

RIGHT TO KNOWLEDGE FOR PERSONS WITH PRINT IMPAIRMENT: A PROPOSAL TO AMEND THE INDIAN COPYRIGHT REGIME

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INTRODUCTION

The Constitution of India guarantees all its citizens fundamental rights to life, to dignity, to speech and expression, to education and information. It is estimated that India has 100 million disabled persons¹ who are unable to fully exercise their fundamental rights guaranteed by the Constitution as their access to printed material is almost wholly restricted. Such disabled persons include the visually impaired, persons with dyslexia and those suffering from paralysis among others, all of whom are ‘Persons with Print Impairment’.² Persons with Print Impairment can access printed material only when it is converted into older formats, such as Braille or the newer and more flexible and mainstream formats like audio and electronic formats including .txt, MS Word and pdf files. Although recent technological developments have made such conversion possible, there are, among other barriers, certain legal impediments that restrict their access to such conversion or to the use of such converted works. Under the present legal regime, the conversion and use of the printed material in its converted form requires the permission of the copyright holders that is, more often than not, cumbersome and highly cost ineffective. Currently only five per cent of all the published works are produced in accessible formats that visually impaired and other print disabled people can read, such as large print, Braille and audio.³ Also known as a “Book Famine”, this is constituted by the condition wherein most of the works that are available in accessible formats are to be found in a few specialist organizations around the world which have scarce resources. In order to maximize these and increase the percentage of books available to Persons with Print Impairment, these organizations need to be able to legally share their books across

¹ India has approximately 36 million visually impaired persons as per the World Blind Union. <http://www.worldblindunion.org/en/>. India has approximately 60 million persons with dyslexia <http://en.wikipedia.org/wiki/Dyslexia#Incidence>. India has approximately 2.4 million persons with cerebral palsy. http://en.wikipedia.org/wiki/Cerebral_palsy.

² Persons with Print Impairment refer to all persons with any form of disability whatsoever, who are unable to access material in printed form as comfortably, flexibly and conveniently as persons without any disability. Persons with Disabilities is a broader term for persons with any form of disability whatsoever, who are unable to access any material in its normal form (whether in print or otherwise, such as, cinematographic works, audiovisual works, etc.) as comfortably, flexibly and conveniently as persons without any disability (for instance, persons with hearing impairment). All Persons with Print Impairment are necessarily Persons with Disabilities although the converse is not true.

³ “World Blind Union general statement to WIPO 2009 General Assembly” in <http://www.keionline.org/node/623> (last visited November 20, 2009).

national borders. However, due to the national nature of copyright law, they are unable to do so. The World Blind Union (WBU) has recently proposed a treaty for the blind, visually impaired and other reading disabled, which seeks to harmonize limitations and exceptions internationally to enable exchange of knowledge and information in accessible formats for the print impaired persons at a global level.⁴ It is submitted that the law governing copyright in India in its present form hinders access by print impaired persons to works in alternative accessible formats since it does not provide sufficient exceptions to allow for conversion and distribution of works in accessible formats. In broader terms, the current copyright regime, in fact, hinders the process of dissemination of information rather than promote it. In view of the same, this paper seeks to highlight the importance and the urgency of making changes to the existing legal regime by expanding the scope of exceptions and limitations to copyright under the Indian Copyright Act, 1957 (Copyright Act), to enable print impaired persons to access copyrighted works in convenient accessible formats.

This paper argues that the need for a provision in Indian copyright law for exceptions to exclusive rights of copyright holders, for the benefit of print impaired persons arises out of the state's obligation to grant them access to exercise their rights and to enable them to partake of their entitlements. It is not merely a suggestion or a great idea to moot but the duty of the state and a step towards reparation of the injury caused to persons with print impairment by denying them their rights and fundamental freedom guaranteed to them under the Constitution of India. There is more than one angle to be examined in order to buttress a view such as the one stated above. Part I of the paper examines the history of copyright law in order to determine the objective underpinning its existence. The current frame of perception of intellectual property law is through the frame of property rights which grant greater rights to the authors of the work. Part I examines the public interest, development of arts, since, future works and access to knowledge objectives underpinning the existence of intellectual property law regimes. It questions the current legal regime regulating copyright in works on the basis of the extent to which it balances

⁴ "World Blind Union general statement to WIPO 2009 General Assembly" in <http://www.keionline.org/node/623> (last visited November 20, 2009).

the interests of all stakeholders (creators, owners, users and intermediaries) in the process of its interpretation and enforcement. Part II of the paper studies the rights for persons with print impairment guaranteed under the Constitution of India. It also examines national laws providing for people with print impairment to build up a case for amending the Copyright Act to include exceptions to rights of copyright owners for the benefit of Persons with Print Impairment. Part III of the paper studies the various international treaties and conventions setting global standards for copyright law which incorporate exceptions to exclusive rights for the benefit of print impaired persons. Part IV of the paper talks of the various considerations to be kept in mind while incorporating exceptions to copyright in the Copyright Act.

PART I: PHILOSOPHY OF COPYRIGHT: BALANCING STAKEHOLDERS' INTERESTS

For several years publishers have argued at length that copyright is a simple mechanism provided for protection of the authors' rights. Authors own the creations and therefore, they must be free to control them. A one-sided view such as this totally neglects the interests of the users of those works and copyright law is, in fact, interpreted to their detriment. In light of this, it is important to examine the history and evolution of copyright law to determine if public interest and development of arts and science also form the rationale of the system of copyright.

The system of copyright was born in England at the time of introduction of the printing press arising out of concerns due to proliferation of works which was now possible because of the printing press. As book selling and publishing became a profitable venture the stationers (publishers) sought to protect their trade and the copyright system was used by them to serve their needs and establish their monopoly. In the process, the authors (creators) of the work did not have their interests considered and they did not hold copyright. The Company of Stationers which received its legitimacy from the Crown became enmeshed in politics and ultimately sought to control the press leaving behind the initial objective of controlling the book trade. The general sense was that the stationers had abused their monopoly and thus the book trade went from being a closely regulated and monitored activity to one which was open and free for all. The stationers petitioned against such a move and out of such petition, the Statute of Anne was born in 1709. While it sought to restore order in the book trade, its purpose was also to prevent the stationers from abusing their monopoly. Thus, it allowed people other than stationers (the authors) to hold copyright and they also limited the term of copyright of the stationers which was hitherto perpetual. The stationers were obviously unhappy and circumvented the Statute of Anne by using the authors as intermediaries and argued that authors had a natural right of ownership as part of the common law.⁵

⁵ See John Ewing, "Copyright and Authors", *First Monday*, Vol. 8, Issue 10, 2003.

Then came the landmark ruling of the House of Lords in 1774 in the case of *Donaldson v. Beckett*⁶ which gave a mixed verdict as far the interest of the book sellers was concerned. While the House of Lords did rule that authors indeed had a common law copyright over their works and thus a perpetual monopoly in their or their assignees' favour (which the book sellers were happy about) it also held that the common law copyright was superseded by the statutory right (laid down in the Statute of Anne) and thus, the copyright was limited by the provisions of the statute. Thus, by this time, it was settled and the public was firmly behind the idea that copyright was a statutory right and that perpetual monopoly was not very desirable.⁷ Once the statutory rights expired, the work was available to all. The Copyright Act, 1842 sought to extend copyright protection beyond the old 28 year period to last till the lifetime of the authors. Thus, copyright slowly moved from being a publisher's right to being an author's right. The 1842 Act, in fact, clearly espoused the cause of public interest element of copyright:

*“Whereas it is expedient to amend the law relating to copyright, and to **afford greater encouragement to the production of literary works of lasting benefit to the world.**”*
(Emphasis Supplied)

The evolution of modern copyright began to take shape and debates moved from monopoly and registration rights to the duration and nature of protection being granted by the copyright law. If the length of protection was greater, it would take longer to fall in the public domain. Thus, ideas of copyright law to balance the interests of the users and the authors began to take shape and moved away from being solely concerned with granting rights to publishers. The public interest element of copyright gained significance as the focus shifted towards the interests of the users and the harm caused to the public by extending the rights in a work for longer periods.⁸ It is opined that an examination of copyright cases which followed the Statue of Anne indicates that many uses of copyright

⁶ 1774 1 Eng. Rep. 837.

⁷ See Mark Rose, “The Author as Proprietor: *Donaldson v. Beckett* and the Genealogy of Modern Authorship”, 1988 in Brad Sherman & Alain Strowel (Eds.), *Of Authors and Origins – Essays on Copyright Law*, (1994: Oxford University Press), p.23.

⁸ See Melissa De Zwart, “A Historical Analysis of the Birth of Fair Dealing and Fair Use: Lessons for the Digital Age”, 2007, *Intellectual Property Quarterly*, 1, 60.

material which may be considered an infringement in the current scenario were originally considered “fair” on the ground that such acts promoted development and use of printed material for public good. This, in fact, marked the beginning of the evolution of the concept of “fair use” as an exception to copyright.

The Statute of Anne and the concept of copyright in English law formed the basis for the evolution of copyright law in the United States of America and much later, in India. The Statute of Anne was used as a model for the Federal Copyright Act of 1790 which began with the opening words from the Statute of Anne: “*An Act for the encouragement of learning.*” The authority for the 1790 Act was in the Constitution of the United States Article I, Section 8, Clause 8, which stated that the idea was “*to promote the **progress of science and useful arts**, by securing for limited times, to authors ... the exclusive right to their respective writings.*” The public interest/public good element (learning) is conspicuous. The system of copyright was not an arrangement solely to safeguard the interests of the publishers but was an arrangement to balance interests of all the parties involved in order to espouse the greater cause of “encouragement of learning”. The copyright in an author was secured for “a limited time”, again with the objective of promoting “the progress of science and useful arts”. In 1834, the US Supreme Court held that the copyright of an author in his work subsisted only by virtue of statute and not by virtue of common law.⁹

In the later years copyright came to encompass a wide area of creative works – art, performances, musical recording, video recording, computer programmes, photographs, etc. The system of copyright also got entangled in a complex mesh of international treaties and negotiations associated with it, cross-country movement of creative works in new formats with the development of technology. Thus, the goal of promoting scholarship, “progress of science and useful arts” was but a minor concern and in interpretation, the entire objective underpinning the system of copyright was lost or conveniently neglected to secure vested interests.¹⁰

⁹ *Wheaton v. Peters* (1834) 8 Pet. 591.

¹⁰ See John Ewing, “Copyright and Authors”, *First Monday*, Vol. 8, Issue 10, 2003.

The current debate on whether copyright is about authors' rights or public interest is, in fact, a question about balancing the interests of various stakeholders of the copyright system. The system of copyright evolved to be a structure to control dissemination of creative works in order to ensure there is enough incentive to create works and publish. Such a result works for the benefit of authors, publishers and the users alike. However, perpetual or unreasonably long periods of copyright and unreasonably narrow exceptions to copyright works against public good and ultimately against the interest of the very objective of copyright – one of creation and dissemination of information.

Balancing the interests however, does not provide us concrete results in terms of ensuring public interest, equity and support for the backward. This is because, there is no shift in our frame of analysis of the issue at hand. The frame of analysis has always been one of securing the interests of the owners of copyright. Intellectual property rights, when viewed from the perspective of creators' rights alone results in situations demanding “exceptions” for ensuring public interest. It is submitted that the analysis of the nature of intellectual property rights law must be made from the perspective of ensuring equity, justice and public interest. In this framework, the public welfare aspect of the law gains precedence and rights afforded to users is viewed as a matter of entitlement rather than an “exception” granted in order to help them or uplift them.¹¹

¹¹ See generally Amy Kapczynski, “The Access to Knowledge Mobilization and the New Politics of Intellectual Property”, 2008, 117 *Yale Law Journal*, 204.

Public Interest in Copyright: India

Indian copyright law was given by English law and thus, India did not see debates on the philosophy of copyright as witnessed in England and continental Europe. The Indian Copyright Act of 1914 which was simply an incorporation of the whole of the United Kingdom Copyright Act of 1911 was repealed by the Indian Copyright Act, 1957 (the Copyright Act).

Entry 49 List I of Schedule VII of the Indian Constitution empowers the Union to enact laws relating to copyright, patents and trademarks. However, neither the Constitution of India nor the Copyright Act is clear about the purpose/objective of Indian copyright law. This vacuum can only be filled with interpretations of the framework of the Indian Constitution and judicial pronouncements. By virtue of the common law system of India, law is made more by way of judicial precedents than on written laws. Thus, a vacuum left by the Constitution is most readily filled by the law made by the judiciary. As seen in detail below, the judiciary interpreted the existent regime of intellectual property rights law to be consistent with public interest and with the public policy objectives of the State.

An interpretation of the purpose and objective of copyright law in India was laid down, perhaps for the first time, by the Delhi High Court in 1984 in the case of *Penguin Books Limited v. India Book Distributors and Ors*¹² wherein the court held as follows:

*“Copyright is a property right. Throughout the world it is regarded as a form of property worthy of social protection in the ultimate public interest. The law starts from the premise that protection should be as long and as broad as possible and **should provide only those exceptions and limitation which are essential in the public interest.** The courts adopt a “purposive” approach to statutes”.*

¹² AIR 1985 Del 29.

This decision has been subsequently followed in later cases wherein Indian courts have read in the element of public good or public interest in the framework of Indian copyright law.

