

EMPOWERING THE VISUALLY IMPAIRED THROUGH COPYRIGHT LAW REFORM IN SRI LANKA

Abstract

Copyright in the modern age of technology is manifold, ranging from books and printed work to e-books, clips played on screen, acted out on a stage, music on the radio, software programmes, video games, lyrics of a song, paintings and so forth. Legal Copyright protection enables the author of copyright to reap the economic benefits of his or creation, acting as an incentive as it is the; *“key to wealth in the age of information”*. The law is the guardian of the interests of copyright owners, yet the law assumes the dual role of balancing the rights of other sections of the society *vis a vis* the economic rights of copyright owners.

The aim of the current study is to build up a strong case made in favour of the visually impaired community in Sri Lanka and to create an especial exception for them traversing beyond the concept of ‘fair use’ which currently exists in copyright law that enables use of copyright work without reference to the owner in the interest of the general public.

The Sri Lankan Intellectual Property Act No. 36 of 2006 which includes a chapter on copyright law has engraved the concept of 'fair use' with a tinge of elasticity required in practical application. Yet a clear exception for the personal use of visually impaired persons is a need of the hour and as an advancement of their rights to equality, education and information in the modern day of advanced technology. As a stepping stone, this paper defines visual impairment, evolution of the assistive technology and explores and compares the laws of progressive jurisdictions, mainly the UK, the USA, New Zealand and India that have created exceptions for the visually disabled persons, with the objective of lobbying for copyright law reform through the Law Reform Commission of Sri Lanka.

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Chapter 1

Introduction

1.1. Entreaty of the 'Visually Impaired' Community

The population of the Democratic Socialist Republic of Sri Lanka is estimated at 20 million, out of which, 200,000 people are believed to be blind while another 400,000 are visually impaired.¹ Every democratic society strives to grant equal rights, protection and opportunities to its citizenry without discrimination. The Fundamental Rights Chapter (iii) of the Constitution of the Democratic Socialist Republic of Sri Lanka guarantees that; *“Every Person is entitled to freedom of thought, conscience and religion including the freedom to have or to adopt a religion of his choice”*², Article 12 (01) of the Constitution embodies that *“All persons are equal before the law and are entitled to the equal protection of the law”* and Article 14 (01) guarantees the freedom of speech and expression, including publication. Article 12 (04), in particular allows enactment of special legislations *‘for the advancement of women, children and disabled persons’*. Thus the basic law of Sri Lanka recognises ‘disabled persons’ as a category who deserves special protection of the law. The intriguing question of whether the laws of Sri

¹ <http://www.vision2020.lk/blindness&vision.html>;

² Article 10 of the Constitution of the Socialist Republic of Sri Lanka 1978

Lanka have achieved to guarantee equal rights and opportunities to the 'disabled' or narrowly to the specific group of 'visually impaired' being the focus group of this essay, may be explored in light of the prevalent copyright laws in Sri Lanka.

The inspiration for the current project derived from entreaties of friends, colleagues and members of the community with visual and print disabilities, who enlightened on the dire need to amend the existing copyright laws of Sri Lanka in favour of the right to information and education of the 'visually blind' community of Sri Lanka.³

This essay is part of lobbying⁴ for law reform in Sri Lanka and to propose to the Law Reform Commission of Sri Lanka⁵ to include in its mandate and prioritise and to propose to the Parliament of Sri Lanka to amend the copyright laws in favour of visually impaired community in the country on the lines of progressive reforms effected in other jurisdictions such as England, the United States of America, New Zealand and India.

³ Information extracted out of the Legal Aid Clinic for the blind held in Kalutara, Sri Lanka in 2013 organised by the Law Students Association of Sri Lanka (LSASL);

⁴ www.srilankablindcouncil.org/- Sri Lanka Council for the Blind, www.slfvh.org/adaptive.htm-Sri Lanka Federation of the Visually Handicapped, www.dabal.org/- Deaf & Blind Aid Lanka;

⁵ <http://lawcom.gov.lk/web/> -The Law Reform Commission of Sri Lanka;

1.2. What is 'Visual Impairment'?

Visual impairment and blindness fall under the umbrella term 'disabilities'. Visual impairment may be defined as a condition of sight loss that cannot be fully corrected using glasses or contact lenses. According to the World Health Organisation (WHO) a person with low vision is one who has impairment of visual functioning even after treatment and/or standard refractive correction, and has a visual acuity of less than 6/18 to light perception, or a visual field of less than 10 degree from the point of fixation, but who uses, or is potentially able to use, vision for planning and/or execution of a task⁶. Thus moderate visual impairment combined with severe visual impairment is grouped under the term "low vision". Blindness on the other hand means having a maximal visual acuity in the better eye with best possible correction. Low vision taken together with blindness represents all visual impairment.

Globally, the main cause of moderate and severe visual impairment is uncorrected refractive errors whilst cataracts among other things such as glaucoma cause blindness in middle and low income countries⁷. Annually, the global blindness is increasing by 1-2 million. The number of people visually impaired from infectious diseases has reduced in

⁶ World Health Organisation(WHO); Change the Definition of Blindness, <http://www.who.int/blindness/Change%20the%20Definition%20of%20Blindness.pdf>;

⁷World health Organisation(WHO); <http://www.who.int/mediacentre/factsheets/fs282/en/>;

the last two decades. However, blindness caused as a result of chronic non-communicable diseases in the developed and the developing world is on the rise.⁸

In the year 2006, the estimated number of blind and partially sighted people in the world was 180 million⁹. This figure increased to 285 million by the end of year 2010 with a blind population of 39 million and a whopping 246 million people experiencing low vision. About 90% of the visually impaired people live in low income settings. As per statistics 82% of the people living with blindness are aged 50 and above¹⁰. The estimation of blind children worldwide stands at 1.5 million.¹¹

The unavailability of reliable statistical data surveys on visual disability in developing parts of the world widens the problem of tackling world blindness and Sri Lanka is no exception. According to national census of 1981, there were 9331 blind persons out of a population of 14 million. Since then estimations relating to blind people in Sri Lanka had been carried out based on the assumption that 1% of the population in developing countries is visually impaired.¹² As at 2015, the population of Sri Lanka is recorded as 20 million. Of these, around 200,000 people are believed to be blind with another

⁸ Sunday Observer; 18, March 2012; <http://www.sundayobserver.lk/2012/03/18/spe50.asp>;

⁹ World Intellectual Property Organisation (WIPO), Standing Committee on Copyright and Related Rights http://www.wipo.int/edocs/mdocs/copyright/en/sccr_14/sccr_14_5.pdf;

¹⁰ World Health Organisation(WHO), <http://www.who.int/mediacentre/factsheets/fs282/en/>;

¹¹ Royal Institute for Deaf and Blind Children; <http://www.ridbc.org.au/blindness>;

¹² Amaradasa Gunawardena and T.D.T.L. Dhanapala, (1999) "The Status of Low Vision in Sri Lanka", Swets & Zeitlinger Publishers, CRC Press, Jan 1, 2000,p 952;

400,000 having low vision. Research shows that majority of people are blind due to cataract. Refractive errors, glaucoma, diabetic retinopathy and blindness in children are the other causes of vision impairment in Sri Lanka.¹³

Blind and visually impaired people encounter difficulties doing day-to-day activities which normal people take for granted. They confront a number of challenges in their everyday lives and one such challenge is the inability to read. Hence, blind and visually impaired people are commonly known as print disabled. The standing Committee of the 14th session on Copyright and Related Rights held in Geneva in 2006 under the aegis of the World Intellectual Property Organisation (WIPO) defined a person with a print disability as: *(a) a person without sight; (b) a person whose sight is severely impaired; (c) a person unable to hold or manipulate books or to focus or move his or her eyes; or (d) a person with a perceptual disability.*

1.3. The Rights of the Visually Impaired in the Digital World

1.3.1. The Primitive Era

Learning to read and to access information is a quality entwined in the normal course of child development. The human brains are naturally wired for literacy¹⁴. The situation is more or less the same in the case of the blind as there has always been, among blind

¹³ National Programme for Prevention to Avoidable Blindness, 2020,
<http://www.vision2020.lk/blindness&vision.html>;

¹⁴ Rachel Aviv (2010), 'Listening to Braille', New York Times Magazine DEC. 30,
2009http://www.nytimes.com/2010/01/03/magazine/03Braille-t.html?_r=0;

people, a political and even moral dimension in learning to read. It is the view of the National Federation of the Blind in the United States that the real problem of blindness is not the loss of eyesight but the misunderstanding and lack of information which exists. If a blind person has proper training and opportunity, it is believed that blindness can be reduced to the level of a physical nuisance.¹⁵

During the primitive era the blind received scanty regard as being of much value to the societies in which they lived. In some societies the blind were subject to ostracism and they were exposed to situations of not being able to provide anything for their basic sustenance.

