

Copyright’s Role in Disability Law
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IPSC colleagues: this is a very early stage work-in-progress. As you’ll see, this version pairs a very overstuffed introduction with a brief skeleton of how I hope the paper will ultimately unfold. I anticipate significantly shortening the introduction and migrating much of the content to the subsequent sections in the next round of drafting, but at this point the introduction stands effectively as a mini-essay/preview of what the full article will ultimately encompass. I really appreciate feedback both small and large. Thanks for reading!

The accessibility of copyrighted works for people with disabilities has attracted significant recent attention from scholars in the wake of the implementation of the Marrakesh VIP Treaty. While the attention to the Treaty is welcome and important, the copyright literature is missing a holistic framework for understanding the role of copyright law in facilitating and inhibiting the accessibility of copyrighted works to people with disabilities in the broader set of disability civil and human rights regimes.

This article aims to fill that gap by illustrating the role of copyright law in the accessibility of copyrighted works through two comparative case studies of U.S. disability law: the long-running efforts to make books accessible to people who are blind or visually impaired through the provision of Braille and other accessible format texts, and the parallel efforts to make video programming accessible for people who are deaf or hard of hearing through the provision of closed captions.

*The article uses these case studies to make several observations about copyright law’s role in the substantive fulfillment of disability rights: copyright’s routine failure to provide incentives for the creation of “born-accessible works,” the sweeping role of fair use under the *HathiTrust* decision, the clarifying and extending roles of specific exemptions and limitations such as the *Chafee Amendment*, the additional role of the Marrakesh Treaty’s cross-border provisions, and the ongoing need for exemptions and limitations in an accessibility landscape that will be increasingly dominated by machine learning and other artificial intelligence approaches. The article concludes with a normative framework for the accessibility of copyrighted works, proposing accessibility requirements and incentives for copyright registration, extended registration incentives and requirements, and extended copyright exceptions and limitations that broadly cover the accessibility of all categories of copyrighted works to people with all types of disabilities.*

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¹ Thanks to Jack Bernard, Brad Bernthal, Margot Kaminski, Kristelia Garcia, Scott Skinner-Thompson, Navad Orian Peer, Doron Dorfman, Alexandra Roberts, Brandon Butler, Pam Samuelson, and Jonathan Band for helpful early conversations on this article.

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I. Introduction

As Eric Johnson has argued, “American intellectual property law has, as a general matter, proceeded in ignorance of disabilities.”² Johnson has carefully documented instances in which a failure to consider the perspective of people with disabilities has led to intrinsic miscarriages of intellectual property doctrine and policy—for example, the failure to consider the source-identifying role of trademarks to people with developmental disabilities, and the failure to conceive of the importance of three-dimensional objects to people who are blind or visually impaired in copyright, right of publicity, and trade dress law.³

It is less well understood or documented, however, how the failure of intellectual property law to fully account for disability and accessibility perspectives can cause extrinsic harms to the goals of disability law and policy. The potential for such failures is perhaps most acute in copyright law.⁴

Doctrinally speaking, copyright law usually arises in the context of disability rights as a potential barrier for third parties to make works accessible to people with disabilities. This is because remediating inaccessible copyright works, such as by creating a Braille or large print version of a book, or adding captions to a video program, may implicate a rightsholder’s exclusive rights to reproduction, adaptation, and distribution.⁵

As a result, accessibility-oriented exceptions and limitations have become a significant feature of U.S. copyright law. The most notable developments are the 1996 Chafee

² *Intellectual Property’s Need for A Disability Perspective*, 20 GEO. MASON U. CIV. RTS. L.J. 181, 186 (2010).

³ *Id.* at 191-204.

⁴ Chris Buccafusco has recently begun exploring the role of innovation policy, including patent law, in facilitating accessibility. See *Law, Innovation, and Disability* (forthcoming—abstract only), available at https://law.depaul.edu/about/centers-and-institutes/center-for-intellectual-property-law-and-information-technology/programs/ip-scholars-conference/Documents/ipsc_2019/Buccafusco%20-%20Abstract.pdf.