Courts have also considered that if a particular Act has the effect of contributing to public interest/ public good as a factor then to determine whether such Act fell foul of the Copyright Act. The Delhi High Court case of *The Chancellor Masters and Scholars of The University of Oxford v. Narendra Publishing House and Ors*¹³ did exactly that in refusing to deny permission for publication of guide books as such denial “*would be contrary to public interest and interest of the student community.*” The court further sought to shed light on the very nature of copyright law and in the process, read in the element of public interest and the necessity to balance the authors’ rights with the interest of the public domain, in no uncertain terms while holding as follows:

*“Copyright law is premised on the promotion of creativity through sufficient protection. On the other hand, various exemptions and doctrines in copyright law, whether statutorily embedded or judicially innovated, recognize the equally compelling need to promote creative activity and ensure that the privileges granted by copyright do not stifle dissemination of information. Two doctrines that could be immediately be summoned are the idea-expression dichotomy and the doctrine of “fair use” or fair dealing. **Public interest in the free flow of information is ensured through the idea-expression dichotomy, which ensures that no copyright is granted in ideas, facts or information. This creates a public pool of information and idea from which everyone can draw.**”*

The court specifically interpreted the doctrine of fair use within copyright to be used to serve public interest.

“...[T]he doctrine of fair use then, legitimizes the reproduction of a copyrightable work. Coupled with a limited copyright term, it guarantees not only a public pool of ideas and information, but also a vibrant public domain in expression, from which an individual

¹³ 2008 (38) PTC 385 (Del).

can draw as well as replenish. Fair use provisions, then must be interpreted so as to strike a balance between the exclusive rights granted to the copyright holder, and the often competing interest of enriching the public domain.” [Emphasis supplied]

Another instance in which the Delhi High Court, in determining whether an Act amounted to copyright infringement considered if such Act contributed to public interest was in *Warner Brothers Entertainment Inc. and Ors v. Santosh V.G.*¹⁴. In this case, the court relied upon the decision of the 1984 Penguin Books case (as discussed earlier) in interpreting Indian copyright law as one essentially with the purpose of contributing to public interest and stressed on the need to balance the interests of various stakeholders in interpretation of copyright law while holding as follows:

“Copyright law, and the protections afforded to owners and those entitled to it, under Section 14, is a balance struck between the need to protect expression of an idea, in a given form to promote creativity, on the one hand, and ensure that such protection does not stifle the objective, that is, creativity itself.”

Recently, the Supreme Court, in *Entertainment Network (India) Limited v. Super Cassette Industries Limited*,¹⁵ upon consideration of arguments urging the court to rule on the impugned Act on the basis of its contribution to public interest within the framework of the Copyright Act, expressly held as follows:

*“The protection of copyright, along with other intellectual property rights, is considered as a form of property worthy of special protection because it is seen as benefiting the society as a whole and **stimulating further creative activity and competition in the public interest.**”* [Emphasis Supplied]

Interpreting the rights of copyright owners to be analogous to rights of property owners (since the court considered intellectual property as a form of property), the court held that, since right to property is no longer a fundamental right, it may be subject to

¹⁴ MIPR 2009 (2) 175.

¹⁵ 2008 (37) PTC 353 (SC).

reasonable restrictions and may be wholly, or in part, acquired in public interest and on payment of reasonable compensation. The court held, in no uncertain terms that, “*when a right to property creates a monopoly to which public must have access, withholding the same from public may amount to unfair trade practice.*” In continuation of such a view, it further held that “[I]n our constitutional scheme of statute, monopoly is not encouraged. Knowledge must be allowed to be disseminated. An artistic work if made public should be made available subject of course to reasonable terms and grant of reasonable compensation to the public at large.”

This case has been relied upon in the recent decision of the Bombay High Court in *Music Choice India Private Limited v. Phonographic Performance Limited*.¹⁶

In light of the brief examination of case laws clarifying the intent of the Indian copyright law, it can be inferred that the system of copyright in India is not for commercialization of works but for achieving a balance of the interests of all stakeholders, including publishers, authors and users alike. Most importantly, Indian courts have laid stress on protecting public interest and contributing to public good and enriching public domain to enable dissemination of information. Thus, an exception to the reproduction right of a copyright owner for the benefit of print impaired persons which is undoubtedly in public interest and in furtherance of the cause of dissemination of information to that large group of persons which would otherwise have no access to the copyrighted work in question, is well within the bounds of the purposive framework of the Indian copyright law. In order to enforce the law governing copyright in a way that serves public interest and enriches public domain by promoting and enabling access to and dissemination of information as ruled by the courts, and to remove any ambiguities that may exist in the law in this regard, it is critical that the current copyright law be amended to provide for specific exceptions to copyright for the benefit of print impaired persons. In fact, it is the duty of the state to enable such access failing which, the very objective of the Indian copyright system would be defeated.

¹⁶ 2009 (111) Bom LR 609.

The Copyright Act allows reproduction of a copyrighted work for “private use, including research” under Section 52(a)(i). Such an exception does not make provision for printed works to be converted to accessible formats on large scale for purposes other than research, including for recreational purposes or for use in the normal course of any work by print impaired individuals at par with persons without such impairment. A book or a novel published on a commercial scale cannot be converted into an accessible format for the use of persons with print impairment under this exception. Section 52(h) allows for reproduction of a copyrighted work by a teacher or a pupil “in the course of instruction”. Even though it may be argued that a work in print can be reproduced in an accessible format (limited only to sign language or oral means), it does not go beyond the purpose of education, that too, only “in the course of instruction”. The scope of the term is unclear and ambiguous. Further, it does not allow for reproduction in all formats accessible by print impairment pupils including Braille, large text, e-text, talking books, etc. It does not allow intermediary organizations such as not-for-profit organizations working for providing access to print impaired persons, to convert copyrighted works. The Copyright Act does not provide for import of already converted copies of copyrighted works from other countries. This adds an additional burden of converting works which have already been converted and amounts to duplication of work and unnecessary expense.

Certain amendments were proposed to be made to the Copyright Act in 2006. These amendments, it is submitted, are insufficient for the purpose of providing access to printed material for the benefit of persons with print impairments of any nature (not restricted to visual impairment alone, for instance). The proposed amendments do not include the insertion of a specific amendment for the benefit of the print impaired. One of the amendments proposed makes it mandatory for a person seeking to make sound recordings of copyrighted works to pay royalty to the right holder for a minimum of 50000 copies. This severely restricts conversion of printed material into a sound recording (or a talking book or any audio format) for the purpose of providing access to persons with print impairments. It makes the process cumbersome and heavily tilted in the favour of copyright holders. It requires the license or consent of the right holder which may not be given easily.

It was also proposed to insert a new clause in the form of Section 52(za) providing for “reproduction, issue of copies or communication to the public of any work in a format, including sign language, specially designed only for the use of persons suffering from a visual, aural or other disability that prevents their enjoyment of such works in their normal format.” While such an insertion is strongly recommended since it promoted access to knowledge and dissemination of information to persons with impairments which prevent them from enjoying any work in its normal format, it does not allow for conversion of the work in all possible formats which can be accessed by such persons. For instance, it does not allow for conversion of a work in audio format or an Adobe PDF file among others. This is extremely problematic, given that a condition of access to knowledge and information for people with a disability is that they are able to take advantage of the enormous amounts of such material currently available in widespread formats especially given the time, labour and technical costs of conversion; the preference for some formats over others (for example, audio over Braille, as the situation demands) and the fact that widespread formats such as audio are indispensable to facilitating their access.

The proposed amendments seek to include the concept of Digital Rights Management (DRM) into the Copyright Act in the form of Sections 65A and 65B. DRM is a term used for technologies that define and enforce parameters of access to digital media or software. The reason for the deployment of such measures is – ostensibly – to 'enforce' the copyright of the manufacturer or the copyright-holder as the case maybe.

However, DRM is *extra-statutory*. Consequently, rights that are conferred by the law are enforced by the copyright holder himself through technological measures so as to prevent access to such digital media or software which would infringe the copyright of the copyright holder. But, more importantly, this would also mean that DRM allows for copyright holders to restrict access to digital media or software under terms which would be *currently permissible* under copyright law.

For example, if a person wished to make a copy of a legally purchased media file for personal use or for back-up, utilising the flexibility sanctioned under Section 51(1)(b)(ii) of the Copyright Act, he/she would *not be able to do so* if the proposed amendments suggested here are enacted. It could also prevent private screening of digital media, which would (otherwise) be perfectly legal to do under the current Act. The inclusion of this provision means that copyright holders will be allowed to enforce *their own copyright terms* on digital media or software that they produce; *terms that are not concurrent with the present Copyright Act*. This would also restrict the production of talking books or the use of screen reading software for the benefit of persons with print impairment if the owner of a digital work has prohibited such use of his work. In light of the statutory analysis of the copyright regime currently in place in India, it is submitted that the same is highly inadequate in its current form to ensure that persons with print impairment get access to works in formats accessible by them. Thus, an amendment to the current copyright law is of utmost urgency and importance.

PART II: RIGHTS OF PERSONS WITH DISABILITIES UNDER THE INDIAN CONSTITUTION

The Constitution of India (Constitution) expressly provides for the right to equality (Article 14), right to non-discrimination (Article 15), right to freedom of speech and expression (Article 19) and the right to life (Article 21). Indian courts have routinely upheld the rights of persons with disability and the Supreme Court of India has specifically recognized that the “right to life” as enshrined in Article 21 of the Constitution includes right to dignity including basic necessities such as reading and writing. The right to education has also been recognized as a fundamental right. For print impaired persons to enjoy their fundamental rights, it is essential that they have access to material, including but not limited to educational material, in accessible formats. In this context it can be argued that the fundamental rights of print impaired persons are being infringed because the Copyright Act does not provide exceptions and limitations for the benefit of print impaired persons.

Article 14 – Right to Equality

Article 14 of the Constitution of India guarantees the right to equality as a fundamental right for all its citizens. Article 14 provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. This is similar to the concept of equality enshrined in Article 17 of the Universal Declaration Human Rights, 1948, which declares that all are equal before the law and are entitled to equal protection of laws without any discrimination. “Person” includes every citizen of India including persons with disabilities.

The Supreme Court has held in *Jagannath Prasad v. State of Uttar Pradesh*¹⁷ that “equal protection of laws” does not mean that every law must have universal application throughout the country irrespective of differences in circumstances. It implies equality of treatment to persons who are *similarly* situated and that the like ones should be treated alike without discrimination on the basis of race, religion, caste, social or economic

¹⁷ AIR 1961 SC 1245.

status. Since all people are not born equal and are influenced by differences in circumstances be it in terms of caste, religion, disability or social status, equal treatment of those who are unequally placed results in injustice. This position was taken by the Supreme Court in *Chiranjit Lal v. Union of India*¹⁸ wherein it was held that different classes or sections of people need to have differential treatment based on their varying needs. If persons with disabilities are unable to enjoy their rights and the fundamental freedoms guaranteed to them on par with other persons by reason of their disability, it is submitted that it is the obligation of the State to provide them with differential treatment in order that they are brought to the same level as that of other citizens and are thus able to enjoy their rights and freedoms on an equal basis. The Court has held in *Gauri Shankar v. Union of India*¹⁹ that Article 14 implies that equals should not be treated unlike and unlikes should not be treated alike. If varying needs of classes require differential treatment, it might lead to classification among groups of persons. The Supreme Court has held in *Ashutosh Gupta v. State of Rajasthan*²⁰ that in order to apply the principle of equality in a practical manner, if the law is based on rational classification, such law would not be discriminatory (and thus constitutional). Going by this reasoning, if a law is enacted which treats persons with disabilities on a differential basis from other persons in order that such persons with disabilities may be enabled to enjoy their guaranteed rights and freedoms on an equal basis with others, such law will not only be constitutional but, it is submitted, will be a requirement to be enacted by the State which guaranteed equal protection of laws to all its citizens.

It is important to note that the right to equality has been declared by the Supreme Court in *Keshavananda Bharati v. State of Kerala*²¹ and subsequently in several other cases following it including *Indra Sawhney v. Union of India (II)*,²² to be part of the basic feature of the Constitution. The Preamble to the Constitution also highlights the principle of equality to be one of the basic principles of the Constitution. Thus, any constitutional amendment violating the right to equality would be invalid. The Court has reiterated this

¹⁸ AIR 1951 SC 41.

¹⁹ AIR 1995 SC 55.

²⁰ (2002) 4 SCC 34.

²¹ AIR 1973 SC 1461.

²² AIR 2000 SC 498.

principle in *M.G. Badappanavar v. State of Karnataka*²³ holding that any treatment of equals unequally or unequals equally will be a violation of the basic structure of the Constitution. Article 14 does not merely constitute a ban on creation of inequalities but also requires the State to take affirmative action to eliminate existing inequalities due to reasons of caste, religion, social and economic status and even disability. It is the obligation of the State (keeping also with other commitments agreed to by the State in international covenants as well as national laws) to grant equal protection by way of affirmative action towards unequals by providing additional facilities and opportunities which may not be provided for other persons. Any affirmative action, even while it is discriminatory would not be invalid if it is in aid of all persons attaining equality. Failure on part of the State to enact laws which provide for empowerment of persons with disabilities to enjoy their basic rights on equal terms with other persons is, in fact, violative of Article 14 of the Constitution since such failure amounts to discrimination of persons with disabilities. The Copyright Act, by effectively disallowing persons with print impairment from accessing works in print in accessible formats, does not provide unequal treatment to unequals. Hence, it is violative of Article 14 of the Constitution and requires to be amended accordingly.

Article 15 – Right to Non-Discrimination

Article 15(1) of the Constitution guarantees that the State shall not discriminate against any citizen on grounds *only* of religion, race, caste, sex, place of birth, or any of them. However, Articles 15(3) and 15(4) constitute exceptions to the same while providing for the State to create exceptions or special provisions in favour of women, children and for the advancement of any socially and educationally backward classes of citizens. The right to equality under Article 14 read with the right to non-discrimination under Article 15 and the provision for special measures in favour of the backward classes under Articles 15(3) and 15(4) make out a strong case for provision of special measures in favour of persons with disabilities in order that such persons are not discriminated against and are able to enjoy equal protection of laws in the country.

²³ AIR 2001 SC 260.