In the middle ages, the blind were considered an obligation to society and they were given similar care and were afforded the equal footing of the poor and disadvantaged. Prior to the commencement of the 18th century, countries like England and France opened schools for the blind¹⁶ and in due course, the negative stance towards the blind diminished to a greater extent. However, until the 19th century the blind people were confined to an oral culture. Though some makeshift methods such as reading letters carved in wood or wax was available, their services fell temporary.

¹⁵ National Federation of the Blind, United States 'The International Braille And Technology Center For The Blind'; <http://aggedor.freeshell.org/ibtc.txt>;

¹⁶ American Action Fund for Blind Children and Adults; 'History of Blindness', <https://www.actionfund.org/history-blindness>;

1.3.2. The Case for the Rights

Equal treatment and equal protection as guaranteed by the Constitution of Sri Lanka, are two core principles that lie at the heart of every civilised society. Moreover the fundamental right of free speech/expression and right to information too have been commented as “the matrix of all other rights and freedoms”¹⁷. The Sri Lankan Legal luminaries, civil organisations and others have long been engaged in lobbying the Parliament of Sri Lanka to enact laws to guarantee the right to information and which has resulted in the Cabinet approval of the Bill embodying the right to information in the present day. The right to information is undeniably a basic right of all the citizens and especially those with visual disabilities. In a context where the right to information is not an expressly guaranteed constitutional right, in a forward looking judgment, the Supreme Court of Sri Lanka pronounced that the right to information as being intertwined with the fundamental right of thought, conscience and religion.¹⁸

The right to access information is also explicitly recognised by the international community in the UN standard rules on the Equalisation of Opportunities for Persons with Disabilities. These standard rules were developed on the basis of the experience

¹⁷ Kishali Pinto Jayawardena, ‘Right to Information in Sri Lanka’, Critical Scrutiny of existing Laws and Proposed law reform;

http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/srilanka/conf_paper_rti_natl_regl_perspectives_manusher_jonno.pdf

¹⁸ The Supreme Court of Sri Lanka, In Re the Broadcasting Authority Bill, S.D. No 1/97 ñ 15/97, delivered on 5 May, 1997;

gained during the United Nations Decade of Disabled Persons (1983-1992).¹⁹ Although not a legally binding instrument, the Standard Rules represent a strong moral and political commitment on the part of Governments to take action to attain equalisation of opportunities for persons with disabilities.²⁰

The aforesaid rules are underpinned by provisions of the UN Universal Declaration of Human Rights. Article 19 reads *'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'* The right to read principle is set out in various other texts. The UN Convention on the Rights of Child, echoes the same principles while Article 30.3 of the UN International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disability²¹ though refers specifically to copyright makes reference to the broader issue of access to information.

The UN Convention on the Rights of Persons with Disabilities²² adopted in 2006 entered into force in May 2008. This was a result of decades of work by the United Nations to change attitudes and approaches to persons with disabilities by changing the way of

¹⁹ United Nations Enable, The Secretariat for the Convention on the Rights of Persons with Disabilities, <http://www.un.org/esa/socdev/enable/dissre01.htm>;

²⁰ World Intellectual Property Organisation (WIPO), Standing Committee on Copyright and Related Rights http://www.wipo.int/edocs/mdocs/copyright/en/sccr_14/sccr_14_5.pdf;

²¹ UN International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disability, A/RES/57/229;

²² The Convention on the Rights of Persons with Disabilities, A/RES/61/106;

viewing persons with disabilities as "objects" towards viewing them as "subjects" with rights. Through this Convention, it was intended to restore all persons with all types of disabilities, all human rights and fundamental freedoms²³. Article 21 of the Convention, enshrines freedom of expression and opinion and access to information and directs state parties to take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice. Such communication includes providing information intended to the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost, accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions; urging private entities that provide services to the general public, including through the internet, to provide information and services in accessible and usable formats for persons with disabilities; encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities; and recognising and promoting the use of sign languages.²⁴

²³Ibid 19, <http://www.un.org/disabilities/default.asp?id=68>;

²⁴ <http://www.un.org/disabilities/convention/conventionfull.shtml>;

Full integration of handicapped people into the work and play of the community and giving access to information and education regardless of their physical disabilities is of paramount importance. Likewise, people with visual and print disabilities should have every right and possibility to avail themselves of all the rights and privileges enjoyed by people without such disabilities. The word disability should not be narrowly construed as inability. Hence, it should be the responsibility of every state to provide equal commitment towards the advancement of the rights of its people with sight loss. They should be placed in a position to enjoy the concept of 'Life Long Learning for All'. Proper execution of these steps will in turn elevate and uplift a new paradigm of social, economic and cultural standards for the blind. The collaboration and cooperation with the public and private institutions and non-profit organisations concerned with blind services is yet again essential in developing the abilities of the visually handicapped people for giving them full access to the information resources and education system of the country.

The World Blind Union²⁵ representing the estimated 285 million of the blind and partially sighted population worldwide believes that in this so called information age, access to information is a human right that must be enjoyed by all as a precondition for equal participation in society. The blind and partially sighted people ought to form an important part of the society and should not be marginalised on any front.

²⁵ www.worldblindunion.org/;

The human history has witnessed a period which is characterised shift from traditional industrial revolution brought through industrialisation to a society based on information technology. This current era is known as the information age also referred to as computer or digital age, has compelled human beings to undergo a major transformation in almost all aspects of life.

The term "equalisation of opportunities" means the process through which the various systems of society and the environment, such as services, activities, information and documentation, are made available to all, particularly to persons with disabilities.²⁶

States are under an obligation to develop strategies to make information services and documentation accessible to different groups of persons with disabilities. Braille, tape services, large print and other appropriate technologies should be used to provide access to written information, software programmes and documentation for persons with visual impairments.²⁷

Robust copyright laws and such laws being strictly construed can pose a serious barrier to the blind and partially sighted people wishing to access information. This situation is aggravated in the absence of domestic laws granting permission to reproduce copyright work in accessible formats for the use of disabled community. In such a situation the new forms of copy protection and digital rights management further compound this

²⁶ Resolution adopted by the UN general assembly; 1993 A/RES/48/96 [on the report of the Third Committee (A/48/627)] Standard Rules on the Equalization of Opportunities for Persons with Disabilities;

²⁷ WIPO, http://www.wipo.int/edocs/mdocs/copyright/en/sccr_14/sccr_14_5.pdf;

problem. Digital Rights Management (DRM) is a system that is used to manage the use of digital content, and to protect digital content against un-authorised use²⁸. In simple terms it is a lock that is placed on a digital file that keeps the file tied to the account of the person who purchased it.

Digital technology offers the opportunity to use the same source files to create a range of formats. This means there is enormous potential for the integration of "mainstream" and "specialist" publishing. This would allow new business models which would lead to more titles becoming available, publication in accessible formats at or close to the date of original publication. The positive aspect of this is the prospect of a revenue stream for the author and publisher owing to the concept of partnership in publishing.²⁹ Hence, Technological Protection Measures commonly known as "TPMs" and "digital padlocks" are often resorted to by the publishers to use on digital books, to stop it being passed on or accessed illegally. These systems too can unwittingly block legitimate access by print disabled people. With thousands of books available online as e-books over the past decade of the digital book era, the print disabled individuals relying on screen-reading, text-to-speech and read-aloud software may encounter difficulties accessing such versions as these versions are subject to various Technological Protection Measures and digital locking systems.

