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## **Beyond the lens to the new disability exceptions: additional needs in Higher Education**

*Ruth MacMullen*

### **Abstract**

The introduction of the UK *Copyright and Rights in Performances (Disability) Regulations* (2014) marks the most significant changes to copyright disability exceptions for twelve years. The legislative changes bring long-awaited updates to this area of copyright law, but practical encumbrances such as reporting, Digital Rights Management, and cross-border exchange of files threaten to undermine the positive aspects such as a widening of the material formats that are covered by the exception. This article examines the changes and their practical applications, comparing what the law allowed previously to what it now permits, and how this intersects with licensing schemes such as the Copyright Licensing Agency (CLA) Licence. It looks at the responsibilities of rightsholders and of “authorised bodies” who can adapt works for users with disabilities. Finally, this article will summarise current international legislative issues such as the ratification of the World Intellectual Property Organisation (WIPO) Marrakesh Treaty.

### **1 The domestic legislative landscape**

Prior to last June we had - in the UK - the *Copyright (Visually Impaired Persons) Act (CVIPA)* (2002). This came into force in October 2003. Before this, there had been no exception in the law to legitimise making copies for people with disabilities. The Act, therefore, removed the main barrier to information being made accessible in a timely manner: the need to seek permission from rightsholders, and the resulting delay that this presented.

The Act included quite a broad definition of “visual impairment”, which encompassed those who were blind, unable to hold or to manipulate a book, or unable to focus or move their eyes. An “accessible copy” was defined as a version which “provides improved access to the work” and could “include facilities for

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navigating around the work” (*Copyright (Visually Impaired Persons) Act, 2002, s31F*).

Although welcomed, the Act had its limitations. Works that could be copied were limited to “literary, dramatic, musical or artistic works” (s31A, s31B), so audio-visual materials could not be adapted. Licensing schemes took precedence when an “approved body” made and supplied accessible copies (s31B); and, perhaps most crucially, the definition of visual impairment did not include those with perceptual or cognitive disabilities, such as dyslexia - and no other disabilities that restricted access to copyright material were included (s31F).

These issues have been addressed by a new statutory instrument which supersedes the *CVIPA* and came into force in June 2014: the *Copyright and Rights in Performances (Disability) Regulations (2014)*. For the first time, all relevant disabilities and all categories of copyright works are covered, effectively lifting the previous restrictions on what could be copied, and for whom.

The new statutory instrument amends Section 31 of the *Copyright, Designs and Patents Act (CDPA) (1988)* – which is now called “Disability” rather than ‘Visual Impairment’. Let us take a closer look.

### **1.1 Section 31 A**

Section 31A is an example of how the new law is more concise and inclusive than its predecessor. It covers copying for the personal use of a disabled person if their disability “prevents [them] from enjoying the work to the same degree as a person who does not have that disability”. The word “enjoy” implies a degree of pleasure rather than just comprehension, but in the legal sense it means to have use of or benefit from. The change can be anything that makes the work accessible for the person with the disability.

### **1.2 Section 31 B**

This section covers the making and supply of accessible copies by “authorised bodies”. The copies must contain a statement and acknowledgment of the copyright owner. This is the section under which educational establishments, charities, and other not-for-profit bodies may keep accessible copies for future use, and supply them to other authorised bodies that would also be entitled to adapt that work.

Copy-protection must be reinstated where possible – “the accessible copy must... incorporate the same or equally effective copy protection” (*CDPA, s31B*) – so it is still illegal to circumvent Technological Protection Measures (TPMs).

### **1.3 Section 31 BA**

This section covers the making and supply of intermediate copies. This would allow an authorised body to make a copy of the work if necessary to make an accessible copy, and to supply this to other authorised bodies that would also be entitled to adapt that work.

#### 1.4 Section 31 BB

Organisations must keep records of copies they make under sections 31B and 31BA, and notify copyright owners of copies made under section 31B.

#### 1.5 Section 31 F

This contains the updated interpretation for the new exception. The definition of “disabled person” is more in line with the *Equality Act* (2010): a person who has a physical or mental impairment which presents a barrier to them “enjoying” the copyright work, and the “accessible copy” is the version which enables “fuller enjoyment”. “Authorised body” is defined as “an educational establishment” or “a body that is not conducted for profit”. Finally, there is a no contractual override clause (*CDPA*, s31F).