The right to equality on the grounds of disability are not explicitly provided for in the Constitution. However, there have been significant strides taken to promote and realise equality for disabled persons. On an international level, India's ability to comply with its obligations would rest on interpretations of the Constitution that go beyond the literal text and embrace the spirit and purpose of the constitution as well as the growing judicial consensus in India that the Indian Constitution is subject to teleological interpretations. It was held for example in the Delhi High Court case of *Naz Foundation v. Government of NCT and Ors*²⁴ that:

“[A] constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take into account of changing conditions and purposes so that the constitutional provisions does not get fossilized but remains flexible enough to meet the newly emerging problems.”

Equality in regard to disabilities involves more than just an obligation to protect or promote the rights of disabled persons; it involves an obligation to fulfill, and to ensure the disabled persons are placed on the same plane as non-disabled persons. The fulfillment of the right to equality therefore, mandates the State to take positive steps towards this end.²⁵ Equality is not a static concept and it evolves as the needs of the disadvantaged evolve.

In a determination by the Delhi High Court that Section 377 of the Indian Penal Code, 1860²⁶ is unconstitutional due to a violation of the right to equality, it recognised that the legislation discriminated on grounds of sexual orientation, expanding the right to equality to take into account the history and purpose of the Constitution.

²⁴ 160 (2009) DLT 277.

²⁵ See M.P. Jain, *Indian Constitutional Law*, Wadhwa and Co. (5th ed.: 2003), p. 1000-1005.

²⁶ Section 377 of the IPC criminalizes sexual activity “against the order of nature” and was, for long, interpreted to criminalize homosexuality.

A close parallel can be drawn between the inclusive interpretation of sexual orientation as a ground for non-discrimination in terms of the equality clause and the similar inclusion of discrimination as a ground for non-discrimination. This inclusion rests on a proper interpretation of the purpose of the clause and the objectives sought to be achieved by non-discrimination and the policies related to affirmative action.

Both a teleological and purposive approach is adopted by the Delhi High Court in regard to the interpretation of the Constitution and in regard to the interpretation of the right to equality. The Court's reasoning, therefore, as regards the equality clause, cannot be confined to the issue of sexual orientation alone but would necessarily extend to any kind of discrimination which is based on differential criteria. The vulnerable and weaker sections of the population, such as disabled persons would then fall in a category of persons who are discriminated against based on differential criteria.

On a number of occasions the Supreme of Court of India has justified the introduction of special measures to guarantee de facto equality. Elaborating on this principle, the Supreme Court in *Dr. Jagadish Saran and Ors v. Union of India*²⁷ has held that “*even apart from Articles 15(3) and 15(4), equality is not degraded or neglected where special provisions are geared to the larger goal of the disabled getting over their disablement consistently with the general good and individual merit.*”

Article 19(1)(a) – Right to Freedom of Speech and Expression

Every citizen of India is guaranteed the right to freedom of speech and expression under Article 19(1)(a) of the Constitution subject to certain reasonable restrictions which may be placed on it as detailed under Article 19(2). Any restriction on the right to freedom of speech and expression which goes beyond the framework of Article 19(2) is invalid.²⁸ It is important to note that a restriction on the freedom of speech of any citizen may be placed as much by an action of the State as by its inaction. Thus, failure on the part of the State to guarantee to all its citizens irrespective of their circumstances and the class to

²⁷ (1980) 2 SCR 831.

²⁸ M.P. Jain, *Indian Constitutional Law*, (5th ed., 2003: Wadhwa and Co.), p. 1153.

which they belong, the fundamental right to freedom of speech and expression would constitute a violation of Article 19(1)(a).

The right to freedom of speech under Article 19(1)(a) includes the right to express one's own views and opinions on any issue through any medium (such as by oral communication, printed material, films, sound recordings, television broadcast, photographs, etc.). It includes within its bounds, the freedom of communication and the right to publish opinion or propagate it.

The fundamental right to freedom of speech and expression is regarded as one of the most basic elements of a healthy democracy for it allows its citizens to participate fully and effectively in the social and political process of the country. In fact, the freedom of speech and expression gives greater scope and meaning to the citizenship of a person extending the concept from the level of basic existence to giving the person a political and social life. The Supreme Court, while emphasizing on the importance of the freedom of speech and expression in *Maneka Gandhi v. Union of India*,²⁹ has held as follows:

“If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential.”

As shall be seen below, this aspect of the right to freedom of speech and expression extending the concept of citizenship to include socio-political participation of a person is critical in the process of determining the scope of right to life of a citizen under Article 21 of the Constitution.

It is important to note that the scope of the “freedom of speech and expression” in Article 19(1)(a) of the Constitution has been expanded to include the right to receive and disseminate information. It includes the right to communicate and circulate information

²⁹ AIR 1978 SC 597.

through any medium including print media, audio, television broadcast or electronic media.³⁰ The judiciary has time and again opined that the right to receive information is another facet of the right to freedom of speech and expression and the right to communicate and receive information without interference is a crucial aspect of this right. This is because, a person cannot form an informed opinion or make an informed choice and effectively participate socially, politically or culturally without receipt of adequate information. The Supreme Court in *State of Uttar Pradesh v. Raj Narain*³¹ has held that Article 19(1)(a) of the Constitution guarantees the freedom of speech and expression to all citizens in addition to protecting the rights of the citizens to know the right to receive information regarding matters of public concern. This position was reiterated by the Court in *Secretary, Ministry of Information and Broadcasting, Govt. of India v. Cricket Association of Bengal*³² wherein it was held that Article 19(1)(a) includes the right to acquire and disseminate information. The Supreme Court, while opining on the right to freedom of information, further noted in *Dinesh Trivedi, M.P. and Ors v. Union of India*³³ that “*in modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the government which, having been elected by them, seek to formulate sound policies of governance aimed at their welfare.*”

The print medium is a powerful tool for dissemination and receipt of information for any citizen. Thus, access to printed material is crucial for satisfaction of a person’s right to freedom of speech and expression guaranteed to him under the Constitution. Persons with print impairment have no access to printed material in their normal format. Failure on part of the State to make legislative provision for enabling access to persons with print impairment of material in alternative accessible formats would constitute a deprivation of their right to freedom of speech and expression and such inaction on the part of the State falls foul of the Constitution. In view of the same, it is an obligation on part of the State to ensure that adequate provisions are made in the law enabling persons with print impairment to access printed material in accessible formats.

³⁰ See M.P. Jain, *Indian Constitutional Law*, Wadhwa and Co. (5th ed.: 2003), pp. 1154-1157.

³¹ AIR 1975 SC 865.

³² AIR 1995 SC 1236.

³³ (1997) 4 SCC 306.

Article 21 – Right to Life and Personal Liberty

The Constitution of India guarantees to all its citizens the right to life and personal liberty under Article 21 which reads as follows:

“No person shall be deprived of his life and personal liberty except according to procedure established by law.”

Indian courts interpreted the ambit of right to life very narrowly for almost three decades spanning between 1950 and 1977 wherein, in the landmark ruling of the Supreme Court in *A.K. Gopalan v. State of Madras*³⁴ it was held that the right to life under Article 21 was mutually exclusive of the fundamental freedoms guaranteed under Article 19. This means that Article 19 was not to apply to a law affecting personal liberty to which Article 21 would apply. It was further held in the *A.K. Gopalan* case that a law affecting right to life and personal liberty could not be declared unconstitutional on grounds of its failure to guarantee natural justice or due procedure. Thus, a law prescribing an unfair and arbitrary procedure could deprive a citizen of his right to life and personal liberty as long as such law was enacted by a valid legislature.

The Supreme Court ruling in *Maneka Gandhi v. Union of India*³⁵ brought about a transformation in judicial attitude towards right to life and personal liberty guaranteed under the Constitution. Judicial activism at its best ensured that the scope of this most crucial right was extended to many areas not expressly laid down in the law and has, in the process read in many more fundamental rights and has made it obligatory on part of the State to fulfill on many aspects which were, till then, constituents of the Directive Principles of State Policy. It was held in the *Maneka Gandhi* case that Articles 14, 19 and 21 of the Constitution were not mutually exclusive. Thus, a law prescribing a procedure for depriving a person of his personal liberty under Article 21 has to meet the requirements of Article 19. Further, the procedure established by law under Article 21

³⁴ AIR 1950 SC 27.

³⁵ AIR 1978 SC 597.

must be in consonance with Article 14 and must not be discriminatory or arbitrary and must be just, fair and reasonable. It was in this case that the terms “life” and “personal liberty” were given an expansive meaning to move beyond mere animal existence. The case also read in several fundamental rights into and as part of the right to life under Article 21 even though these rights were not expressly mentioned in the Constitution.

This trend of expansion of the ambit of the right to life was carried forward in subsequent cases. The Supreme Court gave an expansive interpretation to the term “life” in *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors*³⁶ by extending it beyond mere “physical or animal existence” and including the right to read, write and express oneself and to lead a life of dignity. The Court held that “*the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.*”

This view of extending the ambit of the right to life under Article 21 to go beyond mere animal existence (bios) to include political, social and cultural participation (zoe) was reiterated by the Supreme Court in *Olga Tellis v. Bombay Municipal Corporation*³⁷ wherein it held that the “inhibition against deprivation of life extends to those limits and faculties by which life is enjoyed.”

On more than one occasion thereafter, the Supreme Court emphasized on the point that the right to life under Article 21 must guarantee to every citizen something beyond just the life of an animal to include the needs of a human being including “suitable accommodation which allows him to grow in all aspects, viz., physical, mental and intellectual.”³⁸ The Supreme Court further held in *P. Rathinam v. Union of India*³⁹ that the term “life” has an expanded scope in Article 21 and defined “life” as follows:

³⁶ AIR 1981 SC 746.

³⁷ AIR 1986 SC 180.

³⁸ *Shantisagar Builders v. Narayanan Khimalal Totame* (1990) 1 SCC 520.

³⁹ (1994) 3 SCC 394.

“The right to live with human dignity and the same does not connote continued drudgery. It takes within its fold some of the fine graces of civilization which makes life worth living and that the expanded concept of life would mean the tradition, culture and heritage of the person concerned.”

This view has been further followed and endorsed by the Supreme Court in *CERC v. Union of India*.⁴⁰ Another broad formulation of the theme of life with dignity is found in the decision of the Supreme Court in *Bandhua Mukti Morcha v. Union of India*⁴¹ wherein it was held that right to life under Article 21 includes “opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities... [T]hese are the minimum conditions which must exist in order to enable a person to live with human dignity. No government can take any action to deprive a person of the enjoyment of these basic rights.” The Court in this case expressly included provision for educational facilities within the ambit of right to life. It also broadened the scope of the right to life by including, in an over arching statement, “opportunities and facilities” for children to develop in a healthy manner. These opportunities and facilities, it is submitted, may be interpreted to include educational and teaching aids and reading material which aids a child in its mental and intellectual development.

One of the most crucial aspects of the expansion of the ambit of the right to life under Article 21 of the Constitution is the provision for inclusion of the social, political and cultural life of the person. Thus, the fundamental right to life guaranteed to all persons under the Constitution includes the right to live with human dignity and to participate fully in the social, cultural and political processes of the country. This goes beyond the biological concept of life encompassing only the vegetative state of being alive. As a result of such an expansion, the right to read, write and fully express oneself becomes an integral part of the right to life under Article 21 because these rights are integral to a person’s active participation in the political, social and cultural processes of the country

⁴⁰ AIR 1995 SC 922.

⁴¹ AIR 1984 SC 802.

or of his communities. Access to printed material is one of the most fundamental aspects of the right to read, write and express oneself in order to form an informed opinion or make an informed choice in one's political, cultural or social life. When persons with print impairment are denied such access to printed material in alternative formats, their fundamental right to life (and the fundamental right to freedom of speech and expression under Article 19 as discussed above) guaranteed to them under the Constitution is taken away from them since such denial of access will prevent their participation in the political and social aspects of their lives. Thus, it becomes an obligation on the part of the State to ensure that their fundamental rights are granted to them on an equal basis with other persons by doing away with any gap which may exist in the law which prevents persons with print impairment from accessing information in print format. Such action on the part of the State is not only within the framework of the Constitution but is also an obligation on its part to be fulfilled.

Right to Education

A natural extension of the argument for the expansion of the scope of right to life to include a right to a political, social and cultural life and to a life of human dignity would lead to the inclusion of the right to education within the ambit of the right to life under Article 21. By introducing a qualitative concept into the right to life under Article 21, the Supreme Court has made way for any aspect which promotes the quality of life to fall within the parameters of Article 21. As a result, many Directive Principles of State Policy which were hitherto not enforceable have become enforceable under Article 21. Further, the Supreme Court has also implied a number of fundamental rights from Article 21 even though these rights have not been expressly provided for under the Constitution.

The Supreme Court has implied the right to education as a fundamental right as part of the right to life under Article 21. It is submitted that the word "life" has been held to include "education" since education promotes and is, in fact, an important requirement for a life with dignity. The Supreme Court, while dealing with eliminating the practice of collecting capitation fee for admitting students into private educational institutions, held

in *Mohini Jain v. State of Karnataka*⁴² that the right to education flows directly from the right to life and that the right to education was concomitant to the fundamental rights. Even while admitting that the Constitution did not expressly guarantee right to education as a fundamental right, the Court read Article 21 cumulatively with the Directive Principles of State Policy with respect to the State providing education, as enshrined in Articles 38, 39(a), 41 and 45 and opined that “*it becomes clear that the framers of the Constitution made it obligatory for the State to provide education for its citizens.*”

Even while such a broad obligation with respect to providing education, placed on part of the State in *Mohini Jain* was considerably toned down in *Unni Krishnan v. State of Andhra Pradesh*,⁴³ the Court reiterated the proposition that the right to education is implicit in, and flows from the right to life under Article 21. However, it was qualified by stating that such a right to education was not absolute and would be guided by the Directive Principles of State Policy contained in Articles 41, 45 and 46 of the Constitution. The Court held that every citizen has a right to free education and the State has an obligation to provide the same to the citizens till they attain 14 years of age. In view of the same, the right to education is the fundamental right of every citizen till he/she attains 14 years of age.