⁵ [infra cite to later discussion about the details of the implications of exclusive rights]

Amendment to the Copyright Act, which allows for certain remediations of books for people with print disabilities,⁶ and the Second Circuit’s holding in *Authors Guild v. HathiTrust*, which recognizes accessibility purposes as non-infringing fair use.⁷

However, the past two decades of copyright scholarship have yielded little more than glancing discussions of Chafee⁸ or the accessibility dimensions of *HathiTrust*.⁹ Instead,

⁶ Pub. L. 104-197, 110 Stat. 2394 § 316 (17 U.S.C. § 121). The Chafee Amendment was so named for Senator John Chafee of Rhode Island, who introduced Section 121 in an amendment to an appropriations bill in 1996. *See* Cong. Rec. S9066-67 (July 29, 1996); Amendment to 104 H.R. 3754 (July 30, 1996). The Chafee Amendment was itself significantly amended by the Marrakesh Treaty Implementation Act, Pub. L. 115-261, 132 Stat. 3667 (Oct. 9, 2018), which also added a companion section, 17 U.S.C. § 121A, addressing cross-border exchange issues.

⁷ *Authors Guild v. HathiTrust*, 755 F.3d 87, 101-03 (2d Cir. 2014), *aff’g* *Authors Guild v. HathiTrust*, 902 F. Supp. 2d 445 (S.D.N.Y. 2012).

⁸ A small number of copyright scholars have addressed the substance of Chafee. *See* Pamela Samuelson, *The Google Book Settlement As Copyright Reform*, 2011 WIS. L. REV. 479, 534 (2011) (criticizing the shortcomings of Chafee in the context of the development of fair use doctrine as applied to accessibility); Jonathan Band, *The Impact of Substantial Compliance with Copyright Exceptions on Fair Use*, 59 J. COPYRIGHT SOC’Y U.S.A. 453, 461–62 (2012) (describing the interplay of Chafee with fair use). Some scholars have explored Chafee in the context of the Copyright Office’s triennial review of disability-related exemptions from the anti-circumvention provisions of Section 1201 of the Digital Millennium Copyright Act, which has explicitly adopted exemptions that are keyed to the Chafee Amendment. [see copyright office cite] *E.g.*, Bill D. Herman, Oscar H. Gandy, Jr., *Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings*, 24 CARDOZO ARTS & ENT. L.J. 121, 184 (2006) (citing Woodrow Neal Hartzog, *Falling on Deaf Ears: Is the “Fail-Safe” Triennial Exemption Provision in the Digital Millennium Copyright Act Effective in Protecting Fair Use?*, 12 J. INTELL. PROP. L. 309 (2005)). But most citations to Chafee are relegated to brief or off-handed references, *e.g.*, Peter S. Menell, *Knowledge Accessibility and Preservation Policy for the Digital Age*, 44 HOUS. L. REV. 1013, 1071 (2007); David Nimmer, *Access Denied*, 2007 UTAH L. REV. 769, 783 (2007); Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1896 (2007); Lateef Mtima & Steven D. Jamar, *Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information*, 55 N.Y.L. SCH. L. REV. 77, 88 (2010) or to Chafee as the end of the exhaustive range of exceptions and limitations in the Copyright Act, of which Chafee (Section 121) coincidentally stood as the last for many years, *e.g.*, Noel L. Hillman, *Intractable Consent: A Legislative Solution to the Problem of the Aging Consent Decrees in United States v. ASCAP and United States v. BMI*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 733, 771 (1998). *See also* Kimberly Hancock, *Canadian Copyright Act Revisions*, 13 BERKELEY TECH. L.J. 517, 528 (1998) (briefly describing Chafee’s corresponding exemption in Canadian copyright law).

