Copyright’s Role in Disability Law

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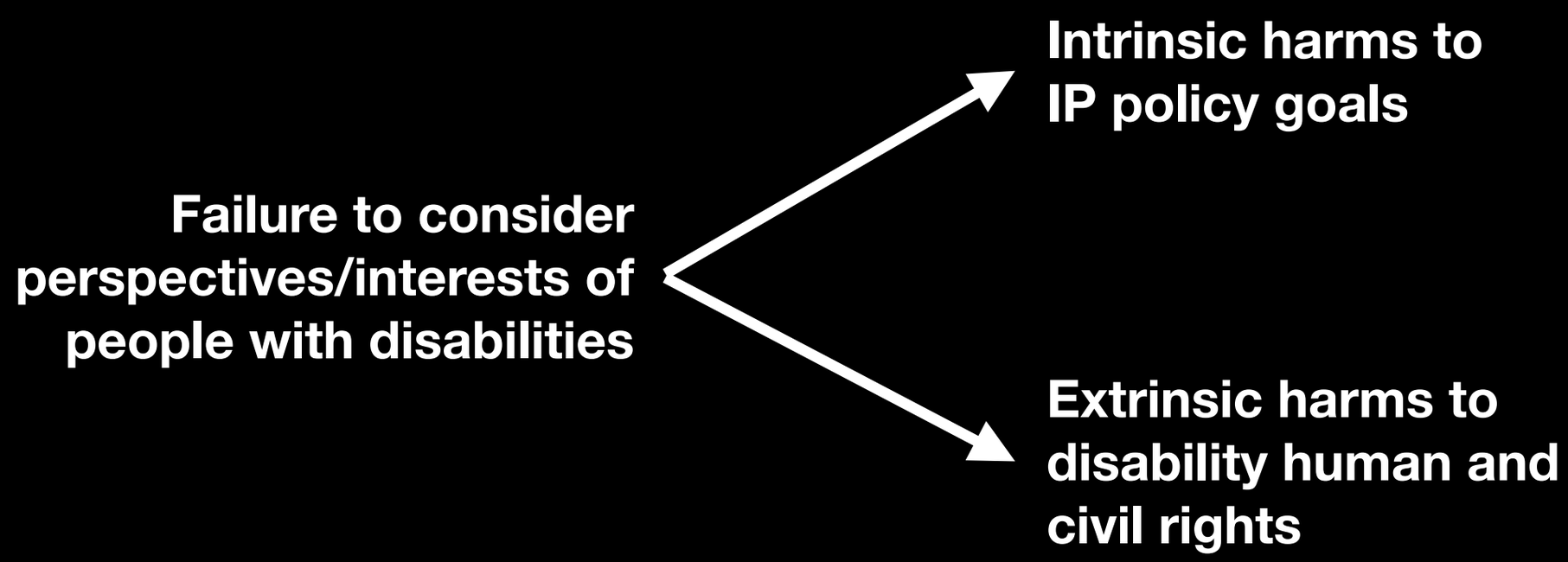
“American intellectual property law has, as a general matter, proceeded in ignorance of disabilities.”

Eric Johnson, *Intellectual Property’s Need for A Disability Perspective*

Intrinsic vs. Extrinsic Harms



Intrinsic vs. Extrinsic Harms

Implication of exclusive rights under © law → **Extrinsic harms to disability human and civil rights**

Remediation and © Exclusive Rights

- Ex. 1: Braille/other accessible format version of a book: reproduction + distribution rights
- Ex. 2: Captions to a video: reproduction/adaptation (?) + distribution rights

Accessibility Exceptions and Limitations in U.S. © Law

- *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014)
  - Remediating books for print disabilities is fair use
  - Reasoning extensible to nearly every other form of accessibility remediation, category of copyrighted work, and category of disability

Accessibility Exceptions and Limitations in U.S. © Law

- *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014)
  - First factor:
    - Not transformative, but…
    - Reinforced by Copyright Act legislative history + positive citation by Supreme Court in *Sony*
    - Consistent with congressional intent expressed in ADA + Chafee

Accessibility Exceptions and Limitations in U.S. © Law

- *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014)
  - Second factor: varied types of works, so not dispositive
  - Third factor: need entire work (text and images), but not dispositive
    - Cuts even less w/other remediation—e.g., closed captions use only the audio track of a video

Accessibility Exceptions and Limitations in U.S. © Law

- *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014)
  - Fourth factor: serious concerns about market failure
    - "It is undisputed that the present-day market for books accessible to the handicapped is so insignificant that 'it is common practice in the publishing industry for authors to forgo royalties that are generated through the sale of books manufactured in specialized formats for the blind . . . .'"

Accessibility Exceptions and Limitations in U.S. © Law

- *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014)
  - Fourth factor: serious concerns about market failure
    - “[T]he number of accessible books currently available to the blind for borrowing is a mere few hundred thousand titles, a minute percentage of the world's books.”

Accessibility Exceptions and Limitations in U.S. © Law

- Chafee Amendment (17 U.S.C. §§ 121 & 121A)
  - Post Marrakesh Treaty Implementation Act, largely mirrors Treaty
  - Can reproduce + distribute
  - Accessible format copies
  - Previously published literary + musical works
    - Expanded from non-dramatic works

Accessibility Exceptions and Limitations in U.S. © Law

- Chafee Amendment (17 U.S.C. §§ 121 & 121A)
  - For people with print disabilities
  - By authorized entities
    - “nonprofit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities”

Accessibility Exceptions and Limitations in U.S. © Law

- Chafee Amendment (17 U.S.C. §§ 121 & 121A)
  - New Section 121A: allows cross-border export to Marrakesh countries and import
  - See also:
    - Copyright Office 1201 exemption re: circumvention of access controls
    - Provisions for print instructional materials

Almost no scholarly attention to accessibility dimensions of HathiTrust or pre-MIA Chafee, but…

Increasing Scholarly Attention to Marrakesh

- Significant implications for the recognition of human rights in intellectual property law
- Salutary effects on the availability of books for people with print disabilities
- Allows international leveraging of remediation efforts by U.S. authorized entities under Chafee and HathiTrust

© exceptions and limitations are becoming a focal point for the accessibility of © works

But not well understood what role © should be playing in the broader tangle of disability rights

Copyright L&Es merely permit remediation without permission.