²⁸ Consumer's Guide to Digital Rights Management, Indicare Project,
http://www.indicare.org/tiki-download_file.php?fileId=195

²⁹ The voice of blind and partially sighted people in Europe, <http://www.euroblind.org/working-areas/access-to-culture/nr/10>;

1.3.3. The Advance of the Technology for the ‘Visually Impaired’

The technology for the ‘blind’ and ‘visually impaired’ dawned with the adoption of widespread use of braille that enabled transformation of text into ‘raised dots’. In 1820, Louis Braille invented braille method which endowed the blind community with a reliable method of written communication for the first time in history³⁰. Even if the system of Braille for close on a hundred years permitted the blind a little over a glimpse at the world’s literature, factors such as limited production of braille, lack of trained people for translating books into braille, the short life span of braille books and their enormous size³¹, limited the widespread use of books among the blind. Access to braille version of books became critical to those with visual disabilities and to realise their full potential and to enjoy the benefits of the society.³²

Technology advanced with phonographic books; the recordings of printed books and magazines³³. Over the last couple of decades, the learning technology has undergone

³⁰ ‘Listening to Braille’ http://www.nytimes.com/2010/01/03/magazine/03Braille-t.html?_r=0

³¹ ‘Reading Aids for Blind People – A Survey of Progress with the Technological and Human Problems’ – P.W. Nye <http://link.springer.com/article/10.1007%2FBF02474622>, pp 2;

³² The American Foundation for the Blind; The Need for Access: AFB Testimony on Intellectual Property Law, <http://www.afb.org/blog/afb-blog/the-need-for-access-afb-testimony-on-intellectual-property-law/12>;

³³ Blind inventor Robert Irwin helped adapt the phonograph to operate at slower speeds and offer longer play times, Quoted from The American Foundation for the Blind; The Need for Access: AFB Testimony on Intellectual Property Law- <http://www.afb.org/blog/afb-blog/the-need-for-access-afb-testimony-on-intellectual-property-law/12>;

far-reaching changes. Moreover the blind community too wants an ever greater variety of materials in braille. Hence, braille translation and software and formatting programmes came into being that could be used in conjunction with Braille embossers. Braille editing tools capable of handling all kinds of direct entry Braille tasks with automated page layouts to aid the production of literary, textbook, and music Braille and versions like Duxbury which is compatible with speech and Braille output supporting a number of foreign languages were introduced into the market. Braille embossers are commonplace and can be used with any computer using a Braille translation software programme. Systems such as 'Megadots' let the blind format documents for print and Grade 2 Braille by giving one simple command. In addition, programmes such as Braille-Blazer, Braille-Display, Braille-Wave, Braillex and Braille Keyboards allow blind and visually impaired people write, review, edit data, keep virtual address books, and store many pages of Braille or print.

Open book scanners can scan the pages of books as pictures and by sending them to a computer it can translate the pictures into understandable text, and then speak the text aloud or output to Braille. This method allows reading a page in a book in less than a minute in English or in more than a dozen other languages. Further to the above, equipment that combines state-of-the-art reading machine technology, software that works on personal computers with the ability to find key words or phrases within a document, editing of scanned text, magnification of scanned documents and digital

magnifiers and related tools are also in place to accommodate users with visual impairments.³⁴

Moreover the modern era of fast advancing technology, has brought a variety of novel assistive technologies such as audio books, e-books, software programmes and so forth.

1.4. The Case for Copyright Law Reform

Regardless of numerous Conventions upholding the right to read and the right of access to information and regardless of the plentiful user-friendly technologies allowing access to books and information for the visually impaired and blind, they still suffer what has been dubbed a 'book famine' and a 'digital lock-down'. Statistics confirm one million books are published annually, but only 5% are ever produced in accessible formats for the visually impaired. The case is worse in developing countries where 90% of the world's visually-impaired people live; only 1% of books are available in accessible formats.³⁵

³⁴Sharon Nichols, 'Overview of Technology for Visually Impaired and Blind Students', Texas School for the Blind and Visually Impaired; <http://www.tsbvi.edu/>;

³⁵ [http://stoppress.co.nz/blog/2013/09/blindness-books-and-copyright-law-how-marrakesh-treaty-giving-gift-literature](http://stoppress.co.nz/blog/2013/09/blindness-books-and-copyright-law-how-marrakesh-treaty-giving-gift-literature;);

When shifting the glance to the problem of 'Book Famine' two major reasons for the continuing existence of the problem can be identified. Firstly, many publishers have chosen not to produce accessible books, for basic economic reasons. For instance, transcribing books to braille is an expensive and cumbersome task requiring reams of thick oversize paper³⁶. This in turn renders a market of nearly 285 million persons look negligible on the face of it. Allowing certain organisations, such as libraries and not-for-profit institutions to reproduce the material in accessible format and to provide the material exclusively to the blind community would be seen as a workable solution. However, this opens doors to the second reason for the book famine: copyright law. The conferral of exclusive rights on creators and the ability to benefit from the use of copyrighted work along with the ability to control and restrict the use of such work inhibit the free flow of information. In the most general sense it is vital to acknowledge the legitimate interests of authors and publishers entrenched in copyright protection laws, yet such protections should not be made as a shield to discriminate against people with disabilities.

This purpose can be achieved by having in place a precisely set up intellectual property system to balance the interests of society with those of creators. Thus, the concept of innovation and creativity should not be overlooked with the act of serving disadvantaged communities.

³⁶ 'Listening to Braille' http://www.nytimes.com/2010/01/03/magazine/03Braille-t.html?_r=0;

Restrictions of the copyright regimes are the main cause of unequal distribution of knowledge and access to information. According to research, laws over two-thirds of the world's countries do not allow the reproduction of any copyright work without the owner's consent, not even reproduction of the work in accessible formats³⁷. This is mainly owing to the existence of archaic intellectual property law regimes without prioritising the idea of amending and repealing the existing provisions in law. These legal barriers prevent the translation of books from its original versions into other versions and it has a direct impact when it comes to transcribing of text into Braille or audio books. By the end of year 2006, significantly fewer than half of WIPO member states had been found to have provisions containing specific exceptions to copyright for the benefit of visually impaired people.

The Library for Blind People of Santiago de Chile, a non-profit making organisation dedicated to the conversion of written material into audio tapes to be used by visually impaired people for entertainment, cultural and/or educational purposes was denied making accessible copies. Even though there is an exception in the law in Chile permitting use of copyright works in educational places, the libraries such as the Library for Blind People of Santiago de Chile was held to have been unable to rely on this exception as the library did not function as an educational place. Therefore in the absence of agreements with authors and publishers owing to reaching and tracing

³⁷ Ibid 34;

difficulties, legal activity to make accessible copies for visually impaired people is left impossible in Chile.³⁸

1.5. Aims and Objectives

In light of the rights and needs of the 'Visually Impaired' community of Sri Lanka, the copyright law of Sri Lanka ought to be amended. While the rationale for law reform is well-established in the foregoing discussion, the ensuing Chapter 2 reviews the laws and reforms that have taken place in the UK, USA, New Zealand and India on a comparative basis, in order to draw inspiration for the current project of copyright law reform in Sri Lanka, so as to create an exception of 'fair use' in copyright law which would serve as an intellectual harvest for the local visually blind community in the modern era of technology.

Chapter Three (3) contains an analysis of the research methodology and reviews the advantages and disadvantages of adopting such a method for the current project. Chapter Four (4) sets out the findings and recommendations derived out of the current project for law reform, followed by the Concluding Chapter Five (05).

³⁸ A case study by the World Intellectual Property Organisation (WIPO), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_7.pdf;

Chapter 2

Literature Review

2.1. Review of Copyright Law in Sri Lanka

Copyright is an important form of intellectual property³⁹ and the aim of copyright protection is to safeguard the author's right to exploit his work⁴⁰. Copyright acts as an incentive for innovative work.

The prevalent copyright law of Sri Lanka is contained in Part II of the Intellectual Property Act No. 36 of 2003 of Sri Lanka (Hereinafter referred to as **“the IP Act”**). One may briefly examine the predecessors of the said IP Act and the sequence of law reforms that has taken place in intellectual property law and specifically copyright law. The laws relating to intellectual property were first introduced into Sri Lanka during the British colonial era. The Copyright Ordinance No.12 of 1912 of the United Kingdom was one of the many laws introduced by the British. The provisions of this Ordinance were

³⁹ William. M. Landes and Richard. A. Posner. 'An Economic Analysis of Copyright Law', Chicago Journals, Volume 18 No 02, June 1989;

⁴⁰ Priya. R.Pillai, 'Accessible Copies of Copyright Work for Visually Impaired Persons in India', 2012. Vol.3, Special Issue, October 2012 (<http://www.SciRP.org/journal/ce>);

made applicable in Sri Lanka (then Ceylon) and they continued to apply. With the introduction of the open market economy in 1977, it felt timely to update laws to harness the maximum benefits of the new market economy model. Consequently, the Code of Intellectual Property Act, No.52 of 1979 embracing the principles of Berne Convention, Universal Copyright Convention, WIPO Convention and a number of other important international agreements and treaties were passed in Parliament. The realm of intellectual property law continued to evolve internationally with several new agreements, treaties and conventions. This position necessitated the amendment of the Code of Intellectual Property Act, No.52 of 1979. In the year 2003, the Intellectual Property Act No.36 of 2003 was enacted in Parliament and the prime objective was to provide for a better and more effective procedure for the administration of matters pertaining to intellectual property.⁴¹

None of the above laws provide a comprehensive legislative solution in respect of the visually impaired and the blind. Thus with no specific exceptions for visually impaired people in the law and no blanket agreement to reproduce copyright material into accessible formats, the subject of 'copyright' in the context of Sri Lanka is perceived as a frustrating impediment to the making of a real difference for visually impaired people unable to read the printed word.

