessible format copies.

However, the CAB amendment was delayed by the President on 16 June 2020 after raising concerns about its constitutionality.<sup>18</sup> As a result, the National Assembly's decision to pass the CAB was rescinded and the Bill was reclassified and referred back to Parliament for re-consideration. According to Blind SA, the delay in amending the Copyright Act was unconstitutional because it perpetuated the violation of the rights of persons with print and visual disabilities. Over and above relying on section 9 of the Constitution, which guarantees the right to equality and non-discrimination on the ground of disability, Blind SA relied on the following fundamental rights that are guaranteed by the Constitution: the right to human dignity (section 10), freedom of expression (section 16(1)(b)), basic education (section 29(1)), and the right to language and culture (section 30). The respondents did not oppose the assertion that the Copyright Act does not afford access by print-disabled persons to accessible format copies. However, they argued that the lack of accessibility limitations in the Copyright Act was not unconstitutional since the first respondent was empowered by law to promulgate regulations that would allow for the reproduction of works under copyright in the manner contemplated by Blind SA.

### 3.1 Issues

The main issue in *Blind SA* was whether the provision of the Copyright Act to limit the availability of works under copyright in accessible formats infringes on the rights of persons with print and visual disabilities to equality, human dignity, freedom of expression, basic education, and language and culture in accordance with sections 9, 10, 16(1)(b), 29(1) and 30 of the Constitution respectively.<sup>19</sup> An attendant issue was whether the Court in exercise of its broad remedial powers in terms of section 172(1)(b) of the Constitution, should read-in, with immediate effect, section 19D of the CAB into the Copyright Act for purposes of ensuring equity and justice

16 *Blind SA* (n 4) para 17.

17 (B 13B-2017).

18 *Blind SA* (n 4) para 7.

19 *Blind SA* (n 4) para 4.

to the public. The case considered the need to align the Copyright Act with the Marrakesh Treaty, as well as other international agreements, which South Africa is a signatory to, such as the CRPD.

### 3.2 Decision

At first instance, the High Court agreed with *Blind SA* and declared the Copyright Act to be unconstitutional to the extent that it failed to make provision for exceptions that would enable access to literary works in accessible formats by persons with print and visual disabilities.<sup>20</sup> The High Court, per Mbongwe J, held that the statutory prohibition of the free conversion of works to be discriminatory and inconsistent with the right to equality under section 9 of the Constitution. This is particularly so because persons with print and visual disabilities are one of the groups contemplated by section 9 as a previously disadvantaged category of people who are not only entitled to the full and equal enjoyment of all rights and freedoms, but for which the state has a duty to take positive measures to protect and advance their equality.<sup>21</sup>

The judge found section 19D of the CAB to be in accordance with South Africa's intent obligations under the Marrakesh Treaty. Therefore, the delay in adopting the CAB, according to the High Court, was unreasonable and contrary to the provisions of the Constitution as it unjustifiably perpetuated the violation of the rights of persons with print and visual disabilities.<sup>22</sup> The decision of the High Court was upheld on appeal to the Constitutional Court. The Constitutional Court reaffirmed the duty of the state to ensure that works are made accessible in the variety of formats that will best serve those with print and visual disabilities. To this end, it declared sections 6 and 7 as read with section 23 of the Copyright Act to be inconsistent with the rights of equality, human dignity, freedom of expression, basic education, and language and culture in accordance with sections 9, 10, 16(1)(b), 29(1) and 30 of the Constitution respectively.

### 3.3 Analysis

Generally, copyright law protects certain categories of original works, including literary, musical, dramatic, cinematographic, broadcast, and sound recordings. *Blind SA* concerned published literary works.<sup>23</sup> The Constitutional Court defined literary works to include books, magazines, periodicals, articles, textbooks and other educational materials.<sup>24</sup> The

20 *Blind SA* (n 15) para 28.1.

21 Pretorius et al (n 14) para 7.2.

22 *Blind SA* (n 15) para 11.

23 *Blind SA* (n 4) para 60.

