

Accessible Content

***A Guide to the Canadian Copyright Act on
Searching for Accessible Formats and Producing
and Distributing Alternate Formats***

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Introduction

Summary

This guide aims to provide a summary of the laws that govern access to and use of material under copyright for people with a perceptual disability in Canada. The guide includes how these laws are applied, a checklist of the major requirements of these laws, best practices and practical advice for everyday situations, guidance on eliminating past practices that inadvertently add barriers to access and a glossary of relevant terms that may be unfamiliar to some readers.

It is intended for use by alternate format producers, libraries, archives, museums, galleries, schools, colleges, universities and similar institutions and/or non-profit organizations acting for the benefit of people with perceptual disabilities, and for the users themselves, as specified by sections 32, 32.01, 32.02 and 41.16 of the *Copyright Act*.¹ It also may be a source of information for rightsholders (publishers and other copyright holders) on the legislative interpretation for creating alternate format works for persons with perceptual disabilities so rightsholders can understand how alternate format producers are operating and how best to assist with the process. Publishers are engaged in ongoing work in creating born-accessible commercial content, which can reduce the time and effort required to produce alternate formats. In the interim, this document is intended to guide alternate format producers when born-accessible works do not exist commercially.

There are two important principles that underlie this guide and should form the starting point for most interpretations:

1. The provisions of the *Copyright Act* are intended to put people with a perceptual disability or print disability in the same position as those without a disability, with the goal of achieving equitable access to works.²
2. An alternate format specially designed for persons with a perceptual disability as specified in the *Act* is intended to include both a) an alternate format that is specific to a person with a perceptual disability (e.g., Braille or DAISY audio) and b) any format, alternate or otherwise (e.g., EPUB), that requires accessibility features and functionality to be added to it to enable use by a person with a perceptual disability. Accessibility features and functionality can include, but are not limited to, full navigation, complete image descriptions, circumvention of digital locks or

¹ *Copyright Act*. R.S.C., c. C-42, s.1. <https://laws.justice.gc.ca/PDF/C-42.pdf>

² World Intellectual Property Organization (WIPO). 2013. *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled*. https://www.wipo.int/edocs/mdocs/copyright/en/vip_dc/vip_dc_8_rev.pdf

technological protection measures (TPMs), inclusion of full front and back matter, reflowable content, and tactile graphics.

Copyright and Human Rights

The exception in the *Copyright Act* for persons with perceptual disabilities (s. 32) recognizes fundamental human rights in the copyright regime, such as the rights to access works, to education, and to cultural participation. Canada amended s. 32 of the *Copyright Act* in 2016 to comply with the provisions of the 2013 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, (Marrakesh Treaty) and complete its ratification process. The Marrakesh Treaty is historic because it was the first copyright treaty to embody human rights as its central focus³. The Marrakesh Treaty's preamble states that it complies with the "principles of non-discrimination, equal opportunity, accessibility, and full and effective participation and inclusion in society" as set out in the Convention for the Rights of Persons with Disabilities and the Universal Declaration of Human Rights.⁴ The Treaty also states the importance of copyright protection as an incentive and reward for literary and artistic creations, which enhances opportunities for all, including persons with visual impairments or other print disabilities.⁵ In Canada, the *Accessible Canada Act* (2019) has the goal to identify, remove and prevent barriers, to make Canada barrier-free by 2040.⁶ This guide accordingly considers the centrality of the human rights of the beneficiaries of the exception in its interpretation of the statute. In Canada, according to a recent government report, there are 5.2 million Canadians who "indicated they had a difficulty with print material" that would benefit from improved access.⁷

Perceptual Disability Access and Copyright in Canada

Section 32 of the *Copyright Act* is intended both to encourage existing commercial markets to better serve those with a perceptual disability, and to provide a working solution to ensure copyright material is accessible even where it is not commercially available. Canadian law aims to ensure that people with perceptual disabilities can enjoy equitable access to

3 Helfer, L. R., & Helfer, L. R. (2017). *The world blind union guide to the Marrakesh Treaty: Facilitating access to books for print-disabled individuals*. Oxford University Press.

4 United Nations. 2006. *Convention on the Rights of Persons with Disabilities (CRPD)*. New York: United Nations Department of Economic and Social Affairs. Disability. <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>. United Nations. (1948). *Universal Declaration of Human Rights*. <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

5 World Intellectual Property Organization (WIPO). 2013. "Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, VIP/DC/8 REV." Preamble. https://www.wipo.int/meetings/ru/details.jsp?meeting_id=28722&la=EN

6 *Accessible Canada Act* S.C. 2019, c. 10, s.5

7 Statistics Canada. (2023). Print material accessibility in Canada [Report]. <https://www150.statcan.gc.ca/n1/pub/89-654-x/89-654-x2023003-eng.htm>

copyright material in the same way as a person without a perceptual disability.

