

# The Proposed Accessibility Exception to Copyright

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*(This is a Working Paper and is based on the proposed Copyright Amendment.)*

## Introduction

The disabled in India are, for the most part, an invisible minority with disability, and often the disabled themselves, being stigmatised. In a country where access to information and education is limited by a variety of factors, including class and caste, persons who have disabilities tend to be far more disadvantaged than the average person of their own caste and class would be.

Disability is generally considered to be an individual and isolated problem and without a support structure, comprising family or other persons, that has adequate resources, having a disability in India is almost certain to limit one's ability to be a productive member of society.

One of the ways in which disabled persons are prevented from realising their potential is by their access to printed material such as books being virtually non-existent should they suffer from a disability which hampers their ability to access printed material.

## The Scale of the Issue

A large fraction of printed materials are protected by copyright law which grants the owners of copyright certain exclusive rights with respect to such materials.

In the developed world, estimates indicate that only 5 per cent of published books are converted into formats which are accessible to people with visual impairments. In India, the situation appears to be much worse. It has been estimated that only about 0.5 per cent of

all published books in [India](#) are converted into accessible formats, and that less than 1 per cent of visually impaired persons have adequate access to printed matter. These statistics only take into account persons who are visually impaired.

Additionally, besides those who cannot access printed material due to reasons not related to disability such as illiteracy or financial constraints, there are millions of people in India whose access to printed material is limited because of other disabilities ranging from dyslexia to an inability to manipulate the pages of a printed book.

### **Exhaustion of Rights**

The doctrine of Exhaustion of Rights states that once a copy of a copyrighted work has been legally sold, the copyright owner exhausts his rights in that copy of the work and can be resold without reference to or consent from the owner. This means that once a copy of a copyrighted work had been made available anywhere in the world in an accessible format, that copy would not be considered to be an infringing copy of the work in India.

Thus, although explicitly following the principle of international exhaustion could adversely impact such things as the availability of low priced editions in India, since publishers would have little incentive to make such editions available in the Indian market without the assurance that the copy would not be 'leaked' to countries, following a principle of international exhaustion may actually benefit disabled persons since the cross-border movement of copyrighted works in accessible formats would be legal.

### **The Proposed Amendment to the Copyright Act, 1957**

Indian Copyright law does have 'exceptions to copyright' incorporated in it. These exceptions could be in the form of 'Fair Use' or 'Fair Dealing' provisions, and, if one were to extend the definition of 'exceptions to copyright', it would also probably be possible to include within the scope of the definition statutory and compulsory copyright licences.

The Indian Copyright Act, 1957, as it stands today, however, does not contain provisions

which deal with making copyrighted works accessible to disabled persons. Traditionally, exceptions to copyright have been defined in terms of very narrow circumstances in which a copyrighted work may be exploited by a person other than its owner without the consent of the owner.

The need to incorporate provisions which enable disabled persons to access to copyrighted works has, however, been recognised in recent years, and it has been [proposed to amend the Copyright Act, 1957](#), to include within the statute a separate compulsory licensing provision to allow for the publication of copyrighted works in formats for the benefit of the physically challenged.

In addition to this, it has been proposed to incorporate an additional 'exception to copyright' in the statute which would allow a copyrighted work to be reproduced and distributed in a format accessible to disabled persons. The proposed amendment reads as follows:

Section 52(1)(za): The reproduction, issue of copies or communication to the public of any work in a format, including sign language, specially designed only for the use of persons suffering from a visual, aural or other disability that prevents their enjoyment of such works in their normal format.

Although the proposed insertion of such a Section is, in itself, a step forward, it would appear that the provision does not serve the needs of either copyright owners or disabled persons as best it could. For example, it is entirely silent with reference to technological protection measures, and does not say that such a measure may be circumvented in order to convert a copyrighted work into an accessible format. While it would be possible to argue that the law intended to allow for technological protection measures to be circumvented under the accessibility exception, one would probably have to use rather circuitous logic to do so.

In addition to this, there are a number of other provisions in the accessibility exception which give rise to concern. The aim of an accessibility exception to copyright would presumably be to ensure that disabled persons are able to enjoy copyrighted works to the

same extent as abled persons. It is, however, debatable whether the proposed amendment to the Copyright Act, 1957, is successful in doing so.