24 *Blind SA* (n 4) para 48.

definition is aligned with the provisions of the Marrakesh Treaty, which stipulates that works permitted to be converted into accessible format include

literary and artistic works within the meaning of ... the Berne Convention ... in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media.<sup>25</sup>

Article 2(a) of the Marrakesh Treaty further interprets this definition as including works in audio form, such as audiobooks. However, article 2(a) should be interpreted to exclude audio-visual works, such as films, for conversion into accessible format since no consensus was reached during the negotiation process of the Marrakesh Treaty.<sup>26</sup>

The decision in *Blind SA* is the first time the Constitutional Court interpreted the provisions of South Africa's Copyright Act in relation to the Marrakesh Treaty. Sections 6 and 7 as read with section 23 of the Copyright Act vests ownership of copyright in a literary work in the author, who is defined as the person who first makes or creates the work. The provisions have conferred copyright-holders with certain exclusive rights to their protected works, which include reproduction, adaptation, distribution, broadcasting, communication, importation, and exportation rights and the right to enforce technological protection measures over their digital contents. Besides the rights of the copyright-holders, the Copyright Act does not mention the rights of persons with print and visual disabilities. It means that only the owner of the copyright can limit the use or re-dissemination of their works. Sections 6, 7, and 23 of the Copyright Act were alleged to violate South Africa's Constitution and the country's obligations under the Marrakesh Treaty in *Blind SA*.

Although the Copyright Act focuses on the interests of the copyright-owners, there is need for determining the legitimacy of these interests in relation to limitations and exceptions for the benefit of persons with print and visual disabilities. The Marrakesh Treaty reaffirms the importance of public interest in the balance of protection and access and relates it to the case of the persons with print and visual disabilities by stating that its Contracting Parties recognise:

[T]he need to maintain a balance between the effective protection of the rights of authors and the larger public interest, particularly education, research and access to information, and that such a balance must facilitate effective and timely access to works for the benefit of persons with visual impairments or with other print disabilities.<sup>27</sup>

25 Article 2(a) of the Marrakesh Treaty.

26 JJ Hua 'Implementation of the Marrakesh Treaty for Visually Impaired Persons into the Chinese copyright law' (2017) 1 *China and WTO Review* 14.

27 Preamble of the Marrakesh Treaty.

It is apparent on examination of the list of exclusions to the protection offered by copyright contained in the Marrakesh Treaty that the public interest is the overriding concern. Therefore, exclusions made for the benefit of persons with print and visual disabilities should be interpreted with the public interest in mind. In fact, under article 4(1) of the Marrakesh Treaty, contracting parties are obliged to provide, in their national laws, a limitation or exception to the rights of reproduction, adaptation and distribution, so as to facilitate the availability of literary works in accessible format to persons with print and visual disabilities.

Prior to the Marrakesh Treaty, South Africa's Copyright Act required authorisation from the copyright owner before any literary work could be copied, interpreted or disseminated. Unterhalter AJ acknowledged that the purpose of the requirement of authorisation under the Copyright Act was to protect the rights of owners of copyright in literary works.<sup>28</sup> The concept of 'authorisation' was one of the innovations under the British Copyright Act.<sup>29</sup> Due to colonialism, the concept of authorisation is firmly established in the legislation of many common law countries in Africa. South Africa inherited her first copyright laws from her former colonial masters, the Netherlands and Britain.<sup>30</sup> The action for authorising infringement, in the context of persons with print and visual disabilities in South Africa, is to be found in section 23 of the Copyright Act. The section restricts access to literary works by rendering it illegal to perform certain actions without obtaining the rights holder's consent.<sup>31</sup> As a result, those with print and visual disabilities have reduced access to a great deal of copyright work. According to the Constitutional Court, the application of the requirement of authorisation without regard of its impact to different classes of persons, such as those with print and visual disabilities amounts to unfair discrimination under section 9(3) of the Constitution.