⁴¹ Kalinga Indatissa, 'Criminal Prosecutions under the Intellectual Property Act No.36 of 2003';

Section 6 (01) of the IP Act defines 'Works Protected' as "literary, artistic and scientific work which are original intellectual creations in the literary, artistic and scientific domain" including books, pamphlets, articles, computer programmes and other writings⁴², speeches, lectures, addresses, sermons and other oral works,⁴³ audiovisual works.⁴⁴

There is no procedure for registration of works qualified for copyright protection. The IP Act stipulates that the 'works' are protected by *the sole fact of their creation and irrespective of the mode or form of expression as well as their content, quality and purpose*⁴⁵. Derivative Works of copyrighted work, such as translations, adaptations, arrangements and other transformations and modification of works too are protected under the IP Act.⁴⁶

The author or owner of any protected copyright work under the IP Act is entitled to rights of two kind. Firstly, the owner of a copyright of a work is entitled to the exclusive right to carry out by himself or by representation, reproduction of the work, translation of the work, adaptation, the public distribution of the original and make commercial use of the work by sale, rental, export or otherwise⁴⁷. Secondly, the author is entitled to moral rights over the work that cannot be licenced to a third party unlike the case of economic

⁴² Section 6 (1) a) the Intellectual Property Act;

⁴³ Section 6 (1) b) the IP Act;

⁴⁴ Section 6 (1) f) the IP Act;

⁴⁵ Section 6 (2) of the IP Act;

⁴⁶ Section 7 (1)(1) of the IP Act;

⁴⁷ Section 9 (1) of the IP Act;

rights. Under moral rights, the owner has the right to publication, recognition of authorship, right to prevent distortions, right to prohibit alteration of the work. Any person who violates any right protected under the act is said to have caused an 'infringement' of the rights of the owner. Nevertheless, Section 11 (01) creates an exception of using copyrighted work which shall not be considered as an 'infringement' of rights of copyright owners. If the use of a copyrighted material qualifies as a fair use, then it would not be considered an illegal act or infringement. Thus 'fair use' can be used as a defence against a claim of copyright infringement⁴⁸. While the doctrine of 'Fair Use' is well-enshrined in sections 11(1) and 11(2) of the IP Act, neither the IP Act nor any other prevalent or repealed legislation afford a definition of the doctrine of 'fair use'.

Although 'fair use' is not defined, Section 11(2) of the IP Act provides a criterion for a court of law to adopt, in determining whether a particular use is fair or not. Section 11(2) (a) indicates consideration of purpose and character of the use. It is said that for an intellectual property system to work for all, it is critical that copyright exceptions such as fair use be defended as a laboratory for creativity.⁴⁹

Section 11(1) of the Intellectual Property Act of Sri Lanka reads thus; *"notwithstanding the provisions of subsection (1) of section 9, the fair use of a work, including such use by reproduction in copies or by any other means specified by that section, for purposes*

⁴⁸ 'What is Fair Use' , <http://fairuse.stanford.edu/overview/fair-use/what-is-fair-use/>;

⁴⁹ Jim Fruchterman, 'The Case for Copyright Exceptions and Fair Use'; <http://benetech.org/2014/01/17/the-case-for-copyright-exceptions-and-fair-use/>

such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, shall not be an infringement of copyright.”

Therefore the term ‘such as’ prior to listing the several purposes nullifies the question whether the scope of the doctrine of fair use is confined to those purposes listed in the provision. Further, it is the accepted view that the purposes of fair use referred to in this section are merely a set of examples and they do not constitute an exhaustive list. Thus, these provisions are obviously open-ended.⁵⁰

Therefore the task of definition of ‘fair use’ falls squarely on the judiciary. Such scope of judicial intervention has enabled in striking a balance between the interests of the copyright owners and those of the users. As per judicial pronouncements, this section assumes that the user’s purpose of the use of work can have an impact on the probable harm caused to the copyright owner from that use.⁵¹ It is also assumed that a commercial use of a work can seriously impair the potential market for a copyright work than its use for a non-commercial purpose. Section 11(2) (b) deals with the nature of the work. Whether the copyright work is factual or fictional, in other words whether the work is ‘primarily informational’ or ‘primarily creative’ is the deciding factor. The scope of the doctrine of fair use, assumes far significance when the work concerned is primarily

⁵⁰ D.M. Karunaratna, ‘An Introduction to the Law of Copyright and Related Rights in Sri Lanka’ (Sarvodaya Vishva Lekha 2006), pp77;

⁵¹ Ibid 48;

factual or informational rather than fictional and creative.⁵² Section 11(2) (c) discusses 'the amount used'. The higher the amount which the user has copied from the work both in terms of quality and quantity, the lesser the chances of such copying being interpreted as fair. There is no hard and fast rule to decide how much of copyright work can be copied for such copying to be construed as unsubstantial and for the use to be deemed as fair. Finally, Section 11(2) (d) deals with the effect on the potential market. This section mandates courts to consider whether the use of a copyright work in the particular situation has an adverse impact on the potential market for that product.⁵³ If section 11(2) (d) is given a strict interpretation by Court, the determination of fair use will stand in favour of the copyright owner, which in turn will defeat or negate the distinction between fair and unfair uses of copyright work.

Given the purpose and character of the use is for a non-commercial use and that the effect of the use of copyright work has a minimal impact on the potential market in the case of reproducing copyrighted material by and in favour of people who are blind or visually impaired or otherwise have print disabilities, it can be concluded that the doctrine of 'fair use' enshrined in section 11(1) and 11(2) of the IP ought to serve as an exemption. Whilst a flexible user right 'fair use' clause may give the distinct advantage allowing implementing authorities and the judiciary to find particular uses to be lawful despite the indirect listings of such uses in the provisions of the law, the absence of

⁵² Dharam Veer Singh and Pankaj Kumar, 'Photocopying of Copyrighted Works for Educational Purposes: Does it Constitute Fair Use? [2005] 10 JIPR 21, 23h

⁵³ Chamila S. Talagala, 'The Doctrine of Fair Use in Sri Lankan Copyright Law: An Overview', https://www.academia.edu/5263418/The_Doctrine_of_Fair_Use_in_Sri_Lankan_Copyright_Law_An_Overview

such judicial pronouncements within the legal framework of Sri Lanka has rendered the 'fair use' concept a little less important.

Therefore, regardless of the enabling provision of 'fair use', the overall absence of an all-encompassing, straightforward exemption in the Intellectual Property Act directly addressing blind or visually impaired or otherwise have print disabled people is a marked legislative miss. The absence of such a straightforward provision in the IP Act is highlighted when it is compared against the legal provisions of other countries. In the succeeding sections of this Chapter, a discussion would be carried out regarding countries which may provide comprehensive avenues for distribution of accessible copies.

Hence, an unswerving exemption in the Intellectual Property Act, giving specific reference to the use of copyright work by print disabled people is critical to ensure that non-infringing, fair use of materials is readily available to allow access by people who are blind, visually impaired or otherwise print disabled. Such an exemption will help not only to better safeguard the importance of fostering creativity but also for the wide dissemination of its fruits for human development without any discrimination.

2.2. The Perspective of International Treaty Law-The Journey towards the Marrakesh Treaty

Let us now turn to the case put forward by international treaty for creation of copyright exemptions in the interest of realising the rights of the visually impaired and specifically Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (Hereinafter referred to as the 'Marrakesh Treaty'). The important copy-right related international treaties are the WIPO⁵⁴ administered Berne Convention for the Protection of Literary and Artistic Work, 1971 as amended, WIPO Copyright Treaty, 1996 and Marrakesh Treaty and the World Trade Organisation administered TRIPS (The Agreement on Trade-Related Aspects of Intellectual Property Rights).

Article 9(1) of The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) requires that members will comply with Articles 1-21 of Berne Convention, regardless of whether the country in question is a Berne member. Moreover, Article 1(4) of the WIPO Copyright Treaty (WCT) requires Contracting Parties to comply with Articles 1-21 and the Appendix to the Berne Convention. The Convention is silent as regards the law dealing with the needs of visually impaired people. There are however provisions relating to education. Article 10(2) of the Berne Convention, provides as follows: *"it shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilisation, to the*

⁵⁴ <http://www.wipo.int/portal/en/>

extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided that such utilisation is compatible with fair practice.”

Culminating of five years of discussions, deliberations and negotiations, occurred with the adoption of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled formally by the Member States of the WIPO which was finalised on 27 June 2013 in Marrakesh, Morocco. It was entered into force upon the ratification of 20 WIPO member countries.