The 86th Constitutional Amendment

The State’s obligation to provide free and compulsory education to children below the age of 14 years which was hitherto a judicial law became a statutory one when the Constitution (Eighty Sixth Amendment) Act, 2002 was passed by the Parliament of India whereby Article 21A was inserted into the Constitution of India. Article 21A provides that “[T]he State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.”

The 86th amendment further inserted Article 51A(k) making it a fundamental duty on part of a “*parent or guardian to provide opportunities for education to his child or, as the*

⁴² AIR 1992 SC 1858.

⁴³ AIR 1993 SC 2178.

case may be, ward between the age of six and fourteen years.” Even while fundamental duties in the Constitution are not in the nature of public duties and are thus unenforceable in a court of law by way of a writ of *mandamus* or otherwise, they are guiding principles and are directory in nature and can be promoted by constitutional means. Thus, Article 51A can be used to interpret ambiguous statutes as was held by the Supreme Court on various occasions.⁴⁴

Thus, the right to free and compulsory education is the fundamental right of every child between six and fourteen years of age as guaranteed under the Constitution. It is further, the fundamental duty of every parent or guardian to provide opportunities for education of their child or ward between six and fourteen years of age.

Persons with print impairment who are not provided access to printed material in alternate formats are unable to enjoy their fundamental right to education and this ultimately constitutes deprivation of their right to life by the State. Thus, the State must ensure that any legislative or other barrier preventing access to printed material of persons with print impairment is removed in keeping with its obligation to enable its citizens to enjoy their fundamental rights and freedoms including the right to education and the right to life guaranteed to them under the Constitution. Considering that it is the fundamental duty of every parent or guardian to ensure that opportunities for education are provided to their child or ward, it is important to ensure that parents or guardians of children too are allowed access to printed material in accessible format for the purpose of providing access of the same to their child or ward.

The Right of Children to Free and Compulsory Education Act, 2009

The Parliament recently enacted the Right of Children to Free and Compulsory Education Act, 2009 (Education Act) for the purpose of providing free and compulsory education to children between the age of six and fourteen years. With the enactment of this law, the

⁴⁴ *Mumbai Kamgar Sabha v. Abdulbhai* AIR 1976 SC 1455; *Head Masters v. Union of India* AIR 1983 Cal 448; *Dasarathi v. State of Andhra Pradesh* AIR 1985 AP 136; *Mohan v. Union of India* (1992) Supp 1 SCC 594.

State has given effect to the fundamental right of the children to obtain free and compulsory education from the State as enshrined in Article 21A of the Constitution.

Section 3 of the Education Act provides that every child between the ages of six years and fourteen years has the right to free and compulsory education in a neighbourhood school till the completion of elementary education. Proviso to Section 3(2) provides that children with disability as defined under the Persons with Disabilities (Equal Opportunities, Protection and Full Participation) Act, 1996 shall have the right to pursue free and compulsory education in accordance with Chapter V of the said Act. Chapter V of the said Act is dealt with in detail below.

The Persons with Disabilities Act, 1995

The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act (Act) was passed by the Union Parliament in 1995 and this marked focus on the need for eliminating all barriers to full participation of disabled persons in the society. The Act incorporates provisions for non-discrimination and affirmative action apart from weaving these principles along with the mandate to provide equal opportunities in education and employment to disabled persons. Chapter V of the Act which deals with education lays down that every child below 18 years of age be provided with free education in an appropriate environment. Section 27 of the Act requires the Government to provide disabled children, free access to special books and equipments needed for his education. Needless to mention, “special books” must be in accessible formats in order for print impaired students to use it. The Act demands that equal opportunities in education be granted to disabled children and Section 28 calls for initiation of research for the purposes of designing and developing assistive devices, teaching aids, special teaching materials and other items for this purpose. In light of the same, the Government is obliged under the provisions of the Act to ensure that all research and teaching material including books for children’s education are available to print impaired children in accessible formats, *free of cost*. In fact, local bodies and Government authorities are required to promote and sponsor research for the

development of assistive devices under Section 48 of the Act. Thus, the law requires the Government to not only provide materials in accessible formats to the print impaired but also actively assist in development of technology for conversion of materials into accessible formats. This is, in fact, consistent with the larger mandate of the Act to provide a life of dignity, a healthy standard of living, assistive facilities and an enabling environment to disabled persons as a matter of right and as a matter of ensuring availability of equal opportunities to them. It must be noted that, even while the Act calls for dismantling “environmental barriers” and for such purpose, seeks to provide access to information in accessible format, it does not expressly mention access to information and communications technology. However, it is undeniable that such access is a necessary condition in today’s day and age to ensure equal opportunities for disabled persons in education and employment. Thus, an amendment of the copyright law providing for access to printed material to the print impaired in accessible formats covers this gap ensuring that the Act is enforced effectively and the purpose of the Act is safeguarded.

National Policy for Persons with Disabilities, 2006

Apart from legislations and constitutional provisions, a study of the national policy documents demonstrates the vision and commitment of the Indian Government in guaranteeing a life of dignity and freedom to disabled persons in India at par with other citizens. The National Policy for Persons with Disabilities (Policy) formulated by the Ministry of Social Justice and Empowerment in 2006 lays down the commitment of the Government in providing disabled persons, access to education and to a barrier-free environment for their development. The Policy recognizes that education is the most effective vehicle of social and economic empowerment. In view of the right to education as a fundamental right guaranteed to all persons under the Constitution and in consideration of the Government’s obligations under Section 26 of the Persons with Disabilities Act, 1995, Chapter IIB of the Policy envisages the Government providing the *“right kind of learning material and books to the children with disabilities, suitably trained and sensitized teachers and schools which are accessible and disabled friendly.”* Under Chapter IV of the Policy dealing with education of persons with disabilities, the

Government has assured that “teaching/learning tools and aids such as educational toys, Braille/talking books, appropriate software, etc”, would be made available. The Government has also assured incentives to be given to expand facilities for setting up e-libraries, Braille-libraries and talking books libraries. The Government has also promised provision of financial support by public sector banks to private, public and joint sector enterprises involved in the manufacture of high tech assistive devices for persons with disabilities.

The Policy talks of creation of a barrier-free environment for persons with disabilities for the achievement of which, several strategies would be adopted including meeting communication needs of persons with disabilities by making information service and public documents accessible to them. For this purpose, the Policy expressly provides for use of “*Braille, tape-service, large print and other appropriate technologies.*” It is submitted that such a commitment would imply that the Government would strive to provide for technologies including digital or other technology required to convert printed material in formats accessible to print impaired persons. In order for the Government to effectively bring such an intention to action, it is important that such conversion using technology is not prohibited by the copyright regime. Further, it is also important to ensure that the same technology is not used to restrict the access and conversion of the copyrighted material in the first place.

The Policy has also considered the contribution on non-governmental organizations to the cause of print impaired persons. Such official recognition of their work provides great support to their activities and also makes out a strong case to accommodate and facilitate the work of NGOs within the legal framework. In light of the same, it is interesting to note that Chapter VIII of the Policy recognizes the NGO sector as an important institutional mechanism to provide *affordable* services complementing the efforts of the Government with regard to accessibility issues concerning disabled persons. It has been expressly mentioned in the Policy that exchange of information amongst NGOs would be encouraged and facilitated. This is a huge boost for efforts of several NGOs striving to provide access to print impaired persons of copyrighted material in accessible formats.

Provision for exchange of information amongst NGOs would hugely help cut costs of distribution and reproduction of material in accessible format. The costs of such access without a mechanism for exchange between various institutions are usually so huge that they preclude any effort to make copies of works in accessible formats. However, a provision for such a mechanism for sharing work is of little or no use if there are legislative barriers making the very act of producing the material illegal. Thus, an amendment of Indian copyright law to provide for access to print impaired persons of copyrighted material is of utmost necessity to enable the policy objectives of the Government in providing for access by disabled persons to fundamental freedom, education and information.

The Eleventh Five-Year Plan

Consistent with the objectives of the Policy and the approach of the Convention, the Eleventh Five-Year Plan (Plan) formulated by the Government provides for a right-based approach for disabled persons marking a shift in national policy from a welfare-based approach. Provision for accessibility is one of the eight basic principles on basis of which Chapter 6 (Social Justice) is formulated. The Plan recognizes that there is an “urgent need” to review all legislations pertaining to disability and to amend them to make them consistent with the Convention. This is a welcome provision and it is submitted that it automatically makes way for amendment of the Indian Copyright Act which is, in its current form, directly restricting the access of print impaired persons to materials in accessible format. The Plan also suggests that interventions by the Government in the area of providing accessibility to disabled persons would include provision of access to information to such persons in all its forms. The Plan specifically ensures “development of disabled-friendly curricula”. Thus, printed material which is converted to format accessible by print impaired persons would naturally be covered under the scope of the Plan. In light of the same, in order to further the objectives of the Plan and to bring it into action, it is important for the Government to ensure that all legislative barriers which restrict, in any manner whatsoever, the access and exchange of information among persons with disabilities including print impaired persons. Thus, it is not only the need of

the hour but also an obligation on part of the Government to amend the Indian Copyright Act to provide for conversion of copyrighted material into formats accessible by print impaired persons.

PART III: PROVISION IN INTERNATIONAL LAW RELEVANT TO EXCEPTIONS FOR PRINT IMPAIRED

PERSONS

This section briefly highlights what the position might be for each of the relevant pieces of international law governing global standards of copyright protection and the impact their provisions may have on the scope of exceptions for the benefit of print impaired persons in national legislations. The international treaties regulating copyright law globally seek to establish minimum standards of protection to be followed by all member states. The three-step test incorporated in Article 9 of the Berne Convention finds place in many other international treaties as can be seen below. These provisions have great implications for the rights of the print impaired and, when read with provisions of the United Nations Convention for the Rights of Persons with Disabilities (UNCRPD) and national laws providing for disabled persons, make out a case for introducing an exception in Indian copyright law for the benefit of print impaired persons. This section seeks to highlight the provisions in international treaties relating to exceptions to copyright directly impacting access (reproduction) to the work (as opposed to distribution, adaptation, import, export, etc).

The Berne Convention for the Protection of Literary and Artistic Works, 1886 (The Berne Convention)

The Berne Convention governs protection for every production in the literary, scientific and artistic domain including all forms of sound and visual recordings, dramatic works, musical compositions, cinematographic works, drawings and photographs.

Article 9(2) of the Berne Convention provides for an exception to the reproduction right of the copyright holder while providing a minimum standard for such exceptions in national legislations. It provides that “[I]t shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.” This forms

what is known as the three-step test for national legislations to adhere to, while providing exceptions to the rights of the copyright holders. The exception, in order to be valid must (a) apply to reproduction of works in certain special cases, (b) be such that the reproduction does not conflict with a normal exploitation of the work, and (c) not unreasonably prejudice the legitimate interests of the author. All other exceptions to the exclusive rights recognized in the Berne Convention must pass this test. This is in addition to satisfying the specific requirements contained in the Berne Convention itself. The three steps are cumulative and a failure to comply with any one of them would preclude the exception from being consistent with the Berne Convention. It is important to note that the three-step test has also been adopted as the minimum standard in many other international treaties as is seen below.

The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961 (The Rome Convention)

The Rome Convention governs protection for performances given by performers, phonograms and broadcasts. In respect of the print impaired, this would have an implication for sharing works in accessible format which could be in the form of an audio recording or a video broadcast. Article 15(2) of the Rome Convention permits exceptions “of the same kind” as are permitted for literary and artistic works, that is, as provided for under the Berne Convention. Article 7(1) of the Rome Convention provides that protection for performers need not be given by way of an exclusive right and this implies that it does not mandate issuance of compulsory licences. Further, it does not mandate compulsory licences for protecting the exclusive rights of producers of phonograms and owners of broadcast. This would make it more plausible for an exception for the benefit of print impaired not involving remuneration to be consistent with the provisions of the Rome Convention.

The Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994 (TRIPS)

TRIPS governs protection for literary and artistic works as covered by the Berne Convention, computer programs, compilations of data, performances given by performers, phonograms and broadcasts. The rights and exceptions to the rights under the TRIPS for literary and artistic works is the same as that under the Berne Convention. This is clear from Article 9 of TRIPS which requires its members to comply with Articles 1 to 21 of the Berne Convention. This further implies that Article 9 of the Berne Convention providing for the three-step test is also mandated to be complied with by TRIPS. Further, Article 13 of TRIPS incorporates a slightly modified version of the test to further limit the scope of exceptions to exclusive rights (copyright). Article 13 modifies the third step by mandating that the exception should not unreasonably conflict with the legitimate interests of the right holder (and not the author as is provided under the Berne Convention). All right holders need not be authors. For instance, publishers hold rights over the work although they may not be creators of the same. Further, right holders who are not authors do not own moral rights to the work. Thus, Article 13 actually limits the scope of exceptions to be provided to exclusive rights. These exceptions may be those provided for the rights incorporated under the TRIPS and also those incorporated by the requirement to comply with the Berne Convention provision under TRIPS. Further, Article 14(6) of TRIPS relating to rights in performances, phonograms and broadcasts restrict the scope of exceptions to these rights to the extent permitted by the Rome Convention. Thus, it is submitted that an exception for the benefit of print impaired persons in respect of any area protected by TRIPS would need to pass a higher standard than that set by the Berne Convention.

