

THE DISABILITY EXCEPTION AND THE TRIUMPH OF NEW RIGHTS ADVOCACY

*Rahul Cherian Jacob, Sam Taraporevala
& Shamnad Basheer**

In a momentous development, the Indian Copyright Act, 1957, was amended to introduce one of the most progressive provisions ever in the history of global copyright law. These amendments seek to foster access to copyrighted works for the disabled by providing for the conversion and distribution of copyrighted works without the risk of copyright infringement. It is important to appreciate that these amendments did not emerge overnight. Rather, they were the culmination of more than a decade of advocacy, by a group of dedicated campaigners drawn from a diverse set of stakeholders, including leaders of the disability community, civil society activists and the academia. This paper provides a ringside view of the evolution and progress of the campaign, with its final culmination in the amendment. It tracks the advocacy effort through the lens of 'new social movements', and focuses on the need to bring together different stakeholders with complementary skills to achieve shared goals of public interest. Additionally, this paper reflects upon the scope of the amendment, the current international efforts to secure a global treaty on this count and India's role in shaping it.

*The authors of this paper were an integral part of the advocacy campaign and worked extensively with several others to secure the introduction of this critical amendment. Unfortunately upon completion of this paper, we lost the most committed campaigner of all, Rahul Cherian.** This paper is dedicated to his memory and the boundless passion and enthusiasm with which he brought so many of us together in his quest for creating a better world for the disabled. Over the last few years, Rahul worked tirelessly to champion the cause of the disabled in India and achieved commendable progress on several fronts. However, the copyright amendment will rate as his crowning glory, given the rather difficult political terrain that had to be traversed. Rahul is to be credited for providing a fresh fillip to the advocacy campaign and mediating differences between a diverse set of people*

* Rahul Cherian Jacob, Inclusive Planet Centre for Disability Law and Policy; Prof (Dr.) Sam Taraporevala, Associate Professor and Head of Department of Sociology at St. Xavier's College, Mumbai, Director of the Xavier's Resource Centre for the Visually Challenged; Professor (Dr.) Shamnad Basheer, Ministry of Human Rights and Development Chair Professor in Intellectual Property Law at the West Bengal National University of Juridical Sciences (WBNUJS). We wish to thank Ashna Ashesh (3rd year, WBNUJS) for her outstanding research and editorial assistance on this paper.

** Lawrence Liang, *A Lightness of Spirit*, THE HINDU February 9, 2013.

with different skill sets, ideologies and expectations and ensuring that they worked together as 'one' team with a common goal.

I. INTRODUCTION

George Kerscher famously articulated the concept of the 'print disabled' to describe persons who cannot "access print because of a visual, physical, perceptual, developmental, cognitive, or learning disability".¹

Today, technological advances have enabled the print disabled to access material in ways that might have been qualified as fanciful some decades ago. These include Screen Readers, Magnifiers, Optical Character Recognition (OCR) and various other technologies.² However, notwithstanding wonderful technological advances, the law continued to lag behind and it was well nigh impossible for the print disabled to access a wide cornucopia of works without the permission of copyright owners. This contributed significantly to what is popularly called the 'book famine', where only an infinitesimal percentage of all published works are available in accessible formats.³

While less than 5% of all books are available in accessible formats⁴ in developed countries, the percentage in developing countries, including India, is an abysmal 1%!⁵ India constitutes a significant percentage of the world's disabled. While estimates vary,⁶ there is growing evidence that people with disabilities comprise between 5 and 8 percent of the Indian population, which amounts to roughly 60 to 96 million persons.⁷

¹ George Kerscher, *The Definition of Print Disabled*, available at <http://www.readingrights.org/definition-print-disabled> (Last visited on January 23, 2013).

² See Dr. Sam Taraporevala, *The Copyright Challenge: Legal and Social Imperatives* in LIBRARY SERVICES FOR BLIND AND VISUALLY IMPAIRED PEOPLE 37 (2012) (Provides information on different types of access technology).