⁹ A small number of copyright scholars have discussed the accessibility portions of *HathiTrust*. Rebecca Tushnet, *Free to Be You and Me? Copyright and Constraint*, 128 HARV. L. REV.

scholarly and policymaking attention to copyright law as a vehicle for achieving fundamental disability policy goals has arisen primarily in the wake of the 2013 adoption and subsequent U.S. ratification and implementation of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled.¹⁰ The Marrakesh Treaty, creates a set of exemptions and limitations that allow the remediation of inaccessible copyrighted works into formats that are accessible to people with print disabilities, as well as the cross-border exchange of those works. In doing so, the Treaty aims to help alleviate the so-called “book famine”—the unavailability of books in Braille, large print, and other accessible formats throughout the world—by allowing the remediation and export of books to countries where people who are blind or visually impaired lack access to reading material.¹¹

In its closing statement at the adoption of the Treaty, the U.S. delegation to WIPO declared that the Treaty would “significantly improve access to printed works for persons with print disabilities.”¹² Teresa Stanek Rea, then-Acting Director of the US Patent and Trademark Office (USPTO) hailed the Treaty as a “historic agreement” and that U.S. involvement in its negotiation demonstrated that “[i]mproving access to copyrighted works for the benefit of the blind and other people with print disabilities has been an issue of the highest priority for the United States.¹³ Upon the signing and deposit of the U.S. Marrakesh ratification documents in 2019, USPTO Director Andrei Iancu hailed the “opportunities that

F. 125, 135 (2015); Rebecca Tushnet, *Content, Purpose, or Both?*, 90 WASH. L. REV. 869, 882 (2015); Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815, 833-37 (2015); David E. Shipley, *A Transformative Use Taxonomy: Making Sense of the Transformative Use Standard*, 63 WAYNE L. REV. 267, 325 (2018); Neil Yap, *Fitting Marrakesh into A Consequentialist Copyright Framework*, 6 NYU J. INTELL. PROP. & ENT. L. 351, 357 (2017) Yafit Lev-Aretz, *The Subtle Incentive Theory of Copyright Licensing*, 80 BROOK. L. REV. 1357, 1418 (2015).

¹⁰ WIPO, *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled* (June 27, 2013), <https://www.wipo.int/treaties/en/ip/marrakesh/>.

¹¹ See generally World Intellectual Property Organization, *Study on Copyright Limitations and Exceptions for the Visually Impaired*, SCCR/15/7 (Feb. 20, 2007), http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=75696; Margot E. Kaminski & Dr. Shlomit Yanisky-Ravid, *The Marrakesh Treaty for Visually Impaired Persons: Why A Treaty Was Preferable to Soft Law*, 75 U. PITT. L. REV. 255 (2014) (reflecting on the negotiation of the treaty); Aaron Scheinwald, *“Who Could Possibly Be Against A Treaty for the Blind?”*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 445, 448, 468-73 (2012) (describing the etymology of the term “book famine” and the early stages of the WIPO negotiations); Patrick Hely, *A Model Copyright Exemption to Serve the Visually Impaired: An Alternative to the Treaty Proposals Before WIPO*, 43 VAND. J. TRANSNAT’L L. 1369 (2010).

¹² <https://geneva.usmission.gov/2013/06/27/wipo-marrakesh/>.

¹³ <https://www.uspto.gov/about-us/news-updates/statement-acting-under-secretary-commerce-intellectual-property-and-acting>.

[U.S.] ratification creates for the blind and visually impaired community in the United States and around the world,” and then-Acting Register of Copyrights Karyn Temple praised ratification as a “major achievement for our country and a significant positive step forward for the millions of persons who are blind and visually impaired throughout the world.”¹⁴

Scholars exploring the Treaty have adopted somewhat more nuanced, but still positive, views on the Treaty’s goals, effects, and promise. For example, Ruth Okediji and Molly Land have argued that the Treaty’s requirement of exceptions and limitations represents a notable development in the effort to recognize human rights in intellectual property law.¹⁵ Many others have argued that the Treaty has or is likely to significantly improve the extent to which people with print disabilities can access books in practice.¹⁶ Krista Cox has cited concerns from the community of people with print disabilities about the overall low level of

¹⁴ https://www.wipo.int/pressroom/en/articles/2019/article_0002.html.

