

Access to Books: Human Rights, Copyright and Accessibility

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Abstract. This paper will explore the tension between the right to read (ensuring intellectual property does not create an unreasonable barrier to access) and the protection afforded to literary works by copyright, particularly how copyright policy can limit access to content. Using statutory analysis of international copyright law and human rights law, it will look at the way Human Rights treaties have addressed intellectual property in the past, and will compare them to the United Nations Convention on the Rights of Persons with Disabilities. This will be followed by a discussion the proposed World Intellectual Property Organization Treaty on Limitations and Exceptions for Visually Impaired Persons/Persons with Print Disabilities and how this proposed treaty will increase access to content for persons with disabilities. The conclusion of this analysis is that copyright policy must evolve in order to keep up with technology to enable equal access to content for persons with disabilities.

Keywords: WIPO, Accessibility, Copyright, Exceptions, Limitations, UNCRPD, Human Rights, Visually Impaired, Print Disabled, Disability, Dyslexic, Access to Knowledge, Access to Content.

1 Introduction

The right to read is fundamental. It is impossible to overstate the importance of literacy. Through the written word, past generations speak to the present, great ideas are expressed, language is learned, critical thought is developed, political movements rise and fall. Not only this, but reading provides pleasure and entertainment, and is valuable for this reason alone. It is nearly impossible to fully participate in cultural and community life without being able to access the written word.

There are many reasons why people are denied access to content, economic, social and educational opportunity to name a few. However, persons with print disabilities¹

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¹ For the purposes of this paper, the term Print Disability will encompass any disability that limits a person's ability to access standard text material. While there are many disabilities that affect a person's ability to read and understand print material, this paper is limited to those visual, perceptive and motor impairments that do not require substantive alteration to the content of a work to enable access.

are faced with greater challenges. These challenges are not reflective of their impairment, but rather of policy. Persons with print disabilities are denied access to works protected by copyright. They are denied access even though there are technological tools to support universal access to content.

Historically, persons with print disabilities have been served by non-profit organizations working under exceptions and limitations to copyright to produce physically bulky accessible material using Braille, or accessible audio books in analog formats. The process to create these accessible format books was expensive in time and resources, and as a result, persons with print disabilities were extremely limited in what cultural materials they were able to access. The rise of digital technology has the potential to change all of this.

Digital technology allows the costs of creating accessible format material to drop significantly, and there has been some success in creating widely accepted standards for web accessibility, allowing for much greater access to cultural content that is available on the Internet. Engineers have created hardware and software that enables access for persons who had previously been unable, due to disability, to access much of this content. Refreshable braille readers and screen readers, as well as a multitude of cell phone apps and other developments have opened up a whole world of cultural content.

Unfortunately, international copyright law has not kept pace with these new technologies, and publishers have not embraced universal design in publishing. A great deal of content, particularly books, has been kept locked away through the territorial nature of copyright law and exceptions, through expansive protection for digital rights management protections/technical protection measures (DRM/TPM) and due to the publishers reluctance to engage in accessible publishing. Without content, these enabling technologies are useless. There still exists, in this digital age, a book famine.

The term book famine refers to a World Blind Union (WBU) statistic that in the wealthiest nations only about 7% of all books published annually are converted into accessible formats (Braille, digital files with accessibility tools for DAISY readers and other devices, audio files, and other formats) for persons who are unable to access the written word (which encompasses digital format as well as hardcopy format material) in a standard format. In the developing world, this can be as low as 1%.

WBU estimates that there are 285 million blind and partially sighted persons living in the world. 90% of those people live in the developing world. This number grows every day as the global population ages and more people experience age-related disability.

2 Human Rights – The Right to Read

The ability to access the written word is essential to the realization of many human rights. It provides the foundation to the right to political involvement, freedom of expression, the right to education and the right to access culture and take advantage of scientific progress. These rights were articulated by the Universal Declaration of Human Rights (UDH), and reaffirmed through various treaties and conventions, most

recently by the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).

The Universal Declaration of Human Rights initially had no legal force, and it required implementing treaties, the International Convention on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICESCR Article 15 recognizes that access to culture is a fundamental human right, and that it is tied with the right to benefit from one's intellectual product. That relationship is extremely complicated. It implies that states must find a balance between those rights, but provides no guidance in how to do so.

