

Impact of the “Provisional Regulations for Making Works Available to Persons with Print Disabilities in Accessible Formats” on the Limitations and Exceptions of Copyright in China

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Abstract

In order to fulfill mandatory obligations under the Marrakesh Treaty, China has formulated the Provisional Regulations for Making Works Available to Persons with Print Disabilities in Accessible Formats, which provide a high standard of protection for visually impaired persons. The Provisional Regulations for Making Works Available to Persons with Print Disabilities in Accessible Formats expand the beneficiaries from the blind to the visually impaired persons, expand Braille works to accessible formats, increase the right of visually impaired persons to make fair use of works, stipulate that the authorized entity is the subject of fair use, and add exceptions to the protection of accessible formats to circumvent technical measures. In the future, China may introduce commercial accessibility clause and refine the cross-border exchange of accessible format copies at an appropriate time, in order to further improve the fair use for the visually impaired.

Keywords

Copyright, Visually Impaired Persons, Accessible Format Copy, Commercial Availability Clause, Cross-Border Exchange of Accessible Format Copies

1. Background

Free access to information is a fundamental human right of modern citizens.¹

¹See Universal Declaration of Human Rights Art 19.

Unfortunately, there exists a substantial number of individuals worldwide who are incapable of accessing literary materials due to congenital disabilities and acquired challenges. This encompasses individuals with visual impairments and dyslexia, as well as those with normal vision but is unable to read due to physical disabilities. Statistics show that China has approximately 17.3 million people with visual impairments, and its number of residents with print disabilities is even higher (China SCIO, 2024). With the accelerated development of China's aging process, the burden on visual health, which is closely related to changes in demographic characteristics, is becoming more and more serious (WHO, 2024) and older people inevitably face the plight of dyslexia ("visually impaired persons"). The demographic of those with vision impairments has broadened from being exclusive to an inaccessible population to encompassing a wider population that is not exclusive to social vulnerable groups (Jia & Wang, 2014).

Because of the high production costs and low profit of accessible format copy, the high costs in copyright licensing of Braille books, large-print books and audiobooks, there is a lack of incentives for publishers to distribute accessible format copy. Differences in national legislation and value also hindered access to works in accessible formats for the visually impaired. The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled ("Marrakesh Treaty") was a result of WIPO's efforts to promote a treaty that facilitates access to accessible format copy for the visually impaired and restricts the exercise of copyright. In view of the entry into force of the Marrakesh Treaty for China on May 5, 2022, and in order to fulfill mandatory obligations under the Marrakesh Treaty, China enacted the Provisional Regulations for Making Works Available to Persons with Print Disabilities in Accessible Formats ("the Regulations") on the basis of the 2020 amendment of the Copyright Law to expand the scope of fair use in accessible format copy.

2. High Standard of Protection of the Rights and Interests of Visually Impaired Persons

2.1. Extending the Scope of Beneficiaries from Individuals Who Are Blind to Those Who Are Visually Impaired

As early as 1990, Article 22 of China's Copyright Law provided for the fair use of published works in Braille. While the law does not explicitly mention the blind as those who are to benefit of fair use, it can be inferred that the beneficiaries of accessible reading materials are restricted to individuals who are blind. This does not encompass individuals with visual impairments who are unable to focus or move their eyes to read normally, or those who are unable to turn the pages of a book due to a physical disability. According to the Copyright Law of 2020, the Regulations provides that visually impaired individuals encompass not only those who are blind, but also individuals who are unable to read in the usual

manner due to visual impairment, perceptual impairment, or physical disability.²

2.2. Expansion from Braille to Accessible Format Copies of Works

Text-to-audio conversion technology, such as Kindle audio adapters, TTS readers, Microsoft Edge screen reading software, and DAISY digital accessibility systems, have made audible reading the primary means for visually impaired users to access information. The 2020 revision of China's Copyright Law expands Braille to be accessible to visually impaired persons.³ This expansion encompasses a wider range of copyright objects, allowing for accessible format copies of works.

Although China's Copyright Law stipulates that the utilization of a work by a visually impaired person constitutes fair use in accordance with the "three-step test", it does not limit the scope of works subject to fair use. On the basis of the minimum requirements of the Marrakesh Treaty, China has expanded the types of works in accessible formats from text, symbols and/or related illustrations to include audiovisual works, including mechanically recorded and digitally copyrighted audio books. The rationale for broadening the range of accessible format versions is that the auditory perception modes experienced by individuals without visual impairments do not align with the auditory perception of certain visually impaired individuals. Additionally, relying solely on dialogue, music, and sound effects cannot completely convey the narrative of an audiovisual piece. Prohibiting the narration of audiovisual works would deprive the visually impaired of the ability to appreciate audiovisual works. There have been cases in Chinese judicial practice in which TTS technology has been ruled to be different from Braille publishing, constituting an infringement of copyright.⁴ This highlights the importance of revising the categories of works that can be reasonably accessed by the visually impaired.