¹⁵ Ruth L. Okediji, *Does Intellectual Property Need Human Rights?*, 51 N.Y.U. J. INT’L L. & POL. 1, 45 (2018); Molly K. Land, *The Marrakesh Treaty As “Bottom Up” Lawmaking: Supporting Local Human Rights Action on IP Policies*, 8 UC IRVINE L. REV. 513, 548–49 (2018); *see also* Kaminski & Yanisky-Ravid, *supra* note 11 (exploring the international law-making dimensions of Marrakesh); Jessica Silbey, Aaron Perzanowski, and Marketa Trimble, *Conferring About the Conference*, 52 HOUS. L. REV. 679, 686 (2014) (noting that the Treaty “might be a groundbreaking milestone delineating a trajectory that will place more emphasis on the interests of copyright users than the interests of copyright holders”);

¹⁶ Donald P. Harris, *The Power of Ideas: The Declaration of Patent Protection and New Approaches to International Intellectual Property Lawmaking*, 6 UC IRVINE L. REV. 343, 384 (2016) (arguing that the Treaty “goes a long way towards remedying” the book famine); Lea Shaver, *Copyright and Inequality*, 92 WASH. U.L. REV. 117, 146 (2014) (arguing in the context of Marrakesh that when “copyright barriers are lowered, not-for-profit solutions may emerge to serve neglected audiences”); Lateef Mtima, *Copyright and Social Justice in the Digital Information Society: “Three Steps” Toward Intellectual Property Social Justice*, 53 HOUS. L. REV. 459, 504 (2015) (declaring that the Treaty represents “important progress toward rendering copyrighted works accessible to the blind”); Neil Yap, *Fitting Marrakesh into A Consequentialist Copyright Framework*, 6 NYU J. INTELL. PROP. & ENT. L. 351, 352 (2017) (lauding the Treaty as a “significant achievement in advancing the rights of, and promoting equal opportunity for, the visually disabled.”); Peter K. Yu, *A Spatial Critique of Intellectual Property Law and Policy*, 74 WASH. & LEE L. REV. 2045, 2132 (2017) (the “treaty provides individuals with print disabilities with easy or ready access to copyright publications”); Hong Bao, *The World Blind Union Guide to the Marrakesh Treaty*, by Laurence R. Helfer, Molly K. Land, Ruth L. Okediji, and Jerome H. Reichman. New York, Ny: Oxford University Press, 2017. Pp. Xxv, 207. \$33.61 (Paperback), 50 N.Y.U. J. INT’L L. & POL. 690, 690 (2018) (“The Treaty marks a breakthrough in enabling the blind and other print-disabled people . . . to access printed works”); Shae Fitzpatrick, *Setting Its Sights on the Marrakesh Treaty: The U.S. Role in Alleviating the Book Famine for Persons with Print Disabilities*, 37 B.C. INT’L & COMP. L. REV. 139, 140 (2014) (“[C]opyright reform could eradicate the inequality experienced by the visually impaired.”)

remediated books in accessible formats even in the U.S., but argues that the Treaty’s cross-border exchange provisions are well-positioned to enable U.S. libraries to improve access for people in books with even lower availability of accessible-format books.¹⁷

Largely missing from this policymaking and scholarly attention, however, is holistic analysis of the role that substantive copyright law and the presence or absence of exceptions and limitations actually play in ensuring or inhibiting the broader goal of making copyrighted works accessible to people with disabilities on equal terms. This is particularly important because copyright exceptions and limitations simply allow third-party accessibility remediation to occur without permission from copyright holders; they do not require copyright holders to make their works accessible or guarantee that third parties will intervene to do so where rightsholders do not.

Moreover, positive obligations to make copyrighted works accessible to people with disabilities are already a significant component of both human and civil rights regimes and is embodied in both international and U.S. disability law. The United Nations Convention on the Rights of People with Disabilities (CRPD) broadly requires parties to ensure the accessibility of “cultural materials,” “television programmes, films, theatre, and other cultural activities.”¹⁸ The CRPD also addresses the accessibility of copyrighted software in information systems, and its use in facilitating the distribution of other copyrighted works, by requiring parties to “urg[e] private entities . . . to provide information and services in accessible and usable formats,”¹⁹ “encourage[e] the mass media . . . to make their services accessible,”²⁰ and “promote access to new information and communications technologies and systems . . . and promote the design, development, production, and distribution of accessible information and communications technologies and systems.”²¹

¹⁷ Krista L. Cox, *Research Libraries and New Technologies, Promoting Access to Information, Learning, and Innovation for Today and the Future*, 13 I/S: J.L. & POL’Y FOR INFO. SOC’Y 261, 288 (2016); see also Brandon Butler, Prue Adler, and Krista Cox, *The Law and Accessible Texts: Reconciling Civil Rights and Copyrights* at 32-35 (July 8, 2019) (describing the Treaty’s salutary effects for accessibility efforts of libraries), <https://www.arl.org/wp-content/uploads/2019/07/2019.07.15-white-paper-law-and-accessible-texts.pdf>; Scheinwald, *supra* note 11 (discussing various drawbacks to the treaty).