³ Erika Lambert, *Bread for the Blind: Ending the International Book Famine through Negotiation of an International Instrument on Access to Copyright Works for Persons with Blindness or Visual Impairment*, 2, available at <http://www.djls.org/20/Lambert.pdf> (Last visited on March 14, 2013).

⁴ Accessible formats include braille, audio, large print, computer readable formats such as MS Word, .pdf and DAISY.

⁵ *Right to Read Campaign- Fall 2011 Update*, available at <http://www.worldblindunion.org/English/resources/Documents/Right%20to%20Read%20Campaign%20Fall%202011%20update.doc> (Last visited on January 23, 2013).

⁶ According to the National Sample Survey Organization (NSSO 2002), the total number of disabled population in India is approximately 1.85 crores (1.8% of the population); See World Health Organisation & The World Bank, *World Report on Disability*, 2011 available at http://whqlibdoc.who.int/publications/2011/9789240685215_eng.pdf (Last visited on January 23, 2013) (It is widely believed that the actual number of persons with disabilities in India is much larger since the World Health Organization estimates that globally, about 1 billion people (or 14% of the population) live with some form of disability, of whom nearly 200 million experience considerable difficulties in functioning).

⁷ Human Development Unit, South Asia Region, The World Bank, *People with Disabilities in India: From Commitments to Outcomes*, May 2007, available at <http://siteresources.worldbank.org/>

Even amongst the visually impaired, it is estimated that of the world's 285 million people with visual impairment,⁸ India has about 47 million persons with visual impairment. Given that only 10% of all blind children get access to education, most are illiterate. To add to this, very few blind people are gainfully employed, with statistics showing employment for only 25% of blind people in industrial nations, and an even lesser number in developing countries.⁹ While there are many reasons for these dismal statistics, the 'book famine' is seen as one of the major contributors to the problem,¹⁰ since neither educational material nor reference material is available in accessible formats.

To the extent that this access deficit can be redressed by amending the copyright laws, several countries have done so, albeit with differing levels of permissible access.¹¹ Others are yet to do so, and an international treaty in this regard is now in the offing.¹² Even in the absence of such an international treaty, India is required to promote access through copyright exceptions, given that it is a signatory to the United Nations Convention on the Rights of Persons with Disability ('UNCRPD'), 2006.¹³ More importantly, courts have held that the right to life under Article 21 of the Indian Constitution includes the 'right to read'.¹⁴ It is in this wider context that India's recent copyright amendment ought to be appreciated; an amendment that marks a watershed in the

INDIAEXTN/Resources/295583-1171456325808/DISABILITYREPORTFINALNOV2007.pdf (Last visited on January 23, 2013) (It is estimated that 90% of this number live in developing countries).

⁸ See World Health Organization, *Visual Impairment and Blindness*, June 2012, available at <http://www.who.int/mediacentre/factsheets/fs282/en/> (Last visited on January 23, 2013).

⁹ *Right to Read Campaign*, *supra* note 5.

¹⁰ Graeme Innes, *Digital Alliance Copyright Forum*, available at http://digital.org.au/sites/digital.org.au/files/Graeme%20Innes_ADA%20conference%209%20March.doc (Last visited on February 22, 2013).

¹¹ Judith Sullivan, *Study on Copyright Limitations and Exceptions for the Visually Impaired*, 28, available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_7.pdf (Last visited on January 12, 2013).

¹² *WIPO Advance Towards Treaty to Facilitate Access to Published Works by Persons with Print Disabilities, Morocco Offers to Host Diplomatic Conference*, available at http://www.wipo.int/pressroom/en/articles/2013/article_0026.html (Last visited on January 23, 2013).

¹³ United Nations Convention on Rights of Persons with Disabilities, available at <http://www.un.org/disabilities/default.asp?id=290> (Last visited on January 12, 2013) (Art. 30 (3): "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"); European Commission, *Fifth Disability High Level Group Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities*, 214, May 2012, available at http://ec.europa.eu/justice/discrimination/files/dhlg_5th_report_en.pdf (Last visited on January 12, 2013).

