

Institution: Abertay University		
Unit of Assessment: 18 – Law		
Title of case study: Enhancing the optimal application of the Marrakesh Treaty to increase access to literary works for the disabled community		
Period when the underpinning research was undertaken: 2017 to 2020		
Details of staff conducting the underpinning research from the submitting unit:		
Name:	Role (e.g. job title):	Period employed by submitting HEI:
Jade Kouletakis	Lecturer in Law	01/01/2017 – Present
Period when the claimed impact occurred: 2017 – Present		
Is this case study continued from a case study submitted in 2014? No		
1. Summary of the impact <p>Kouletakis's research impacted on the implementation of the Marrakesh Treaty in South Africa, specifically section 1(a) definition of 'accessible format copy' and the section 19D portion pertaining to general exceptions regarding protection of copyright work for persons with a disability. She submitted evidence on South Africa's Copyright Amendment Bill to the South African Department of Trade and Industry.</p> <p>Her research into corresponding UK and EU provisions has informed her ongoing engagement with the South African legislative process, to include the threat of sanctions from the US Trade Representative arising from the South African legislation on the Marrakesh Treaty.</p>		
2. Underpinning research <p>Kouletakis's work focusses on the Marrakesh Treaty's incorporation into national legislation. The Marrakesh Treaty aims to improve print disabled people's access to copyright works around the world by requiring its members to provide exceptions to current copyright legislation allowing the making of accessible format copies and transfer of such copies across national borders.</p> <p>Kouletakis's research has focused specifically on the optimal application of the Marrakesh Treaty in various jurisdictions. Her research started in South Africa and continued after she moved to Abertay University in 2017. Kouletakis has argued that suboptimal application of the Treaty may result in perpetuating the disability discrimination which underpinned the rationale for the treaty in the first instance, create legal uncertainty for the disabled community and those involved in facilitating their access to literary works, and put undue burdens on the resource-limited non-governmental organisations who are primarily responsible for administering these works.</p> <p>The Marrakesh Treaty was signed on behalf of the EU on 30 April 2014, with the UK being obliged to implement said Treaty by virtue of its EU membership. The UK has done this. While not being a signatory to the Marrakesh Treaty, the South African government has undertaken to implement the Marrakesh Treaty directly into its own legislation.</p> <p>Research by Kouletakis, undertaken between 2017 and 2020, culminated in her peer reviewed article in SCRIPTed [3.1] on the UK's implementation of the Marrakesh Treaty. Kouletakis was</p>		

the first academic to examine this piece of legislation. Her article addressed the UK's implementation both with regards to its incorporation into domestic legislation and with regards to UK obligations under EU legislation and the non-EU international obligations which the UK remains bound by beyond Brexit. The paper asks: Can it be said that the UK in implementing the Marrakesh Treaty is fulfilling its obligations owed both to the EU as well as its own citizens?

The paper finds that Regulation 20 allowing for an ongoing review by the government with the potential to introduce a compensation scheme at any point in the future violates the EU Directive as well as numerous non-EU international human rights instruments. It also found that Regulation 20 read with related documentation may allow the government to introduce a commercial availability requirement post-Brexit, returning the UK to its pre-EU Directive position. This would result in disability discrimination, legal uncertainty and put undue burdens on resource-limited non-governmental organisations.

The implementation of the UK Copyright and Related rights (Marrakesh Treaty etc.) (Amendment) Regulations 2018/995, amending the Copyright, Design and Patents Act 1988 and the Copyright and Rights in Data bases Regulations 1997 was done pursuant to UK obligations under Directive (EU) 2017/1564. Comparative legal research into UK and EU laws enacted pursuant to Marrakesh Treaty obligations have informed Kouletakis' ongoing engagement with the South African legislative process, to include the threat of sanctions from the US Trade Representative arising from the South African legislation on the Marrakesh Treaty.

3. References to the research

3.1 Jade Kouletakis. 'No man is an island: A critical analysis of the UK's implementation of the Marrakesh Treaty' (2020) *SCRIPTed* 17(1) 54-82. doi: <http://dx.doi.org/10.2966/scrip.170120.54>

This is a double-blind peer reviewed article.

4. Details of the impact

South African Copyright Amendment Bill

Kouletakis was invited by the Global Expert Network on Copyright User Rights, in partnership with South Africa's Freedom of Expression Institute, to submit written commentary on the then Draft South African Copyright Amendment Bill to the South African Department of Trade and Industry.

Kouletakis's submissions **[5.1]** were discussed at public hearings, held from 27-29 June 2017, before being agreed upon and formally noted by the South African Department of Trade and Industry on the 29th June **[5.2]**.

a. Section 1(a) definition of 'accessible format copy'

Article 3 of the Marrakesh Treaty limits its application to the visually or physically impaired. Kouletakis argued on p. 60 – 61 and 66 of her *SCRIPTed* article **[3.1]** and in her 2017 Department of Trade and Industry submission **[5.1]** that the exceptions and limitations within the treaty as implemented at a national level should apply to all print disabilities whether visual or otherwise. Instead, Kouletakis recommended a broader definition including 'permitting the person to navigate and have access as feasibly and comfortably as a person without visual impairment or other print disability' and was the first to do so in the South African context.