Thus, any restriction by the state to restrict the use of any information that is subject to copyright, must be done in a manner that does not violate the provisions of the Constitution. According to Unterhalter AJ, the right of a copyright owner under the Copyright Act to authorise the reproduction or adaptation of literary works to the exclusion of persons with print and visual disability is a constitutional infirmity that must be cured.<sup>32</sup> The Preamble of the Constitution states, inter alia that all citizens, including those with disabilities, are equally protected by law. In the Bill of Rights, persons with disabilities enjoy the rights to dignity,<sup>33</sup> education,<sup>34</sup>

28 *Blind SA* (n 4) para 69.

29 British Copyright Act of 1911.

30 M Riby-Smith 'South African copyright law – The good, the bad and the Copyright Amendment Bill' (2017) 12 *Journal of Intellectual Property Law & Practice* 216.

31 Section 23 of the Copyright Act.

32 *Blind SA* (n 4) para 88.

33 Sec 10 of the Constitution.

34 Sec 29 of the Constitution.

language and culture,<sup>35</sup> access to information<sup>36</sup> and freedom of expression<sup>37</sup> on an equal basis with non-disabled persons. Therefore, in order to ensure that there is substantive equality under the Copyright Act, it is necessary for the state to accommodate the different needs of persons with disabilities.<sup>38</sup> Clearly, the exclusive rights of copyright-owners to literary works as set out in the Copyright Act cannot be justified since they do not allow for special measures that take into account the needs of persons with disabilities to access literary works.

Another example of the Copyright Act falling behind in terms of the Marrakesh Treaty can be found in its definition of 'reproduction'. Section 1 of the Copyright Act defines reproduction in terms of literary works to include a reproduction in the form of a record or a cinematograph film. An argument that was raised in *Blind SA* is that reproduction under the Copyright Act permits sufficient amplitude to allow literary works to be rendered into accessible format copies for the use of persons with print and visual disabilities.<sup>39</sup> It was contended by the respondents that the Copyright Act does not violate the provisions of the Constitution since section 13 empowers and requires the Minister in charge of intellectual property (IP) to promulgate regulations that would permit the reproduction of literary works into accessible format copies for persons with print and visual disabilities. Section 13 of the Copyright Act stipulates that:

In addition to reproductions permitted in terms of this Act reproduction of a work shall also be permitted as prescribed by regulation, but in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright.

Clearly, this provision only mentions the limitations and exceptions to the right to reproduction. According to Unterhalter AJ, the definition of reproduction in South Africa's Copyright Act is not comprehensive as it is only limited to making copies of literary works. The judge's conclusions are valid because reproduction alone cannot translate literary works into accessible format copies. The latter, according to Unterhalter AJ, requires interpretation and an effort to render the meaning in other accessible formats, which goes beyond reproduction.<sup>40</sup>

According to Sullivan, reproduction is linked to the right of distribution.<sup>41</sup> However, it can be argued that according to the Marrakesh Treaty, reproduction is also connected to the right of adaptation. As a

35 Sec 30 of the Constitution.

36 Sec 32 of the Constitution.

37 Sec 16 of the Constitution.

38 Pretorius et al (n 14) chap 7, para 7.1.

39 *Blind SA* (n 4) para 76.

40 *Blind SA* (n 4) para 87.



result, limitations and exceptions of copyright ownership should not be restricted only to making copies. What is required are copies that are accessible, thus the right of adaptation. The phrase ‘accessible formats’ has been defined broadly under the Marrakesh Treaty to mean ‘alternative manner or format’ that allows an eligible person to have access to a work that is equivalent to a person without a disability.<sup>42</sup> The Marrakesh Treaty does not list the formats in detail in which literary works can be converted into, but rather is accommodating of all possible formats accessible to persons with disabilities.<sup>43</sup> The Judge in *Blind SA* reiterated this point in the following manner:

Those who serve the interests of persons with print and visual disabilities should be given the greatest latitude to produce literary works in accessible format copies and to develop technologies to do so that are ever better at rendering the original work in the best possible way, tailored to the varied incidents of the impairments such persons suffer.<sup>44</sup>

