
THE MARRAKESH TREATY AND COPYRIGHT EXCEPTIONS FOR PERSONS WITH PRINT DISABILITIES: INDIA'S EXPERIENCE

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ABSTRACT

Access to reading and information is essentially linked to human rights of people with print disabilities. For many years, the international copyright system that was highly skewed towards protecting authorial and economic rights inadvertently created a situation of 'book famine.' The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (2013) marked an important landmark in international intellectual property law by incorporating human rights in copyright law. India, the frontrunner among developing countries, became the first nation to ratify the Treaty, bringing into harmony its laws mostly by virtue of Copyright (Amendment) Act, 2012, more specifically Section 52(1)(zb). This paper provides a comprehensive analysis of theoretical bases of copyright exceptions, discussing provisions of the Marrakesh Treaty and their application in the Indian context. While critically evaluating present practices, the study identifies gaps in implementation of the Treaty in India, including DRM restrictions, uncertainties about 'authorized entities,' infrastructural inadequacies, and language differences. Moreover, when we look at these differences through the lens of global justice, there appear to be structural inequalities present in international intellectual property agreements. In the end, the article suggests several constructive and innovative assessments that could be made, from changing the Information Technology Act to forming government-sponsored decentralized storage.

I. INTRODUCTION

The copyright system has traditionally been designed around a balancing act between offering incentives to creators by means of exclusive rights and providing accessibility of cultural and educational advances to the public.¹ Nevertheless, for millions of people who have been living with blindness, visual impairment, and other conditions that affect their ability to read, this balancing act was always skewed in favor of copyright norms. As a result, only around ten percent of published books became accessible, which is known as “the book famine.”² The situation was much more severe in countries such as India. The change in international IP law was needed in order to resolve the issue. The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled was adopted in 2013, becoming the first instance of a treaty in which human rights and copyright laws have converged.³ It stipulates that parties are obliged to implement standard exceptions and limitations to copyright laws in order to allow reproduction, distribution, and availability of published works in accessible formats as well as the cross-border exchange of these works. India is the first Country to Ratify Marrakesh Treaty and has aligned its Domestic legislation via Copyright Amendment Act of 2012.⁴

This paper considers the relevant literature on copyright exceptions for persons with print disabilities through a two-pronged approach of statutory analysis and theory. This paper will trace the history of the evolution of the treaty, outline the current status of law and practice in India, and highlight the shortcomings that exist. The paper will go beyond the usual statutory approach to provide useful suggestions and reassess theories for bridging the gap between intent and implementation in India.

II. THEORETICAL FRAMEWORK AND THE GLOBAL CONTEXT

A. Human Rights and Global Justice

In IP Regimes the tensions between copyright and accessibility have their roots in structural inequities in the international legal framework. Theoretically speaking, the global

¹ William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989).

² World Blind Union, *The Book Famine*, WBU PRESS (2013).

³ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013, WIPO DOC. VIP/DC/8 [hereinafter *Marrakesh Treaty*].

⁴ The Copyright (Amendment) Act, No. 27 of 2012, INDIA CODE (2012).

intellectual property regime prior to the Marrakesh Treaty can be analyzed from the perspective of global justice. Drawing on structural critiques made by political philosophers about the international order, one can assert that an IP regime which fails to provide access to basic knowledge for the disabled population violates the principle of equity.⁵ In the same way as there are structural imbalances in international trade or medicine patents which adversely affect the global poor, the unbridled extension of copyrights and reproduction rights adversely affects the visually impaired.⁶

The “book famine” cannot simply be understood as a technical glitch, but rather as an injustice within the institution itself. In the case of the global IP regime prior to the Marrakesh Treaty, the Berne Convention on the Protection of Literary and Artistic works did provide for limitations and exceptions in cases where the three-step test was satisfied.⁷ However, the discretionary nature of these measures led to the creation of a structure where the visually impaired in developing countries had no access to cross-border accessible literature.

B. The Road to Marrakesh

The process of negotiating the Marrakesh Treaty signified a crucial shift from WIPO’s protective approach. The civil society groups, especially the World Blind Union, spearheaded the discourse of the treaty as one which interpreted exceptions to copyright as the fulfillment of, and not derogations from, the rights of authors as stipulated in the Convention on the Rights of Persons with Disabilities (CRPD).⁸ Article 30 of the CRPD clearly obliges the member states to ensure that intellectual property laws do not pose an unreasonable and discriminatory obstacle to access to cultural material. The Marrakesh Treaty put into practice this obligation and established the first mandatory minimum standard for user rights in international copyright law.