2.3. Expansion of Copyright Rights

The amendment to China's Copyright Law replaces the term "publishing" with "making available" in relation to the fair use of a work by a visually impaired person.⁵ This broadens the extent of fair use. The fair use for the visually impaired encompass not only the rights of reproduction, distribution, and public accessibility (including the right of transmission through information networks), but also the rights of renting, performance, modification, and neighboring rights. The rationale behind this modification is the challenge of mitigating the disparity caused by inherent factors such as natural skill and physical condition, despite efforts to ensure equal chances. In order to ensure substantive justice for the visually impaired, the government should allocate resources in a way that takes

²See Provisional regulations for making works available to persons with print disabilities in accessible formats Art. 2.

³See Copyright Law of China Art. 24(12).

⁴See Tianjin Third Intermediate People's Court, No. 2386 (2019) Jin 0116 Min Chu.

⁵See Copyright Law of China in 2010 Art. 22(12) & Copyright Law of China Art. 24(12).

into account their specific requirements, while also upholding formal equality and the principle of non discrimination (Ye & Su, 2021). Providing equal preferential treatment is not only aligned with humanitarian principles, but it can also significantly enhance the accessibility of works for the visually impaired (Wang, 2013). The Regulations mandates that publishers who produce and distribute accessible format copies must uphold the copyright owner's right to maintain the integrity of the work.⁶ Publishers are prohibited from making any alterations, such as abbreviations or interpretations, unless there are essential modifications required by the specific features of the accessible format copy.

Due to the technical and cost limitations of accessible formats, in daily life, only Braille versions made from existing written works are available for visually impaired persons to access. In fact, only simple written works can be made into accessible format copy for visually impaired persons to access but the works that visually impaired persons obtain should not be limited to written works but also cover audiovisual works. There are doubts about whether the China's Copyright Law can fully protect visually impaired persons. Although the Copyright Law and the Regulations provide a possible basis for interpreting the accessible format of works, there is still controversy over the judicial cases. In the typical case released by the Supreme People's Court on November 3, 2023, the court ruled that fair use was limited to meeting the reasonable needs of visually impaired individuals. Accessible works that did not have effective verification of the audience's identity were not for the exclusive use of visually impaired individuals and did not constitute fair use.⁷

Based on the principle of exhaustion of rights, the copyright owner loses the right to control the work within a certain geographical area after the work is first placed on the market. In order to avoid the transmission of accessible format copies between the visually impaired and the able-bodied, the Regulations restrict the re-transmission of accessible format copies to the extent that it does not interfere with the normal use of the work or unreasonably jeopardize the legitimate rights and interests of the copyright owner, and require that accessible format copies should be marked "for the use of visually impaired" on the cover of the work in an appropriately conspicuous manner,⁸ so as to avoid commercial exploitation by the able-bodied.

2.4. Provide for Authorized Entities as Fair Use Entities

Compared with the high cost and low profit of Braille books, audiobooks and digitized works will lead to profitable accessible format copies, and the Marrakesh Treaty empowers each country to determine the scope of authorized enti-

⁶See Provisional regulations for making works available to persons with print disabilities in accessible formats Art 3.

⁷See Beijing Internet Court, No.(2020) 14935 Jing 0491 Min Chu &Beijing Intellectual Property Court, No.2496 (2021) Jing 73 Min Zhong.

⁸See Provisional regulations for making works available to persons with print disabilities in accessible formats Art 3.

ties in accordance with the actual situation in the country. The United States and Canada narrow the scope of authorized entities by means of generalized provisions. Japan typifies authorized entities as children with disabilities, developmental services for persons with disabilities, libraries, and elderly care institutions by means of a generalization and enumeration.