There are 3 components to the exception for people with perceptual or print disabilities in the *Copyright Act*.

1. Section 32(1), which was first introduced in 1997, allows a non-profit organization acting for the benefit of a person with a perceptual or print disability to reproduce literary, musical, artistic or dramatic works in an alternate format specially designed for persons with a perceptual or print disability without requiring copyright holder permission. Persons with perceptual disabilities can also produce and distribute alternate format works to other qualified recipients. This exception cannot be applied if the work in question is commercially available in Canada in the desired format. If the desired format can be found for a reasonable price in reasonable time with reasonable effort, it is considered commercially available. Further discussion of commercial availability can be found under #4 of the Checklist.
2. In 2012, s. 41.16 created additional exceptions for TPMs for people with perceptual disabilities. Amended in 2016, s. 41.16⁸ was further clarified to allow for an organization acting for the benefit of a person with a perceptual or print disability to circumvent a TPM for the sole purpose of making a work perceptible to the person with a perceptual disability. This means that a digital lock or other TPM can be circumvented or removed for users with perceptual or print disabilities, when it impacts the ability of those users to access the content.
3. In 2016, s. 32.01(1) was added. This section implements the provisions of the Marrakesh Treaty on the cross-border exchange of alternate format material for people with print disabilities around the world. The Marrakesh Treaty prescribes a minimum global standard for exceptions that allow access to copyright materials for persons with a print disability for countries ratifying or acceding to the Treaty. Section 32.01(2), also added in 2016, specifies that the export is not allowed if the alternate format material is already available in the format specially designed to meet the needs of the person with a print disability, and can be located with a reasonable time, at a reasonable cost, with reasonable effort, in the country to which the material is being exported. Section 32.01(2) is an optional provision of the Marrakesh Treaty, and Canada is one of the few countries that included it in its legislation.⁹

Section 32.02 was also added to further define a non-profit organization to include a department, agency or other portion of any order of government, including a municipal or local government, when it is acting on a non-profit basis. It also removed the limitation which prevented the production of large print books.

⁸ Section 41.16 makes 41.1(1)(a) not applicable when removing TPMs for people with perceptual disabilities.

⁹ While no current regulations exist, note that s.32.01, *Print disability—outside Canada* states that the Governor in Council may make regulations regarding royalties and reporting.

In summary, the *Copyright Act* allows for the making, distribution and import of alternate format works, and the export of alternate format works to a non-profit organization, in another country, acting for the benefit of persons with a print disability in that country. The legislation enables a non-profit organization in Canada, acting for the benefit of persons with a perceptual disability, to share alternate formats with other countries. The amendments allow for the removal of digital locks on works for use within Canada and for the purpose of exporting material outside of Canada, if that is what is needed to meet the needs of someone with a print disability.

Print Disability and Perceptual Disability

There are two terms and definitions provided in the *Copyright Act* that specify who can benefit from the exceptions – persons with a perceptual disability and persons with a print disability. The distinction in terms follows from the legislative history, where the cross-border exchange of accessible formats under the Marrakesh Treaty has a narrower scope than the long-standing Canadian exception for persons with a perceptual disability. For the production of alternate formats in Canada for distribution to people in Canada as outlined in s. 32(1) and s. 32(2), the term ‘perceptual disability’ is exclusively used. Perceptual disability is defined in s. 2, as follows:

Perceptual disability means a disability that prevents or inhibits a person from reading or hearing a literary, musical, dramatic or artistic work in its original format, and includes such a disability resulting from:

- (a) severe or total impairment of sight or hearing or the inability to focus or move one’s eyes,
- (b) the inability to hold or manipulate a book, or
- (c) an impairment relating to comprehension (*déficiences perceptuelle*)

For s. 32.01, *Print disability*—*outside Canada*, the term ‘print disability’ is used. This is the term used in the Marrakesh Treaty and the definition in s. 32.01 matches that of the Marrakesh Treaty. Print disability is defined as follows:

Print disability means a disability that prevents or inhibits a person from reading a literary, musical, artistic or dramatic work in its original format and includes such a disability resulting from:

- (a) severe or total impairment of sight or the inability to focus or move one’s eyes;
- (b) the inability to hold or manipulate a book; or
- (c) an impairment relating to comprehension (*déficiences de lecture des imprimés*)

The definitions of Perceptual disability and Print disability are similar, with the key difference that ‘Perceptual disabilities’ is a broader term, and includes hearing impairment. For the purposes of this document, this is interpreted to mean that under the s. 32 F *Copyright Act*, organizations in Canada can produce and distribute material in an alternate format for users in Canada with a hearing impairment, however this same material is not eligible for distribution outside of Canada to someone with a hearing impairment.