The WIPO Copyright Treaty of 1996 (The WCT)

The WCT governs protection for literary and artistic works as defined in the Berne Convention including computer programmes and databases. The rights and exceptions to the rights under the WCT for literary and artistic works is the same as that under the

Berne Convention. This is clear from Article 1(4) of the WCT which requires its members to comply with Articles 1 to 21 of the Berne Convention. Article 10 of the WCT provides separately for limitations and exceptions to exclusive rights which include rights covered and not covered by the Berne Convention. Thus, the WCT basically retains the three-step test under the Berne Convention for admitting exceptions to exclusive rights granted under it. Further, the agreed statement concerning Article 1(4) of the WCT extends exceptions to the reproduction right permitted under Article 9 of the Berne Convention to the digital environment as well. This will have implications on providing for exceptions to exclusive rights with respect to digitally accessible formats of works for persons with print impairment.

The WIPO Performances and Phonograms Treaty of 1996 (The WPPT)

The WPPT governs protection for performers and producers of phonograms. It is fully consistent with the provisions of the Rome Convention even though it does not require adoption of any of the provisions of the Rome Convention. Article 16(1) of the WPPT mandates its parties to provide for the same kind of exceptions to protect performers and producers of phonograms as is provided by them for protection of copyright in literary and artistic works which is similar to the provision in the Rome Convention. This essentially boils down to the three-step test provided in the Berne Convention. Articles 7 and 11 of the APPT limit the exceptions to the rights of the performers and producers of phonograms respectively to the extent permitted by the three-step test. In view of the statements made in the diplomatic conference of the WCT in 1996, it is clear that the reproduction rights and exceptions to the same apply to the digital environment as well and that the agreed statement applying to Article 10 of the WCT applies *mutatis mutandis* to Article 16 of the WPPT.

The Three-Step Test – An Analysis

It is clear from the discussion above that as long as there is no national legislation on the issue and no inconsistency with the same, the provisions of the Convention along with those of the various international treaties India has ratified, including the Berne Convention, constitute law in India. Thus, any exception to exclusive rights under Indian copyright law must be measured against the touchstone of the three-step test. Further, in light of the fact that many international treaties governing global standards in copyright law require national legislations to adhere to the three-step test under the Berne Convention, it becomes important to study the test in detail. In order that an exception to the reproduction right of a copyright holder in a national legislation is permitted, it must adhere to certain minimum standards as laid down in Article 9 of the Berne Convention which constitutes the three-step test. This test mandates that the said exception (1) permits reproduction of the copyrighted work in certain special cases, (2) is such that such reproduction does not conflict with a normal exploitation of the work, and (3) does not unreasonably prejudice the legitimate interests of the author. The precise meaning, scope and application of the three-step test in respect of the Berne Convention as well as other international treaties is in dispute and is not settled.⁴⁵ A WTO Dispute Resolution Panel dealt with the interpretation of the three-step test in Article 13 of TRIPS (which is only a slightly modified form of the test in the Berne Convention and is not in conflict with the same) in respect of a dispute in 2000 between the European Union and the United States of America over an exception to copyright under the US law.⁴⁶ The decision of the Panel has been criticized on the ground that it makes it difficult for fair use provisions to pass the test.⁴⁷ There have also been concerns of the suitability of the test in its current form in the digital age.

⁴⁵ Christophe Geiger *et al*, “Towards a Balanced Interpretation of the Three-Step Test in Copyright Law”, 2008, 30, *European Intellectual Property Review*, 12, p. 479.

⁴⁶ Report of the WTO Panel dated June 15, 2000, WT/DS160/R.

⁴⁷ Tobias Schonwetter, “The Three-Step Test within the Copyright System” available at <http://pcf4.dec.uwi.edu/viewpaper.php?id=58&print=1> (last visited on November 20, 2009).

Step 1: “Certain Special Cases”

The WTO Panel opined that the first step requires that an exception to national legislation should be clearly defined and narrow in its scope and reach. Further, it was opined that the exception need not be justified by a clear reason on the lines of public policy. An exception for the benefit of print impaired persons in the Indian Copyright Act, it is submitted, can be clearly defined in terms of its scope and reach. The exception is for the benefit of persons who are unable to access printed material in their normal form by one or more reasons of a form of disability. The criterion is objective and clearly defined. Further, even though it is not mandated by the first step, an exception for the benefit of print impaired persons is absolutely in line with public policy considerations as discussed earlier.

Step 2: “No conflict with normal exploitation of the work”

The WTO Panel opined that every use of work which is, in principle, covered by the scope of exclusive rights and conflicts with commercial gains need not necessarily conflict with a normal exploitation of that work. Otherwise, the Panel further held, no exception would ever pass the second step since a copyright is, by nature, an exclusive right and is mostly associated with commercial gains. Thus, normal exploitation cannot be equated with a full use of exclusive rights. The Panel opined that the second step only restricts those activities which cause significant or tangible commercial losses in actual or potential markets. It is submitted that in case of reproduction of copyrighted works in formats accessible by print impaired persons, the end beneficiary is a person who can otherwise not access the work in its normal form. Thus, such person never formed part of the actual or potential market of the work (in its normal form) in the first place. Hence, there is no question of any losses in respect of the same. In the event, a suitable nominal remuneration mechanism is worked out between the print impaired persons and the copyright holders, it only expands the market of the work since it can now cater to those persons who did not otherwise form part of the market.

Step 3: “Not unreasonably prejudice the interest of the right holder”

While the Berne Convention and the WCT use the word “author”, the TRIPS uses the word “right holder”. Since all right holders need not be authors, the word “right holder” has a broader scope. The Panel opined that prejudice to the legitimate interests of the right holder constitutes an unreasonable one if the exception in question causes an unreasonable loss of income to the copyright holder. Importantly, the Panel has woven into the third step, a proportionality test such that the harm to the right holders has to be reasonably related to the benefits of the users (in whose favour the exception in question is provided). It further stated that the term “legitimate” needs to be read in a normative context of protection of interests that are justifiable in light of the objectives underpinning the protection of exclusive rights. These two points are specifically important in the context of exceptions for the benefit of print impaired persons. As far as the proportionality aspect is concerned, it is indisputable that the harm, if any, to the copyright holder caused by reproduction of the work in accessible formats cannot outweigh the enormous benefit - from a public policy viewpoint or otherwise - such reproduction causes to the millions of print impaired persons who will then be able to access the work. Further, looking at the term “legitimate” from a normative viewpoint, public interest, freedom of expression and development of arts and science are, *inter alia*, the objectives underpinning the protection of exclusive rights. Providing access to information and thus, education to millions of print impaired persons who are otherwise unjustly denied such rights is directly serving public interest and the cause of development of arts and science. Thus, it is submitted that an exception to the reproduction right of a copyright owner, for the benefit of print impaired persons passes the third step of the three-step test.

In light of the same, it is interesting to note that over 50 countries worldwide have provided exceptions for the benefit of the “print impaired” or the “visually impaired” and none of the exceptions have been challenged on the basis that they violate the three-step test. Further, 21 countries provide exceptions not limited to special formats while 19 countries provide exceptions limited to special formats such as Braille.⁴⁸ Article 5(3)(b)

⁴⁸ See Judith Sullivan, “*Study on Copyright Limitations and Exceptions for the Visually Impaired*”, World Intellectual Property Organisation, 2006, p. 37-39.

of the European Union Copyright Directive provides for exceptions to the reproduction right, and the right of communication to the public for works and the right of making available to the public for other subject matter, for “*uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability.*” This has a wider scope and can include all kinds of disabilities including print impairment. Australia specifically provides exceptions for the benefit of the print impaired while Canada provides exceptions for the benefit of persons with perceptual disability.⁴⁹

As stated earlier, the Panel’s decision has been criticized on the grounds that it makes it more difficult for provisions of fair use to pass the test. In fact there are several debates to modify the three-step test to enable it to provide a greater scope for exceptions to be incorporated in national legislations. In light of the fact that an exception to reproduction of a copyrighted work for the benefit of print impaired persons passes the three-step in its current form, it is disheartening to see that even the test in its current form is not fully given credence to and the much needed exception to reproduction rights which, it is submitted, print impaired persons are entitled to, is not provided for in Indian copyright law.

Three Step Test versus Exception for “Teaching Purposes”

As already noted above, the Berne Convention allows signatories to create exceptions to the rights of copyright holders if such exceptions meet the standard laid down by the three-step test as contained in Article 9(3). This standard has been incorporated by other international instruments governing intellectual property rights including TRIPS (Article 13) and the WIPO Copyright Treaty (Article 10). However, Article 10(2) of the Berne Convention also provides for signatories to create uncompensated exceptions and limitations for use of copyrighted works for illustration in publications, broadcasts and sound recordings for teaching purposes. These exceptions are available to signatories of the TRIPS Agreement, which incorporates the provisions of the Berne Convention. There is no provision in the international copyright regime to provide for exceptions facilitating

⁴⁹ *Ibid.*

education or specific provisions reaching out to the establishment of libraries or archives or specific provisions for use of copyrighted works by persons with disabilities. In light of an absence of such a provision, Article 10(2) of the Berne Convention providing for exceptions for “teaching purposes” gains importance in respect of use of copyrighted works in accessible formats by print impaired persons for educational purposes. Provision for such an exception in the Berne Convention makes out a case for incorporation of a similar provision in national law governing copyright. Article 10(2) mandates a different test than the Three Step Test in order for an exception for “teaching purposes” to be incorporated by a signatory.

Article 10(2) lays down that *“[i]t 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 utilization, to the 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 utilization is compatible with fair practice.”*

While the three-step test mandates exceptions to be introduced in **certain special cases** which do not **conflict with the normal exploitation of the work** and do not **unreasonably prejudice the interests of the right holder**, exceptions for teaching purposes under Article 10(2) can allow for “**utilisation**” of the work (as opposed to “reproduction” of the work under Article 9(3)) to the **extent justified by purpose** by way of **illustration** as long as such utilization is **compatible with fair practice**.

The question which has been debated in this regard is whether Article 10(2) is in any way affected by the three-step test in Article 13 of the TRIPS or is independent of it. In other words, the question is whether or not an exception for teaching purposes introduced under Article 10(2) is required to pass the three-step test. The question is a subject of much debate. Certain legal commentators following the WTO Panel Decision in *United States – Section 110(5) of the U.S. Copyright Act*, claim that the three-step test applies to all exclusive rights of copyright holders (including the right to use works for teaching

purposes) and requires all proposed exceptions to pass the test.⁵⁰ However, other commentators read the three-step test narrowly as applying only in addition to the existing exceptions in the Berne Conventions when the test is compatible with the requirements of those in the Berne Convention.⁵¹ The Electronic Frontier Foundation (EFF) argues that on tracing the history of the negotiation of the Stockholm Conference of the Berne Convention, it is seen that the history supports the interpretation that the three-step test does not apply to those areas where members are granted the discretion to create exceptions recognized in the Berne Convention such as Article 10(2). On this basis, EFF argues that a country can create exceptions under Article 10(2) of the Berne Convention even though it does not satisfy the three-step test.⁵²

The three-step test also finds place in TRIPS, the WCT and the WPPT as stated earlier and it governs the creation of exceptions and limitations to rights newly granted under these treaties. In the course of the negotiations of the treaties in 1996, developing countries expressed concern over such a provision which had a potential impact of restricting the sovereignty of member states over creating exceptions in their national copyright laws (the discretion for such creation being granted to the member states under the Berne Convention) tailored to meet domestic needs.⁵³ As a result, member states adopted an agreed statement preserving the countries' existing copyright exceptions and allowing the countries to introduce appropriate exceptions to meet domestic needs. The statement expressly protects the Berne Convention exceptions from the scrutiny of the three-step test under the TRIPS. In fact, Article 10 of the WCT which incorporates the three-step test expressly states that the test does not, in any way, expand or reduce the scope of the existing exceptions under the Berne Convention. It further affirms that member states are free to extend exceptions to exclusive rights into the digital environment to suit the domestic needs.

⁵⁰ Sam Ricketson, "Applying the Three-Step Test in the Digital Environment", 2004, available at www.wipo.int/edocs/mdocs/copyright/.../sccr_17_www_111472.ppt (last visited on November 20, 2009).

⁵¹ See Lawrence Liang, "Copyright Exceptions and Limitations for Education", *Alternative Law Forum*.

⁵² Gwen Hinze, "[Making Knowledge Accessible Across Borders: Mandatory Minimum International Copyright Exceptions for Education](http://www.eff.org/wp/making-knowledge-accessible-international-copyright-exceptions-for-education)", *Electronic Frontier Foundation*, 2008, available at <http://www.eff.org/wp/making-knowledge-accessible-international-copyright-exceptions-for-education> (last visited on November 20, 2009).

⁵³ See Lawrence Liang, "Copyright Exceptions and Limitations for Education", *Alternative Law Forum*.

Considering that the agreed statement expressly protects erosion of any existing exceptions in national copyright laws under the Berne Convention from the influence of the three-step test incorporated under the WCT and the WPPT, it is submitted that Article 10(2) can be interpreted to be independent of the three-step test. This is of particular significance to promoting access to copyrighted works for the print impaired. An interpretation suggesting that Article 10(2) is independent of the three-step test would imply that an exception for “teaching purposes” can be introduced as long as the utilization of the work is consistent with fair practice even though it may appear to unreasonably prejudice the interests of the right holder. Therefore, an exception which may not otherwise pass the third step of the three-step test may be a valid one under Section 10(2) as long as it satisfies the conditions thereunder. Such an interpretation would make it easier for the introduction of an exception allowing conversion of copyrighted works in accessible formats for the benefit of print impaired persons.

UN Convention on Rights of Persons with Disabilities

The United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol was adopted on 13 December 2006 at the United Nations Headquarters in New York and was opened for signature on 30 March 2007. It entered into force on May 3, 2008.⁵⁴ India has signed and ratified the Convention.

