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Reproduction of Copyrighted Work by Person with Disabilities: A Critical Analysis

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ABSTRACT

This paper critically examines the interplay between copyright law and accessibility rights of persons with disabilities (PwDs), with a focus on India and the United States. It explores the barriers posed by intellectual property regimes and evaluates whether current legal frameworks adequately serve the needs of PwDs. The analysis focuses on the Indian Copyright Act, especially Sections 52(1)(zb) and 31B, post-2012 amendments, and contrasts them with the US doctrine of fair use. Through doctrinal and comparative analysis, the paper argues that while US law appears more flexible, its factor-based fair use test creates practical challenges when applied to PwDs. The burden of proof, market effect, and requirement for transformation are identified as problematic in access contexts. The paper concludes that India's hybrid approach, though restrictive, provides a clearer route for rights-based exceptions. A more inclusive and rights-sensitive doctrine is proposed to ensure equitable access to knowledge.

Keywords: *Persons with Disabilities, Copyright Law, Fair Use, Fair Dealing, Indian Copyright Act, Marrakesh Treaty, Accessibility, Intellectual Property, Reproduction Rights, Right to Read.*

I. INTRODUCTION

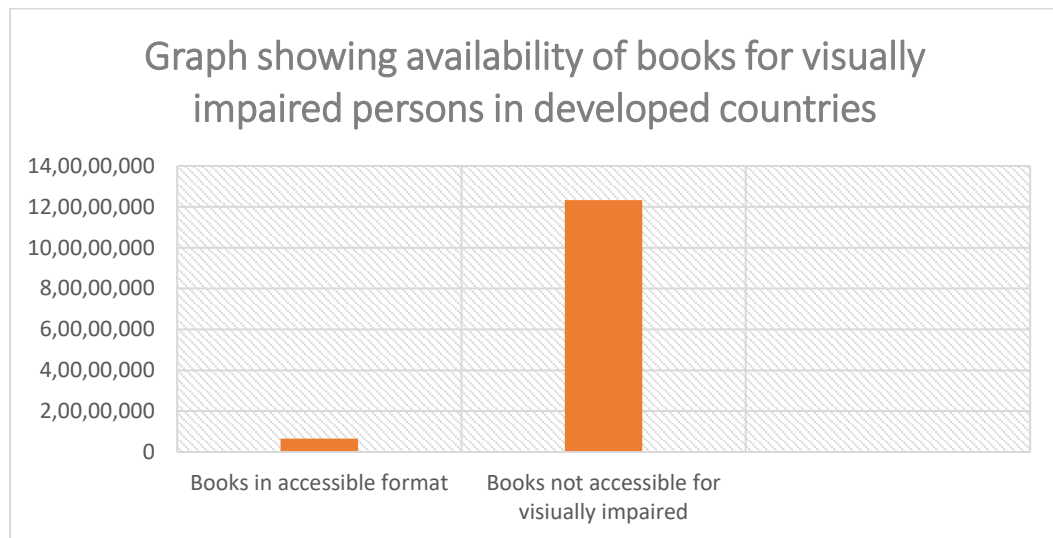
It is always a tough challenge for the Person with Disabilities to have the access of knowledge and participation.² Book famine³ is one of the larger issues which Person with Disabilities faces even after having the right to read under Article 21.⁴ The graph shown below is the proof of Person with Disabilities having almost no-access to the books published in the developed countries.

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² Caterina Sganga, 'Disability, Right To Culture And Copyright: Which Regulatory Option?' (2015) International Review of Law Computers & Technology <<https://www.researchgate.net/publication/281671648>> accessed 24 November, 2022

³ 'The Right to Read for Disabled People' (*Open Society Foundations*, 4 May 2010) <<https://www.opensocietyfoundations.org/events/right-read-disabled-people?skin=printable>> accessed 23 November, 2022

⁴ Universal Declaration of Human Rights, 1948



In making the published books accessible to the Person with Disabilities, Intellectual Property laws play a major role. The rights of copyright owner always create an opposite force which cannot be rejected altogether.