This also applies to s.41.16, *Technological Protection Measures*, which allows for the circumvention of digital locks for the benefit of both people with perceptual disabilities in Canada and those with print disabilities outside of Canada.

The definition for ‘print disability’ as it relates to export of materials outside of Canada in accordance, is a slightly narrower definition and does not include hearing disabilities. While the definition in the *Copyright Act* includes hearing impairments, this guide focuses on print disabilities.

Accessible vs Alternate Format

It is important to note that “alternate format” and “accessible format” have slightly different meanings and are not necessarily interchangeable, depending on the context. The *Copyright Act* uses the term “alternate format” and therefore this guide uses the term “alternate format” when it is specifically referring to the *Copyright Act*. However, because “alternate format” is reflective of an ableist approach to policy language, this guide also uses the more inclusive terms of “accessible format” when possible. The term ‘alternate format’ is used within the context of “copyright limitations and exceptions [and] elides an ableist tradition centering the interests of copyright holders, rather than those of readers, viewers, listeners, users, and authors with disabilities.”¹⁰ Accessible format is a term that can apply to copyright holders and alternate format creators alike, and supports a more inclusive and, hopefully, less ableist approach.

“Alternate format”, the term used in the *Copyright Act*, generally applies to organizations making alternate formats, and refers to any format specially designed for persons with a perceptual disability and can include:

- 1) alternate formats (e.g., DAISY Audio, braille) or
- 2) mainstream formats that need accessibility features or functionality added by an alternate format producer or person with a perceptual disability (e.g. EPUB with the addition of page navigation and image descriptions).

¹⁰ Reid, B. E., Copyright and Disability (December 2021). 109 *Calif. L. Rev.* 2173, *U of Colorado Law Legal Studies Research Paper No. 19-16*. Available at SSRN: <https://ssrn.com/abstract=3381201>

“Accessible format” is a broader more inclusive term and can include:

- 1) alternate formats (e.g., DAISY Audio, braille),
- 2) mainstream formats with accessibility features or functionality added by an alternate format producer or person with a perceptual disability (e.g. EPUB with added page navigation and image descriptions); and
- 3) born-accessible commercial formats (e.g., commercial EPUB with full accessibility features).

Checklist for Alternate Format Production

This checklist has been designed to help alternate format producers identify whether your organization is meeting the major requirements of the laws governing access to copyright material for people with a perceptual disability in Canada. What can be done under the exceptions is primarily governed by the needs of the person wanting to access the work. There are no limits on the technologies or formats that can be used, or the number of alternate copies that can be created.

The exceptions apply to people with perceptual disabilities, individuals acting at the request of people with disabilities, and non-profit organizations acting for the benefit of people with perceptual disabilities. It allows them to copy, convert and supply material to people with perceptual disabilities, to provide access to the material in the form they need. Please note that this exception does not apply to cinematographic works (films, videos, etc.). Answering the following questions will help you decide when your use is permitted under the exceptions.

1. Is the intended user a ‘person with a perceptual disability’?

Under Canadian copyright law, the definition of a perceptual disability is as follows:

perceptual disability means a disability that prevents or inhibits a person from reading or hearing a literary, musical, dramatic or artistic work in its original format, and includes such a disability resulting from

- (a) severe or total impairment of sight or hearing or the inability to focus or move one’s eyes,
- (b) the inability to hold or manipulate a book, or
- (c) an impairment relating to comprehension;

Each organization establishes user eligibility according to its own policies and procedures in line with the organization’s service mandate. In general, in Canada, simply asking users to self-declare their perceptual disability is sufficient.

2. Are there other formats or additional accessibility features or functionality that will allow those users to better read, view, hear or comprehend the material?

The fact that the work is available in a format that might generally be thought of as 'accessible' does not matter if this form does not suit the requirements of the user. Though not required by law, in some cases, it may be more efficient and cost-effective to adapt an existing accessible commercial format.

Like any other exception under the *Copyright Act*, this exception must be considered from the perspective of the user, in this case, the person with a perceptual disability seeking to access the content.

The work is not accessible to the user if they cannot access it in an equitable way, consistent with the access a person without a perceptual or print disability has, in the form the user requires.