¹⁸ CRPD Art. 30(1)(a)-(c). The CRPD also expressly requires parties to enable people with disabilities to “develop and utilize their creative, artistic, and intellectual potential.” While the topic of copyright policy for authors with disabilities is an important one, it is beyond the scope of this article.

¹⁹ CRPD Art. 21(c).

²⁰ CRPD Art. 21(d).

²¹ CRPD Art. 9(2)(g)-(h).

While the U.S. has never ratified the CRPD,²² various provisions of U.S. disability law specifically require the accessibility of copyrighted works in all of the categories of works specified under Section 102 of the Copyright Act.²³ For example, many types of literary works—namely, books²⁴—must be made available in formats accessible to blind and visually impaired people by public libraries and in educational contexts under Title II of the Americans with Disabilities Act (ADA)²⁵ and Section 504 of the Rehabilitation Act.²⁶ Copyrighted software procured by the federal government and public universities must be made accessible through compatibility with screen readers and other assistive devices under Section 508 of the Rehab Act.²⁷ Motion pictures and other audiovisual works, and their accompanying sounds²⁸ as well as the sound recordings²⁹ and musical compositions they contain,³⁰ must be made accessible to people with sensory disabilities through the provision of closed captions and audio description under the Telecommunications Act of 1996 and the Communications and Video Accessibility Act of 2010 when distributed on broadcast, cable, or satellite television or over the Internet.³¹ Dramatic,³² choreographic,³³ and pictorial, graphic, and sculptural works³⁴ must be made accessible to blind and visually impaired people via the provision of audio description when presented in a place of public

²² United Nations, Convention on the Rights of Persons with Disabilities, Status, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en (last visited July 18, 2019). *See generally* Arlene S. Kanter, *Let's Try Again: Why the United States Should Ratify the United Nations Convention on the Rights of People with Disabilities*, 35 *TOURO L. REV.* 301, 328-42 (2019) (chronicling the failure of the U.S. to ratify the CRPD); Janet E. Lord & Michael Ashley Stein, *The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities*, 83 *WASH. L. REV.* 449 (2008) (describing the contours of the CRPD's ratification process).

²³ 17 U.S.C. § 102(a).

²⁴ 17 U.S.C. §§ 101 (defining “literary works”), 102(a)(1) (including literary works within the subject matter of copyright).

²⁵ *See* 42 U.S.C. § 12132. [will include a deeper dive into DOJ regulations for this and the other laws cited in the next draft]

²⁶ 29 U.S.C. § 794(a).

²⁷ 29 U.S.C. § 794d(a).

²⁸ 17 U.S.C. §§ 101, 102(a)(6)

²⁹ 17 U.S.C. § 102(a)(7).

³⁰ 17 U.S.C. § 102(a)(2).

³¹ [will do a full dive on FCC citations in the next draft of the article]

³² 17 U.S.C. § 102(a)(3)

³³ 17 U.S.C. § 102(a)(4)

³⁴ 17 U.S.C. § 102(a)(5).

accommodation, such as a theater or museum—or perhaps the Internet³⁵—under Title III of the ADA.³⁶ And the ADA even demands the accessibility of copyrighted architectural works³⁷ when they are rendered into actual buildings.³⁸

Against this backdrop, the significant interest in the Treaty’s requirement of copyright exceptions and limitations as a primary vehicle for achieving the accessibility of copyrighted works is somewhat surprising, at least in the U.S. Given that international and U.S. law already impose positive requirements under many circumstances to make nearly all categories of copyrighted works accessible to people with all types of disabilities, why has a treaty that merely permits (and does not require) after-the-fact third-party efforts to remediate only a subset of copyrighted works—literary works—for a subset of people with disabilities—those with print disabilities—garnered so much attention?