Sections 31D on licensing schemes and 31E on limitations have been removed.

## 2 The changes in practice

### 2.1 Rights holders and licensing

Protection for the owners of copyright works is built into this exception. The disabled person must have lawful possession or lawful use of a work. Any charge that is made cannot exceed the charge of making and supplying the copy; people cannot profit from producing accessible copies. Furthermore, a work cannot be copied if an accessible version is commercially available on reasonable terms. What constitutes “reasonable terms” – a new addition to this exception – is a matter of debate. It could be argued that a price which corresponds with the market value would be reasonable. The term “commercially available” is also problematic. Each person with a disability will have a different experience of accessing a work; what is accessible to one person with a disability may not be accessible to the next.

This exception is now enshrined in the legislative framework, but this is not to say that licences are no longer relevant. A pertinent example is the CLA Higher Education (HE) Licence (Copyright Licensing Agency, 2013). This permits accessible copies to be made for users with relevant disabilities, allows institutions to keep those copies securely for future use, and does not require reporting of the accessible copies. This gives some of the benefits of section 31B minus the cumbersome reporting requirements. However, the new exception covers all formats, and material that is excluded under the Licence, such as maps (Schedule 1). A challenge for librarians is to develop the workflows to separate these requests for reporting purposes.

Another important consideration is communicating with publishers to ensure that their practices are consistent with changes to copyright law. Some publishers continue to supply files with licensing conditions that – whilst unenforceable – forbid storage and sharing. This is likely to be due to legacy versions and unawareness rather than direct resistance to change. Another difficulty is the lack of any definition of “intermediate copy” in the new exception. Publishers may provide an accessible digital file in response to a request, but if this needs to be further adapted then it becomes an intermediate copy (a file created in the process

of creating an accessible copy) or an accessible copy (the version which is accessible to the disabled user). Further guidance about the meaning of “intermediate copy” has been provided by Jisc and the Publishers Association (Publishers Association, 2015a, 2). Intermediate and accessible copies may be shared with other institutions which would be entitled to make copies of that work under the exception. Jisc have also been working in collaboration with the Publishers Association to produce a checklist of good practice for publishers; the latest version can be seen at <http://bit.ly/PAGuidecopyright> (Publishers Association, 2015b).

## **2.2 Reasonable adjustments**

Under the *Equality Act* (2010) it is illegal for providers of goods and services to discriminate against disabled people. Consequently, publishers have a duty to provide material in an alternative format if somebody with a disability cannot access it. They do not need to publish alternative versions of their books – although this is recommended as best practice – but may rely upon a licensing scheme or a related service in order to facilitate the making and distribution of accessible versions (Publishers Association, 2015). However, if their commercially available versions are produced with built-in accessibility features, such as magnification with reflow and screen reader access, then this will lessen the chance that copying would be required in order to produce an accessible version.

Additionally, educational establishments have a statutory duty to make reasonable adjustments to ensure disabled people are not disadvantaged in relation to their non-disabled peers. The *Equality Act* (2010) contains a provision for information “being provided in an accessible format” (*Equality Act*, 2010, s20). Timeliness of access to information is crucial to all users, particularly those in an education setting. It is therefore incumbent on both copyright owners and educational establishments to facilitate the making and supply, in a timely manner, of accessible versions of works.

## **3 Further issues**

### **3.1 Legislation – the wider world**

The UN Convention on the Rights of Persons with Disabilities outlines specific rights of equal and timely access to information. Two articles are particularly pertinent.

Firstly, Article 24 on equal access to education:

*...without discrimination and on the basis of equal opportunity... States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others.*

(United Nations, 2006)

And, secondly, Article 30 on Participation in cultural life:

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*States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities enjoy access to cultural materials in accessible formats.*

(ibid.)

These are noble aims, but what is the reality? Have you, perhaps, come across this phrase, “the book famine”? Here are some statistics from the World Health Organisation and RNIB:

- There are no fewer than 285 million visually impaired people worldwide and 90% of those live in developing countries;
- 7% of all books published in the UK are available in braille, audio and large print and this drops to just one in a hundred in developing countries.