For example:

- ◆ Content available in braille is not accessible to a person who does not read braille
- ◆ Content in mathematics and science courses may be more effectively used via braille and tactile graphics whereas literary content may be better used via human voice audio format
- ◆ Content available in 18-point text is not accessible to a person who needs it in 36-point text
- ◆ Content available in a locked proprietary ebook format is not accessible to a person if the device or software needed to open it is not accessible
- ◆ A student writing a paper on a book needs to be able to quote page numbers, search the work, move back and forth through the text, etc. An audiobook or ebook that does not provide this functionality does not meet their needs and is not accessible to them.

Please note that these examples are illustrative, not exhaustive, and may not apply to all users.

In addition, non-profit organizations may consider providing access to an existing, commercially available format, when time, cost and accessible and assistive technologies (such as text-to-voice, text-to-Braille, adjustable screen fonts, etc.) render this the best solution for the user.

3. Are you a qualified person or organization?

The exceptions are available to people with perceptual disabilities, people acting at the

request of people with perceptual disabilities, and non-profit organizations that provide assistance to people with a perceptual disability. This may include dedicated disability organizations, libraries, educational institutions and other non-profit organizations (such as a department, agency or other portion of any order of government, including a municipal or local government, when it is acting on a non-profit basis) that provide accessible materials to your users. A qualified person or organization, referred to as an ‘authorized entity’ in the Marrakesh Treaty, can make use of the exceptions for People with Perceptual Disabilities: i) the *Print disability—outside Canada exception*, and ii) the *Technological Protection Measures exception*. Please see the glossary for more information on Authorized Entities and Technological Protection Measures.

4. Have you checked if the material is commercially available in the format the user needs?

The exceptions allow you to convert and supply the work if it cannot be obtained on the Canadian market in the format the person needs within a reasonable time, for a reasonable price and with reasonable effort.¹¹ In accordance with the principle of access “on an equal basis with others” as outlined in the Article 9 of the CRPD, reasonable in this context means expending the same effort, cost and time to locate materials in accessible format as would be expended in locating the same work for a user without a perceptual disability.¹² Users requiring accessible formats should not face delays that other users would not. To determine whether the material is commercially available, a search of your organization’s usual sources of material would be required¹³. It is important to document the reasonable search and include sources checked and dates. Publishers and related distribution and technology providers are beginning to both produce born-accessible content and to provide accessibility metadata which may help in locating commercially available accessible formats in a reasonable (effort, cost and time) search. Though not required, in some cases, it may be expedient for non-profit organizations to contact the publisher or rightsholder to request a copy in the appropriate format.

The *Copyright Act* does not define reasonable; the guidelines on reasonable search are informed by the principle “on an equal basis with others” and sets out the definitions below related to the *Act*’s reasonable parameters of time, price and effort.

¹¹ See s. 2 the *Copyright Act*.

¹² United Nations, 2006. CRPD article 9h is intended to support producers in promoting the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.

¹³ Commercial repositories to check will be based on organization type and the users’ content needs (e.g., general book and publisher websites, commercial platforms for textbooks, academic journals, trade fiction, etc., and special repositories geared specifically for commercial born-accessible content such as Accessible Alberta, Canadian Digital Library Collection and All Lit Up’s eBooks for Everyone program.

To qualify as ‘commercially available’, the accessible work must be available for purchase:

a. With the access features and functionality needed by the user

For example:

- ◆ Is the text large enough for the user?
- ◆ Is the format accessible on their device?
- ◆ Does it have the functionality needed by the user?

To illustrate: a student may need the material to be searchable, have pagination, include a table of contents, and so on, whereas a general user may need a work to be available as an audiobook.

b. In a reasonable time

What amounts to a ‘reasonable time’ should be commensurate with delivery times and standards for the same material for users without perceptual disabilities. For example, if you are looking in advance for next semester’s course material, a few weeks’ wait might be reasonable; if you are addressing a request by a student trying to complete an assignment, three days might be too long. Users requiring accessible formats should not be expected to face delays that other users would not.

c. At a reasonable price

What amounts to a ‘reasonable price’ will depend on the work. Consider the price that would be paid for a standard format copy of the same material and if the price is in excess of this, it is unlikely to be a ‘reasonable price’.

d. With reasonable effort

Organizations are not expected to expend any more effort locating materials in accessible formats than they would locating the same work for a user without a perceptual disability. In addition, the commercial availability check is done at the point of production, and if a commercial copy is not available, the organization can begin production of the alternate format. However, once the alternate format work is in production or has been produced, it is not necessary, nor is it required, that the organization continually check for commercially available accessible copies of the work.

e. Additional considerations

It is also important to note that **material is not commercially available if it is:**