¹⁴ Francis Coralie Mullin v. Administrator, Union Territory of Delhi, 1981 SCC (1) 608, ¶8: "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".

history of disability and copyright jurisprudence not only domestically, but also internationally.

II. THE INDIAN COPYRIGHT EXCEPTION

On May 17, 2012, the Indian Parliament introduced a rather liberal disability friendly copyright exception.¹⁵ More specifically, § 52(1)(zb) was introduced to permit the conversion of a copyrighted work to any accessible format, so long as the converter operated on a non-profit basis and ensured that converted formats were only accessed by persons with disabilities. In case the conversion and distribution were done for profit, the concerned entity would have to apply for a compulsory license under §31(B).¹⁶ The relevant exception-envisaging provision is reproduced as under:

§52(1) (zb) exempts from infringement:

“the adaptation, reproduction, issue of copies or communication to the public of any work in any accessible format, by-

- (i) any person to facilitate persons with disability to access to works including sharing with any person with disability of such accessible format for private or personal use, educational purpose or research; or

¹⁵ See Annexure 1, Chronology 35.

¹⁶ The Copyright (Amendment) Act 2012, § 31 B:

- (1) Any person working for the benefit of persons with disability on a profit basis or for business may apply to the Copyright Board, in such form and manner and accompanied by such fee as may be prescribed, for a compulsory licence to publish any work in which copyright subsists for the benefit of such persons, in a case to which clause (zb) of sub-Section (1) of Section 52 does not apply and the Copyright Board shall dispose of such application as expeditiously as possible and endeavour shall be made to dispose of such application within a period of two months from the date of receipt of the application.
- (2) The Copyright Board may, on receipt of an application under sub-Section (1), inquire, or direct such inquiry as it considers necessary to establish the credentials of the applicant and satisfy itself that the application has been made in good faith.
- (3) If the Copyright Board is satisfied, after giving to the owners of rights in the work a reasonable opportunity of being heard and after holding such inquiry as it may deem necessary, that a compulsory licence needs to be issued to make the work available to the disabled, it may direct the Registrar of Copyrights to grant to the applicant such a licence to publish the work.
- (4) Every compulsory licence issued under this Section shall specify the means and format of publication, the period during which the compulsory licence may be exercised and, in the case of issue of copies, the number of copies that may be issued including the rate of royalty: Provided that where the Copyright Board has issued such a compulsory licence it may, on a further application and after giving reasonable opportunity to the owners of rights, extend the period of such compulsory licence and allow the issue of more copies as it may deem fit.

- (ii) any organisation working for the benefit of the persons with disabilities in case the normal format prevents the enjoyment of such works by such persons:

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

Explanation.—For the purposes of the sub-clause, “any organisation” includes an organization registered under Section 12A of the Income Tax Act, 1961 and working for the benefit of persons with disability or recognized under Chapter X of the Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act, 1995 or receiving grants from the Government for facilitating access to persons with disabilities or an educational institution or library or archives recognized by the Government.¹⁷

In short, the amendment envisaged three broad kinds of activities:

- i) conversions by the disabled person for his/her own use and for sharing with others in the community;
- ii) conversions by third parties (individuals or organisations) working for the benefit of the disabled on a non-profit basis;
- iii) conversions by ‘for profit’ organisations.

This amendment was the culmination of more than a decade of concerted advocacy by a diverse and disparate group of experts, who collaborated to produce a meaningful exception for the disabled. The genesis of the advocacy can be traced back to the year 2003, when a group of committed campaigners led by Professor Vinod Sena advocated for a copyright exception for the disabled.¹⁸ The government responded favourably and proposed an exception, as mentioned below:

“The following acts would not constitute an infringement of copyright: reproduction, issue of copies or communication to the public of any work in a format, including sign language,

¹⁷ The Copyright (Amendment) Act, 2012, § 52(1)(zb).

¹⁸ *Supra* note 15, Chronology 1.