The right to access culture until fairly recently has been largely ignored. Intellectual property and human rights are fields that have evolved separately and as each sphere has grown, they have begun to intersect more and more. This intersection has become increasingly important as the impact of extremely rigorous intellectual property protection on fundamental human rights has become more and more apparent.

3 The Balance

When most people think about this conflict, they generally think about access to medicine and food held in tension with patent protection. This is one of the most glaring intersections of IP and human rights and where there is highly publicized conflict. However, this is not the only area where intellectual property protection has the potential to effectively deny basic human rights to whole populations.

The intersection between access to content and copyright protection is another balancing act. While these issues may not seem to be as important as the right to adequate food and medical care, particularly in the developing world, it has been recognized that all human rights are reliant on other rights for their realization. The Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights states: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis." It is impossible to be effectively politically active if one has no food, it is difficult to have food if one has no education, and it is difficult to have education if one has no access to books.

Looking at the interaction between the right to access culture and education and the right of authors to benefit from the moral and material protection of their work becomes particularly challenging when one considers the above statement regarding the need to treat human rights in a fair and equal manner, on the same footing and with the same emphasis. It then becomes a balancing act between two fundamental human rights. The U.N. Sub-Commission on the Promotion and Protection of Human Rights recommends that governments recognize the "primacy of human rights obligations over economic policies and agreements." This guidance helps in some circumstances, particularly when dealing with large corporations, but that does not help when dealing with the rights of natural persons.

Why has this intersection between intellectual property and human rights become so important? It comes down to the purpose and mission of copyright protection.

Black's Law Dictionary defines copyright as follows: "The right to copy; specifically, a property right in an original work of authorship... fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work..."

Copyright protects the rights of the author and copyright owner, but the purpose of copyright is to benefit the public. The US Constitution empowers Congress "To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventers the exclusive Right to their respective Writings and Discoveries." This notion of using Intellectual Property to promote the public good hinges on the balance of protection, and access. If the balance swings too far one way, the protection hinders innovation and further creative activity. If it swings too far the other way, authors and innovators will not be able to support themselves doing their creative and innovative work.

This balance is extremely important, and it should be noted that no natural person is exclusively a creator or exclusively a consumer. Access and protection can both benefit a single person.

4 United Nations Convention on the Rights of Persons with Disabilities

The UNCRPD is the first treaty that explicitly requires states that have signed and ratified to examine the balance between the protections provided to rights holders and the right of the public to access content protected by intellectual property law. Article 30.3 requires that "States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials." This reflects the tension between the rights guaranteed by the ICESCR Article 15 for the first time, and is a direct response to the book famine experienced by persons with disabilities.

All state parties who have signed and ratified the UNCRPD have an obligation to address the global book famine. Not only is it a moral imperative, it is also a legal one. Article 4(1) of the UNCRPD obligates the state parties to undertake "(a) to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present convention..."

Article 9 requires member states to "take appropriate measures to ensure to persons with disabilities access, on an equal basis with others (...) to information and communications..." Not only must member states legislate to make sure the printed work is accessible, they must also cooperate to promote the rights outlined in the UNCRPD.

Article 32(1) requires that "State parties recognize the importance of international cooperation and its promotion in support of national efforts for the realization of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard, between and among states and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities."

5 Copyright Protection Barriers to Access

Unfortunately, the digital revolution that has allowed for standard print materials to be made accessible is a double-edged sword. On one hand, accessible publishing and making available of works is simpler and cheaper than ever before. On the other hand, digital technology allows for content piracy. The publishing industry fears they will suffer the same fate as the record industry. This makes them extremely protective of proprietary content and resistant to harmonized exceptions and limitations internationally.

Added to this is the challenge of the territorial nature of copyright law. While some baseline protection standards have been set by international law through the various IP treaties (discussed below), copyright is a territorial right. The protection, and exceptions, is only valid within the physical territory of the protection nation.

The balance of interests in copyright law is, in part, maintained through a system of limitations and exceptions to the exclusive right of the owner of the copyright. Examples of exceptions are areas where copyright law does not apply in the same way, i.e. licensing fees could be limited or waived, authors may not have the right to prevent distribution in a certain format and so forth. Exceptions differ from country to country as the “nature and scope... has been largely left to national policy makers to determine within broad permissive areas” (WIPO Sullivan Study). Broadly speaking, they are created to allow for commentary or criticism, news reporting, academic research, teaching, archiving, and access for the print disabled community.