Therefore, section 13 of the Copyright Act is not useful for clarifying the scope and definition of intended limitations and exceptions as per the Marrakesh Treaty. The South African Parliament, as discussed earlier, had initiated an amendment to the Copyright Act in 2019 in order to bring the Copyright Act in line with the Marrakesh Treaty. Section 19D of the CAB partly cures the infringement on the rights of persons with print and visual disabilities in respect to access of literary works. As a remedy to the defects of the Copyright Act, the Constitutional Court read in the amendment into the present law.<sup>45</sup>

## 4 Lessons for the African region

Undoubtedly, the decision in *Blind SA* aims to ensure that persons with print and visual disabilities participate effectively in education, entertainment, and other relevant activities in the society. However, in order for persons with disabilities to be able to effectively have access to literary works, an enabling legal framework is required. Although certain African states, for example Botswana, Burkina Faso, Central African Republic, Ethiopia, Ghana, Lesotho, Mali, Morocco, Rwanda, Tanzania, Tunisia, and Zimbabwe have ratified the Marrakesh Treaty, they are yet to amend their copyright laws.<sup>46</sup> The copyright laws in these states, it could therefore be argued, do not meet the minimum standards of copyright protection required by the Marrakesh Treaty. African states need to

41 J Sullivan *Study on Copyright Limitations and Exceptions for the visually impaired* World Intellectual Property Organization (WIPO) Standing Committee on Copyright and Related Rights (SCCR), SCCR/15/7, 20 February 2007, at 28.

42 Art 4(1)(a) of the Marrakesh Treaty.

43 Hua (n 26) 14.

44 *Blind SA* (n 4) para 89.

45 *Blind SA* (n 4) para 104.

46 Band & Cox (n 1).

introduce 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 persons with print and visual disabilities. Copyright-owners are unlikely to voluntarily provide measures facilitating these exceptions. Experience has shown that copyright-owners will resist any measures that are not mandatorily provided by law to allow for limitations and exceptions for beneficiaries so that they can legally gain access to literary works.<sup>47</sup> Therefore, the adoption and implementation of the Marrakesh Treaty is the only way to address the accessibility problem.

Some African states may argue that provision of access for persons with print and visual disabilities were already provided for under their domestic copyright law and there is no need for amendments as per the Marrakesh Treaty. Examples of African States with pre-Marrakesh exceptions in their copyright legislation include Cameroon,<sup>48</sup> Cape Verde,<sup>49</sup> Mauritius,<sup>50</sup> Nigeria,<sup>51</sup> and Uganda.<sup>52</sup> However, some of these provisions do not capture the essence of the Marrakesh Treaty thus the need for reforms. For example, Nigeria's copyright legislation provides as follows:

[R]eproduction of published work in braille for the exclusive use of the blind, and sound recordings made by institutions or other establishments approved by the Government for the promotion of the welfare of other disabled persons for the exclusive use of such blind or disabled person.<sup>53</sup>

Clearly, this pre-existing exception for persons with visual disabilities is not Marrakesh compliant as it is too narrow in scope. A close reading of the provision reveals that the scope of the beneficiaries in the Nigerian Act is only limited to 'the blind', whereas the application of the Marrakesh Treaty extends to those who cannot read print books due to a physical disability.<sup>54</sup> Therefore, the parameters of beneficiary persons under domestic copyright regimes in Africa should be expanded to include persons with print and visual disabilities and those who are unable to physically hold a book or move their eyes for reading, so as to comply with the Marrakesh Treaty.<sup>55</sup> This approach, according to Helfer et al, is consistent with the CRPD's evolving concept of disability.<sup>56</sup>

47 C Tan 'Moving towards a more inclusive copyright regime for the visually impaired' (2012) 24 *Singapore Academy Law Journal* 433.