The Convention aims to support the full and effective participation of persons with disabilities in social life and development⁵⁵ and to advance the rights and protect the dignity of persons with disabilities⁵⁶ and to promote equal access to employment, education, information, goods and services. The Convention strives to ensure accessibility for persons with disabilities and requires parties to provide accessible technology (including communication and information technology) for persons with disabilities at affordable prices.⁵⁷ Thus, provision of works in accessible formats to print

⁵⁴ United Nations, *United Nations Convention on the Right to Persons with Disabilities*, available at <http://www.un.org/disabilities/default.asp?navid=13&pid=150> (last visited on November 20, 2009)

⁵⁵ Article 1, United Nations Convention on the Rights to Persons with Disabilities, 2006 (UNCRPD)

⁵⁶ *Ibid*

⁵⁷ Article 9, UNCRPD

impaired persons is an obligation of parties to the Convention. Parties are required to take appropriate measures to ensure availability of information to persons with disabilities, at par with the general population. Article 21 of the Convention casts an affirmative obligation on the state parties to effectuate the freedom of speech and expression, (including the freedom to seek, receive and impart information). The provision calls for parity between persons with disabilities and others in so far as the freedom of speech and expression are concerned. This would include, as provided under the Convention, accepting and facilitating the use of 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. Parties are also required to take all appropriate steps to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities of cultural material.⁵⁸

The Convention marks a shift in the approaches to persons with disabilities from the “object” to the “subject” approach. That is to say, disabled persons who have been, for a long time, viewed as “objects” necessitating charity, medical treatment and social protection, were, for perhaps the first time, viewed as “subjects” capable of claiming their rights and entitled to a life of dignity with free choice and informed consent being the important elements of the same. Thus, the Convention looked at state parties as being *obliged* to provide disabled persons with equal opportunities and an access to a healthy social, cultural and political life shaped by free choice, as a matter of right, with such persons being entitled to the same. If such access to rights and an effective exercise of the same by disabled persons requires certain adaptations to be made by the state parties, the Convention mandates such an adaptation. In fact, it reaffirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms at par with other persons.

In the context of such a rights-based approach adopted by the Convention, it can be seen that the WIPO proposal for sharing accessible formats of copyrighted works for print impaired persons is consistent with and is indeed essential for achieving the broad

⁵⁸ Article 30(3), UNCRPD

purpose of the Convention. Equality of opportunity and accessibility are some of the general principles on which the Convention is based. It is heartening to note that the Convention expressly highlights in the Preamble, *“the fact that the majority of persons with disabilities live in conditions of poverty, and in this regard recognizing the critical need to address the negative impact of poverty on persons with disabilities.”* While recognizing the economic depravity of disabled persons (caused mostly due to denial of their rights and equal opportunities by the State), the Convention mandates the state parties to establish a mechanism for enforcement of its provisions in a way which ensures cost effectiveness and at the same time, shifting the burden of costs on the State. Thus, the Convention expressly calls for state parties to ensure that the objectives of the Convention are fulfilled at “minimum cost”. This reflects the empowering and enabling approach of the Convention which would support a cost-effective solution for conversion, distribution and reproduction of copyrighted materials in accessible formats for the benefit of the print impaired. Under Article 4(f) of the Convention, one of the general obligations of State Parties is to *“undertake or promote research and development of universally designed goods, services, equipment and facilities...which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities...”*

It is a general obligation of a state party under Article 4 of the Convention to take all appropriate measures, including measures to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities. Further, Article 12 of the Convention mandates state parties to ensure that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life and require state parties to take all measures to provide any access which may be required by disabled persons to exercise their legal capacity. A reading of Articles 4 and 12 together makes it clear that the Convention requires state parties to amend their national laws, if such an action is necessary to ensure that disabled persons are able to exercise their legal capacity on an equal basis with the others. This, it is submitted, would imply that an amendment of Indian copyright law providing an exception in favour of print impaired persons is indeed an *obligation* for India under the Convention since such an amendment

ensures that print impaired persons exercise their legal capacity including their fundamental rights and freedoms on an equal basis with others which, they have been unable to do in absence of the exception.

Article 9 of the Convention which specifically deals with accessibility requires that state parties to take appropriate measures to provide disabled persons with access to information and communications, including information and communications technologies and systems. Article 9 also specifically mandates the state parties to promote the design, development, production and distribution of *accessible* information and communications technologies at an early stage so that these technologies and systems become accessible at minimum cost.

The Convention lays down that persons with disabilities are entitled to the right to freedom of expression and opinion, including the freedom to access and impart information on an equal basis with the others.⁵⁹ For the purpose of providing access to such right, state parties are mandated under Article 21 of the Convention to provide *“information intended for 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.”*

Article 30 of the Convention mandates state parties to recognize the right of persons with disabilities to take part on an equal basis with others in cultural life and requires them to take appropriate actions to ensure that disabled persons enjoy access to cultural materials in accessible formats. Article 30(3) expressly requires an enabling intellectual property rights regime in state parties as it lays down that *“state parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.”*

The Convention recognizes the need for international cooperation as a support system for national efforts for the realization of the purpose and objectives of the Convention and calls for state parties to *“undertake appropriate and effective measures in this regard,*

⁵⁹ Article 21, UNCPRD.

*between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities.*⁶⁰ Article 32(1)(d) of the Convention mandates state parties to take measures providing as appropriate, technical and economic assistance in this regard, including by facilitating access to and sharing of accessible and assistive technologies, and through the transfer of technologies.

In short, the Convention recognizes that disabled persons are entitled to rights including the right to a free and informed choice, the right to access information, the right to freedom of expression and opinion and the right to a cultural, social and political life at par with other persons in society. It mandates the State to ensure disabled persons, the access to these rights at minimum cost considering the economic depravity of majority of disabled persons across the world. It specifically requires the intellectual property regime of state parties to remove all unreasonable and discriminatory barriers to access of cultural materials by disabled persons. Thus, it is submitted, that India is, in fact, obliged to amend the copyright law to remove all barriers which discriminate against the print impaired and restrict their right to access information and thus, restrict their exercise of their fundamental rights. The Convention further promotes international cooperation and thus, India is obliged to remove all barriers restricting conversion of copyright material and dissemination of information in accessible formats at a minimum cost. In view of the same, barriers on export and import of copyrighted material and material in accessible formats which not only cause duplication of work but also raise the costs of conversion and distribution so high that it becomes impossible for print impaired persons to access material, must be eliminated. It is of importance to note that the Bombay High Court has, in the case of *Ranjit Kumar Rajak v. State Bank of India* (WP No. 576/2008, decided on May 8, 2009), held that although the Convention has not been incorporated into municipal law, as long as it is not in conflict with municipal law and can be read to form part of Right to Life under Article 21, it is enforceable. In effect, the Court has read into Indian law, the provisions of the Convention. In addition, since the Supreme Court held to that effect in *Vishaka v. State of Rajasthan*,⁶¹ it is a wellsettled position of law that

⁶⁰ Article 32(1), UNCRPD.

⁶¹ AIR 1997 SC 3011.

international conventions and norms are to be read into domestic laws in the absence of domestic law in that area as long such conventions and norms are consistent with the provisions of national law. Right now, Indian copyright law not only fails to provide access to technology and information in accessible formats to its print impaired citizens but is also drafted in such a way that any attempt on part of a person to provide such access by reproduction of works in accessible formats fall foul of copyright regulations. In light of the same, it is submitted that it is indeed obligatory on part of the legislature to enable print impaired persons to access technology and information including works protected by copyright at affordable costs and at par with the rest of the population.

Part IV: Case Studies – Countries and Private Initiatives

As Judith Sullivan has pointed out in her study on copyright limitations and exceptions for the visually impaired, it is important to note that many countries have already provided for exceptions in their copyright laws to permit reproduction and/or distribution of printed material in accessible formats for the benefit of the print impaired. As Judith Sullivan's study points out, there are 57 countries in the world today that have incorporated specific provisions for the benefit of the visually impaired specifically or to assist print impaired persons more generally, by making a copyright work available to them in an accessible form.⁶² Annexure A contains a list of countries that define under their copyright laws, acts which are permitted without, in fact, using language of the acts that are restricted by copyright. These exceptions, are however, limited by other conditions required to be fulfilled as prescribed elsewhere in their laws.

It must be noted that the needs of print impaired persons vary greatly with the kind of impairment they suffer from and the degree of such impairment. While some visually impaired persons may be able to read Braille, persons with other kinds of print impairment may not find any use for documents in Braille. Among persons with visual impairment itself, those who are impaired at birth may have learnt to use Braille all along while persons who acquire such impairment much later in life may not be able to learn Braille. Thus, suitable accessible formats should include other formats such as audio recordings, large print publications and photographic enlargements. With technological advancement, there are more ways of accessing material in print such as, through the use of screen-reading software and talking digital books. Thus, it is important that an exception to copyright in favour of print impaired persons permits conversion to different formats and does not restrict such conversion to specific formats. Some countries such as Cameroon, China, Iceland, Indonesia limit their exceptions only to the production of Braille copies. At the same time, around 21 countries have provided exceptions that are not limited to conversion to specified formats. Annexure B lists the countries which have provided exceptions in their copyright laws for conversion to any accessible format

⁶² Judith Sullivan, "*Study on Copyright Limitations and Exceptions for the Visually Impaired*", World Intellectual Property Organisation, 2006 at p. 9.

without limiting such exception to allow only certain types of formats.⁶³ Of the other countries which allow exceptions to copyright for the benefit of print impaired persons, 19 countries restrict such exceptions to conversion of documents to Braille or other specific formats.⁶⁴ Annexure C contains a list of those countries which provide for conversion to only specialised formats.

It would be useful to do an illustrative study of a couple of cases in this regard so that we are afforded a preview of the situation in India after an analogous amendment is effected to the Indian copyright law.

United Kingdom

The producers of accessible material for the print impaired in the UK were required to obtain permission from copyright holders for conversion of every title prior to 2003. In most cases, it was unclear as to who held the rights to actually give such permission – was it the publisher, the literary agent or the author of the work? In many cases, it was unclear if the publisher had already given permission to another entity. In absence of any law authorizing institutions to make legal copies of material in accessible formats, it was difficult for right holders to trust the institutions themselves. Judith Sullivan cites the example of the National Library for the Blind which was one such organization in the UK making copies in accessible format for the visually impaired. She states that publishers were unsure of the intentions of the NLB and in most cases, refused permission. Further, there was enormous confusion about the extent and mode of payment. Most of the time, the print impaired persons are economically dis-empowered and such costs impose a huge burden on persons converting the material as well as the persons who are the beneficiaries of the same (that is, the print impaired persons). In the event permissions are given, they came with a lot of restrictions such as on geographical extent of loans, number of copies that could be made and time before permission would need to be sought again. Thus, obtaining permission was a huge administrative burden not to mention an economic one as well.

⁶³ *Ibid* at 36.

⁶⁴ *Ibid* at 38.

In 2003, a legislative change was introduced in the UK carving out an exception to copyright to enable making multiple accessible copies of copyrighted material while leaving it open to copyright holders to set up a scheme for licensing which is not more restrictive than what is permitted by the exception itself. This made it much simpler for conversion of copyrighted material in accessible formats as well as giving access of the same to the print impaired. The licensing scheme clarified terms of payment and made it administratively easier to secure permission for conversion. Judith Sullivan cites the example of the Copyright Licensing Agency which set up the licensing scheme for conversion of books and journals into accessible formats. A condition under the scheme was that all information about the converted material had to be entered into an online database. This made it easier for all persons requiring copies of works in accessible formats to ascertain if it actually existed and determine the person or organization holding its rights. It also avoided duplication of work since it provided information on previous attempts, if any, to convert the same material. Copyright holders also had access to information about entities who required any additional access to their work.

United States of America

In the United States, access to printed material in formats accessible by the print impaired is, in fact, a civil rights issue. While Section 504 of the Rehabilitation Act, 1973 deals with education programmes which receive federal funding, the Individuals with Disabilities Education Act, 2004 (IDEA) requires public schools to make available to all eligible children with disabilities a free and appropriate public education in the least restrictive environment appropriate to their individual needs. Thus, the US law allows school texts and educational material for children to be converted in electronic or other formats accessible by the print impaired. An amendment to the law requiring users to obtain permission from copyright holders for such conversion was effected in the Chafee Act of 1996 or the Copyright Law Amendment, 1996. This amendment provides for certain authorized entities to reproduce or distribute copies of a broad range of previously published literary works in accessible by print impaired persons. Authorized entities must

screen recipients and provide access to their collections to qualified individuals. The IDEA establishes the National Instructional Materials Access Center (NIMAC) which is statutorily obliged to provide access to print instructional materials, including textbooks, in accessible media, free of charge, print impaired persons in elementary schools and secondary schools in accordance with certain prescribed terms and procedures. The legislation requires a local educational agency that chooses to coordinate with NIMAC to contract with a publisher of the copyrighted material, either to require the publisher to provide electronic files of the content of that material to NIMAC, or to purchase the material from the publisher that are already produced in accessible formats. This makes educational material for print impaired children in the US more accessible and affordable.

Bookshare.org

Bookshare.org is an initiative in the USA which is supported by a non-profit organization, Benetech.⁶⁵ This initiative operates under the special exception to copyright for the benefit of the print impaired persons which is permitted by the US copyright law. This exception allows for reproduction of copyrighted works into specialized formats accessible by print impaired persons, such reproduction being subject to certain prescribed conditions. This is indeed an example to illustrate the impact an enabling exception in national law may have on millions of print impaired persons. Bookshare.org is an online community facilitating print impaired persons to have access to books which have been scanned by members. This way, duplication of work can be avoided and a single member's effort in scanning a work may benefit an entire community of print impaired persons. Bookshare.org also obtains digital copies of books directly from the publishers. The scanned copies of works submitted by members and digital copies directly obtained by publishers are converted to digital talking books and digital Braille. The works in these accessible formats are distributed to schools, libraries and to other individuals having print impairment. It has been reported that Bookshare.org's experience of getting agreements with publishers has been quite positive and it is now in partnership

⁶⁵ See <http://www.bookshare.org> (last visited November 20, 2009).

with Lex Mundi Pro Bono Foundation which is working on publisher agreements in New York and London.