This paper seeks to analyse the IP laws in the field of reproduction of work for the Person with Disabilities. Major analysis has been drawn on the applicability of the doctrine of ‘fair use’ and whether the approach results in a more efficient and better outcome.

The whole paper is written in an essay format comprising of four parts. The second part focuses on the legal system in India with respect to the reproduction of work for Person with Disabilities. The third part describes the doctrine of ‘fair use’ and ‘fair dealing’ and how US and Indian jurisprudence has described the same. In the last part, the doctrine of ‘fair use’ has been applied in the field of reproduction of Person with Disabilities and an analysis of the outcome has been drawn.

(A) Research questions –

- What is the India’s legal stance on the exception for Person with Disabilities under IP Laws and how the same is getting implemented?
- How the law in US different from India in the field of exceptions under IP Laws?
- Can the doctrine of ‘fair use’ be applied in reproduction of work for Person with Disabilities? How?
- Whether the US legal position is better than India in the field of exception for Person with Disabilities in IP Laws.? How
- How the ‘fair use’ doctrine appears to be a problem in the field of Person with Disabilities in general?

II. AN ANALYSIS OF INDIAN LEGAL FRAMEWORK: INDIA COPYRIGHT ACT AND BEYOND

Prior to the amendment came in 2012, copyright laws made it difficult for people with disabilities to access content since the copyrighted material owner had the only right to adapt, create, distribute, and transmit their work to the general public. Therefore, any adaptation of a book into an accessible format, such as a Braille version or an audio book, was regarded as a copyright violation.⁵

India, having around 20 million Person with Disabilities⁶, became the first nation to adopt the Marrakesh Treaty and align its policies and practices with the Marrakesh Treaty for the first time in June 2014.⁷

Section 52(1)(zb) and Section 31B of the Copyright Act of 1957 have been incorporated by India, which is a step in the right direction toward bringing India up to par with other nations. In order to ratify it, India amended the Indian Copyright Act and came up with the changes under Section 52(1)(zb), which gave India the authority to impose exceptions and restrictions on the current system and so made it possible for people with disabilities to access resources. Even if Section 52(1)(zb) made it illegal to convert copyrighted works for profit, anybody or any organisation can still request for a license from the Copyright Board by following the steps outlined in Section 31B. Judges have also linked the exceptions under section 52 with article 19(1)⁸ of freedom of expression giving a broader and liberal interpretation for the same.⁹

In addition to the Copyright Act, additional laws like the Person with Disability Act¹⁰ and the Right to Education Act¹¹, among others, also prohibit discrimination. However, the provisions did in fact turn out to be restrictive for a very long time. For example, the current compulsory licensing system not only makes it impossible for educational institutions, self-help organizations, and non-governmental organizations to obtain a license allowing for distribution and conversion but also proves to be incredibly time-consuming and burdensome.¹² In addition,

⁵ Kailas R. Jagdeo and Sanjay V. Jadhav, 'Right of Accessibility of Visually Impaired under Indian Copyright Law-A Critical Study' (2020) 8(6) International Journal of Creative Research Thoughts <<https://www.ijert.org/papers/IJCRT2006133.pdf>> accessed 28 November, 2022

⁶ Accessible_Copies_of_Copyright_Work_for_Visually_I.pdf

⁷ Anita Joshua, 'India ratifies Marrakesh Treaty for visually impaired' (*The Hindu* 6th April 2022)

⁸ Constitution of India, 1950

⁹ *Wiley Eastern Ltd and Ors v Indian Institute of Management* 1995 (35) DRJ 522

¹⁰ Rights of Person with Disabilities Act 2016, Section 42.

¹¹ The Right of Children to Free and Compulsory Education Act 2009, Section 3.

