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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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A DECADE AFTER THE ADOPTION OF THE MARRAKESH TREATY: DO ITS AVOWED OBJECTIVES REMAIN A MIRAGE?

AUTHORED BY - DR. RAJU NARAYANA SWAMY IAS

Introduction

In 2013, the Member States of the WIPO adopted the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled. The Treaty addresses the 'book famine' – a nomenclature for the low number of books and other copyright protected material that is accessible to the visually impaired. To quote none other than the President of the World Blind Union, “The Marrakesh Treaty is much more than a Treaty about books. It is a historic human rights instrument. Access to published works means the potential for blind and partially sighted children and adults to live integrated, productive lives.”

As the preamble proclaims, “The aim of the Treaty is to build a solid foundation to ensure the widespread dissemination of accessible material recognizing that many Member States have established limitations and exceptions in their national copyright laws for persons with visual impairments or with other print disabilities, yet there is a continuing shortage of available works in accessible format for such persons.” To put it in simple terms, the Treaty addresses copyright as barrier to accessibility. It requires its contracting parties to adopt exceptions to their copyright laws to allow making, distributing, exporting and importing copies in accessible formats. It requires the Member States to ensure that they comply with the obligations under the Berne Convention, the TRIPS Agreement and the WCT (WIPO Copyright Treaty). This is because the copyright works that are in the centre of the ‘book famine’ problem are governed by these instruments.

In June 2014, India became the first country to ratify the Treaty. On September 30, 2016, the Treaty came in to force by formally gathering 20 nations that acceded the Treaty (viz) India, El Salvador, UAE, Mali, Uruguay, Paraguay, Singapore, Argentina, Mexico, Mongolia, Republic of Korea,

Australia, Brazil, Peru, Democratic People's Republic of Korea, Israel, Chile, Ecuador, Guatemala and Canada.

The Background

Electronic text is more accessible than printed books. For a blind person in a physical library, the only option to access the information is to have it read out loud. On the contrary in the case of a text file, it can be sent to a braille display or alternatively text – to – speech software can be used to read it out loud. Thus compared to paper and ink, text files are wide open to the blind. In fact, today technological advances have enabled the visually impaired to access material in ways that might have been qualified as fanciful some decades ago. These include Screen Readers, Talking Newspapers (audio recordings of news articles in newspapers), Magnifiers, Optical Character Recognition (OCR), Braille Translation software and the like .¹

But Digital Rights Management (DRM) - which is often used to lock down content – can restrict those uses. Moreover law continued to lag behind and it was almost impossible for the blind to access a wide cornucopia of works without the permission of copyright owners.

Beginning in 2004, WIPO examined access to works for the blind. A WIPO study in 2007 estimated that only about 5% of published books are available in an accessible format. For the rest, if the book is to be read, someone must convert it in to an accessible format. A series of discussions lasting nearly a decade led to the Marrakesh Treaty. As countries change their laws to allow making accessible format copies of works, this will allow the conversion of a greater portion of works to accessible formats. The biggest change ushered in may be that as people create accessible copies, they can share them across borders. This means that the cost and effort to convert something to an accessible format is less likely to be duplicated globally.

Salient Features of the Treaty

a). Works Covered

Article 2(a) of the Treaty defines “works covered.” This refers to the types of material which can be transcribed or distributed under the terms of the Treaty. Works such as literary and artistic works in the form of text, notation and/or related illustrations made publicly available in any media have been

covered. This definition is rather narrow as it does not cover photographic works, cinematographic works, sound recordings, dramatic works, broadcasts, performances etc. The exclusion of audio visual works, films and data bases is an unfortunate choice.

b. Beneficiaries

Article 3 of the Treaty defines “Beneficiary Persons”. The beneficiaries under the Treaty includes.

1. Blind persons
2. Persons with visual impairment that prevents them from reading like a normal person and
3. Person who cannot hold or manipulate a book or move eyes like a normal person to read a work.

Visually Impaired Persons or dyslexic persons, it needs to be mentioned here, range from those with only light impairment to the inability to read a text without assistive technology.

The inclusion of ‘print disabled’ - anyone who cannot access print due to any form of disability – as a beneficiary furthers the objective of nondiscrimination and equal opportunity. It reminds us of the concept articulated by George Kerscher to describe persons who cannot “access print because of a visual, physical, perceptual, developmental, cognitive or learning disability.”ⁱⁱⁱ However it does not cover people with auditory issues, mental disability etc, who also have problems with accessing printing works. Moreover, Article 3 does not clarify the qualifying indicators for 'blindness', 'visual impairment' etc. The Treaty leaves the specifications of the spectrum of impairments and disabilities to be decided by national laws – hoping that all nations follow a social model of disability and include all who are in real need.