It is however, disheartening to note that initiatives such as bookshare.org have their activities largely confined to supplying digital copies of works only within the US or such other domestic jurisdiction as that initiative may relate to, because national laws, even while permitting exceptions for the benefit of their own print impaired citizens do not provide for import or export of such copies to facilitate access to print impaired individuals outside the country. For instance, bookshare.org has global rights on roughly 2000 titles⁶⁶ which, even while being quite commendable an achievement in its own right considering the kind of legal and other barriers that such an initiative faces, is very miniscule compared to the total number of titles actually published in the world. In the US alone, the number of publications which come into the market in a year are in lakhs and so is the case in every other country including India. Therefore, compared to the total number of publications released worldwide, rights over 2000 titles is, even while being a start, hardly effective to address the accessibility issue facing print impaired persons worldwide. These restrictions on import and export of works in accessible formats which are imposed by national copyright laws of several nations severely restrict the access to such works of print impaired persons and in fact, make it impossible for them to obtain access. This barrier is, in fact, in addition to the barrier of high costs which may have to incurred in conversion and distribution given the restrictions in the current legal regime. Digital technology has afforded a great opportunity to provide access to print impaired persons since it is only a matter of economies of scale where efforts in one country to make accessible formats actually benefits another country greatly. Conversion of a book into an accessible format is extremely expensive and far exceeds the cost of the book itself. It also involves conversion of the work into an intermediate digital format from which actual copies in an accessible format such as Braille become much cheaper to convert to. Due to restrictions on export and/or import of such converted/intermediate copies in national copyright laws of several countries has posed to be a great barrier to international sharing or cross country exchange of works for the benefit of the print

⁶⁶ *Ibid.*

impaired persons. Annexure D lists the countries which, even while, providing for exceptions in their copyright laws benefit print impaired persons impose restrictions on import and export of such copies. It also includes a list of the countries wherein provisions for export and/or import of accessible copies are much more facilitative and wherein publisher agreements are, in fact, easier to obtain.

Indian Initiatives

Several not-for-profit organizations in India have been actively working for the rights of persons with print disabilities to have access to printed material in alternative formats. Seven of these several organizations have been working in collaboration on problems in copyright law and policy in India which impose restrictions on the activities of print impaired person. These seven organizations which constitute the Publication Access Coordination Committee (PACC) are:

- a) Blind Graduates' Forum of India, Mumbai
- b) Blind Persons' (Men's) Association, Mumbai
- c) Dr K M Shah Self Vision Centre, Ramnarian Ruia College, Mumbai
- d) Helen Keller Institute for the Deaf and Deafblind
- e) Indian Association for the Visually Handicapped
- f) National Association for the Blind, India
- g) Xavier's Resource Centre for the Visually Challenged, St Xavier's College, Mumbai

The PACC submitted a joint response to the Copyright Office at the Ministry of Human Resource Development commenting on the changes required to be made to copyright law for the benefit of persons with print impairment.⁶⁷ PACC has made an attempt to bring attention to the difficulties encountered when seeking permission from copyright holders to make printed material available in alternative formats, especially when such right holders are unaware of the needs of persons with print impairment. Of the many initiatives undertaken by various organizations in India working for providing access to

⁶⁷ See Public Action Coordination Committee, "Response to the Invitation of Views for Changes in the Copyright Act of India, 1957 with Special Reference to Proposed Clause 52(za) Focusing on the Visually Challenged and the Print Disabled", May 12, 2006, available at <http://www.daisyindia.org/PACC%20Representation.pdf> (last visited November 20, 2009).

persons with print impairment, of printed material in alternate formats, a couple of noteworthy ones are the initiatives of the National Association for the Blind and the Daisy Forum of India.

The National Association for the Blind (NAB) established the first production and distribution centre for talking books called the Talking Books Centre. NAB later envisaged the concept of talking magazines in four languages with such magazines recorded on cassette and played in various institutes catering to the needs of the visually impaired.⁶⁸ Converted forms of books of general interest along with textbooks for children in higher classes were also added to the list. Material in print was thus converted to sound recording and it was provided to persons with visual impairment free of cost.

The Daisy Forum of India (DFI) is an organization constituted in 2007 by more than 60 organizations from all over India involved production of Braille, talking books or large print books for the benefit of persons with print impairment.⁶⁹ There are different formats in which a material in print can be accessed by a person with print impairment. These may be Braille, Talking Books, Large Print Books or E-Textbooks. DAISY refers to Digitally Accessible Information System and a DAISY book consists of typically a set of digital files that include:⁷⁰

- a) One or more digital audio files containing a human narration of part or all of the source text;
- b) A marked-up file containing some or all of the text (strictly speaking, this marked-up text file is optional);
- c) A synchronization file to relate markings in the text file with time points in the audio file; and
- d) A navigation control file which enables the user to move smoothly between files while synchronization between text and audio is maintained.

⁶⁸ See National Association for the Blind website available at <http://www.nabindia.org> (last visited November 20, 2009).

⁶⁹ See Daisy Forum of India website available at <http://www.daisyindia.org> (last visited November 20, 2009).

⁷⁰ See Daisy Consortium website available at http://www.daisy.org/about_us/index.php (last visited November 20, 2009).

The DAISY Standard for production of material in alternate accessible format allows the producing agency full flexibility regarding the mix of text and audio ranging from audio-only, to full text and audio, to text-only. Works produced using the DAISY Standard are one of the most easily accessible formats for print impaired persons which are not only very economical but also rich in features and easily navigable. It provides for a richer reading experience since it contains features enabling jumping to any page of the book or to the next or previous chapter or sub-section or sentence.⁷¹ DAISY talking books can thus be played in CD players, mobile phones, computers, flash memory discs, I-pods, etc. Braille Books produced using the DAISY Standard can be printed on paper or on refreshable Braille display. Large Print Books can be read on the computer or on paper and E-Textbooks can be read out through a computer through use of screen reading software which is also economical to use.⁷²

Member organizations (which are essentially not-for-profit organizations)⁷³ of the DFI produce and maintain library of Digital Talking Books, Braille Books or E-Text books, these books being converted from printed form to accessible forms. The library for books in accessible formats is an effective structure to ensure that members are able to obtain a copy of a book produced by any other member of the forum even while such forum is outside the organization of the member in question. The seamless network between various organizations enables combined projects to be undertaken for distribution and production of books in accessible formats all over the country thus avoiding duplication of work and cutting down costs. Such a library structure also makes it convenient for efforts in India to be part of the network of initiatives for print impaired persons and libraries worldwide.

The DFI is in partnership with Bookshare.org with whom it has created a unique innovative e-library model where qualified users with print impairment access books in alternate accessible formats. By virtue of such partnership, Bookshare India is also a

⁷¹ See *Ibid.*

⁷² See <http://www.daisyindia.org/02HelloDAISY.html> (last visited November 20, 2009).

⁷³ See <http://www.daisyindia.org/> (last visited November 20, 2009).

member of the DFI. Bookshare.org has also partnered with three organizations in India to regulate registration of Indians with print impairment who seek membership of Bookshare.org, such membership enabling access to the users of books for which DFI and Bookshare.org jointly work to get permission for conversion and convert into accessible formats including titles of books which have obtained permission internationally for conversion and distribution.⁷⁴ Such registration is helpful, as is seen below, especially to ensure that the end beneficiaries of any amendment in the law or any action taken by the Government or private bodies are only persons with print impairment and not other persons seeking to free ride on the structure.

These organizations recognize the limitations which the current copyright regime places on their efforts to provide access to all titles published in normal print format in alternate formats for the benefit of persons with print impairment. Mass conversion of books into accessible formats is not provided for specifically by the current law regulating copyright in India and thus, such an effort may tantamount to violation of the rights of the copyright holders and may be subject to penalty under law. In view of the same, the only way to provide access is by obtaining permission for conversion, reproduction and distribution of works in accessible format from individual publishers. The partnership between DFI and Bookshare.org has been helpful in jointly seeking permission and support from the publishing community in India to convert books into accessible formats. DFI has thus appealed to publishers to be sensitive to the needs of persons with print impairment and grant permission for conversion of the works they publish into accessible formats.⁷⁵ This process is not only uncertain (as there is no guarantee that the publishers will grant permission for conversion as there is no obligation on them under law to do so) but also cumbersome as it is time consuming and expensive. Any barriers to sharing an already converted copy among different groups of users will only cause duplication of work and huge expense. Nevertheless, DFI has so far obtained permission from only a few publishers and this accounts for an insignificant number of books converted relative to the total number of titles published every year.⁷⁶

⁷⁴ *See Ibid.*

⁷⁵ *Ibid*

⁷⁶ *Ibid*

It is heartening to note that even in the absence of effective social and economic empowerment of persons with disabilities in India and in the face of laws which not only fail to protect but hinder access of persons with disabilities to material aiding their education and overall development, organizations such as the NAB and the DFI have taken up effective steps to reach out to persons with visual impairment for several decades now. However, these have been inadequate to meet the needs of the entire country. In addition to the lack of resources for conversion, the difficulty of distributing them to reach beneficiaries in distant areas has resulted in a majority of persons being left out of the knowledge market. Contemporary sharing and distribution models such as bookbole.com which is an internet based platform for blind and visually impaired persons to share accessible content open up huge possibilities for access to knowledge at a global level for print impaired persons (as is detailed below). However, all these models are unable to achieve their maximum potential for successful utilisation due to an unsupportive legal regime. It is disappointing to see that pioneers of works reaching out to persons with visual impairment depend solely upon the caprice of publishers in carrying out their work. Appeals and statements such as “*We look forward to your support and cooperation to bridge this long awaited gap in print access for the print disabled in India*” adorning the website of organizations such as the DFI working to enable persons with print impairment to enjoy their basic rights and fundamental freedoms guaranteed to them under the law (both constitutional and statutory) are, in fact, a reflection of the glaring need for the State to act immediately to provide for such persons. Removal of legal barriers towards providing such access to persons with disabilities will only enable such initiatives to take on greater heights and reach more number of beneficiaries. A small amendment allowing for conversion of material in accessible formats for the print impaired would go a long way in providing them access to enjoy their basic human, constitutional and statutory rights.

Bookbole.com

While Bookshare.org's initiative to obtain publishers' consent/agreement represents a top-down approach to serve the needs of the print impaired, another initiative to reach out to the needs of the print impaired has recently taken shape in India. Bookbole.com is an online platform launched by Inclusive Planet in association with the Centre for Internet and Society wherein print impaired persons can share works in accessible formats with each other, subject to certain terms of use. The idea behind the initiative is simple. Considering that the availability of works in accessible formats is almost negligible, those works that are already converted into accessible formats must be easily shared among the print impaired persons. Bookbole.com is an answer which is community driven and inclusive. A user downloading content from the online sharing platform represents that he is either print impaired or that he is a caregiver, teacher, parent or guardian of a person with print impairment or that he represents an organization providing assistance and support to print impaired persons and that he is using the service solely for the benefit of persons with print impairment. Further, the initiative is only to provide a platform for print impaired persons to share and does not extend to validating the nature and content of the works uploaded. The website also has a "take down policy" according to which any authorized person may notify Bookbole.com of any content, the upload of which is in violation of copyright laws and such content, if found to have been uploaded in violation of law shall be removed from the website. Only two months since its inception, Bookbole.com has already reached out to people in 72 (sixty) countries and has over 2000 (two thousand) visually impaired members sharing close to 15000 (fifteen thousand) works in 34 (thirty four) different languages.⁷⁷ Work has already begun to provide a Spanish version of the website. A seemingly small initiative such as Bookbole.com introduced amid what may be inferred to be an unfavourable copyright policy for the print impaired, goes such a long way in providing access to print impaired persons of works in alternative formats. An amendment to copyright law for the benefit of print impaired persons would only contribute to greater availability and access to works in alternative formats.

⁷⁷ See <http://www.bookbole.com> (last visited on November 21, 2009).

PART V: OTHER CONSIDERATIONS TO BE ACCOMMODATED WHILE PROVIDING FOR AN EXCEPTION TO COPYRIGHT IN FAVOUR OF PRINT IMPAIRED PERSONS

It is indisputable that providing exceptions to the reproduction right of a copyright owner for the benefit of print impaired persons is the first and the most important step towards enabling access to such persons to copyrighted works. However, introducing such an exception without regard to considerations which ultimately influence the free and full exercise of the exceptions by the beneficiaries would amount to the exception becoming a paper tiger and the laudable objective behind such a move would be defeated. In light of this, certain considerations which need to be kept in mind while drafting the exceptions in order that such exceptions are effective are detailed below. Many of these considerations have also been highlighted by the World Blind Union in the advice note issued by them on exceptions to copyright for blind, partially sighted and other print disabled persons.

1. There should be no restriction on conversion of works into particular formats or technologies and should cover both analog as well as digital formats.
2. Access to copyrighted works must be provided in such a way that technological protection measures may be circumvented and digital rights management does not pose a barrier to such access by print impaired persons.
3. Access to copyrighted works by way of a right to reproduce such works in accessible formats must be complimented with rights of distribution (including rental and lending), adaptation, broadcasting by wireless means, other communication to the public by electronic transmission of the work so that the right to access the work is exercised fully and effectively.
4. It is also important to establish a mechanism for sharing the work in accessible format amongst other print impaired persons (for non-commercial use) because this would not only ensure free dissemination of information (without any harm to the copyright holder) but also achieve that result economically. Considering that making copies of

works in accessible formats is extremely cost ineffective, enabling sharing a converted copy among other print impaired persons only makes it that much more economical for all persons concerned.