- ◆ **bundled** – the user or organization must be able to purchase the specific material they want separately for it to count as commercially available. For example, if the person only needs one chapter of a book, they do not need to purchase the whole book – if the chapter cannot be purchased separately, you can convert that part into the accessible form and provide it to them.
- ◆ **in a different format** – the material must be able to be purchased in the format required by the person. Being available in another format that can be converted into an alternate format does not satisfy the criteria of availability. Though not required by law, in some cases, it may be more efficient and cost-effective to buy and convert into the required alternate format, however this is a local organizational decision.
- ◆ **available on a platform that is digitally locked (includes TPMs)** – if the work is only available through a platform that would prevent the user from reading the document on a device or reading application of their choice that meets their needs.
- ◆ **second-hand** – second-hand copies do not satisfy the ‘commercial availability’ test. If the material cannot be purchased new in the format needed by the person, it can be converted from an existing copy.

Best Practices

The best practices presented below are guidance on the current legislation, and they may not all be applicable for organizations or all works/projects but they help to make a nationally consistent implementation framework. These best practices are a compilation of established procedures undertaken by organizations engaged in alternate format production across Canada and serve as the basis for establishing an agreed upon national approach.

Implementing appropriate best practice steps may facilitate consistent actions and practices by librarians and information professionals, and help mitigate the risk that your use may be challenged. These practices may also encourage and support the efforts of the publishing industry in moving towards producing born-accessible works.

1. Following a commercially available search, check whether the material is already available in the alternate format the person needs from other organizations’ collections

After conducting a reasonable commercial availability check and your own collections, you may wish to check whether an appropriate format is already available through another

organization (e.g., libraries and alternate format repositories). Although this does not prevent you from making a new accessible version under the exceptions, generally it will be cheaper and easier to use a version that is already available. If the material is held in another collection in Canada, the exceptions allow you to obtain a copy from that collection for your own user, rather than creating your own alternate version.

Organizations will generally search repositories appropriate to their user base¹⁴. If the material is held in a collection in another country and the export provisions of that country allow for it, the Canadian organization can import accessible materials from other Marrakesh Treaty countries. Each organization should coordinate the access with the supplying organization or through an international repository such as the Accessible Book Consortium's Global Book Service.

2. When providing the material to a user, include an additional copyright notice related to the alternate format

An example of such a notice:

- (a) This material is provided for access by persons with a perceptual or print disability, in accordance with s. 32 of the *Copyright Act*. The material should only be further copied, communicated or otherwise used by or for persons with a perceptual or print disability, in accordance with Canadian copyright law.

OR

- (b) This material is for the exclusive use of people with perceptual disabilities within Canada or to people with print disabilities internationally pursuant to an exception or limitation of the recipient's national copyright law and its compliance with the Marrakesh Treaty.

3. Request the digital file from publisher to facilitate the alternate format production process

Digital versions of the original work (without the desired accessibility features and functions) may also be requested from the rightsholder to facilitate the alternate format production. Though the *Copyright Act* does not require rightsholders to provide these files, it can be helpful if they provide timely access to the digital file that is more easily convertible into alternate formats. It will generally be cheaper, faster, and preferable to build on existing work, rather

¹⁴ Search repositories for alternate formats will depend on the organization and users' content needs. These can include repositories for alternate formats from different sectors such as organizations supporting public libraries, K-12 schools, and post-secondary institutions. Examples include, but are not limited to, the National Network for Equitable Library Service (NNELS), the Centre for Equitable Library Access (CELA), Service québécois du livre adapté (SQLA) in Quebec and ABC Global Books Consortium.

than starting from scratch and creating a digital version from the print copy in order to create the alternate version. Ideally, these files should be 'clean' copies of the material without any watermark or digital locks.

4. Properly manage electronic files of works in copyright

Any files created or used in the production process, including those received from the rightsholder, should be handled carefully and only forwarded to users or entities working within the alternate format provision of the *Copyright Act*, including external contractors, transcribers, and producers. You may be asked to agree to certain terms and conditions from rightsholders before the file is supplied.

5. Have clear documentation on your policies and practices in applying the exceptions

While not a legal requirement, clear policies and practices on how your organization is applying the exceptions will benefit everyone. Implementing the recommendations and best practices in this guide, some of which will only be appropriate in some cases, is a good starting point.

6. Always make the use free

For copies made under the exceptions, it is considered best practice to make the alternate format free to the user and for non-profit organizations producing alternate formats for persons with perceptual disabilities to exchange works without fees. While a fee is not prohibited by law, it is a barrier to access.

7. Understand what the law allows for alternate format work

Making alternate format works in Canada

Section 32(1) of the *Copyright Act* lays out the parameters for the making of alternate formats. It is permitted, through an exception to copyright, for a person with a perceptual disability or a non-profit organization to make a copy of a literary, musical, artistic or dramatic work, except a cinematographic work, in a format specially designed for persons with a perceptual disability. The exception applies only to works that are not commercially available in the desired format.