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.”¹⁹

The campaign vociferously protested this woefully inadequate clause that limited the exception to ‘special formats’. In practical terms, this meant that only Braille and sign language would have been permissible under the exception, effectively catering to a very limited segment of the disabled community. Illustratively, legendary scientist Stephen Hawking who suffers from Amyotrophic Lateral Sclerosis (‘ALP’),²⁰ would have been left out of the purview of the amendment, given that his primary mode of accessing copyrighted content is by digitising the said content, a process that can hardly be said to result in a ‘special’ format.²¹ The campaign argued that this narrow construction of the exception effectively violated Article 14 of our Constitution which mandates the State to not ‘discriminate’ between similarly situated class of persons.²²

More importantly, given technological advances and the burgeoning of audio formats and digital formats that were being used by a large number of visually impaired persons, the exception would have been meaningless, had it not covered such formats. It shall be pertinent to note that such digital formats could be availed by the abled as well and thus, do not strictly constitute “formats specially designed for the disabled”.²³

¹⁹ See <http://www.copyright.gov.in/View%20Comments.pdf> (Last visited January 23, 2013).

²⁰ See generally BBC News, *Stephen Hawking's Medical Condition*, April 21, 2009, available at <http://news.bbc.co.uk/2/hi/8009804.stm> (Last visited on January 29, 2013) (Amyotrophic Later Sclerosis is the most common form of motor neuron disease that causes nerve cells to degenerate).

²¹ See generally Sullivan, *supra* note 11, 36 (Last visited on January 23 2013) (“The needs of visually impaired people vary enormously. Whereas some people learn to read specialised formats using relief characters such as Braille, many more do not. This may depend on the degree of their disability, the age at which they were no longer able to read commercially available publications comfortably or otherwise”).

²² Gauri Shankar v. Union of India, 1994 SCC (6) 349, ¶ 7: “Equals should not be treated unlike. Likes should be treated alike”.

²³ See Sullivan, *supra* note 11, 36 (Last visited on January 23, 2013) (“Technological advances mean that newer types of formats are also important, such as electronic Braille, and digital copies that are compatible with screen-reading software that reads aloud text messages appearing on a computer monitor, or with software that magnifies the size of text displayed on monitors. Against this background of the types of accessible formats that visually impaired people might find most useful, it is therefore interesting to examine what type of formats can be made under specific exceptions to copyright that benefit visually impaired people. At the other end of the spectrum, 21 countries appear to have provided exceptions that are not limited, or appear not to be limited, to the making of specialised formats”).

Lastly, the assumption that Braille effectively catered to the entire visually impaired community was incorrect, given that many of those who became visually impaired later in life were often not familiar with Braille.²⁴

The government's concern was that the exception would be misused to aid those who did not have any disabilities. The campaign however stressed that while circumscribing the scope of the exception to "formats specially designed for the disabled" might help achieve this objective, it seriously prejudiced the scope of access for the disabled. Therefore, the campaign proposed that instead of limiting the types of formats that could be created, the government must limit the 'beneficiaries' i.e., any accessible format created under the said exception could be made available only to persons with disabilities. One way of implementing this was by mandating converters and distributors to take 'reasonable measures' to ensure that the intended beneficiary belonged to the disabled community, including *inter alia*, by relying on certificates issued by doctors attesting to the disability. In any case, even assuming there were mistakes in this verification, the campaign stressed that the potential revenue loss to publishers would be insignificant. Additionally, it was pointed out to the government that the Indian copyright law left the monitoring of infringement to the copyright owner. In the same way, the monitoring of activities that fell outside the scope of the disability exception ought to be left to the copyright owner.

The government attempted to address the above critique by proposing a compulsory licensing provision in favour of 'non-special' formats. In other words, while there would be a blanket copyright exception in favour of 'special formats' such as Braille, in so far as non-special formats were created for the disabled (such as digital copies that would be read out through screen reading software), one would have to apply for a compulsory license through a tedious process and pay royalties as well. Naturally, the campaign objected to this distinction and highlighted the serious disadvantages associated with compulsory licensing.