5. It is important to determine the role of intermediaries in reproduction and distribution of copyrighted works in accessible formats to the beneficiaries (print impaired persons). These intermediaries need not necessarily be print impaired persons and may be involved in reproduction and distribution of the work on a non-profit basis. For the purpose of this study, intermediaries are *not* users or beneficiaries of the works in accessible formats. There is a great deal of scope for collaboration between authors and publishers on the one hand and specialist agencies (intermediaries) on the other, to integrate publication processes and share content in a trusted environment. Such agreements could contribute significantly to reducing the current chronic shortage of accessible material.
6. In view of enabling sharing of accessible material across countries, it should also be possible for accessible material created under an exception in one jurisdiction to be imported for the benefit of blind or partially sighted people in another. This requires provision to be built into national legislation, at least amongst countries which have comparable exceptions.
7. It is essential that organizations that convert and distribute accessible material are able to recover their costs.
8. A structure for compensation to right holders may be worked out where conversion and distribution is done on a for-profit basis keeping in mind that (a) income levels of print impaired persons are, more often than not, low (considering their social circumstances and the measures taken by the state to grant them access to their constitutional rights and entitlements), (b) the cost of converting a work into accessible formats usually exceeds by several times, the cost of the work itself.

9. It is important that the benefits of the exception to copyright are availed of only by persons with disability and not by others, who may free ride on such an exception. While limiting the exception to “formats specially designed for the disabled” may help achieve this objective, it seriously limits the scope of access by the disabled in this technological day and age, as explained above. Rather than limit the kinds of formats that could be created, we propose that the government restrict access of works created under the aegis of this exception to only people with disabilities. One way to do this is by insisting that institutions conduct routine audits on users or relying on certificates that confirm one's status as "differently-abled".

CONCLUSION

With almost 10 per cent of India's population being print impaired, addressing the basic needs of persons constituting that portion forms a critical issue in law making and governance. In addition to fundamental needs such as food, clothing and shelter, it is of utmost importance that persons with print impairment are able to exercise fully and freely their right to freedom of speech and expression, right to information, right to read and write, right to education and most critically, the right to live with dignity. It is only when one is enabled to exercise these basic rights that one can effectively and fully participate in the social, political and cultural process of the country, make meaningful contribution to the pool of public opinion and be able to make a responsible and informed choice in all areas of life. Such participation guarantees citizenship in an expanded and holistic sense so as to go beyond mere animal existence. Thus, lack of provision to enable a person to exercise any of the basic rights as mentioned above would constitute denial of such rights and would amount to an unconstitutional act. It is submitted that there is no difference between a positive act of such denial and a failure to amend a restrictive legal regime which effectively hinders persons from enjoying basic rights.

In light of the same, it is submitted that the Indian copyright regime is restrictive inasmuch as it does not provide for conversion of copyrighted works in print into formats which are accessible by persons with print impairment. This, in the face of almost 50 nations worldwide providing for such an exception to benefit print impaired persons only makes out a stronger case for the India to act in this regard and fulfill its obligation to enable citizens to enjoy their fundamental rights guaranteed to them under the Constitution. Such an action on part of the government is also necessitated by the ratification by India of international conventions and treaties which require its member states to ensure that its citizens who are print disabled are able to fully enjoy right to life, education, information and freedom of speech and expression, with some treaties specifically mentioning that member states should strive to alter their intellectual property rights laws to enable access to persons with print impairment of works in alternate/accessible formats.

While some organizations are already working to provide for such access and have made significant progress in the form of providing access to several titles in accessible formats, the same forms an insignificant portion of the total number of titles which are published and available in the market at any given point. An alteration of a restrictive legal regime would provide a much needed boost to this cause and ensure that the benefit reaches a large number of persons with print impairment. We propose an amendment to the Copyright Act to create an exception to copyright in favour of persons with print impairment so that they are granted access to works in accessible formats at par with other persons, comfortably and at an affordable cost. The amendment must be sensitive to the disparities of income of persons with print impairment and must devise a compensation scheme for right holders accordingly. Since, persons with various types of print impairments (such as visual impairment, dyslexia, paralysis, etc) use various formats including Braille, Large Print Books, Talking Books, E-text books (in .txt and .pdf formats), audio recordings, the amendment should not create any restriction on the type of format into which the work is converted. Since the process of conversion is cumbersome and expensive, organizations creating converted copies should be allowed to recover costs of conversion and restriction on for-profit bodies making conversions should be removed as long as the right holders are reasonably compensated. Finally, the amendment should enable access to software and other tools required for conversion and should not allow content owners to use technological locks or any form of Digital Rights Management to preclude persons with print impairment from accessing their work.

The current frame with which the scenario is analysed is one of intellectual property rights being essentially a tool to guarantee rights to creators of work. Under this frame, any case made out in favour of social justice, public welfare and equity would essentially take the form of an exception to certain “basic” rights already granted to the copyright owners. In fact, copyright owners are, by default, considered ‘right holders’ and they are on the other side of “users” who, at best, can be granted an exception to get access to the work even if it is part of their basic constitutional right to access it. The purpose of access to knowledge and dissemination of information, both being crucial to the development of

democracy and a healthy society, take sidelines in the face of granting rights to content owners. It is submitted that mobilizing access to knowledge and providing right to receive and disseminate information are crucial aspects of exercising one's fundamental right to freedom of speech and expression, information and education. It can be argued that it forms the basic structure upon which the Indian Constitution is founded. It is time that the frame of analysis is shifted from one of rights of creators to one of enabling access to knowledge, with due consideration for the costs and efforts of persons creating works. Such an enabling frame makes out a strong case for granting access to persons with print impairment of works in print which cannot be accessible by them in their normal format. Reforming the legal regime to ensure such access will not be a question of granting an 'exception' to rights which are already granted to owners of works irrespective of the cost such rights create on the development of knowledge resource and pool of information available to citizens of a democratic society. A frame of analysis altered to mobilize access to knowledge will, it is submitted, result in a richer, more just and equitable society providing for all citizens without bias or discrimination.

Annexures

Annexure A⁷⁸

Exceptions defining permitted acts without using language of restricted acts

Country	How permitted/restricted acts are defined
China	“transliteration of a published work into Braille and publication of the work so transliterated”
Croatia	“use of copyright works”
Denmark	“to use and distribute copies of published works”
Iceland	“Braille editions ... may be printed and published”
Ireland	“make a copy ... and supply that modified copy”
Macau	“reproduction or any other ... use of published works” and “the right to transform, by translation or otherwise, to the extent necessary”
Malaysia	“any use of a work ... in the public interest”
Netherlands	“reproduction and publication”
New Zealand	“make copies or adaptations ... for the purpose of providing copies to persons with a print disability”
Poland	“use disseminated works”
Portugal	“reproduction or other forms of use”
United Kingdom	“make or supply accessible copies” and “supplying includes lending”

Annexure B⁷⁹

Exceptions not limiting type of accessible format

Country	Provision on accessible formats
<i>Australia</i>	“the making ... of a sound recording of a work”, “the making ... of Braille versions, large-print versions, photographic versions or electronic versions of the work” and “the making of a sound broadcast”
<i>Austria</i>	“reproduction ... in a suitable form for a disabled person”
<i>Croatia</i>	“the work is reproduced in a manner directly related to the disability of ... people [with a disability] to the extent required by the specific disability”
<i>Czech Republic</i>	“reproduction ... to the extent required by the specific disability”
<i>Denmark</i>	“copies are specifically intended for the blind, visually impaired ... [but does not apply] to use which consists solely of sound recording” and “for the purpose of lending to the blind, the visually impaired ... it is permitted to make sound recordings”

⁷⁸ Judith Sullivan, “Study on Copyright Limitations and Exceptions for the Visually Impaired”, World Intellectual Property Organisation, 2006 at p. 34.

⁷⁹ Judith Sullivan, “Study on Copyright Limitations and Exceptions for the Visually Impaired”, World Intellectual Property Organisation, 2006 at p. 37.

<i>Finland</i>	“copies ... made with the purpose of rendering the text readable by visually impaired persons” and “make copies ... by sound recording”
<i>France</i>	“reproduction ... to the extent consistent with the nature of the disability”
<i>Germany</i>	“reproduce ... in formats accessible to disabled persons to the extent required by the specific disability”
<i>Greece</i>	“reproduction ... for uses which are directly related to the disability, to the extent required by the specific disability”
<i>Ireland</i>	“make a copy ... to meet the special needs of a person who has a physical or mental disability”
<i>Italy</i>	“reproduction ... directly related to the disability ... and limited to the extent required by the specific disability”
<i>Latvia</i>	“reproduce ... in a form perceivable by [visually impaired] persons and insofar as it is necessary in the case of the relevant impairment”
<i>Lithuania</i>	“reproduction ... in the form intended for people having hearing or visual impairment, to the extent required by the specific disability”
<i>Mongolia</i>	“reproduction for use by blind people”
<i>Netherlands</i>	“reproduction ... provided it is directly related to the handicap ... and is necessary because of the handicap”
<i>New Zealand</i>	“copies that are in Braille or otherwise modified for [the] special needs [of persons who have a print disability]”
<i>Poland</i>	“use directly refers to their [disabled persons’] disability”
<i>Slovakia</i>	“use exclusively to cater for the needs of handicapped people to the extent justified by their handicap”
<i>Slovenia</i>	“use is directly related to the disability and limited to its extent”
<i>Sweden</i>	“make, by means other than recording of sound, copies... that people with a disability need in order to be able to enjoy the work” and “libraries and organisations ... may by means of sound recording make such copies”
<i>United Kingdom</i>	“make an accessible copy” which means “a version which provides for a visually impaired person improved access to the work”

Annexure C⁸⁰

Exceptions permitting Braille and other special formats

Country	How specialised formats are defined
<i>Armenia</i>	“reproduction in “raised dots” prints (in Braille) or by other special ways”
<i>Azerbaijan</i>	“the reproduction in Braille or by other special means for the benefit of the blind”
<i>Belarus</i>	“reproduction in Braille or by other special means”
<i>Bulgaria</i>	“reproduction ... in Braille or another analogous method”
<i>Brazil</i>	“reproduction ... in Braille or by means of another process using a medium designed for [the visually handicapped]”

⁸⁰ See Judith Sullivan, “Study on Copyright Limitations and Exceptions for the Visually Impaired”, World Intellectual Property Organisation, 2006 at p. 38.

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<i>Canada</i>	“make a copy or sound recording ... in a format specially designed for persons with a perceptual disability ...but [this] does not authorise the making of a large print book”
<i>Dominican Republic</i>	“public communications ... made for the benefit of blind and other disabled persons”
<i>El Salvador</i>	“communications ... made for the benefit of blind persons”
<i>Estonia</i>	“publication ... in Braille or another technical manner for the blind”
<i>Gabon</i>	“made ... for welfare purposes”
<i>Georgia</i>	“reproduction ... with relief-dotted print or of other special means for the blind persons”
<i>Hungary</i>	“reproduction ... exclusively designed to satisfy the needs of disabled persons”
<i>Japan</i>	“reproduce in Braille”, “record on a memory by means of a Braille processing system using a computer”, “make sound recordings” and “large print”
<i>Kazakhstan</i>	“reproduction in Braille or by other special means for the benefit of the blind”
<i>Kyrgyzstan</i>	“reproduction ... using the Braille system or other special means for the blind”
<i>Macau</i>	“reproduction in Braille”, blind persons are also able to fix lectures by professors “by any means” for their exclusive use and there is a general right of transformation for those with the legal right to use a work “to the extent necessary for its authorised use”
<i>Malaysia</i>	“any use made by ... the Braille MAB Library (Braille Publishing and Library Unit)”
<i>Nicaragua</i>	“reproduction ... by means of the Braille system or another specific procedure”
<i>Nigeria</i>	“reproduction in Braille ... and sound recordings”
<i>Norway</i>	“copies for use of the blind and persons whose sight is impaired ... made in a form other than a sound fixation” and “the King may decide ... on stipulated terms ... a fixation on a device that can reproduce [the work]”
<i>Panama</i>	“communications ... made for the blind and for other handicapped persons”
<i>Peru</i>	“reproduction ... by means of the Braille system or another specific procedure”
<i>Portugal</i>	“reproduction ... employing Braille or another system for blind persons”
<i>Republic of Korea</i>	“reproduce in Braille” and “make sound recordings”
<i>Singapore</i>	“making ... of a record embodying a sound recording of the work” and “making ... of a Braille version, a large-print version or a photographic version, of the work”
<i>Spain</i>	“reproduction ... using the Braille system or another specific method”
<i>Russian Federation</i>	“reproduction ... by using the Braille system or other special means for the blind”
<i>Uzbekistan</i>	“reproduction ... by relief-dot font or other means for blind persons”
<i>United States of</i>	“reproduce ... copies or phonorecords ... in specialised formats

<i>America</i>	exclusively for use by blind or other persons with disabilities”
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Annexure D

List of countries that permit export and import of accessible works

Country	Has it Ratified the UNCRPD?*
Australia	Yes
Canada	No
Chile	Yes
Denmark	Yes
France	No
Ireland	No
New Zealand	No
Russian Federation	No
The Netherlands	Yes (with reservations)
USA	Yes

* - While it is heartening to note that a few countries which have not ratified the UNCRPD yet have provided for enabling exceptions in respect of export/import of copies, it is disappointing to note that countries which have ratified the UNCRPD (including India) have not provided for such an exception in their national laws.

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33. *Unni Krishnan v. State of Andhra Pradesh* AIR 1993 SC 2178
34. *Vishaka v. State of Rajasthan* AIR 1997 SC 3011
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36. *Wheaton v. Peters* (1834) 8 Pet. 591