¹² Rajya Sabha Secretariat, 'Two Hundred Twenty-Seventh Report on Copyright Amendment Bill, 2010' (Parliament of India 2010) ¶13.3,

the section provides no benefit in the new technological world where the author puts certain kind of restrictions on the work because of which organizations are unable to make it accessible for the Person with Disabilities. Blocking of text to speech software is one such example where the organization cannot do anything even after having the exception section in IP Laws.¹³

While aiming to overcome some of the current restrictions, the aforementioned proposed amendment broadened the definition of copyright and beneficiaries and attempted to include extend various benefits for Person with Disabilities through broader access to materials.¹⁴

Additionally, the requirements fall broadly within the "Fair Use Doctrine" and "Fair Dealing" doctrine. These are comparable to copyright principles that are upheld by countries like the Great Britain, United States, India, and the United Kingdom. However, India follows the hybrid system in the field of exceptions in IP Laws. In addition, Indian system uses the doctrine of 'fair dealing' in certain specific cases.¹⁵

(A) Doctrine of 'Fair use' and 'Fair dealing'

The 'fair dealing' doctrine is an exemption to the copyright infringement even if it is not defined anywhere. It outlines the conditions that limit how much of a copyrighted work can be used. India has embraced the idea of fair dealing as well, in accordance with UK copyright legislation. However, under U.S. copyright regulations, the same idea is known as "Fair Use." This legal theory began as a notion of equity that permitted the use of some copyrighted works that would have otherwise been barred.

In the league of the doctrine, Lord Hartwicke stated his two categories for the classification of abridged work in the case of *Gyles vs Wilcox*¹⁶. Finally, the case of *Folsom v. Marsh*¹⁷ came into field which first ever discussed the doctrine of 'fair use'. In this case of US, Justice Story set forth four points to be considered for the application of doctrine of 'fair use'. These four points later became the part of statutory provision in US copyright law.

The following factors are further the foundation of fair use embedded in the US law. -

- The character and purpose of the work. It includes whether the use is of commercial

<<http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20HRD/227.pdf>> accessed 2 December, 2022

¹³ Neha Priyadarshini, Special Provisions for Disabled Persons Under Copyright Law in India, 4 JIPL (2019) 123

¹⁴ *ibid*

¹⁵ Ayush Sharma, 'Indian Perspective of Fair Dealing under Copyright Law: Lex Lata or Lex Ferenda?' (2009)

¹⁴ Journal of Intellectual Property Rights 523-531 <<http://14.139.47.15/bitstream/123456789/6706/1/JIPR%2014%286%29%20523-531.pdf>> accessed 27 November, 2022

¹⁶ *Gyles v Wilcox* (1740) 26 ER 489

¹⁷ *Folsom v. Marsh*, 9. F.Cas. 342 (C.C.D. Mass. 1841)

nature i.e. whether the purpose is non-profit educational.

- Nature of the work that is copyrighted.
- The substantiality and amount of the portion used with respect to the whole of the work that is copyrighted.
- Effect of the use of work upon the potential market.¹⁸

In the case of *Civic Chandran v. Ammini Amma*¹⁹ the Indian court opined that as long as a parody has not been abused or misappropriated, the Court believed that it does not violate copyright. Court laid down three factors on the line of US factors comprising of amount, purpose and competition aspects. In the newer cases like *Super Cassette Industries Ltd. Vs Humar Television Network*,²⁰ Delhi High Court laid down several factors which have to be taken into consideration on which the doctrine of 'fair dealing' is based. It was held that the concept of 'fair dealing' is determined through the fact, degree and an umbrella impression drawn by the court and hence cannot and should not be defined in an exact form.²¹ According to this view, the application of 'fair dealing' in India depends upon how Court interpret the facts and principles laid down in International legal system.²²

III. APPLYING FAIR USE DOCTRINE IN THE CASE OF REPRODUCTION OF WORK FOR PWDs

(A) Purpose and character –

The key considerations that courts use for establishing this first factor is whether the work is profit oriented and whether it is transformative. Transformative means the addition of something new with some different purpose or character. The more transformative the work will be, the more judgment will be tilted towards fair use.

In the *Hathitrust*²³ case, US Court came to the conclusion that providing a full-text search of works comprised "a quintessentially transformative use" when examining the first element.²⁴ The court also came to the conclusion that even though the use of works for people with print disabilities was not transformational because the basic goal remained the same, the objective

¹⁸ United States Code, § 107

¹⁹ *Civic Chandran v. Ammini Amma* 1996(1) K.L.T. 608

²⁰ *Super Cassette Industries Ltd. Vs Humar Television Network* (2011) (45) PTC 70 (Del.).