48 Section 29 of the Copyright and Neighbouring Rights of 2000.

49 Article 64 of the Copyright Law of 1990.

50 Section 23 of the Copyright Act of 2014.

51 Second schedule of the Copyright Act, Cap 28 Laws of the Federation of Nigeria, 2004.

52 Section 15 of the Copyright and Neighbouring Rights Act of 2006.

53 Nigerian Copyright Act (n 51) Second schedule.

54 Article 3 of the Marrakesh Treaty.

55 Hua (n 26) 20.

56 Helfer et al (n 8) 334.

In addition, the Nigerian provision is only limited to reproduction. However, in order to ensure accessibility of literary works to persons with print and visual disabilities, the producers need to adapt and distribute the information.<sup>57</sup> For these rights to be realised, exceptions should be adequately addressed in domestic legislations in order to allow for adaptation and distribution rights as discussed in *Blind SA*.<sup>58</sup> In fact, Nigeria was among the countries which argued for the need to include the right to adapt as a copyright exception since persons with print and visual disabilities have different levels of education which may impact on their ability to understand literary works.<sup>59</sup>

The Marrakesh Treaty allows for works to be produced in any alternative manner or form which would facilitate the access of a beneficiary person to the work.<sup>60</sup> Accessible format copies in terms of the Nigerian Copyright Act only include Braille and means that are perceptible only to the blind. This narrow definition of an accessible format copy thus excludes other forms that would benefit persons with print and visual disabilities, such as large print, audiobooks, and electronic books. Domestic copyright legislation in Africa should consider widening the defined scope of accessible format copy, in accordance with the Marrakesh Treaty, to include alternative forms that would facilitate persons with disabilities in gaining access to copyright works as feasibly and comfortably as someone with no print or visual disability.<sup>61</sup>

Some African countries such as Côte d'Ivoire,<sup>62</sup> Kenya,<sup>63</sup> Liberia,<sup>64</sup> and Malawi<sup>65</sup> amended their copyright legislation after ratifying the Marrakesh Treaty to allow people with print and visual disabilities to translate works into accessible formats. For example, in the case of Kenya, section 26(c) of the Copyright (Amendment) Act<sup>66</sup> provides as follows:

Notwithstanding the provisions of section 26, it shall not be an infringement of copyright for—(a) an authorized entity to reproduce or to distribute copies or sound recordings of a previously published literary work if such copies or sound recordings are reproduced or distributed in specialized formats exclusively for use by visually impaired or other persons with disabilities; or (b) to make, import, distribute, lend or share accessible format copies by a beneficiary person or authorized entities or persons acting on behalf of a beneficiary person, including the circumvention of any technological

57 *Blind SA* (n 4) para 87.

58 *Blind SA* (n 4) para 89.

59 WIPO Standing Committee on Copyright and Related Rights SCCR/24/12 (July 16-25, 2012) 424-425.

60 Article 3 of the Marrakesh Treaty.

61 Article 2 of the Marrakesh Treaty.

62 Articles 1 & 32 of Law 2016 555 on Copyright and Related Rights.

63 Sections 2 & 26(c) of the Copyright (Amendment) Act 20 of 2019.

64 Section 9.16 of the Liberia Intellectual Property Act, 2016.

65 Section 49 of the Copyright Act, 2016.

66 Section 26(c)(1) of the Copyright (Amendment) Act.

protection measures that may be in place, subject to the terms and conditions set out under Regulations.

It means that literary works may be copied, adapted and distributed in accessible formats for the benefit of person with print and visual disabilities without infringement of copyright. Such provisions will no doubt greatly improve access to literary works and resolve the problem of book famine in the African region.

## **5 Conclusion**

Without sufficient exceptions for persons with print and visual disabilities, copyright owners are free to limit transformation of their works into accessible formats. In light of *Blind SA*, there is need for national copyright laws to adopt limitations and exceptions for persons with disabilities who are unable to read normal copies because of visual or other impairments. The book famine and its impact on the human rights of persons with print and visual disabilities should justify adoption of limitations and exception that allows for reproduction and distribution of literary works in accessible formats. African states should consider the Marrakesh Treaty as a guiding tool for adoption of limitations and exceptions and for evaluating pre-existing copyright provisions against the current international standards.