More worryingly, only a small number of organisations could avail of the compulsory licensing route if:

- i) It was registered under Section 12A of the Income Tax Act, 1961 (Act 43 of 1961);
- ii) It worked primarily for the benefit of persons with disability; and

²⁴ Surekha Dhaleta, *Himachal Disability Policy in Cold Storage, Beneficiaries Fend for Themselves*, December 3, 2012, available at http://articles.timesofindia.indiatimes.com/2012-12-03/india/35570054_1_disabled-person-disability-policy-employment-opportunities (Last visited on January 23, 2013); Sanjay Sharma, *Punjab Polling Booths to get Braille Ballots*, April 27, 2009, available at http://articles.timesofindia.indiatimes.com/2009-04-27/india/28011554_1_braille-ballot-papers-polling-booths (Last visited on January 23, 2013).

- iii) It was recognized under Chapter X of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Act 1 of 1996).

The campaign stressed that the Copyright Board, the body vested with the right to issue compulsory licenses, had been assailed on several fronts, including a constitutional challenge, ever since it began functioning.²⁵

Apart from the above, the campaign highlighted the fact that software and other intellectual property protected tools required to create accessible formats were often expensive and that the amendment ought to ensure their availability at a reasonable cost. Illustratively, one had to pay almost Rs 50,000 (USD 1000) in order to avail of the most widely used screen reading software known as the Job Access for Windows and Speech ('JAWS').²⁶

Lastly, it was suggested that in order to have an effective exception, content owners that locked up digital content under technology circumvention measures and/or Digital Rights Management ('DRM') locks, must be mandated to make available such content to persons with disabilities. Absent such a provision, the production of talking books or the use of screen reading software for the benefit of the visually impaired would have been severely restricted, given that a number of copyright owners were beginning to lock up their works.

A. CAMPAIGN PROPOSAL

The campaign proposed a more liberal and meaningful exception as given below:

“§ 52 (1) (za) (i): The making of an accessible version of a copyrighted work or the doing of any other act including reproducing, adapting and making available the copyrighted work or accessible version thereof, with the primary objective of enabling persons with visual, aural or other disabilities

²⁵ See generally Prashant Reddy, *Compulsory Licensing Dispute between PPL and Radio Stations Lands up before Madras High Court*, November 10, 2012, available at <http://spicyipindia.blogspot.in/2010/11/compulsory-licensing-dispute-between.html> (Last visited on January 23, 2013) (It has been dodged with controversy time and again, and recently it has been with respect to the compulsory licensing wars between radio stations and sound recording majors over royalty rates to be paid by the radio stations); See Petition filed by South Indian Music Companies Association, *SIMCA v. Union of India*, W.P. No. 1212 of 2011, (Madras H.C.), available at <http://www.spicyip.com/ip-resources> (Last visited on March 14, 2013); See also Ananth Padmanabhan, *Copyright Board and Constitutional Infirmities: Failure of the Copyright (Amendment) Act, 2012 and Suggestions for Reforms*, 5 NUJS L. Rev. (2012).

²⁶ See generally JAWS Product Page, available at <http://www.freedomscientific.com/products/fs/jaws-product-page.asp> (Last visited on January 23, 2013)(for pricing details of JAWS).

to access copyrighted works as flexibly and comfortably as persons without such disabilities.

Provided that if any person wishes to undertake any of the above activities on a for profit basis, it shall pay such remuneration to copyright owners as may be prescribed by the Copyright Board from time to time. For the purpose of determining remuneration, the Copyright Board shall take into consideration the need to ensure that works are accessible and available at prices that are affordable, taking into account disparities of incomes for persons who are disabled.

Provided further that a person doing any of the acts under this section shall take reasonable measures to ensure that the end beneficiary is a person with a disability.