C. Authorized Entities and Cross Border Exchange

Article 2(c) of the Treaty defines “authorized entity” as an entity that is authorized or recognized by the government to provide education, instructional training, adoptive reading or information access to beneficiary persons on a non-profit basis. The Article specifically states that authorized entity also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations. It is worth mentioning that to qualify as an authorized entity there is no specific process.

Article 4(2) seeks to address the exceptions create by the member states in their national copyright laws. It seeks to permit authorized entities, without the authorization of the copyright right holder, to make an accessible format copy and supply these copies to beneficiary persons by any means, including non-commercial lending or by electronic communication when all of the following conditions are met: -

- i. the authorized entity wishing to undertake the said activity has lawful access to that work or a copy of that work.
- ii. no changes are introduced other than those needed to make the work accessible to the beneficiary person.
- iii. such accessible format copies are supplied exclusively to be used by beneficiary persons and
- iv. the activity is undertaken on a non-profit basis.

To put it a bit differently, this gives them the right to reproduce, the right to distribute, the right to make it available to public and the right to make changes to the work to convert it in to an accessible format.

Article 5(2) which deals with cross border exchange of accessible format copies specifies that a contracting party may fulfill Article 5(1) by providing a limitation or exception in its national copyright law such that authorized entities shall be permitted (without the authorization of the right holder) to distribute or make available for the exclusive use of beneficiary persons accessible format copies to an authorized entity or to a beneficiary person in another Contracting Party. Read with Article 6, it gives authorized entities access to the material from the importing country without the prior consent of the copyright owner.

Thus the Marrakesh Treaty mandates national laws to allow cross border exchange of works in accessible format provided the following conditions are met: -

- a) Accessible works are exclusively distributed to differently abled persons.
- b) The Three Step Test as laid down in the Berne Convention and later in TRIPS and WCT is satisfied.
 - i. The exception or limitation must be a special case.
 - ii. It does not conflict with the normal exploitation of the work and
 - iii. It does not prejudice the legitimate interests of the copyright holder.

To be true to facts, Article 11 orders that governments carve exceptions so as to make sure that the interests of authors are not unreasonably prejudiced.

The Indian Saga

On May 17, 2012 – much before the Marrakesh Treaty came in to picture – the Indian Parliament introduced a rather liberal disability friendly copyright exception. More specifically under Section 52 of the Act, which concerns fair use dealing, Section 52(1) (zb) was introduced which exempts from infringement “the adaptation, reproduction, issue of copies or communication to the public of any work in any accessible format by

- i) any person to facilitate persons with disability to access to works including sharing with any person with disability of such accessible format for private or personal use, educational purpose or research or
- ii) any organization working for the benefit of the persons with disabilities in case the normal format prevents the enjoyment of such works by such persons.

Provided that the copies of the works in such accessible format are made available to the persons with disabilities on a nonprofit basis but to recover only the cost of production. Provided further that the organization shall ensure that the copies of the works in such accessible format are used by persons with disabilities and takes reasonable steps to prevent its entry into ordinary channels of business.”

Thus the section brings with its ambit the following broad kinds of activities:-

- i) Conversions by the disabled persons for his/her own use and for sharing with others in the community.
- ii) Conversions by third parties (individuals or organizations) working for the benefit of the disabled on a nonprofit basis.

In case the conversion and distribution are done for profit, the concerned entity will have to apply under Section 31 B (Compulsory License for benefit of disabled).

The Indian copyright disability exception marks a watershed in the history of copyright and disability jurisprudence. The provisions therein apply not just to the visually impaired, but to the disabled in

general. It was the culmination of more than a decade of concerted advocacy by a diverse and disparate group of experts. It helped build significant momentum for an international treaty.

ABC & Sugamya Pustakalaya

No discussion on the Marrakesh Treaty will be complete without a reference to the ABC(Accessible Books Consortium) which is a public private partnership led by the WIPO. It includes libraries for the blind, standards bodies, organizations representing authors, publishers and collective management organizations apart from of course organizations that represent people with print disabilities such as the World Blind Union. The goal of ABC is to increase the number of books in accessible formats worldwide and to make them available to the visually impaired. On the Indian front, Sugamya Pustakalaya represents the country's largest collection of online accessible books.