There is still a territoriality issue: it is not permissible to make accessible works under national copyright exceptions and to send them across state borders. As an example, the TIGAR service provides access to nearly 300,000 accessible books in 55 languages. Currently publishers have to give permission to allow the cross-border exchange of accessible e-books made under a national copyright exception or licence (Accessible Books Consortium, 2015).

One solution to this problem might be the Marrakesh Treaty. This was adopted by WIPO on the 27<sup>th</sup> June 2013. This will not come into force until twenty states have ratified it. At the time of writing this article, the number is nine. The UK is not one of them.

Articles 5 and 6 of the treaty mention cross-border exchange between parties that have ratified the treaty:

*if an accessible format copy is made under a limitation or exception... [it] may be distributed or made available... to a beneficiary person or an authorized entity in another Contracting Party.*

(World Intellectual Property Office, 2013)

Article 7 makes explicit that technological measures should not interfere with the rights of people to benefit from exceptions dealt with in this treaty:

*Contracting Parties shall take appropriate measures... to ensure that when they provide adequate legal protection... against the circumvention of effective technological measures, this... does not prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty.*

(ibid.)

If Marrakesh does come into force, it is likely to place pressure on publishers and suppliers to provide accessible copies, or, at least, to not hinder the making of them under the exceptions.

### **3.2 TPM and DRM**

Digital Rights Management is applied by publishers to allow them to control if and how a resource can be viewed, downloaded and printed. This is usually

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enforced by the use of Technological Protection Measures. The various methods employed have been neatly summarised by Kristin Eschenfelder:

- *Extent of use: page print limits, PDF download limits;*
- *Obfuscation: needing to select items before use options become available;*
- *Omission: not providing buttons or links to enact uses;*
- *Decomposition: saving document results in many files, making recreating or e-mailing the document difficult;*
- *Frustration: page chunking in e-books;*
- *Warning: copyright warnings, end-user licenses on startup;*
- *Restricted copy and paste OCR: OCR exposed for searching, but not for copying and pasting of text;*
- *Secure container TPM Use rights vary by resource.*

(Eschenfelder, 2008, 219)

All these methods present barriers to accessible use of a work which disproportionately affect users with disabilities. Under the new exception, the process for challenging DRM when it presents a barrier to a lawful act is still to write to the Secretary of State, putting the burden on the user rather than the supplier (CDPA, s296ZA). We cannot rely on publisher goodwill so further legislation is required to navigate this tricky and frustrating area. The Libraries and Archives Copyright Alliance (LACA) has produced *The London Manifesto for Fair Copyright Reform for Libraries and Archives in Europe* (Libraries and Archives Copyright Alliance, 2015), which calls for the right to enjoy statutory exceptions. The Marrakesh Treaty is a potential way forward, and there are also changes to copyright law at an EU level under consideration. Julia Reda's copyright evaluation report calls for publishers "to publish all available information concerning the technological measures necessary to ensure interoperability of their content" (Reda, 2015).

#### **4 Conclusion**

The new UK legislation for copying materials for users with disabilities is, for all the outstanding issues, more fit for the digital age and our need for timely and flexible solutions. It permits the provision of accessible works, in more formats, for more disabled people.

I would like to close with a call to action. The removal of s31D on licensing schemes from the CDPA gives authorised bodies more freedom to supply accessible and intermediate copies to other authorised bodies. This resulting potential for collaborative working is immense. Where an accessible copy is not commercially available, we must continue to request accessible files directly from publishers to let them know that the demand is there. Services such as Load2Learn, a repository and request service for accessible books, can facilitate these requests, and the sharing of intermediate and accessible copies.

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Production of accessible format material is something of a niche role in librarianship, requiring a grounding in copyright, licensing, publishing, information needs of disabled people, digitisation, adaptation and related technologies. I believe that working together at a national level is the optimal way forward, to create processes that will allow the largest number of users with disabilities to have equal access to the information that we hold in our libraries. I have set up a new JiscMail list together with colleagues from the universities of Kent and Leeds Beckett, and from Jisc and would welcome any contributions to the debate. Please join us at [lis-accessibility@jiscmail.ac.uk](mailto:lis-accessibility@jiscmail.ac.uk).

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