Distributing alternate works outside Canada

Section 32.01 of the *Copyright Act* lays out the parameters for the sharing of alternate works outside Canada. It is permitted for a non-profit organization acting for the benefit of persons with a print disability to make alternate format works and make these available to a non-profit organization, in a country other than Canada, acting for the benefit of persons with a print disability in that country, or a person with a print disability who has requested access through a non-profit organization acting for the benefit of persons with a print disability. The exception applies only to works that are not commercially available in the desired format in the other country, and may be located with reasonable effort, within a reasonable time and for a reasonable price. For clarification, a non-profit organization can include a department, agency or other portion of any order of government, including a municipal or local government, when it is acting on a non-profit basis.

If the work is available in the marketplace, the *Copyright Act* states that the onus is on the owner of the copyright to demonstrate that the work, in the format specially designed for persons with a perceptual disability, is available in Canada, or, if being distributed for export to a Marrakesh Treaty country, available in that country, and may be located with reasonable effort, within a reasonable time and for a reasonable price. Note that if the other country is not a Marrakesh Treaty country, then the onus is on the non-profit organization.

Removing of Technological Protection Measures

Section 41.16(1) of the *Copyright Act* lays out the parameters for circumventing TPMs for a person with a perceptual disability or a non-profit organization acting for the benefit of a person with a perceptual disability. The exception allows for the circumvention of the TPM if doing so will make a work perceptible to a person with a perceptual disability. These works can also be shared outside of Canada under the provisions of s. 32.01.

8. Understand the limited liability associated with making an alternate format work

What could happen if a mistake were made, and a commercial, accessible work was readily available in the marketplace? How does a non-profit organization weigh and manage the associated risk?

General Principles

While there is yet no case law on s. 32 of the *Copyright Act*, access to knowledge and culture is a human rights issue, and on similar issues, Parliament and the Supreme Court of Canada have encouraged a broad interpretation in support of users' rights.¹⁵

Liability and Remedy around s. 32 – Reproduction in alternate format

By following the best practices and guidelines in this document, the risks for a person or a non-profit organization of being held liable for copyright infringement due to the production and distribution of an alternate format under s. 32 are minimal. To date, there is no case law on the exceptions in s. 32 that set a precedent. However, should a copyright owner file a claim for infringement, the owner would be entitled to the remedies provided for in s. 34, *Remedies*, more specifically injunctive relief and damages. A court could prevent the distribution of an alternate format work by way of injunction, if the copyright owner can demonstrate that the accessible work was readily available in the marketplace at the time of the reasonable search. It is unlikely that a person or non-profit organization would be ordered to pay damages in this situation. Section 35, *Liability for infringement*, states that 'where a person infringes copyright, the person is liable to pay such damages to the owner of the copyright as the owner has suffered due to the infringement'. The damages that an owner would claim to have suffered due to the reproduction and distribution of an alternate format would need to be proven in court.

Should the copyright owner opt for an award of statutory damages instead of actual damages, the court would consider the factors listed in s. 38.1 in the calculation of the amount. Among the factors, the court would look for example at:

- (a) the good faith or bad faith of the defendant;
- (b) the conduct of the parties before and during the proceedings;
- (c) the need to deter other infringements of the copyright in question; and
- (d) in the case of infringements for non-commercial purposes, the need for an award to be proportionate to the infringements, in consideration of the hardship the award may cause to the defendant, whether the infringement was for private purposes or not, and the impact of the infringements on the plaintiff.

These factors, together with the underlying human rights purpose of producing and distributing an alternate format to a person with a perceptual disability, militate in favour of a low award of statutory damages, if at all.¹⁶

¹⁵ Sullivan, R. (2007). *Statutory interpretation* (2nd ed.), p. 46; 220. Irwin Law; CCH v Law Society of Upper Canada, [2004] 1 SCR 339, para 51.

¹⁶ There is relevant case law on the interpretation of s.38.1. Judges have and use their discretion in interpreting and

Liability and Remedy around s. 32.01- Outside Canada

In the event that the owner of the copyright demonstrates that a copy of the work in the desired format was commercially available at the time of the reasonable search, the non-profit organization, or the person, is safeguarded in that the only remedy permitted is an injunction, as per s. 32.01(3) and s. 32.01(3.1). The injunction would require the non-profit organization, or the person, to refrain from distributing the work.

Organizational Practices to Discontinue

Assess whether your organization has practices or policies that are unnecessary and not required by law, that create barriers to access for the user. Some considerations are listed below.