²¹ (2011) (45) PTC 70 (Del.).

²² Kailash (n 4).

²³ *Authors Guild v. HathiTrust* 755 F.3d 87 (2d Cir. 2014)

²⁴ *ibid*

could still be regarded as legitimate.²⁵

The Supreme Court of US had previously mentioned creating copies of protected works for people with impairments as a case of fair use, the court emphasized.²⁶ Similar to this in the legislative history, it was stated in the House Committee Report that "if any individual is making a copy or phonorecord of a copyrighted work as free of cost for the blind person then the process will be considered under fair use" when the fair use doctrine was codified in the U.S. Copyright Act in 1976.²⁷ Moreover, by passing the Chafee amendment and Americans with Disabilities Act²⁸, Congress has reinforced its commitment to lessen the difficulties faced by those with print disabilities.

Hence the first factor i.e. *purpose* can be said to be fitting the reproduction of work for person with disabilities but court has to go beyond the concept of 'transformative.' In addition, there are several authorities as highlighted above which applied the first factor in the case of exception for person with disabilities.

(B) Nature of the work

With respect to the nature of copyrighted work, whether the work is factual or creative is the main factor to consider. However, the courts have opined that the nature of copyrighted work does not play an important role in the application of doctrine of 'fair use' if the work is transformative.²⁹

The court in the case of *HathiTrust*³⁰ concluded that the database included every type of works, so there was no issue that the accumulation would include works that are creative in nature or "are of the kind that the copyright laws value and try to protect" with regard to enabling full-text searches and granting access to people with print disabilities. However, the second component is rarely deemed to be decisive, the court emphasized.³¹ In addition, as far as the reproduction of work for the Person with disabilities is concerned, the factual or creative degree cannot be applied in the strict sense as there might be the cases while the process is neither factual nor involve any creation but still need to be reproduced to make it accessible for Person with Disabilities.

²⁵ *ibid*

²⁶ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)

²⁷ Mr. Kastenmeier, 'Report on Copyright Law revision' (House of Representatives 94th Congress, 1976) <<https://law.resource.org/pub/us/works/aba/ibr/H.Rep.94-1476.pdf>>

²⁸ American with Disability act, 1990

²⁹ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2006) 612.

³⁰ *HathiTrust* (n 22)

³¹ *Campbell v. Acuff-Rose Music, Inc.* 114 S. Ct. 1164 (1994) 586

(C) Amount of the work –

In the third factor, the amount of the work that is copyrighted considered as a determinative factor for fair use doctrine. The determination of the amount that is allowed is the work of Court and the same depends on the character and purpose of the use. The investigation for the determination of the amount involves both qualitative and quantitative aspects.³²

Regarding the third consideration, the court came to the conclusion that even while the HDL had taken use of whole works to aid full-text searches, the copies which they made were reasonable and not excessive.³³ The court rejected the Authors Guild's claim that the copying amounts to an excessive use because the HDL kept both digital text files and digital image files, which would have provided access for people with print difficulties.³⁴ The court stated that with enough magnification or color contrast, many people who are legally visually impaired would be able to see the graphics.³⁵

Hence the court in this way has allowed the reproduction of the whole work in the case of person with disabilities and hence the third factor also becomes redundant because there is no involvement of investigation of the amount of work involved in the process.

With respect to the 'fair dealing' approach in India, the factor of amount is judged on the basis of substantiality. There must be a substantial infringement to attract the doctrine but for the dealing it should not be too substantial.³⁶ However, in the case of exception for person with disability, the substantiality of the work must not play any role as the whole amount need to be reproduced where there will definitely be too much substantiality therefore cannot be judged on the basis of doctrine of 'fair dealing'.

(D) Effect on market –

The fourth factor is designed to take the consideration of the value of copyrighted work at large. How making the copy of that copyrighted work will affect the same in the market and the author's interest. The scope of this factor is more tilted towards the market side as it does not only take into consideration the effect on current market but also the potential market for that original work or its derivative works if any. There is no need to show the actual harm but some meaningful likelihood of the existence of future harm must be shown. The same approach has

³² *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1178-79 (9th Cir. 2012).