The Regulations adopt a qualified approach to define authorized entities as legal entities providing cultural, educational, training and information services to the visually impaired on a non-profit basis, including relevant institutions providing and exchanging accessible format copies across borders,⁹ so as to avoid any organization or individual from invoking the fair use provisions of the Copyright Law to produce and disseminate accessible format copies,¹⁰ and to implement the mandatory obligation of cross-border exchange of accessible format copies. Public libraries, university libraries, educational and service organizations for the visually impaired, and senior care service organizations can produce, copy, rent, and perform (including reading and mechanical performances) accessible format copies for the visually impaired by keeping on record with the administrative authority.¹¹

The keeping on record does not require administrative approval. In the process of statutory authorization of authorized entities, the administrative authority, after publishing the information of the authorized entity,¹² only acts as an authority for the management and dissemination of the new information. The administrative authority's supervision of the authorized entity shifts from "prior approval" to "process supervision", (Meng, 2021) leaving room for social autonomy of the accessible format copy.

2.5. Exceptions to the Prohibition on Circumvention of the Technical Measures of Protection for Accessible Format Versions

China's Copyright Law as amended in 2010 did not set exceptions to the prohibition of circumvention technical measures, and the exceptions stipulated in the Regulations for the Protection of the Right to Information Network Dissemination were limited to the information network. 2020's newly amended Copyright Law and the Regulations clarify that the accessible format copy is an exception to the prohibition of circumvention technical measures, which realizes the expansion of the information network to the offline physical environment, and the e-reader, CD-ROMs can be incorporated as a result.

Although the Regulations give authorized entities the right to circumvent

⁹See Provisional regulations for making works available to persons with print disabilities in accessible formats Art 2.

¹⁰See Provisional regulations for making works available to persons with print disabilities in accessible formats Art 2 & 8.

¹¹See Provisional regulations for making works available to persons with print disabilities in accessible formats Art 10.

¹²See Filing Guidelines for Accessible Format Copy Service Organizations (including Cross-border Exchange Organizations) Art 3.

technical measures, since the production or sale of devices used to circumvent technical measures is often prohibited, authorized entities need to have the technology to prevent non visually impaired persons from accessing and disseminating accessible format copies. Individuals who intentionally bypass technical security measures often lack the necessary technical expertise to properly exercise that right,¹³ and it is uncertain whether authorized companies can effectively remove technical restrictions.

3. Improvement of the Fair Use for the Visually Impaired in China

3.1. Introducing a Commercial Availability Clause at an Appropriate Time

Commercial accessibility means that if an accessible format copy of a work can be obtained commercially at a reasonable price, the application of a fair use may be excluded,¹⁴ and the parties to the Marrakesh Treaty may choose whether to apply it. If a commercial availability clause is stipulated, the authorized entity should ascertain whether an accessible format copy exists on the market.

The National Diet Library of Japan, as the only legal depository library in Japan, can provide the authorized entity with a searchable catalog to determine whether a published accessible format copy exists in the market (Lu, 2021). At present, China has not yet established a unified system for searching the status of accessible format editions, including “completed”, “in production”, etc., and the hasty introduction of a commercial availability clause may dampen the incentive of authorized entities to produce and disseminate accessible format copies.

The Regulations require that records relating to the production, provision and cross-border exchange of accessible format copies be retained for at least three years,¹⁵ which can lay the foundation for the establishment of a unified system for retrieval of accessible format copies, and at the same time avoid duplication of production and waste of resources.

The non-introduction of commercial accessibility provisions in the Regulations reduces the risk of copyright infringement for Chinese authorized entities, but also limits the orderly formation of marketed accessible format copies. The Marrakesh Treaty aims to unlock the copyright of accessible format copies and address the “book shortage” faced by the visually impaired. Although the cross-border exchange of accessible format copies and copyright exceptions provide a temporary solution to the “book shortage”, they are only stopgap measures. It is only by utilizing the creativity of individuals that the market order can be achieved and the social order can be optimized (Zhu, 2020). If visually impaired persons can ob-

¹³See Provisional regulations for making works available to persons with print disabilities in accessible formats Art 4, 8, 9.

¹⁴See Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled Art 4.

¹⁵See Provisional regulations for making works available to persons with print disabilities in accessible formats Art 5.

tain accessible format copies in the market at a reasonable price, the “book shortage” dilemma has been solved, and there is no need to recreate accessible format copies.

There is a high degree of substitutability between some general works and accessible format copies. For example, unlike Braille versions, there may be substitutability between large-print and regular-format works. Because the production and distribution of large-print works are often of a commercial nature, it is highly likely that their use as fair use will jeopardize the legitimate rights and interests of copyright holders (Lu, 2021). The Copyright Law in Japan, in addition to providing for the non-profit distribution and production of textbooks, requires that compensation be paid to the copyright holder through the Agency for Cultural Affairs of Japan for the provision of large-print books for profit.¹⁶ If a commercial organization has already produced a version of a work that can be applied to the visually impaired, there is no excuse for the authorized entity to give some compensation to the commercial organization.