### **The Protection of Copyright Owners**

Under the proposed amendment, the reproduction, issue of copies or communication to the public of a copyrighted work would be legal if it were in a format specially designed only for the use of persons with a disability regardless of whether or not the copyright holder had already made the work available in that format. Further, given that the format into which a work could be converted to ensure accessibility has not been qualified in any way, the original format could be modified to an extent beyond that which would be required to provide accessibility to disabled persons.

Thus, the extent to which modification has been allowed under the proposed amendment is not qualified. Ideally, for the protection of rights holders, the exception should have only applied to works which had not been made available by rights holders themselves in the necessary accessible formats (at a reasonable price and without undue effort having to be expended in order to obtain the works in question in such formats).

Further, there is also no provision in the accessibility exception which states that it would apply only to non-commercial endeavours to make copies of works in accessible formats available to disabled persons. It is conceivable that such a requirement would, in a country like India, simply restrict the applicability of the exception to an appreciable extent. Further, if the proposed amendment were to be modified along the lines mentioned in the previous paragraph, it would completely obviate the 'need' for a provision regarding non-commercial use since the rights of copyright owners would be adequately protected.

### **The Requirements of Disabled Persons**

The proposed amendment requires the accessible format to have been specially designed only for the use of persons suffering from a disability (such as Braille). This would

immediately exclude formats which have not been “specially designed” only for disabled persons from falling within the scope of the accessibility exception. Since many of the formats which disabled persons would benefit from are not formats which have been specially designed for them (whether they be large-print photocopies for visually-impaired persons or photocopies on coloured paper for dyslexic persons), this requirement would, in a way, defeat the aim of attempting to ensure that disabled persons are in fact able to access copyrighted works.

Moreover, according to the proposed amendment, the format to provide accessibility must have been specially designed not merely for the benefit of persons with disabilities but for their use. This means that a format which may be utilised for instructional or educational purposes, for the benefit of disabled persons, without being designed specifically for the use of disabled persons, could be seen to be excluded from the scope of the accessibility exception.

Similarly, the requirement that a disabled person be prevented from being able to enjoy the work in its original format also significantly narrows down the scope of the proposed amendment since it means that certain ‘activities’ would not fall under the scope of the disability exception. If a disabled person were to enjoy a copyrightable work to any extent at all, the provisions of this exception would not apply, since the person would not be considered to have been unable to enjoy the work, or to have been prevented from doing so on account of their disability. The corollary to this is that a format of work which would merely enhance a disabled person’s ability to access and enjoy a work (such as a large print photocopy) may not fall under the scope of this exception since the disabled person may not have been prevented from enjoying the work in its original format.

With reference to accessible formats themselves, the insertion of sign language as an example of an accessible format gives rise to some concerns in itself. It would probably have been worth specifying that an accessible format contemplated by the provision could be any format whether or not it was substantially the same as the original format of the work. Such an amendment would be welcome since it is entirely conceivable that, in

future, it could be argued that the law never intended for ‘minor’ changes in formats such the making of photocopies to be included within the scope of the exception considering that the one format mentioned would, in most cases, be a ‘substantial’ change, and that it betrays the legislative intent to only include ‘substantial changes’ of format within the scope of the exception.

## **Conclusion**

While the drafting of this proposed amendment in the Indian Copyright Act, 1957, to enhance accessibility to copyrighted works at all is certainly a step in the right direction, the text of the exception is fraught with ‘loopholes’, and its language could well be considered to be a reflection of the way in which the Indian society views disabled persons.

According to the proposed amendment, disabled persons do not simply have disabilities, they are ‘persons suffering’ from disabilities, and formats in which copyrighted works are made available for abled persons (who comprise the majority of the population) are not merely the original formats but the ‘normal’ formats of those works.

India probably has a long way to go before it sees disability as nothing more than a difference instead of as an abnormality. However, in the context of an exception to copyright for the benefit of disabled persons, even as it stands, the proposed amendment would probably significantly enhance the ability of disabled persons to access copyrighted works.

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