There has been very little international harmonization in national copyright laws, and by extension, exceptions to copyright law. Due to this lack of harmonization in exceptions, cross-border trade in digital accessible books created under these exceptions is a matter of uncertain legality. There has been some regional transfer of hard copy Braille format and analogue audio cassettes between nations, but that has been the extent of any sharing between nations, for instance, the National Council for the Blind in Ireland receives books from the Royal National Institute of Blind People in the United Kingdom and the Library of Congress in the United States. There is no clear law governing what types of distribution are within the scope of specific exceptions.

In addition “other aspects of the scope of the exceptions... such as who may act under the exception, how to determine whether or not the requirements about the end beneficiary of the exception are met, whether requirements that a work must have been published are met, whether or not only copies made under the exception may be distributed in the country and whether the same type of accessible copies in both importing and exporting countries are permitted” (WIPO Sullivan Study) complicates the issue even further.

Creators of accessible books do not wish to jeopardize themselves by making themselves liable for civil, and potentially criminal, penalties, by shipping books created under an exception into countries where they may be grey market goods. This has resulted in great redundancy in the world of accessible publishing. If the transfer

of digital master files were clearly legal, the resources of organizations doing accessible publishing could be shared and more books could be unlocked for persons with disabilities, rather than multiple master files being created for each individual country. This means ONCE in Spain could share its more than 100,000 accessible titles with Spanish speaking countries in South America.

International copyright treaties establish baseline protections for the content industry that each member country must provide the intellectual property of citizens of other member states. The ones most frequently discussed in the intersection of copyright and human rights are the Berne Convention and the World Trade Organization TRIPS agreement.

6 “Draft Text of an International Instrument/Treaty on Limitations and Exceptions for Visually Impaired Persons/Persons with Print Disabilities”

None of these treaties listed above establish any mandatory exceptions or limitations to the rights of the content industry. As one WIPO study points out, “Much of the development of the international framework for copyright protection has, however, concentrated on defining rights needed to secure the aim of encouraging and rewarding creativity” (WIPO Sullivan Study). Until recently, the focus internationally has been stronger and stronger protection. Exceptions were acceptable as long as they complied with the three-step test established by the Berne Convention (and reiterated in the subsequent copyright treaties). “The three step test states that exceptions must only be in “certain special cases,” it must not “conflict with the normal exploitation of a work,” and must not “unreasonably prejudice the legitimate interests of the author” (Berne Convention, Art. 9(2)).

The World Intellectual Property Organization (WIPO) administers all copyright treaties except for TRIPS.² In December of 2012 in an extraordinary meeting, the General Assembly of WIPO made the groundbreaking decision to convene a diplomatic conference on a potential international instrument to increase access to copyright material for persons with print disabilities. This international instrument would be groundbreaking because it represents a significant shift in international intellectual property law policy. It is a response to the obligations placed on the UNCRPD member states, as recalled in the recitals, and to the book famine experienced by the millions of print disabled persons worldwide.

This treaty mandates exceptions to the baseline protections established by prior intellectual property treaties. It will harmonize exceptions in member states to remove legal uncertainty in the cross border exchange of books created under exceptions.

² WIPO is an agency of the United Nations, established in 1967. There are 184 member states, including China, the EU, the United States and the Russian Federation, and 250 accredited observers, including the World Blind Union and International Federation of Library Associations.

7 Conclusion

The book famine is a denial of fundamental human rights. Without legal access to content, all of the technology in the world will not allow enable people with disabilities to access content on an equal basis with others. Without that access, persons with disabilities are limited in their right to education, freedom of expression and speech, their right to political involvement, their right to work and the right to access culture.

The Draft International Instrument represents that the international community sees the denial of access to content to persons with disabilities, the so-called “book famine,” is unacceptable. It is an example of human rights law working together with international intellectual property law to realize human rights objectives for persons with disabilities.

Accessible technology has created the possibility of an inclusive world where universal design allows everyone to experience content on an equal basis with others. Policy must evolve to keep pace. Universal access is possible, but only where copyright policy is flexible and responsive to emerging technologies.

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