Obvious implication: L&Es do not require copyright holders to make works accessible.

Less obvious implication: L&Es do not guarantee third-party remediation when works are not born accessible.

Nearly two decades post-Chafee, only a few hundred thousand accessible-format books were available in the U.S.

Copyright is part of the problem, but not the only part

As long as remediation ≠ free,
© L&E cannot fully address
underlying market failures

Need to put © in context of positive obligations to make © works accessible under disability rights law

UN Convention on the Rights of People with Disabilities (CRPD)

- Parties must “ensure that persons with disabilities enjoy access to:”
  - “[C]ultural materials in accessible formats;”
  - “[T]elevision programmes, films, theatre and other cultural activities, in accessible formats;”
  - “[P]laces for cultural performances or services, such as theatres, museums, cinemas, libraries, . . .”

UN Convention on the Rights of People with Disabilities (CRPD)

- Parties must:
  - “[P]romote access . . . to new information and communications technologies and systems . . .”;
  - “[P]romote the design, development, production and distribution of accessible information and communications technologies . . .

UN Convention on the Rights of People with Disabilities (CRPD)

- Parties must:
  - “Urg[e] private entities that provide services to the general public . . . to provide information and services in accessible and usable formats”
  - “Encourag[e] the mass media . . . to make their services accessible to persons with disabilities

U.S. Disability Law

- ADA Title II + Rehab Act § 504 + IDEA: books, audio, video in educational institutions, libraries, etc.
- Rehab Act § 508: software (in context of gov't procurement)
- ADA Title III: PGS/plays/dance in places of public accommodation, web content, works of architecture
- FCC regulations: TV/IP video programming

© L&E and positive law addressing same problems in parallel

Goal: articulate unifying theory of ©'s role in disability rights law

…and what needs to change

Comparative Case Studies: Accessible Books and Video

- Efforts since 19th century to make books accessible to people who are blind or visually impaired through Braille, large print, and other accessible formats
- Efforts since mid-20th century to make video programming accessible to people who are deaf or hard of hearing through the provision of captions

Comparative Case Studies: Accessible Books and Video

- 🚧 Work in progress! 🚧

Comparative Case Studies: Accessible Books and Video

- Many features in common!
- Evolving and new medium results in inaccessibility
  - Introduction of “talkies”

Comparative Case Studies: Accessible Books and Video

- PWD-led innovation makes accessibility possible
  - Braille and embossed/raised letters
  - Captioning

Comparative Case Studies: Accessible Books and Video

- Initial approach: government subsidies
  - Act to Promote the Education of the Blind (1879) / Pratt-Smoot Act (1931)
  - Captioned Films Act of 1958
- Results in limited selection and availability

Comparative Case Studies: Accessible Books and Video

- Copyright law continues to expand in scope and duration without recognizing accessibility issues
    - (But 1976 Act legislative history seeds accessibility<->fair use connection, later recognized by SCOTUS in *Sony*)

Comparative Case Studies: Accessible Books and Video

- Subsidies turn to obligations, but divergence following disability civil rights movement

Comparative Case Studies: Accessible Books and Video

- Accessibility of books becomes responsibility of third parties—e.g., schools, libraries, etc.—under ADA, IDEA, Rehab Act
  - © issues (somewhat) addressed in 1996 Chafee Amendment
  - More fully addressed in *HathiTrust*
  - Parallel international discussions converge in the development of Marrakesh in 2000s-2010s

Comparative Case Studies: Accessible Books and Video

- Accessibility of video becomes joint responsibility of video programmers and distribution/tech partners under FCC administration of Telecommunications Act of 1996
  - © issues increasingly become excuse to avoid regulatory obligations
  - Message from FCC: figure it out through contract
    - Clearance problems with song lyrics
  - © continues to arise in as disability law begins to target platforms for UGC

Takeaway #1:
Copyright law discriminates against PWD by failing to incentivize "born accessible" works

Takeaway #2:

In U.S., fair use broadly covers accessibility uses…

…L&Es serve to clarify FU (for regulated and volunteer third-parties) and expand scope.

Takeaway #3:
Outside U.S., Marrakesh implementation may form entirety of domestic © law—or even domestic disability law

Cross-border exchange is a unique but limited remedy—ideally, short-term stopgap in advance of positive obligations

Takeaway #4:
Even as positive obligations expands, L&E will remain important for automated/AI accessibility techniques

Framework for contextualizing © in disability civil/human rights law

- © holders should make or facilitate born accessible works, unless:
  - Too expensive, fundamental alteration, or impossibility
- Mostly changes to disability law, but © can help:
  - Link disability law compliance with registration or statutory damage thresholds

Framework for contextualizing © in disability civil/human rights law

- If too expensive / fundamental alteration / impossible:
  - Recognize that fair use covers pure accessibility uses
  - L&Es should cross-cut all categories of works and all types of disabilities:
    - Clarify extent of fair use for regulated/volunteer third parties
    - Extend / address where accessibility is intertwined with other purposes (SEO, advertising, FL translation)