Section 52 (1) (za) (ii): For the purpose of Section 52 (1) (za) (i) "accessible version" means any version or form which gives a disabled person access to the work as flexibly and comfortably as a person without a disability, and shall include, but not be limited to, large print, with different typefaces and sizes all being permitted according to need, Braille, audio recordings, digital copies compatible with screen readers or refreshable Braille and audiovisual works with audio and or text description."

As is evident, the above exception catered not only to the visually impaired, but also to any differently-abled person unable to access copyrighted works as comfortably as others. Illustratively, without the subtitling of audio-visual material, a hearing-impaired person is unable to enjoy movies, TV programs and other audio-visual material.

B. STANDING COMMITTEE

A Parliamentary Standing Committee was constituted to review the various amendments proposed by the government including the rather restricted copyright exception for the disabled. The Standing Committee²⁷ agreed with the arguments of the campaigner and opined as below in its report:

²⁷ *Department-Related Parliamentary Standing Committee on Human Resource Development, Two Hundred Twenty-Seventh Report on Copyright Amendment Bill, 2010*, ¶ 13.3, available at <http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20HRD/227.pdf> (Last visited on January 29, 2013).

“The Committee takes note of the following shortcomings as pointed by the representatives of two organizations working for the disabled:

- i) Compulsory licensing system as envisaged under § 31B would prevent educational institutions, Self Help Groups, other NGOs and reading disabled individuals from undertaking conversion and distribution.
- ii) The time-consuming and cumbersome procedure for obtaining permissions from Copyright Board.
- iii) The time involved in subsequent conversions will result in further delays, thereby causing hardships for students.
- iv) It would discriminate between blind persons knowing Braille and those not knowing it.
- v) Exception as envisaged under § 52(1) (zb) in favour of only ‘specially designed’ format does not benefit persons affected by cerebral palsy, dyslexia and low vision.”

Subsequently, it took strong objections to the ‘special formats’ limitation and categorically stated that conversions to any accessible format ought to be permissible in the following words:

“After analysing the proposed amendments as envisaged in § 31B and §52(1)(zb) in the backdrop of interactions held with various stakeholders and the Department, the Committee strongly feels that concerns raised by the organizations working for the disabled are indeed very genuine. The Committee would like to point out that the real objective behind these two provisions is to facilitate the cause of the disabled. Every attempt needs to be made to remove all the drawbacks highlighted in the proposed amendments.

The Committee is of the firm opinion that all physically challenged need to be benefitted by the proposed amendments. It would be very discriminating if envisaged benefit remains restricted to only visually impaired, leaving out persons affected by cerebral palsy, dyslexia and low vision. The Committee takes note of fact that even regular Braille users complement Braille with other accessible formats like audio, reading material with large fonts and electronic texts. The Committee also observes that the modern day Braille

production is dependent on the material being first converted into mainstream electronic formats such as MS Word because Braille translation software requires inputs in such formats.

The Committee hopes that the request of organisations for extending access of works to all accessible formats instead of special formats presently under consideration of the Department will result in a positive outcome.²⁸

Furthermore, the Committee stated that the compulsory licensing provisions should be expanded in order to make it better suited for the needs of disabled sections.²⁹ Lastly, the Committee took issue with the notion of fees having to be paid for compulsory licensing conversions:

“Committee’s attention was drawn to another negative aspect arising out of fees (royalty) likely to be charged for copies going beyond the number of free copies to be specified by the Copyright Board. Committee is well aware of the fact that as only ‘not for profit’ organizations are involved in this area, the issue of potential fees may prove to be a very discouraging factor. Department’s response to this apprehension that an organization registered under § 12A of the Income-Tax Act, 1961 and working primarily for disabled and recognised under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1958 need not pay fee and may get compulsory licence free of charge, does not seem to be very convincing. Such a provision needs to be specifically provided in the Act itself.”³⁰

Although the recommendations of a standing committee report are typically not legally binding on the government, the government acted upon them nevertheless, and came up with a more progressive version of its earlier disability exception. Significant credit for this rethinking and prompt action is attributable to the then Minister for HRD, Shri Kapil Sibal and the Registrar of Copyrights, Shri Raghavender.³¹

²⁸ *Id.*, ¶13.6 and ¶ 13.7.