Social governance is not a set of rules or an activity, but a process of continuous interaction (Su, 2014). The balance between copyright holders and the public is also a dynamic rather than a static mechanism. While the current protection of the visually impaired emphasizes the protection of the interests of vulnerable groups, based on the recognition of the diversity of the visually impaired and the able-bodied, the development of the visually impaired cannot ignore the social environment and the interaction between social expectations and individual capabilities. There is a need to move away from the “social exclusion” of the visually impaired (Li & Deng, 2007) and the “inherent inequality” between the visually impaired and the able-bodied.¹⁷ The biggest barriers faced by visually impaired people (and other different types of disadvantaged groups) are not only physical barriers, but also barriers from society and public awareness. It is difficult for able-bodied people to get rid of the condescending and compassionate attitude towards visually impaired persons. It is only when able-bodied people can empathize with the difficulties of the visually impaired that “inner accessibility” can be achieved at the social level (Jia & Wang, 2014).

The long-term development of accessible format versions needs to be based on the development of a uniform accessible format copy retrieval system. The timely introduction of commercial accessibility clauses could facilitate the formation of an orderly market for accessible format copies in China on its own initiative.

3.2. Refinement of the Cross-Border Exchange of Accessible Format Copies

While clarifying the scope of authorized entities, the Regulations do not provide for an authorization or recognition process between States parties. The cross-border exchange of the accessible format version must take place between authorized

¹⁶See Copyright Law of Japan Art 33.

¹⁷See *Brown v. Board of Education of Topeka*, 347 U.S. 483(1954).

entities of States parties to the Marrakesh Treaty. However, the differences between the legal provisions and legal language of the States parties to the Marrakesh Treaty put the transmission of the accessible format copies at risk.

The establishment of a unified cross-border exchange platform requires a specific entity/platform to collect accessible format copies and related information from various authorized entities, and share accessible format copies with other authorized entities through specific dissemination channels of the already established accessible format copies. For the exchange of accessible format versions in China, there is still a lack of a specific entity to effectively summarize the copyright information and content legality information of accessible format copies. The exchange of accessible format copies in China must solve the communication between multiple entities/platforms at different levels and regions. On the basis of the above-mentioned difficulties, cross-border exchange authorized entities not only have to address the differences in legal provisions related to authorized entities in each country, but also need to review the other party's qualification as an authorized entity, and whether the accessible format copy is made for visually impaired persons. These issues are not addressed in the Marrakesh Treaty or in China's Copyright Law.

The legal provisions for the mutual recognition of orphan works established in the EU Orphan Works Directive are worth taking into account. For the importing country, an accessible format copy produced in accordance with the exporting country's restrictions is considered as a lawful text by the importing country and is made available for use by the beneficiary. As for the exporting country, in order to avoid the abuse of the accessible format version by the users in the importing country, the authorized entity of the exporting country shall add watermarks to the accessible format copy, and set up logos or QR codes for the traceability chain of the accessible format copy (Trimble, 2014). It is undeniable that countries need to improve communication and cooperation in determining the standard and scope of the marking.

4. Conclusion

The promulgation of the Regulations has reserved sufficient legal interpretation space for visually impaired persons in China to access accessible format copies of works, and has achieved many positive results. With the facilitation of the exchange of accessible format copies of works between countries, the Global Alliance for Accessible Reading was established with the participation of representatives from many parties. A globally harmonized publishing standard for accessible format editions and a catalog of book services are gradually being formed. In order to promote the long-term rights and interests of visually impaired individuals in obtaining works, China should build a national unified platform for the exchange of accessible format versions of works for creators, publishers, visually impaired individuals, and other entities, based on relevant laws and regulations such as the Copyright Law revised in 2020, and the Regula-

tions. This platform integrates cross-border communication and cooperation, and the integration of accessible format version resources (including accessible format copy production standards, production progress, and storage mechanisms), which is in line with the Global Accessibility Reading Alliance. China should establish commercial accessibility clauses at an appropriate time to promote the market development of accessible format copy. China should refine the standards and processes of cross-border exchanges by combining relevant legislative provisions and international treaties on accessibility formats outside the region, thereby promoting China's participation in the formulation of world intellectual property treaties and demonstrating the value of humanized governance.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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