1. Do not require the purchase of inaccessible works prior to making the alternate version.

A person with a perceptual disability or an organization is not legally required to purchase their own hard-copy of a work from which to make the alternate copy.

This is most directly applicable to students: there is no requirement in the statute to purchase the work, and it adds a barrier to access to the student.

The alternate format copy can be made from any print or digital copy to which they or the organization has access (e.g., a library or school copy, a file in the organization's collection in a different alternate format, a digital file from the publisher, or a copy borrowed from a friend or another organization). While it is not required by law to purchase the work, many large organizations and libraries purchase source material as a collection development decision and this will facilitate the remuneration to creators.

2. Do not destroy the alternate format version of the work.

There is no legal requirement to destroy the alternate format of the work. Legitimate users or organizations may keep the work for future use or share it with other people with perceptual or print disabilities. Keep the alternate form version for future use, or add it to a shared

applying the Act. They will base their decisions on the factors listed in s.38.1(5). There are two Federal Court decisions that weigh the factors: *Telewizja Polsat S.A. v. Radiopol Inc.* (F.C.), 2006 FC 584 (CanLII), [2007] 1 FCR 444, para 26 and following, <https://canlii.ca/t/1nb8b>. As noted in this case at para 37, "...the over-arching mandate of a judge assessing statutory damages ... is to arrive at a reasonable assessment in all of the circumstances in order to yield a just result." *Microsoft Corporation v. Liu*, 2016 FC 950 (CanLII), para 20 and following, <https://canlii.ca/t/gt2bd>.

repository that is only accessible to people with perceptual disabilities or the organizations that serve them.

3. Do not spend excessive amounts of time trying to track down an accessible commercial work.

The commercial availability check is intended to be reasonable, and easily and practically applied. This means expending a reasonable time and effort to locate an accessible commercial work at a reasonable price that meets the needs of the particular user. It does not require you to prove a negative (i.e., that the material is definitively not available). If you have eliminated the most obvious sources (e.g., by a search of the usual websites, any services your organization obtains materials from, commercial repositories of accessible works, publishers and other organizations), you can usually rely on this to satisfy the requirement. Expend a similar effort as you would in looking for a standard print or ebook; a reasonable search does not mean you have to absolutely prove a commercial accessible work does not exist.

It is helpful to have a documented organizational policy on the commercial availability check.

Final Words

This guide is intended to help those organizations and individuals that are making alternate format copies using the exceptions in the *Copyright Act* for people with perceptual or print disabilities. In tandem, the guide supports commercial, non-profit organizations and individuals in creating accessible materials that meet the needs of the users. This guide offers clear guidelines and best practices so that everyone can enjoy full and equitable access to copyrighted material.

Glossary

Ablism/Ableism – “a set of beliefs or practices that devalue and discriminate against people with physical, intellectual, or psychiatric disabilities and often rests on the assumption that people with disabilities need to be ‘fixed’ in one form or the other.”¹⁷

“Ablist attitudes associated with underestimating the capacity of persons with disabilities, overestimating the cost of adopting inclusive design or making adjustments and trivialising probability that a discriminatory barrier will in fact disable a person with a disability.”¹⁸

Accessible Format – for the purposes of this guide, is understood as any format that has accessibility features or functionality built into it and can include

1. alternate formats (e.g., DAISY Audio, braille),
2. mainstream formats that have had accessibility features or functionality added (e.g., EPUB that have had page navigation and image descriptions added) and;
3. born-accessible commercial formats (e.g., commercial EPUB with full accessibility features).

Alternate Format – is the term used in the *Copyright Act* and refers to any format specially designed for persons with a perceptual disability and is the term used in the *Copyright Act*. This can include

1. alternate formats (e.g., DAISY Audio, braille) or
2. mainstream formats that have had accessibility features added (e.g., EPUB that have had page navigation and image descriptions added).

Accessible and Assistive Technologies – Accessible technologies are the hardware devices and software that provide users with access to accessible digital materials. Accessible technologies are designed to be flexible and provide supports that benefit everyone – they are universally designed. Assistive technologies are designed to address specific barriers users with disabilities may face when they interact with their materials. Examples of assistive technology include text-to-speech, screen readers and speech recognition. In practice, the line between what is accessible and assistive technology can become blurred, especially as more assistive technology is included as built-in accessibility features on mainstream devices (definition from National Centre on Accessible Educational Materials).