Considered a fitting accomplishment for the twenty-first century and cited as the ‘Books for the Blind Treaty’ it saw the light of day as a result of a concerted effort of a wide variety of stakeholders and many governments ‘recognising the compelling interests of visually impaired persons throughout the world in reading works of authorship, as well as the significant investments of authors and publishers in producing those works in the first place’⁵⁵. Hence as rightly declared in the Preamble to the Treaty, the Treaty caters to achieve the principles of non-discrimination, equal opportunity, accessibility and full and effective participation in the society proclaimed in the Universal Declaration of Human Rights and United Nations Convention on the Rights of Persons with Disabilities including the right of free expression and right to information of the visually impaired in the modern era of new information and communication technology, while at the same

⁵⁵ Maria A. Pallante, U.S. Register of Copyrights <http://www.copyright.gov/newsnet/2013/510.html>

time emphasising the importance of copyright protection in a context of different national jurisdictions.

A salient attribute of the Treaty is the broad definition given to the people with vision impairment. By the inclusion of the term 'Beneficiary Persons'⁵⁶ it has included not only people who are blind, visually impaired, reading disabled (example: dyslexia) but also people with a physical disability that gets in the way of effectively holding a book, turning pages or focusing on the page.

Literary and artistic works in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media fall under the term 'Works Covered'⁵⁷. The definition therefore covers books; periodicals and other similar textual works, as well as sheet music. The Treaty does not allow for the contents of a Work to be changed rather just for the Work's contents to be transcribed into an accessible format.

The Treaty obligates the Contracting Parties to make provisions in the national copyright laws for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public as provided by the WIPO Copyright Treaty (WCT), to facilitate the availability of works in accessible format copies

⁵⁶ Article 3 of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled;

⁵⁷ Article 2(a) of Marrakesh Treaty;

for beneficiary persons. The limitation or exception provided in national law should permit changes needed to make the work accessible in the alternative format.⁵⁸

As per the Treaty the copyright exceptions are two-fold. Under the first provision the ‘authorised entities’ defined as a non-profit or government agency that makes accessible copies of Works, and limits distribution of those copies to people with bona fide disabilities⁵⁹ are expected to regulate distribution of the accessible works exclusively to visually-impaired, without the permission of the copyright holder. The Treaty is aimed at making copyright infringement exceptions consistent across contracting countries, where copyright infringement exceptions do exist, albeit to varying degrees.

The second provision of the Treaty addresses the facilitation of both the domestic and cross-border exchange of printed materials in accessible formats at the same time giving the assurances to authors and publishers that system will not expose their assets to misuse and exploitation in parallel markets that are not intended to serve the visually impaired and the print disabled. The books can be imported or received either by the ‘authorised entities’ or directly by the visually impaired individual⁶⁰. Thus the proper implementation of the Treaty helps benefit the visually impaired community in the developing regions of the world who have been unfortunate in accessing the majority of

⁵⁸ Article 4(1) of Marrakesh Treaty;

⁵⁹ Article 2(c) of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled;

⁶⁰ Articles 5 & 6 of the Marrakesh Treaty;

printed material originates from developed parts of the world. The reduction of duplication of work that can be caused during the process of conversion of copyrighted work into accessible formats especially between countries using the same language is yet again a unique feature. The provision also allows those with larger collections of accessible books to share these collections with visually impaired people in countries with fewer resources.

Another highlighting feature is that the cross-border exchange provision restricts the need of commercial availability check. It may be viewed that this concept existed in the Treaty in a much weaker form. Countries with a commerciality requirement in their national copyright law have to inform WIPO formally that their domestic law requires a commerciality test. United Kingdom, the Copyright (Visually Impaired Persons) Act 2002, for instance which introduced the exception to the UK Copyright Law allows educational establishments and charity organisations to make accessible format-copies of protected works on behalf of disabled people on the condition such suitable accessible copies are not commercially available. However, the limited applicability of the commercial availability check no longer makes necessary for non-profit organisations to check if the material is commercially available before the reproduction of the accessible version domestically provided the domestic laws of the country do not provide for a commerciality test.

Article 7 of the Treaty is yet again is vital in that it makes it legal for a person with a print disability to circumvent Technological Protection Measures (TPMs) allowing access to

digital books. These elements along with the requirement of respecting the privacy rights⁶¹ make the implementation process of the Treaty workable and hassle-free. Widespread ratification and implementation of the Treaty assists in alleviating the book famine faced by people who are blind, visually impaired or otherwise print disabled.

2.3. Progressive Laws

2.3.1. The Law of England

Upon examination of the history of the law of intellectual property in Sri Lanka, one encounters the British colonial influence under which the intellectual property law evolved since the small island nation inherited the whole of commercial laws as originated from England including this branch of the law⁶². Moreover it is noteworthy and useful to examine progressive aspects of English Copyright Law as a case forward for copyright law reform in Sri Lanka as the latter inherits the common law tradition of the former. Moreover, the British takes pride in producing the first copyright act in the world, the Statute of Anne in 1710.⁶³

The Copyright, Designs and Patents Act of UK enacted in 1988 remains the current law with amendments upto 2003. Despite the fact that the Act contained the exception to

⁶¹ Article 8 of the Marrakesh Treaty;

⁶² Dr. Harsha Cabral, 'Intellectual Property Law In Sri Lanka';

⁶³ <http://www.copyrighthistory.com/anne.html>

copyright infringement in use for educational purposes,⁶⁴ there was no direct provision creating an exception in the case of print disability citizens. In this context as recognition of the equal rights of those with visual disabilities, the Copyright (Visually Impaired Persons) Act 2002 and the Copyright and Rights in Performances (Disability) Regulations came into force in 2014, making laudable developments in this area of law.

Section 31A (1) of the Act enables Disabled persons to use copies of copyrighted works for personal use and specifically states that such use will not infringe copyright and encompass situations where not only the copy is made by the disabled person but also where copy is made available by a person acting on behalf of such disabled person⁶⁵ , in which case such use ought to be characterised by personal use and are not commercially available and the sum charged for provision to disabled be confined to the cost of supplying copies.⁶⁶

In a context where the originator or the British predecessor to the current Sri Lankan Copyright law has revised its laws to accommodate the balancing needs to visually impaired and the rights of the copyright owners, similar revision in the IP Act of Sri Lanka is a sine qua non in the present day of technological advancement.

⁶⁴ Chapter 3, Acts permitted in relation to copyright work of The Copyright, Designs and Patents Act of UK , http://www.legislation.gov.uk/ukpga/1988/48/pdfs/ukpga_19880048_en.pdf ; <http://www.legislation.gov.uk/>;

⁶⁵ Section 31 A (2) of The Copyright and Rights in Performances (Disability) Regulations 2014;

⁶⁶ Section 31 A (3) of The Copyright and Rights in Performances (Disability) Regulations 2014;

2.3.2. The Case of United States of America

In a surprisingly short period of time US has evolved from an industrialised to an IT and services based society, marked by rapid technological change and the ability to produce and receive information has grown exponentially⁶⁷. The copyright law of the USA has evolved⁶⁸ in tandem with the dynamics of the time into the modern digital era.

Title 17 of the United States Code contains provisions on copyright law⁶⁹, while the copyright Act of 1976 provides the basic framework for the current copyright law⁷⁰. Subject to the fair use concept as defined in the law, Section 106 grants exclusive rights to owner of copyright to do or authorise to reproduce copies, create derivative work, distribute copies and engage in commercial user of the copyrighted work⁷¹. Section 107 contains limitation to such exclusive rights of the owner, where copyrighted work is reproduced in copies or phonocords for purposes such as criticism, comment, news

⁶⁷ C Joyce, W Patry, MA Leaffer, P Jaszi (1998) 'Copyright law', Chapter 1, Introduction to Copyright Law -pp 1

⁶⁸ Copyright Enactments of 1783 to 1973, Copyright Act of 1790, Copyright Act of 1909, Copyright Act of 1909(Revised to Jan. 1, 1973) <http://www.copyright.gov/>-US Copyright Office;

⁶⁹ Chapter 1-8 and 10-12 of Title 17 of the US Code;

⁷⁰ Copyright Law of the United States And related laws contained in Title 17 of the United States Code;
<http://www.copyright.gov/>

⁷¹ Section 106 of Title 17 to US Code;

reporting, teaching (including multiple copies for classroom use), scholarship, or research which will not constitute of an infringement of copyright.

The Case of Sony Corp of America V. Universal City Studios, Inc., 464 U.S. 417 (1984) is an instructive case in point.