III. KEY PROVISIONS OF THE MARRAKESH TREATY

The architecture of the Marrakesh Treaty is aimed at eliminating both domestic and

⁵ John Rawls, *THE LAW OF PEOPLES* 37-38 (1999) (discussing the moral principles that should govern international relations and structural fairness among societies).

⁶ Thomas Pogge, *WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS* 245 (2nd ed. 2008) (analyzing how global institutional orders contribute to systemic deprivations).

⁷ Berne Convention for the Protection of Literary and Artistic Works art. 9(2), Sept. 9, 1886, as revised at Paris on July 24, 1971, 1161 U.N.T.S. 30.

⁸ Convention on the Rights of Persons with Disabilities art. 30(3), Dec. 13, 2006, 2515 U.N.T.S. 3.

international obstacles to access to information. The Treaty's main obligations can be summarized in three major provisions: domestic exceptions, cross-border exchange of accessible formats, and regulation of technological protection measures (TPMs).

A. Compulsory Domestic Exceptions

Under Article 4 of the Treaty, contracting parties shall provide an exception or limitation to the rights of reproduction, distribution, and communication to the public.⁹ This means that "authorized entities," as well as beneficiaries themselves, can make accessible format copies of works without obtaining permission from the copyright owner, provided that the modifications made do not exceed those that are essential for accessibility.

B. Cross-Border Exchange of Accessible Formats

For instance, historically, if a book was reproduced in the United Kingdom through domestic exception, the book could not have been lawfully transported to India where there is a visually impaired individual who speaks English without meeting the copyright obstacles in both countries. Articles 5 and 6 of the Marrakesh Treaty address this obstacle by allowing cross-border import and export of accessible format copies made through the lawful exception.¹⁰ This article is critical in addressing the copyright clearance from both jurisdictions across borders that have been created as a result of a lawful exception.

C. Technological Protection Measures (TPMs)

Article 7 is concerned with an important issue in the present context: digital locks or TPMs. Article 7 of the Treaty stipulates that the states must make sure that protection from circumvention of TPMs does not inhibit beneficiaries from availing of the benefits that they enjoy according to the provisions of the Treaty.¹¹ It was a very debatable point, dealing with DRM issues versus user accessibility.

IV. INDIA'S CASE AND THE REGULATORY ENVIRONMENT

A. The Regulatory Environment Pre-Marrakesh Treaty

⁹ *Marrakesh Treaty*, supra note 3, at art. 4.

¹⁰ *Id.* at arts. 5-6.

¹¹ *Id.* at art. 7.

Until 2012, there were no clear and comprehensive provisions for people with disabilities in the Indian Copyright Act of 1957. Blind people would have to use vague interpretations of the right of “fair dealing” in Section 52(1)(a).¹² Such vagueness was discouraging institutions from creating accessible copies because blind schools and NGOs were always at risk of copyright infringement lawsuits.

B. The Copyright (Amendment) Act, 2012

Acknowledging the imminent international consensus and in response to the forceful domestic lobbying efforts of groups such as the Inclusive Planet Centre for Institutional Access and the Daisy Forum of India, the Parliament of India brought into effect comprehensive reforms in 2012. Section 52(1)(zb) marked a significant change in the context. Section 52(1)(zb) offers a wide exception as per which “the adaptation, reproduction, issuing of copies or communication to the public of any work in any accessible format for facilitating access to such works by persons with disabilities shall not constitute an infringement of copyright.”¹³ The Indian legislation is highly progressive as compared to the Marrakesh Treaty, which only applies to “print disabilities,” the Indian legislation covers the more widely defined scope of “persons with disabilities.”

C. Operation of Section 52(1)(zb)

The Indian Act divides this exception into two parts. The first one permits any individual (even the disabled person himself/herself) to adapt or reproduce any work for their own personal purposes or for research in a non-profit manner. The second part covers the institutional aspect. Any organization that functions for the welfare of disabled people in a non-profit manner (who are “authorized entities”) may reproduce and distribute such works in case they make sure that the reproductions do not reach the open market.¹⁴

V. CONSTITUTIONAL IMPERATIVES AND THE FUNDAMENTAL RIGHT TO READ

For an in-depth appreciation of the significance and urgency of Section 52(1)(zb) in the context of India, it is necessary to move beyond the debate about statutory interpretation and

¹² The Copyright Act, No. 14 of 1957, § 52(1)(a), INDIA CODE (1957).

¹³ The Copyright (Amendment) Act, 2012, *supra* note 4, at § 52(1)(zb).