²⁹ *Supra* note 27, ¶ 13.7 (“Another request for widening the scope of compulsory licence to allow other entities working for disabled, in case it is not possible to withdraw § 31 B, also merits a sympathetic consideration by the Department”).

³⁰ *Supra* note 27, ¶ 13.8.

³¹ They were in turn advised by reputed intellectual property academic, Professor NS Gopalakrishnan.

III. THE SOCIAL MOVEMENT AND NEW RIGHTS ADVOCACY

The aim of this section is to document the emergence, growth and success of this campaign through the framework of new rights advocacy. As stated earlier, the disability amendments did not fructify overnight, but emerged as a result of passionate advocacy and tireless toil by a group of committed campaigners.³² In order to help track the trajectory of this campaign, an annexure titled ‘Chronology of Events’ has been added.³³

New social movements may be broadly defined as “organized collective activities that promote autonomy and self-determination as well as improvements in the quality of life”.³⁴ They concern ‘new politics’ as opposed to the ‘old politics’,³⁵ where precedence is given to human rights, self-realization and the enhancement of the quality of life, rather than forms of security contingent on the economic, political, and the military.

Further, these movements are often characterized by informal networks, rather than a single centralized organization. In order to achieve their goals, new social movements often engage with advocacy, now referred to as ‘New Rights Advocacy’ (‘NRA’). The copyright disability campaign can be categorized as a new social movement and its advocacy tools and techniques fit within the broad framework of NRA.

The term ‘New Rights Advocacy’ was first used by Paul Nelson and Ellen Dorsey to explain the transformatory role played by many NGOs in the world today. More specifically, it envisaged advocacy that made explicit references to internationally recognized human rights standards.³⁶ Many of the characteristics of the NRA as spelt out by Nelson & Dorsey are present in the copyright amendment advocacy campaign.

To begin with, NRA can be operational at the national or international level and each can influence the other. This applies squarely to the campaign, since it constantly cited global precedents in its representations.³⁷ Prof. Vinod Sena, one of the key players in the earliest phases of the campaign, compiled a list of countries that boasted of copyright disability exceptions. The Indian copyright office then proposed a draft clause based, *inter alia*, on Prof.

³² See generally Annexure 1.

³³ *Id.*

³⁴ Steven Buechler, *New Social Movement Theories*, *The Sociological Quarterly*, Vol. 36, No. 3 (Summer, 1995), 1.

³⁵ See generally JURGEN HABERMAS, *LEGITIMATION CRISIS* (1975); JURGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 33 (1981).

³⁶ PAUL J NELSON & ELLEN DORSEY, *NEW RIGHTS ADVOCACY: CHANGE OF STRATEGIES OF DEVELOPMENT AND HUMAN RIGHTS NGOs* 19 (2008).

³⁷ *Supra* note 18.

Sena's representation. Although the wording of the clause left much to be desired, it was nonetheless a good start.

Furthermore, the representations and subsequent follow up work of the Publication Access Coordination Committee ('PACC')³⁸ convened by the Xavier's Resource Centre for the Visually Challenged ('XRCVC'),³⁹ Alternate Law Forum ('ALF'),⁴⁰ Inclusive Planet,⁴¹ and the Center for Internet and Society ('CIS'),⁴² constantly stressed the value of international best practices.⁴³ The documentary titled 'The Blind Act',⁴⁴ highlighted the special needs of persons with disabilities on a broader international canvas. Additionally, the 'Right to Read Campaign'⁴⁵ was conducted in India as part of a World Blind Union ('WBU')⁴⁶ Initiative.⁴⁷

However, it must be noted that the 'national' developments in India also began impacting the international. In her comprehensive comparative study of practices regarding copyright exemptions, Judith Sullivan discusses PACC's proposal for an Indian copyright exception.⁴⁸ In subsequent years, India began to play a significant role in the negotiations around an international treaty at the World Intellectual Property Organisation ('WIPO') in Geneva. In fact, after the Indian Copyright Act had been amended to foster access for the disabled, the WBU held it out as an important precedent worth emulating on the international stage.