Universal City Studios Incorporation and Walt Disney Productions petitioned Sony Corp of America who manufacture and sell home video tape recorders which enable consumers to record copyrighted motion pictures and audio visual work. The District Court held in favour of Sony Corp on the basis that non-commercial and home use character of recording was a fair use of copyrighted works and therefore did not constitute copyright infringement. Justice Stevens observes that; "Even unauthorised uses of a copyrighted work are not necessarily infringing. An unlicensed use of the copyright is not an infringement unless it conflicts with one of the specific exclusive rights conferred by the copyright statute. Twentieth Century Music Corp. v. Aiken, 422 U.S., at 154-155. Moreover, the definition of exclusive rights in Section 106 of the present Act is prefaced by the words "*subject to sections 107 through 118.*" Those sections describe a variety of uses of copyrighted material that "*are not infringements of copyright*" "*notwithstanding the provisions of section 106*".⁷²

⁷² https://www.law.cornell.edu/copyright/cases/464_US_417.htm- Sony Corp Of America V. Universal City Studios, Inc., 464 U.S. 417 (1984);

The US Court's judicial pronouncement by holding with Sony Corp that home use or time-shifting is fair use is favourable to control the monopoly of copyright owners and for the benefit of consumers including and especially those with disabilities.⁷³

Introduction of Section 121 is a watershed in canvassing the right to education and information of the visually impaired as it created the most important exception for the benefit of visually impaired.

Section 121 reads that *“it is not an infringement of copyright for an authorised entity to reproduce or to distribute copies of a previously published, non-dramatic literary work if such copies are reproduced or distributed in specialised formats exclusively for use by blind or other persons with disabilities.”*

The term “specialised formats” is defined as (a) braille, audio, or digital text which is exclusively for use by blind or other persons with disabilities; and (B)with respect to print instructional materials, includes large print formats when such materials are distributed exclusively for use by blind or other persons with disabilities.⁷⁴

Section 121 has two notice requirements; it provides that the copies or phonorecords produced under the exemption shall (1) “bear a notice that any further reproduction or

⁷³ Making a copy of a copyrighted work for the convenience of a blind person is expressly identified by the House Committee Report as an example of fair use, with no suggestion that anything more than a purpose to entertain or to inform need motivate the copying; https://www.law.cornell.edu/copyright/cases/464_US_417.htm;

⁷⁴ Section 121 (d) (4) of US Code;

distribution in a format other than a specialised format is an infringement,” and (2) “include a copyright notice identifying the copyright owner and date of the original publication.

The sweeping progressive US laws has been as a result of strong, persistent and a long-drawn out battle and lobbying by social organisations such as American Foundation for the Blind (AFB). Piece-meal law reforms were the former pattern of the US Federal government due to pressures to create social bargain and help people with *bonafide* disabilities and who make a minimal impact on the normal commercial process of selling books.⁷⁵

2.3.3. New Zealand

Upon an examination of New Zealand’s Copyright Act of 1994⁷⁶, one would perceive a comprehensive set of rules providing for standard to novel features, including qualification for copyright⁷⁷, ownership of copyright, crown copyright, instances of primary infringement of copyright, secondary infringement of copyright⁷⁸ and acts permitted under the Act.⁷⁹

⁷⁵ Jim Fruchterman, ‘The Case for Copyright Exceptions and Fair Use’;
<http://benetech.org/2014/01/17/the-case-for-copyright-exceptions-and-fair-use/>

⁷⁶ <http://www.copyright.org.nz/legislation.php>;

⁷⁷ Section 17 of New Zealand’s Copyright Act of 1994;

⁷⁸ Section 29-39 of New Zealand’s Copyright Act of 1994;

⁷⁹ Part 3 of New Zealand’s Copyright Act of 1994;

The Act grants a wide interpretation to ‘a person with print disability’ *that is if he or she (a) is blind; or (b) suffers severe impairment of his or her sight; or (c) is unable to hold or manipulate books; or (d) is unable to focus or move his or her eyes; or (e) suffers a handicap with respect to visual perception.*⁸⁰

The Copyright Act of New Zealand creates the important exception in the case of print disability by virtue of Section 69 of the Acts. Section 69 is one among other acts permitted for purposes of ‘public administration’. The Act, unlike the US and UK law vests with a body prescribed by regulations made under the Act to “make or communicate copies or adaptations of published literary or dramatic works for the purpose of providing persons b) copies are provided only to persons with print disabilities; c) who have a print disability with copies that are in braille or otherwise modified for their special needs, without infringing copyright in those literary or dramatic works”.⁸¹

The conditions attached to exercise of authority under 69 (1) are laid down in 69 (2) which includes a) reasonable efforts made to obtain a copy in Braille or otherwise modified as required by the person/s with visual disabilities within a reasonable time at an ordinary commercial price, but failed to do so, b) copies are provided only to persons with print disabilities; c) where any third party copies or adapts the copyrighted work, the

⁸⁰ Section 69 (04) of New Zealand’s Copyright Act of 1994;

⁸¹ Section 69 of New Zealand’s Copyright Act of 1994;

prescribed body will take all reasonable steps to notify the owner of the copyright in the work of the making of the copy or adaptation d) the payment to the Body shall not exceed a sum equal to the total cost of the production of the copy and reasonable general expenses of the prescribed body.⁸²

Thus New Zealand qualifies as being well down the track towards complying with the terms of the Marrakesh Treaty. Lack of definition in the Act pertaining to the position on importing and exporting accessible copies posed a hindrance. However, the cross-border provision in the Marrakesh Treaty is expected to make it easier for New Zealand to obtain, as well as share, accessible material. Furthermore Copyright Licencing of New Zealand (CLNZ) has been working with the Royal New Zealand Foundation of the Blind (RNZFB) on a project known as TIGAR (*Trusted Intermediary Global Accessible Resources*) that seeks to facilitate cross-border transfer of copyrighted works in accessible formats among various national institutions or Trusted Intermediaries (TIs), notably national libraries serving those with print disabilities.⁸³ This is yet again a step in the right direction towards improving access in the case of blind and visually impaired community in New Zealand and presents a valuable guidance for law reform in Sri Lanka.⁸⁴

⁸² Section 69 (2) of New Zealand's Copyright Act of 1994;

⁸³ Publishers Association of New Zealand, <http://www.publishers.org.nz/publishers-and-visually-impaired-readers-in-new-zealand-paula-browning-asks-how-well-do-you-know-section-69-of-the-copyright-act-2/>

⁸⁴ For instance the present Companies Act No 07 of 2007 has been modeled on the New Zealand Law.

2.3.4. The Law of India

The Indian Copyright Act of 1957, creates a copyright office and Copyright Board⁸⁵ that acts under the guidance and supervision of Central government of India⁸⁶ and provides for registration of copyright unlike the case of Sri Lanka. Section 51 provides conditions for infringement of copyright, while section 52 set outs the exceptions of fair use not amounting to infringement of copyright.

However the Indian Copyright Act, failed to address any rules regarding converting any print, audio to an accessible format for the visually impaired. Under these unfavourable circumstances, conversion of a book into accessible formats such as Braille, Daisy, audio books, mobile accessible fromats etc., for the benefit of print disabled could be undertaken only by the owner of copyright or with the permission of the owner of copyright. It is in this backdrop that seven non-profit organisations⁸⁷ working together as the Publication Access Coordination Committee (PACC) voiced their concern to the Indian Government pressing the need to amend the Indian Copyright Act.

⁸⁵ Section11 of the Indian Copyright Act 1957;

⁸⁶ Chapter 2, Section 9 of The Indian Copyright Act 1957;

⁸⁷ Blind Graduates' Forum of India, Mumbai, Blind Persons' Association of India, <http://www.bpaindia.org/> I, Dr K M Shah Self Vision Centre, Ramnarian Ruia College, Mumbai , Helen Keller Institute for the Deaf and Blind, Indian Association for the Visually Handicapped , National Association for the Blind, India , Xavier's Resource Centre for the Visually Challenged, WIPO Standing Committee on Copyright and Related Rights 15th Sessionhttp://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_7.pdf

According to the official census 2001 by the Government of India, the number of visually challenged people exceeded to an unmatched figure of ten million. Finally, the need for change was taken up in the Indian Copyright Act by providing in section (52(1)(zb) a new copyright exception for the benefit of persons with print disabilities, including persons with visual impairment and dyslexia. This amendment did away with the necessity to seek the consent of the publishers for converting their books into accessible formats. It would no longer be an infringement of copyright for any person or any organisation working for the benefit of the persons with disabilities and on a non-profit basis in India to create accessible format copies or distribute them to persons with disabilities who cannot enjoy the work in their normal formats.⁸⁸ Further, the new Section 31B allows any person working for the benefit of the persons with disabilities on a profit basis or for business the ability to undertake conversion and distribution after obtaining a license from the Copyright Board in India in accordance with the procedure laid down in that section.