South Africa's legislature chose to adopt this broad view, as evidenced within the Copyright Amendment Bill **[5.3]** which states that an accessible format copy is that 'which permits such person to have access as feasibly and comfortably as a person without disability'. Tobias Schonwetter's testimonial confirms Kouletakis's contribution to the Bill **[5.4]**.

Article 4(4) of the Marrakesh Treaty allows Contracting Parties to confine the limitations and exceptions given to the visually impaired population to circumstances where an accessible format copy 'cannot be obtained commercially under reasonable terms for the beneficiary persons in that market'. Kouletakis argued on p. 78-82 of her *SCRIPTed* article [3.1] that narrowing the scope in this way would lead to legal uncertainty for the disabled community and those involved in facilitating their access to literary works, impose additional burdens on non-governmental organisations who would be primarily responsible for carrying out these checks, and ignore the socio-economic realities of the disabled. This was also commented on by Kouletakis in her 2017 Department of Trade and Industry submission [5.1].

South Africa's legislature chose not to include the narrowed scope originally set out at Article 4 (4) and to adopt the broader view set out by Kouletakis, as evidenced within the Copyright Amendment Bill [5.3] and Tobias Schonwetter's testimonial [5.4].

b. Section 19D general exceptions regarding protection of copyright work for persons with a disability

Currently, print-disabled individuals must purchase the printed version of books and have them converted into an accessible format, e.g., braille. Prior copyright permission must be obtained from the copyright-holder in order to convert works into accessible formats. It is at the discretion of the copyright-holder to grant this permission at any price they choose.

Section 19D of the South African Copyright Amendment Bill [5.3] changes this by allowing print-disabled individuals to freely (i.e., without the copyright-holder's prior consent) convert print works into accessible formats.

This takes significant steps toward increasing access to literary works for and satisfying the state's obligations toward disabled people in terms of the Constitution of South Africa 1996 and the United Nations Convention on the Rights of Persons with Disabilities. It allows educational institutions to provide materials cost-effectively and timeously to learners with disabilities.

Section 19D mirrors the recommendations made by Kouletakis on pp. 68-77 of her *SCRIPTed* article [3.1] and her 2017 Department of Trade and Industry submission [5.1]. This includes allowing 'any person [to make] an accessible format copy for the benefit of a person with a disability' rather than limiting this exception to authorised entities or visually impaired persons as defined by the Marrakesh Treaty.

Presidential assent of the South African Copyright Amendment Bill has been delayed as the International Intellectual Property Alliance has asked the US Trade Representative to sanction South Africa should they adopt this Bill. In 2019, Kouletakis became involved in the American University Washington's Program on Information Justice and Intellectual Property's petition against the US government's behaviour [5.5].

United Kingdom

On 2 February 2020, Kouletakis' *SCRIPTed* article [3.1] was shared with the UK's Conservative Disability Group. On 10 February 2020, Barry Ginley - the Deputy Chairman of the Conservative Disability Group and Chair for the UK Government's Regional Stakeholder Group – emailed to thank Kouletakis 'for raising this issue', acknowledging the importance of the issue, and confirmed that he would pursue this matter at their next Ministerial meeting, scheduled for March 2020 [5.6].

Unfortunately, this meeting was indefinitely postponed due to the onset of the Covid-19 pandemic. Corroborating evidence pertaining to when this issue will be reintroduced on the ministerial agenda is lacking due to the Conservative Disability Group current focus on the impact of Covid-19 on the disabled community.

5. Sources to corroborate the impact

- 5.1** Kouletakis's submission on the South African Draft Copyright Amendment Bill of 2017. Copy provided and available on the American University's Program on Information Justice and Intellectual Property's website: <http://infojustice.org/archives/38534>.
- 5.2** South African Department of Trade and Industry's tabling and minuting of Kouletakis' submission. Copy provided.
- 5.3** South African Copyright Amendment Bill (B-13-2017). Copy provided and available at: https://www.gov.za/sites/default/files/gcis_document/201705/b13-2017copyright170516.pdf.
- 5.4** Testimonial from Tobias Schonwetter, Head of the University of Cape Town's Intellectual Property Research Unit. Copy provided. Mr Schonwetter can corroborate the portions of the Department of Trade and Industry Commissioned Briefing Paper that were solely authored by Kouletakis. Contact details are: tobias.schonwetter@uct.ac.za.
- 5.5** E-mail from Sean Flynn of the American University Washington's Program on Information Justice and Intellectual Property with anti-US petition, dated 30 October 2019. Copy provided.
- 5.6** E-mail from Barry Ginley, Deputy Chairman of the UK's Conservative Disability Group and Chair for the UK Government's Regional Stakeholder Group, dated 10 February 2020. Copy provided.