While this article strongly endorses the role of the Marrakesh Treaty and its implementing legislation in the U.S., it also argues that the conception of accessibility exceptions and limitations as a primary vehicle for cashing out the rights of people with disabilities to access copyrighted works on equal terms is both over- and underinclusive of copyright’s descriptive and normative role in facilitating or hindering accessibility. This article aims, then, to better situate the role of copyright law and disability-related exceptions and limitations in the broader landscape of disability civil and human rights.

This article proceeds by considering two case studies of accessibility problems with copyrighted works and policy interventions in American disability law. First, the article chronicles governmental initiatives to make books accessible to people with print disabilities following the invention of Braille in the early 19th century.³⁹ Second, the article chronicles parallel initiatives to make video programming accessible to people who are hard of hearing following the introduction of “talkie” movies in the early 20th century and the subsequent development of closed captioning technology for broadcast and cable television.

While these case studies do not represent an exhaustive accounting of the efforts to make copyrighted works accessible in the United States, they do showcase strikingly similar dynamics along similar timelines that help illustrate the differing roles that copyright has played—or not—in disability rights efforts. More specifically, they each showcase the initial failure of significant industries economically premised on the conferral of exclusive rights under copyright law—i.e., book publishing and television/movies—to consider people with disabilities. They likewise reflect a concomitant failure to seriously reflect accessibility concerns in substantive copyright law, as evidenced by the enhanced scope of copyright protection for the relevant categories of works in updates to U.S. copyright law. The studies

³⁵ See generally Blake E. Reid, Internet Architecture and Disability, ___ IND. L.J. ___ (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3338589.

³⁶ 42 U.S.C. § 12182(a).

³⁷ 17 U.S.C. § 102(a)(8).

³⁸ 42 U.S.C. § 12183(a).

³⁹ [The citations drop off here. Will fill in in subsequent drafts.]

also demonstrate early governmental recognition of the problem of inaccessibility, followed by government interventions to facilitate accessibility not through copyright law, but through the provision of subsidies, often framed in terms of charity to people with disabilities.

The case studies markedly diverge following the culmination of the disability civil rights movement with the enactment of the ADA. In the 1990s, the accessibility of books arose most prominently in the context of obligations placed on schools and libraries under the ADA and the ongoing role of specialized entities dedicated to creating and distributing reading materials for people who are blind or visually impaired. The uneasy relationship between these entities and publishers led to predictable concerns about third-party accessibility efforts leading to copyright infringement. These concerns led initially to the 1996 Chafee Amendment to the Copyright Act, which in turn formed the substantive core of the Marrakesh Treaty,⁴⁰ and ultimately boiled over in litigation between Authors Guild and HathiTrust, where the Second Circuit issued a sweeping 2014 holding recognizing accessibility efforts as non-infringing fair uses.

Over the same period, the accessibility of video programming accessibility primarily took root in a regulatory regime administered by the FCC under the Telecommunications Act of 1996. Instead of imposing accessibility requirements indirectly on third-parties with attenuated relationships to copyright holders, the FCC's rules held copyright holders and their closely integrated distribution partners directly responsible for making video programming accessible through the provision and delivery of closed captions. In this context, rightsholders have rarely raised copyright issues with distributors; counterintuitively, *distributors* often raise copyright concerns around the creation of closed captions to seek to shift regulatory obligations to rightsholders or avoid them altogether.⁴¹

Using these case studies as a foundation, the article makes a number of observations about copyright law's role in the accessibility of copyrighted works. First, copyright law routinely fails to provide sufficient incentives, either explicit or implicit, for the creators of copyrighted works to make or distribute their works in accessible formats. Focusing exclusively on exceptions and limitations elides the threshold discrimination against people with disabilities that copyright law brooks through its first-order indifference to whether works are “born accessible.”