¹⁴ *Id.* (proviso to § 52(1)(zb)).

move into the realm of constitutional imperatives. In India, copyright is a statutory right, not a fundamental right. Thus, the exclusive rights conferred upon the author and the publisher through the Copyright Act have to make way for the fundamental rights enshrined in Part III of the Constitution of India.

A. Interaction with Article 21 and 21A

Article 21 of the Constitution of India provides the Right to Life and Personal Liberty. Through years of vigorous judicial activism, the Supreme Court of India has extended the scope of “life” to include the right to life with human dignity.¹⁵ This necessarily includes the right to read, the right to information and the right to intellectual development. Without access to books, intellectual and professional development of a blind person becomes impossible, thus leaving him/her with no choice but to lead an inferior standard of life. Also, Article 21A of the Constitution, added by 86th Constitutional Amendment, makes the provision for providing free and compulsory education to all children in the age group of six to fourteen years.¹⁶ The Supreme Court, through its landmark decisions of *Mohini Jain v. State of Karnataka*¹⁷ and *Unni Krishnan v. State of A.P.*¹⁸, has expressly held that education is a fundamental right.

For students with visual disabilities, the implementation of Article 21A is completely contingent on the existence of educational material in a form that is accessible to them. Should the copyright legislation be a stumbling block to the production of Braille or other forms of educational material for them, then they would be violating the fundamental right to education. Hence, Section 52(1)(zb) is not only a kind gesture but an imperative constitutional provision made to prevent a statutory monopoly superseding fundamental rights of marginalized citizens.

B. The Doctrine of Reasonable Classification

The precise identification of “persons with disabilities” within the exception of copyright is also strongly backed by the constitutional doctrine of reasonable classification under Article 14 (Right to Equality). Equality does not imply equal treatment of unequal people. In accordance with the case of *State of Kerala v. N.M. Thomas*,¹⁹ positive discrimination

¹⁵ Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 S.C.C. 608 (India).

¹⁶ INDIA CONST. art. 21A.

¹⁷ Mohini Jain v. State of Karnataka, (1992) 3 S.C.C. 666 (India).

¹⁸ Unni Krishnan, J.P. v. State of A.P., (1993) 1 S.C.C. 645 (India).

¹⁹ State of Kerala v. N.M. Thomas, (1976) 2 S.C.C. 310 (India).

measures are a must for achieving substantive equality. With the creation of an exception in this case, the state has brought all people at par who were earlier treated unequally due to copyright rules.

VI. COMPARATIVE JURISPRUDENCE: INDIA VS. GLOBAL NORTH

In order to understand the progressive character of implementation of Marrakesh Treaty by India, a comparative analysis with the Global North and specifically European Union (EU) becomes important as there exist significant differences in jurisprudential approaches with regard to remuneration of the authors and institutional burden.

A. Uncompensated Exception vs. Remuneration Scheme

The most contentious issue in the Marrakesh Treaty negotiations was whether copyright holders should be compensated when their work is reproduced into accessible format through statutory exception. Ultimately, the decision on this issue remained in the hands of national legislatures.

In the case of India, Section 52(1)(zb) is an uncompensated exception. No royalties or remuneration is paid to the copyright owner for making an accessible copy.²⁰ This represents a highly public interest-based approach as visually impaired persons and non-profits serving these people have limited resources. Any royalty requirement would mean pricing them out of accessibility, continuing the book famine.

By contrast, the European Union's implementation through the Directive (EU) 2017/1564 enables the Member States to impose a compensation obligation.²¹ Article 3(6) of the Directive specifically enables Member States to specify that publishers get "fair compensation" for the use of their works under the exception. A number of countries in Europe, like Germany and Austria, have traditionally had a system of remuneration for disability exceptions.

B. Institutional Economics of Accessibility

The contrast in institutions between India and the EU reveals one of the differences between

²⁰ The Copyright (Amendment) Act, 2012, *supra* note 4, at § 52(1)(zb).

²¹ Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise printdisabled, 2017 O.J. (L 242) 6.

the institutional economics in both regions. In the Global North, the presence of state funding for infrastructure related to disability, as well as well-developed library systems, can withstand the cost impact that will come with a remuneration system. In the Global South, where accessibility is achieved mainly by underfunded, grass-roots NGOs, an obligation to compensate will make the whole system fall apart.

A requirement for remuneration presupposes that the publisher is missing out on the sale since a Braille edition of a book is produced. But the truth is different. Commercial publishers seldom create Braille or specialized Daisy editions of books since the target audience is too limited for any commercial gain to be made—market failure. Consequently, the conversion of a work by a blind school cannot replace a commercial sale but create something where there was nothing before.