In the light of the above, one could not more agree on the need to reform the IP Act of Sri Lanka creating an exception for the visually disabled persons to access copyrighted material in alternative forms. The analysis of the progressive laws of England, the USA, New Zealand and India are all instructive and provides guidance for suitable reform in Sri Lanka. The Marrakesh Treaty obliges all state parties to enact laws to except use of copyrighted material by the visually impaired as part of 'fair use' and in fulfilment of the right to education and equal opportunities. However, progressive the laws maybe in the

⁸⁸ Priya R. Pillai 'Accessible Copies of Copyright Work for Visually Impaired Persons in India' ;

context of given jurisdictions, outright and direct importation of such laws to the Sri Lankan context cannot be regarded as desirable. The local conditions may differ to those abroad, hence suitable provisions out that would fit the local conditions to form a coherent and practicable reformed law of copyright is much desired.

Chapter 3

Methodology

3.1. Qualitative Approach

The success of the findings and recommendations given in the pursuing Chapter is directly linked to the research methodology used in the exploration of the aim and objectives of this project namely that the prevalent copyright law of Sri Lanka need revision in light of relaxing exclusive rights of copyright owners and to provide access to such copyrighted material to those with printing disabilities. The aim and objectives requires an in-depth *qualitative method* in the data collection process, analysis of legislation and judicial pronouncements.

Qualitative Research Methodology enables to understand the research objective in relation to some aspect of social life, and is generally devoid of numeric and analysis of data.⁸⁹

⁸⁹ A Guide to Using Qualitative Research Methodology,
<http://fieldresearch.msf.org/msf/bitstream/10144/84230/1/Qualitative%20research%20methodology.pdf>

3.2. Method of Data Collection and Date Analysis

The development of the aim and objectives or the research topic was ideally qualitative in nature. Therefore the method of data collection was by way of personal individual and group interviews held with persons with visual disabilities in the community and through references to social discourse and experiences shared in the World Wide Web by various organisations focussed on advancing the lives of visually disabled community around the world. The data so collected helped to analyse the hardships being undergone by those with visual impairment due to the denial of access to copyright material under the prevalent intellectual property laws of Sri Lanka and around the world.

In the year 2013, the Law Students Association of Sri Lanka (LSASL) held a Legal Aid Clinic for the blind in the area of Kalutara, Sri Lanka at which many a visually impaired persons approached the LSASL team of lawyers not only with legal issues that personally affected their lives but on a wider scale requiring law reform which enable easy and legal access by them to copyrighted material.

The aim and objectives and characteristics of this research invited, primarily collection of qualitative data for successful research by way of interviews and web-based research and secondarily detailed analysis of the problem which is essential to finding solutions to the problem at hand.

A comparative approach adopted in the dissertation research is unmistakable for a reader of this paper. The updated and repealed legislation of progressive jurisdictions are compared with each other and with the prevalent laws of Sri Lanka. Therefore many a government web portals, text books, articles and other official records enabled comprehensive research of the chosen laws in the jurisdictions along with commentaries and critiques of the progressive laws of England, the USA, New Zealand and India that proved helpful guides in analysing the provisions of each law and comparisons for purposes of extracting the best for guidance in copyright law reform in Sri Lanka.

Use of a traditional search methodology such as qualitative method enables analysis of the laws accompanied by a comparative analysis on the developments made in other legal systems and jurisdictions and thereby to make appropriate observations in support of finding balanced solutions to the issue at the heart of the research.

The objectives of the research are descriptive, explanatory and exploratory. Descriptive due to fact that the current problem is described by way of facts, explanatory as the connection for law reform and the existing problem of denial of access to copyright material by the visually impaired is explained and exploratory since the progressive laws of foreign jurisdictions are investigated and analysed.⁹⁰

⁹⁰ http://www.seu.ac.lk/public_access/Research_Methodology.pdf;

The main advantages inherent in a qualitative research methodology are that the methods of data collection assists in generating rich and detailed data and enables to extract and retain perspectives of participants unlike in a quantitative research methodology. In a quantitative methodology as opposed to a qualitative methodology, quantitative methodology is based on numeric and analysis of statistics. Therefore qualitative methods are not objectively verifiable which, is an advantage under quantitative method.

The qualitative methodology is not devoid of disadvantages, which are that data collection is time consuming and requires considerable effort and labour. Moreover conduct of interviews of individuals and social groups may not be representative of natural and widespread behaviour but of specific circumstances. It often happens that observations of the research may be biased that will allow independent and balanced policy making and which does not allow firm conclusions.

Chapter 4

Analysis and Discussions of Findings

The foremost section of Chapter 2, analysing the shortcomings of the IP Act of Sri Lanka together with the need to assist realise the rights of persons with visual disabilities, have established the necessity to reform the prevalent copyright law of the country.

Sri Lankan Copyright Law is not crystallised in a separate copyright Act in contrast to almost all progressive jurisdictions as discussed in Chapter 2 of this paper, instead the copyright law consists of Part II of the Intellectual Property Act. In the same vein, unlike the laws in the USA or New Zealand but following the British model, there is no registration procedure for copyright protection in Sri Lanka. Therefore, given the increasing significance of copyright in the Sri Lankan economy and in particular entertainment industry in the age of Information Technology, it is ideal that a separate act be enacted for copyright law with provision for registration of copyright, the implementation of which incentivises the creativity vital to a developing economy with increased copyright activities in the public interest.

Despite the fact that the Copyright, Designs and Patents Act of UK as originally enacted in 1988 as well as the Indian Copyright Act of 1957 contained no exception for access to copyright material, timely amendment were enacted in the respective legal systems to include access by those with print disability. These legal systems are good examples and set the tone for the island which inherits the British common law tradition to enact copyright law reforms, which is a need of the hour.

A prospective exception in the IP Act of Sri Lanka, may contain an exception akin to that in Section 121 the USA Code, which provides that whenever a copyrighted work is reproduced or distributed in a special format suited to the visually impaired, such work which will accompany a notice acknowledging that a further reproduction or distribution will constitute an infringement of the copyright. Moreover such notice shall identify the copyright owner and date of original publication. This provision seeks to balance the empowerment of the visually empowered people on the one hand and the rights of the copyright owners on the other hand. Any government body appointed under a prospective copyright amendment law could be given authority to issue copyrighted works in alternative formats to those in need along with a legal notice prohibiting further dissemination, thus protecting the economic rights of the creators of copyright.

It is instructive for Sri Lankan IP Act to contain a wider interpretation of 'persons with printing or visual disabilities' modelled on the definition afforded in the New Zealand's Copyright Act of 1994. Accordingly the IP Act of Sri Lanka could interpret a *'person with*

*print disability' if he or she (a) is blind; or (b) suffers severe impairment of his or her sight; or (c) is unable to hold or manipulate books; or (d) is unable to focus or move his or her eyes; or (e) suffers a handicap with respect to visual perception.*⁹¹

Copyright law ought not to remain static since its enactment but requires modification consonant with the dynamics of the times and especially in tune with the technological advances in the present day. Copyright exception for visually impaired may not fall under the vague concept of 'fair use', which requires law reform and express assertion of the rights of the visually impaired persons.

It is of paramount importance that, while the concept of 'fair use' is vaguely set out in the IP Act with criteria to determine whether a particular use is an infringement or an instance of fair use, the Sri Lankan judiciary is expected to give purposive interpretation of the concept thereby balancing the rights of copyright owners on hand and the other the rights of the visually impaired, as the judiciary of the USA has succeeded in doing so as evidenced in the celebrated case of Sony Corp of America V. Universal City Studios.⁹²

⁹¹ Section 69 (04) of New Zealand's Copyright Act of 1994;

⁹² Ibid pp 33

The opponents to copyright reform under discussion argues that once an exception is created in the IP Act for the benefit of the visually impaired, this will lead to the opening of flood gates which will prevent due financial gain to copyright owners thus discouraging creators. Therefore fear that excessive illegal commercial user of copyrighted work will ensue by relaxing the laws for visually impaired persons can be wiped out by adopting the public administration element as provided for in the New Zealand Act. Under the New Zealand's Copyright Act, a public body is appointed under the Act to disseminate copyrighted works for conversion into special formats and thereby grant access to the visually impaired persons. In an attempt to balance the economic rights of copyright owners, the New Zealand's Copyright Act seeks to impose conditions prior to implementation of fair use hereunder. Accordingly the public body is obligated to obtain a copy in Braille or otherwise modified as required by the person/s with visual disabilities within a reasonable time at an ordinary commercial price. Moreover where any third party copies or adapts the copyrighted work, the prescribed body will take all reasonable steps to notify the owner of the copyright in the work of the making of the copy or adaptation. The public body too is obliged to provide such copies at a sum equal to the cost and including expenses of the public body.