³³ *HathiTrust* (n 22)

³⁴ *ibid*

³⁵ *HathiTrust* (n 22)

³⁶ *RG Anand v Delux Films and Ors* [1979] 1 SCR 218

also been taken in the Indian Courts while applying the doctrine of 'fair dealing'.³⁷

The court in the case of *HathiTrust*³⁸ opined that the full-text search engine was a transformative application that would not lead to a "market substitution," which is required for financial damage under fourth factor analysis, so the court came to the conclusion that the fourth element favored a judgment of fair use. The court similarly dismissed the Authors Guild's two concerns, which were that the HDL constituted the danger of a security breach because hackers would be able to get unauthorized access and that each copy reflected a lost sale since users might obtain the copy without even a license.³⁹ The court determined that the market for this category which is for accessible books was "insignificant" in terms of granting access to those with print difficulties.⁴⁰

Initially, there was a lot of dependence on author-awarded monopoly rights. However, human rights and IP policy have progressed favorably as a result of the Marrakesh Treaty.⁴¹ Many see it as a "bottoms-up" tool since it tries to build a framework and rhetorical framework for national actors to assert their rights and participate in Intellectual Property decision-making, rather than enforcing norms from a position of bureaucratic superiority.⁴² It enables specific victims of violations of human rights to assert their entitlements successfully.⁴³

This point of impact on market may lead to the problem while applying the doctrine of 'fair use' because of the different ideologies and litigating points. The issue can be summed up as having two ends, where one end stresses the author's exclusive rights and the other end emphasises the interests of people with disabilities. Excessive slanting in one direction or the other may not result in the best course of action. For instance, the former will result in a more exclusive and less varied society, whilst the latter may reduce the writers' motivation to put in the effort necessary to produce a any work because of lack of copyrighted protection for the same. Hence, the fourth factor i.e. effect on market first seems to mark the process unfair but ultimately will not be used. As the only case in which fourth factor applied is the involvement of profit making but the same has already been covered by the first factor. Any other effect on the market while processing the work in non profit basis must not be taken into account as the same will attract the other right to education or right to read which Person with disabilities gets

³⁷ *ESPN Stars Sports v Global Broadcast News Ltd and Ors*, 2008 (36) PTC 492 (Del) Para 17.

³⁸ *HathiTrust* (n 22)

³⁹ *HathiTrust* (n 22)

⁴⁰ *ibid*

⁴¹ Rahul Cherian et al, 'The Disability Exception and the Triumph of new rights advocacy' (2012) NUJS Law Review < http://nujlawreview.org/wp-content/uploads/2016/12/05_rahul.pdf> accessed 28 November, 2022