VII. GAP FACING THE PRACTICE AT PRESENT AND ISSUES IN IMPLEMENTATION

Despite the solid legislative framework and rapid ratification of the Marrakesh Treaty by India in 2014, the implementation of the above-mentioned rights faces a very fractured reality. The study of present practices shows serious gap and weaknesses.

A. Confusion Regarding ‘Authorized Entities’

Under the Copyright Rules, 2013, very tough criteria have been prescribed for an organization to become an authorized entity. It must be registered under either Persons with Disabilities Act or Trust Act, and have detailed records of copies made.²² It imposes a heavy burden on small NGOs working in rural India.

B. The Conflict with Digital Rights Management (DRM)

While the section 52(1)(zb) was adopted by India, the amendments made in 2012 also included the enactment of Section 65A, which makes the circumvention of any effective technological measures used for copyright protection an offense.²³ While under Section 65A(2)(a) circumvention may be done for any purpose that is not prohibited under the Act (including the 52(1)(zb) exception), the practical application of the law is very different. E-books are usually

²² The Copyright Rules, Rule 76, GAZ. OF INDIA, pt. II sec. 3(i) (Mar. 14, 2013).

²³ The Copyright Act, 1957, *supra* note 10, at § 65A (as amended in 2012).

protected by DRM, while visually impaired people using screen readers such as JAWS or NVDA would face issues in reading these books since publishers have used DRM to deactivate the text-to-speech function. The amputation of circumvention process requires software of high specialization.

C. Linguistic Disparities and the Cross-Border Bottleneck

India's multilingual society brings its own set of problems. Though the cross-border exchange arrangements of the Marrakesh Treaty help immensely in the provision of accessible English literature (through organizations such as Bookshare in the US), there is an alarming lack of accessible literary material in the various regional languages of India (Assamese, Bengali, Marathi, etc.). The cross-border exchange system cannot resolve the problem of inadequate literature at the national level. Moreover, the customs and border control systems in India lack the expertise to distinguish between genuine cross-border accessible formats and pirated commercial products.

VIII. INNOVATIVE REASSESSMENT AND PROPOSAL

In order to address the deficiencies and convert abstract rights into justice, there needs to be a comprehensive rethinking of the prevailing practices in India.

A. Revising DRM Bypass Systems

The burden of bypassing DRM protection cannot fall on the disabled user and underfunded NGOs. There should be coordination between the Information Technology Act, 2000 and the Copyright Act such that publishers who publish digital books in the Indian market should provide a DRM-free accessible copy at a national repository. Alternatively, a provision of law would make it compulsory for all commercial e-books published in India to have "texttospeech" capability enabled by default.

B. Creation of a National Accessible Format Registry (NAFR)

In order to avoid the wastage of time and effort through the simultaneous conversion of the same textbook into Braille or audio by different institutions catering to blind students, India requires the creation of a state-sponsored National Accessible Format Registry. This cloud based registry will enable the authorized institution to upload and download accessible formats

without any hindrance. Using the model of open source knowledge sharing, the NAFR can function using secure blockchain verification of files so that the files can be accessed only by those who have been verified; thereby alleviating publishers' fears regarding piracy while ensuring accessibility.

C. State Subsidization and Development of Capacity

The core problem with the existing system lies in the economic burden put on the non-profit entity to convert the formats. Under a human rights framework, the duty falls on the state. The Government of India, through the Department of Empowerment of Persons with Disabilities, needs to provide budgetary grants for universities especially for law and STEM research institutes and public libraries to set up an in-house laboratory for conversion. This is particularly necessary for texts which require human intervention for footnotes, tables and formulas apart from OCR.

IX. CONCLUSION

The Marrakesh Treaty is an epochal victory of human rights over formalism within intellectual property law. India's quick legislative adjustment via Section 52(1)(zb) of the Copyright Act has set the country at the forefront of disability law. Nevertheless, as this exhaustive survey demonstrates, legislative intentions are often thwarted by administrative hassles, DRM technology, and infrastructure problems. The realization of true equitable access to information cannot come from merely creating an exception but must also include positive state design. The creation of centralized storage facilities, DRM circumvention reforms, and financial assistance to local authorized entities can make sure that the gap between legislative theory and practice is bridged. It is only through constructive innovation that the full potential of the Marrakesh Treaty can be fulfilled and guarantee that the basic human right to read becomes universally accessible and the book famine is finally eradicated.