⁴⁰ [The genesis story and relationship between Chafee and Marrakesh is one I hope to explore in more depth in the full draft. Compare Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 Berkeley Tech. L.J. 229, 301–02 (2014); David Carson, *Session IV: Fair Use and Other Exceptions*, 40 COLUM. J.L. & ARTS 389, 392 (2017) (describing “the model” for the Marrakesh Treaty as “in many respects the model that we had adopted here in 1996-97 in the Chafee Amendment”) with Krista L. Cox, *The Right to Read for Blind or Disabled Persons*, 4 LANDSLIDE 32, 34 (2012) (describing parallel discussions convened by WIPO dating back to the early 1980s and predating Chafee by nearly 15 years).

⁴¹ See, e.g., John Stanton, *(SONG ENDS)-Why Movie and Television Producers Should Stop Using Copyright As an Excuse Not to Caption Song Lyrics*, 22 UCLA ENT. L. REV. 157 (2015)

Second, third-party efforts to make copyrighted works accessible have long stood and remain an archetypical non-infringing fair use under U.S. law—a proposition made clear by the Second Circuit’s opinion in *HathiTrust*. Against that backdrop, exceptions and limitations, including the Chafee Amendment and its updates under the Marrakesh Treaty Implementation Act, can be understood as serving two functions. First, exceptions and limitations can clarify the scope of fair use to provide third parties with legal certainty both that they will not be liable for copyright infringement for engaging in accessibility remediation *and* that they cannot use fear of copyright infringement as a shield against compliance with disability obligations. Second, exceptions and limitations can serve as a mode for facilitating activities that may run beyond the scope of fair use, such as distributing multiple copies of copyrighted works to people with disabilities at no cost.

Third, the state of affairs in the United States is markedly different than that of some other countries that have signed the Marrakesh Treaty, many of which do not have a fair use doctrine or other general exceptions and limitations. In those countries, the specific exceptions and limitations adopted to implement the Treaty may constitute the entirety of domestic copyright law addressing disability—and, in countries with limited substantive disability law, the entirety of domestic *disability* law addressing the accessibility of copyrighted works. The Treaty’s model for the cross-border exchange of accessible works should also be viewed as a unique contribution to the suite of remedies in disability civil and human rights law.

Finally, the article observes that accessibility-specific exceptions and limitations are likely to remain necessary as debates over the appropriate locus of responsibility for compliance with disability laws shifts to large Internet platforms populated primarily by user-generated content. For these platforms, techniques for accessibility have already begun and are likely to continue shifting from manual remediation by creators to machine learning and other artificial intelligence techniques applied on-demand by third-party platforms, which will continue to raise tricky questions about the scope of infringement when accessibility features are intertwined with other activities such as search engine optimization, the sale of advertising, and foreign-language translation.

The article concludes by knitting together these lessons with principles from disability human and civil rights law to propose a normative framework for the accessibility of copyrighted works and changes to domestic and international copyright law. Creators of all categories of copyrighted works should create or facilitate the initial distribution of their works in formats accessible to people with all categories of disabilities, unless doing so is prohibitively expensive, fundamentally alters the work, or is impossible. While achieving these outcomes will in many cases require expanding the scope and application of substantive disability law, copyright law may be able to help by requiring compliance with disability law as a condition of registration or of certain levels of statutory damages. In circumstances where first-party accessibility does not occur, copyright law should not only facilitate but make clear through specific limitations and exceptions that third-party accessibility is broadly permissible, not only for books and for people with print disabilities, but across all categories of copyrighted works for people with all types of disabilities.

II. Case Studies on the Accessibility of Copyrighted Works

- A. The Accessibility of Books for People Who Are Blind or Visually Impaired**
- B. The Accessibility of Video Programming for People Who Are Deaf or Hard of Hearing**

III. Copyright's Descriptive Role in Disability Rights

- A. Copyright's Failure to Incentivize Born-Accessible Works**
- B. Exceptions and Limitations in U.S. Law: Fair Use, Clarifications, and Expansions**
- C. Exceptions and Limitations in International Law: Baselines and Cross-Border Exchange**
- D. Copyright, Disability, and Artificial Intelligence**

IV. Toward a Just Copyright and Disability Law

- A. Incentivizing Born-Accessible Works**
- B. Broadening the Scope of Specific Exceptions and Limitations**

V. Conclusion