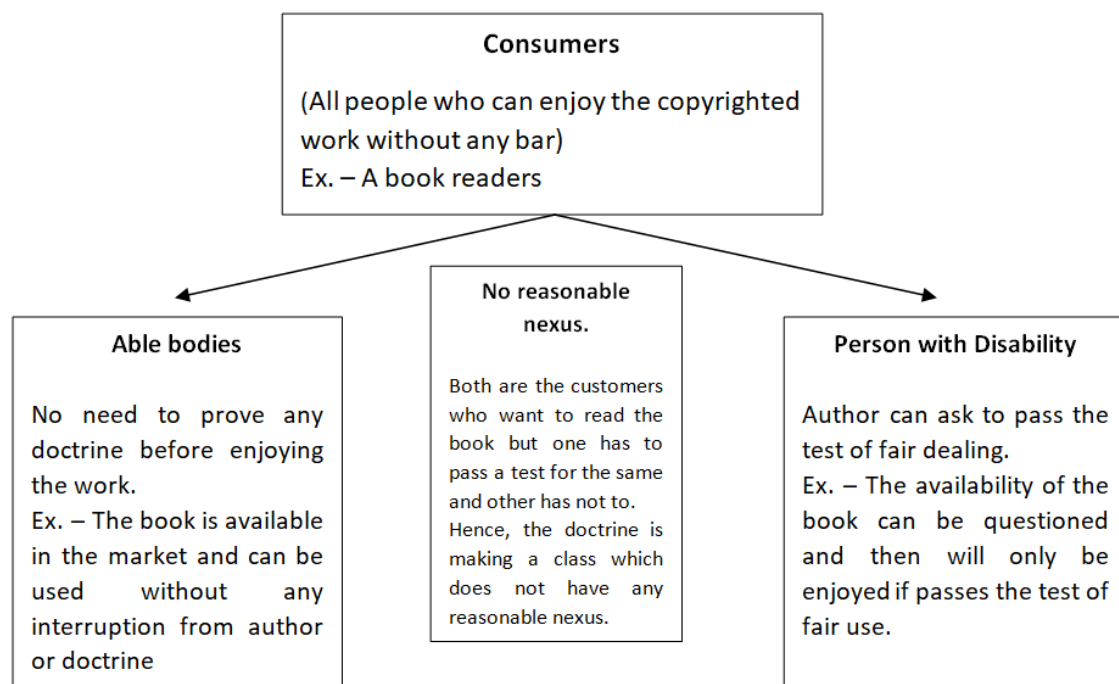
⁴² Molly K. Land, 'The Marrakesh Treaty as Bottom-Up Law making: Supporting Local Human Rights Action on IP Policies' (2018) 8 UC Irvine

⁴³ *ibid*

as fundamental rights. In addition, if the market in the case of the Person with disabilities once held ‘insignificant’ then there is no scope of investigation remains for the later cases in the same field. The market will always be insignificant and non substitutable in all the cases of person with disabilities and hence there is no application of fourth factor of doctrine of ‘fair use’.

(E) Burden of Proof –

The doctrine of ‘fair use’ works by putting the burden of proof on the infringer to prove that the process is covered under the doctrine. Therefore, the infringer has to prove all the nature, purpose, amount and market effect. This puts the person with disabilities on a complete different side from the other able bodies. Both, a able body and a disabled body are the customers who are getting the copyright work to enjoy but the former is getting the same without any interruption and later has to prove the doctrine of ‘fair use’ first. This classification does not have any reasonable nexus and hence also violates Article 14.⁴⁴



However, the fourth factor i.e. effect on the market or author cannot be set aside altogether and hence some kind of petition power must be there. To sort this out, a new method can be placed which is similar to doctrine of fair use but in a reverse scenario. The idea comes from the case of *Kartar Singh Giani v. Ladha Singh*⁴⁵ in which Court was of the view that unless the infringer’s motive is unfair or improper, the dealing would be fair. The court made a

⁴⁴ Constitution of India, 1950

⁴⁵ *Kartar Singh Giani v. Ladha Singh* AIR 1934 Lah. 777

presumption of being fair on account of infringer and, to some extent, putting the burden on the copyright owner to prove the wrong intention or unfair means of the infringer. The same idea was also stamped by the court in the case of *Blackwood and Sons Ltd. v. A.N. Parasuraman*⁴⁶ when describing the doctrine of 'fair dealing'.

IV. CONCLUSION

India, following the hybrid system, has created the specific provisions for the reproduction of work for Person with Disabilities while US applies the doctrine of 'fair use' which is codified in its statute. The doctrine of 'fair use' has been seen very flexible to allow the exceptions so required but does not fit in the cases related to reproduction of work for Person with Disabilities. Though US Courts place the exception for Person with Disabilities as a 'fair use' but the same results cannot be achieved by strictly following the factors of the doctrine.

Hence, an application of the doctrine of 'fair use' causes two problems in the long run. Firstly, it makes the whole doctrine vague and very discretionary and secondly, it opens the gates of attack on the exceptions for Person with Disabilities. In addition, it always puts the Person with Disabilities or the organisations working in the same field under a burden of proof even when exercising the normal right to read which in turn will violate the provisions of Indian Constitutions.

⁴⁶ *Blackwood and Sons Ltd. v. A.N. Parasuraman*, 1958 SCC OnLine Mad 62.