The Copyright Act of India allows fair user of copyright work without the licence of the authors if accesses by visually disabled or other persons on behalf of those with visual disabilities. However such third parties who engage in making copies or adaptations of copyright work on special formats for visually impaired on a commercial basis are required to obtain the approval of the Copyright Board appointed under the Act.

It should be noted that while sweeping allowances are given to visually impaired in relation to copyright work, this may impede on the rights of copyright owners if continued unchecked. Therefore the appointment of public bodies, are intended to provide prohibition and checks and balances on unauthorised commercial user of such copyrighted work obtained on the pretext of assisting the visually disabled in reliance of a copyright exception. Nevertheless, practical problems associated with a public body would be the inherent weaknesses in the local bureaucratic order which may render the rights of visually impaired nugatory. Therefore, it is recommended that while individual use by visually impaired persons be allowed for private use without reference to any external body, in the event any third party or organisation undertakes to provide copyrighted material in special formats to the blind, this ought to require a swift and reliable procedure to obtain a licence from a public authority to enable latter to supervise its activities for protection of rights of copyright owners as well as the rights of the blind.

Under the USA law “authorised entities” meaning, non-profit organisation or governmental agencies whose primary mission is to provide specialised services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities are granted with similar authority.

The lobbyists for copyright law reform also face the challenge of lobbying for Sri Lanka to accede to the Marrakesh Treaty which requires domestic laws to create an exception for the visually disabled. Thus if when acceded, this would grant further support for adopting special provisions to guarantee the rights of visually impaired to education, information and to access social, economic, cultural and political opportunities afforded by copyright work in the context of a digital age.

Despite reforms in the copyright law, the visually impaired community in Sri Lanka still face the challenge of accessing copyright work in specialised formats. For instance braille books and large print books are not widely available and may involve high costs. An average citizen of Sri Lanka and especially a visually impaired person with limited employment opportunities may find access to the special formats such braille or audio books, or e-books, or software programmes and other assistive technologies rather costly.

The emergence of 'Creative Commons licences' have empowered the authors to use these to share their original works in suitable open licences⁹³ in advanced economies; however these theories are still unfamiliar amongst the authors and publishers in the developing parts of the world including Sri Lanka. As a result such novel concepts have not been embraced by developing countries including Sri Lanka in their efforts to equip

⁹³ United Nations Educational, Scientific and Cultural Organisation (UNESCO), 'Intellectual Property Rights', <http://unesdoc.unesco.org/images/0023/002322/232208E.pdf>;

the blind and visually impaired community with reading materials readily available for print readers. In a world no longer dominated by the printed word, blind people in Sri Lanka still encounter obstructions accessing information on print media as well as other novel assistive technology. Therefore, the blind focussed organisations in Sri Lanka and the government body which may be created under copyright law reform could connect with the organisations in the developed world such as the USA, New Zealand and Canada to receive financial and more particularly technological assistance with the hope of empowering the visually disabled in the country. It is the fervent belief that linking organisations across borders could enable sharing of technology for the advancement of the education of visually blind. The following section briefly sets a success story in the USA.

4.1. Success Stories

Bookshare.Org is one unique organisation in the USA that has made it legally viable via the introduction of the copyright exceptions enshrined in section 107 and 121 of the US Copyright Law. Bookshare.Org, based in California, aims to provide a vast library of low cost scanned books instead of a small library of high quality digital books⁹⁴. It functions as an online community allowing users with print disabilities the opportunity to crowdsource and legally share books. Bookshare.Org currently has a membership exceeding 250,000 with a collection of 220,000 accessible books and it is dedicated to

⁹⁴ WIPO Standing Committee on Copyright and Related Rights 14th Session;

http://www.wipo.int/edocs/mdocs/copyright/en/sccr_14/sccr_14_5.pdf;

providing its members accessible books for less than one-fifteenth of the cost of other traditional methods. The ability to make books accessible to the visually impaired community is the biggest plus point as they are the people who desperately need new solutions but are often least able to afford them. With its growing popularity, each month thousands of books are being added to its virtual store by more than 80% of the publishers under voluntary permission agreements permitted by the Chafee amendment.

The drawbacks faced by Bookshare.Org are the absence of reference to some important accessibility issues such as making the content of pictures, math equations and diagrams available in alternate forms, like textual descriptions or tactile graphics.⁹⁵

⁹⁵ Jim Fruchterman, 'The Case for Copyright Exceptions and Fair Use';
<http://benetech.org/2014/01/17/the-case-for-copyright-exceptions-and-fair-use/>

Chapter 5

Conclusion

5.1. Sri Lanka – the way forward

Addressing the 51st Session of the WIPO Assemblies on 23rd September 2013, Permanent Representative of Sri Lanka to the UN in Geneva; Ambassador Ravinatha Aryasinha endorsed the view that intellectual property has a crucial role to play in enriching the lives of vulnerable sections of humanity and creating greater opportunities for growth and prosperity. Whilst adding remarks to the conclusion of two successful diplomatic conferences, the Beijing Treaty on Protection of Audiovisual Performances in June 2012 and the Marrakesh Treaty on Visually Impaired Persons in June 2013, the Permanent Representative expressed the view that Sri Lanka is looking forward to ratifying these two important instruments to better strengthen the international IP regime.⁹⁶

⁹⁶ Ambassador Ravinatha Aryasinha of Permanent Mission of Sri Lanka to the United Nations, Geneva, Switzerland, <http://www.lankamission.org/intellectual-property/758-sri-lanka-believes-ip-is-an-important-catalyst-for-economic-and-social-empowerment-2.html>;

Nearly two years on, there is hardly any progress to amend the intellectual property law of Sri Lanka. The Marrakesh Treaty requires countries to adopt a domestic copyright exception for print disabled people as a condition precedent to the ratification of the Treaty. This principle is encompassed in Article 4 of the Treaty. Therefore, the countries considering ratification of the Marrakesh Treaty must ensure the domestic laws to provide a complete leverage for blind people and domestic organisations dedicated towards the betterment of the blind community to make accessible format books without the need for a licence from the holder of copyright. The Treaty also provides for the creation of an international import/export regime for the exchange of accessible books across borders, which is of importance to a developing country such as Sri Lanka with the need for latest technology at a lower cost.

In Sri Lanka more often than not, owners of published work function with financial constraints. In majority of cases the authors and publishing agencies exhibit unwillingness or disinterest to either undertake the conversion and sale of such accessible format copies or permit such conversion, for reasons ranging from lack of profitability to limited target audience.

In the midst of such a situation, expansive and compatible provisions in the domestic legislation can assist to place the visually impaired community on a unique platform by enabling access to equal opportunities of education, employment or otherwise.

Therefore, it is vital to better equip non-profitable organisations, libraries, educational institutions, schools, colleges and universities in co-operation with a government appointed body in Sri Lanka, to actually convert with the aid of the latest technology and deliver the accessible books to people with disabilities in reliance of the copyright law exception with the objective of full social inclusion of the visually impaired community.

In the process of amending domestic legislation, problems in reaching a consensus on the precise form of amendments are inevitable. High level official recognition, the active involvement of the official body in charge of the subject along with the interests and demands of the society, civil organisations and the input of various other stakeholders are indispensable in finalising a workable solution⁹⁷ to effect changes in the copyright law of Sri Lanka. Therefore, the Law Commission of Sri Lanka is the best forum on whom the task will fall, where the public could voice their concerns through submissions and transparency and intellectual discourse on the subject could be pursued followed by presentations to the legislature for law enactment.

It is true that the national legislators have considerable discretion and authority to determine appropriate legislative reforms being the elected representatives of the people. However in the context of Sri Lanka, the legislature need to be alerted and pressured to enact law reform to cater to the needs and expectations of an underprivileged segment of the society. Therefore the initiative in implementing changes

⁹⁷ A case study by the World Intellectual Property Organisation (WIPO);http://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_7.pdf;

to the law is required from the grass-root level and from all segments of the society voicing the needs of the visually impaired community in the country.

The Marrakesh Treaty and various other progressive laws in other countries as discussed in this paper have enabled and facilitated to promote access to published Works by visually impaired and print disabled by relaxing the rights of the copyright owners. These positive developments around the globe instructs and provide guidance to the island to utilise the constitutional law to make special provisions to enact reforms to the copyright law to advance the lives of the print disabled persons and to assist them realise their constitutionally guaranteed rights on a par with the average abled citizen and human beings. In that light, enactment of an exception clause to the rights of copyright owners in the Intellectual Property Act of Sri Lanka is a *sine qua non*.

The current study is one important step in the lobbying for copyright reform in favour of visually disabled, which will continue unabated with renewed vigour despite the passage of time until desirable amendments to the law are effected; modelled on the progressive aspects of foreign jurisdictions, adapted to the local conditions along with successful implementation mechanisms.

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