Authorized Entities – is a term used in the Marrakesh Treaty for an entity, and applies to a range of organization including government institutions and non-profit organisations, that

¹⁷ Smith, L. (n.d.) Centre for Disability Rights. <https://cdrnys.org/blog/uncategorized/ableism/>

¹⁸ Harpur, P. (2014). Naming, blaming and claiming ablist: the lived experiences of lawyers and advocates with disabilities. *Disability & Society*, 29(8), 1234–1247. <https://doi.org/10.1080/09687599.2014.923749>

provides certain services to beneficiary persons. WIPO says the Marrakesh Treaty itself does not require an organization to fulfil any formalities or undertake specific procedures to be recognized as an “authorized entity”. However, it does not limit such measures, meaning that states can decide for themselves. The *Copyright Act* does not use the term Authorized Entity but identifies who can provide services in s. 32.02(1).

Commercially Available – is defined by the *Copyright Act* (S.2) as being available on the Canadian market within a reasonable time and for a reasonable price and may be located with reasonable effort.

Educational Institution – is defined the *Copyright Act* (S.2) as

- (a) a non-profit institution licensed or recognized by or under an Act of Parliament or the legislature of a province to provide pre-school, elementary, secondary or post-secondary education,
- (b) a non-profit institution that is directed or controlled by a board of education regulated by or under an Act of the legislature of a province and that provides continuing, professional or vocational education or training,
- (c) a department or agency of any order of government, or any non-profit body, that controls or supervises education or training referred to in paragraph (a) or (b), or
- (d) any other non-profit institution prescribed by regulation; (*établissement d'enseignement*)

Library, Archive or Museum – is defined the *Copyright Act* (S.2) as

- (a) (a) an institution, whether or not incorporated, that is not established or conducted for profit or that does not form a part of, or is not administered or directly or indirectly controlled by, a body that is established or conducted for profit, in which is held and maintained a collection of documents and other materials that is open to the public or to researchers, or
- (b) (b) any other non-profit institution prescribed by regulation; (*bibliothèque, musée ou service d'archives*)

Marrakesh Treaty – also known as the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled or just MT. The Marrakesh Treaty was adopted on June 27, 2013 in Marrakesh and it forms part of the body of international copyright treaties administered by WIPO. It has a clear humanitarian and social development dimension and its main goal is to create a set of mandatory limitations and exceptions for the benefit of the blind, visually impaired, and otherwise print disabled (VIPs).

Perceptual Disability – is a term used in the *Copyright Act* in s. 32(1) and s. 32(2). It means a disability that prevents or inhibits a person from reading or hearing a literary, musical, dramatic or artistic work in its original format, and includes such a disability resulting from:

- (a) severe or total impairment of sight or hearing or the inability to focus or move one's eyes,
- (b) the inability to hold or manipulate a book, or
- (c) an impairment relating to comprehension.

Perceptual disability is a broader term than print disability, and includes all print disabilities in addition to hearing impairments. Hearing is not included in the definition of print disability.

Print Disability – this term is used in the Marrakesh Treaty as well as in s. 32.01, Print disability —outside Canada in the *Copyright Act*. Print disability is defined as follows:

Print disability means a disability that prevents or inhibits a person from reading a literary, musical, artistic or dramatic work in its original format and includes such a disability resulting from:

- (a) severe or total impairment of sight or the inability to focus or move one's eyes;
- (b) the inability to hold or manipulate a book; or
- (c) an impairment relating to comprehension (déficience de lecture des imprimés)

Reflowable Content – content that can “flow” in order to automatically adjust to the device's screen size. The lines of text and pagination will change in order to match the device and its orientation. It allows readers to customize their reading experience and easily change text size, font, and margins etc. (definition from Medium)

Tactile Graphics – Tactile graphics, including tactile pictures, tactile diagrams, tactile maps, and tactile graphs, are images that use raised surfaces so that a person with a visual impairment can feel them. They are used to convey non-textual information such as maps, paintings, graphs and diagrams (definition from Wikipedia).

Technological Protection Measures – Technological protection measures (TPM) are any digital management tools used to restrict what users can do with digital materials. TPM may also be called digital locks or digital rights management (DRM). TPM are defined in the *Copyright Act* as

any effective technology, device or component that, in the ordinary course of its operation, (a) controls access to a work, to a performer's performance fixed in a sound recording or to a sound recording and whose use is authorized by the copyright owner; or (b) restricts the doing – with respect to a work, to a performer's performance fixed in a sound recording or to a sound recording – of any act [which only the copyright owner has the right to do or authorize]. (s.41)

TPMs are generally put in place by the copyright holder or content provider to control the ways in which that content can be used. Examples of TPM include passwords, paywalls or

subscriptions, registration keys, time limits, limits on the number of simultaneous users, encryption/scrambling, download, copy and print blocking, and watermarks.

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Legal Review

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