The field reality in India

Several studies have been conducted on whether the provisions in the Indian Copyright Act have been effectively used for the benefit of the visually impaired persons and whether the amendments therein have offered any ideal benefits to the disabled community such as bringing them closer to the copyrighted material. Of these, special mention must be made of the research paper by Ms Anjana Girish and Ms Saraswathy Vaidyanathanⁱⁱⁱ which concludes that although India has hit the mark in drafting suitable legislation, there are deficiencies in its implementation. To quote just an example, even State Government websites used for payment of employees 'salaries are inaccessible to visually impaired persons as it is not compatible with screen reading assisting software.

The study highlighted:-

- a) The provisions in the Marrakesh Treaty to facilitate cross border exchange of accessible format copies has been scarcely utilized.
- b) Awareness of copyright law and needless to say of the amendment therein is abysmally low. In fact even government functionaries are unaware of the policy per se and the beneficial provisions.
- c) Limited financial help or capacity and low technical capacity
- d) Poor communication with authorities with respect to grievance redressal
- e) Lack of volunteers to convert literature texts to audio books.

- f) No steps are taken to ensure that the accessible format copies are available in regional languages. This creates a barrier in the holistic development of the visually impaired community.

To put it in simple terms, incorporation of the provisions beneficial to the visually impaired persons has not aided in improving their access to copyright works. This is an alarming situation which calls for immediate intervention. One possible solution could be issue of a mandatory directive to publishers with respect to printing multiple accessible formats like the United States. Another step could be to ensure that websites are designed with a World Wide Web Consortium (W3C) format which makes every content available to visually impaired persons. Public libraries need to be mandated to devote space for the blind. Needless to say, all these have to be preceded by serious conscientisation efforts and establishment of a database comprising of audio books. Only a multi stakeholder approach in collaboration with all the key players -governmental bodies, authorized entities etc- can save the day. Otherwise the fruits of the Marrakesh Treaty will never reach the 63 million visually impaired people in the country – of whom 8 million are blind.

Conclusion

The Marrakesh Treaty symbolizes an attempt to bring in a more balanced approach between authors and users and marks a huge step forward towards inclusivity. It underlines the need for social integration and cultural participation of the 285 million visually impaired people across the globe - of whom 39 million are blind. It is to be viewed in the back drop of the reality that the shortage of accessible materials for them is due in part to gaps in international and national IP laws. Its importance lies in the fact that it is the first time human rights principles are enshrined in an international copyright treaty.

The Marrakesh Treaty is part of a growing body of internationally recognized disability rights law and involved a decade of negotiation and advocacy. It follows the rapid and widespread ratification of the CRPD (Convention on the Rights of Persons with Disabilities) which recognizes the rights of equality and non – discrimination, the right to accessibility, the right to education and the right to participate in political and cultural life among others. States that comply with the Marrakesh Treaty also may be able to better respect, promote and protect rights contained in the UDHR.

Copyright, it must be mentioned here, is perceived as a hindrance to the free flow of information. The main reason why copyright owners are reluctant to provide accessible format copies for the disabled is that they feel the market that caters to visually impaired persons' needs is unprofitable. Therefore they are not considered by the publishers as a commercially viable customer group. Another concern of publishers is that converted books are also often used by persons who are not visually impaired, thereby leading to a loss in the market.

To put it more succinctly, the intersection of technology, market failure and copyright laws creates a complex access dilemma for the visually impaired, depriving them of equal opportunity. It is in this background that the Treaty is to be viewed – as the first international legal instrument that seeks to address a specific impediment (ie) the issue of book famine for the visually impaired. Though the Treaty does not take in to account the interests of persons with other disabilities, it is no doubt a step in the right direction. It proves that positive change can be made even in giant global institutions and against great odds. But the picture in the field is not so rosy.

Despite perceptions to the contrary, the rise of internet availability and mobile communications technology does not mean automatic accessibility for vision impaired persons. The logistic of practical access and integration with educational opportunities remain challenging. Conversion of books to Braille, large audio or electronic files requires political will, time and resources that not all governments have been willing to support. However the progressive developments recognizing state obligations to respect, protect, promote and fulfill the rights of persons who are differently abled in the backdrop of advocacy by DPOs (Disabled Persons Organisations) is a silver line in the horizon. One can only hope and trust that the glorious day on which the noble objectives of the Marrakesh Treaty are realized in letter and spirit is not too far away.

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