It bears noting that although NRA is often centered around human rights issues, such issues are not necessarily new. However, as Nelson and Dorsey point out, "What is substantially new and significant is the nature of

³⁸ See Copyright Suggestions (Convened by the XRCVC, the PACC initially comprised of 7 organizations. It later received multiple support letters in favor of its stand). Full representation of the PACC, available at http://www.xrcvc.org/pdfs/copyright_suggestions.pdf (Last visited on January 23, 2013).

³⁹ Information about the Xavier's Resource Centre for the Visually Challenged ('XRCVC'), available at www.xrcvc.org (Last visited on March 6, 2013).

⁴⁰ Information about the Alternate Law Forum, available at visiting <http://www.altlawforum.org/node/216> (Last visited on March 6, 2013).

⁴¹ Information about the Inclusive Planet, available at <http://inclusiveplanet.org.in/> (Last visited on March 6, 2013).

⁴² Information about the CIS, available at www.cis-india.org (Last visited on March 6, 2013).

⁴³ *Supra* note 15, Chronology 5, 6, 7, 9, 13, 14, 17.

⁴⁴ *The Blind Act*, available at <http://www.xrcvc.org/gallery.php#theblindact> (Last visited on January 23, 2013).

⁴⁵ *See generally Right to Read Campaign*, available at <http://www.xrcvc.org/copyright.php> (Last visited on March 6, 2013).

⁴⁶ *See generally Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU)*, available at http://www.wipo.int/docdocs/mdocs/copyright/en/scr_18/scr_18_5.pdf (Last visited on January 23, 2013); Information on the WBU, available at <http://www.worldblindunion.org/English/about-wbu/Pages/default.aspx> (Last visited on March 15, 2013).

⁴⁷ *Supra* note 15, Chronology 8, 14, 17, 29, 37.

⁴⁸ Sullivan, *supra* note 11.

the advocacy”.⁴⁹ The campaign around the copyright exception reflected such a new kind of advocacy, as illustrated herein. It is interesting to note that the key players in this advocacy initiative lacked any significant prior experience of orchestrating a social movement. However, they came armed with complementary skills, learning as they went along, enabling the campaign to progress in an organic manner.

A. KEY STRATEGIES AND APPROACHES

The campaign capitalized on the human rights framework from the very beginning.⁵⁰ Given that India had signed and ratified the United Nations Convention on the Rights of Persons with Disabilities (‘UNCRPD’)⁵¹ in 2007, key provisions were highlighted time and again in various representations made by members of the campaign. Further, the Right to Education Act, the Persons with Disabilities Act, 1995, the Universal Declaration of Human Rights, 1948, and the fundamental rights enshrined in the Constitution of India were highlighted for the benefit of both, the government as well as members of the opposition.

The R2R campaign globally initiated by the WBU, Sightsavers⁵² and other organizations highlighted the value of the ability to read, and the critical difference that it made to the quality of life of a human being.⁵³ It argued persuasively that the denial of access to the printed word amounted to a denial of rights, including those which are economic, social or cultural in nature. The active R2R campaign in India was designed to elicit support for both local and global changes to copyright provisions, which blocked access to works and prevented the overall development of print disabled.⁵⁴ The efforts bore significant fruit when the National Human Rights Commission (‘NHRC’), the premier government agency for the promotion of human rights in India,⁵⁵ wrote in support of the amendment.⁵⁶

⁴⁹ Paul Nelson & Ellen Dorsey, *New Rights Advocacy in a Global Public Domain*, European Journal of International Relations 2007; 13; 187.

⁵⁰ *Supra* note 15, Chronology 1, 5, 6, 7, 9, 11, 12, 13, 14, 16, 17, 18, 19, 22, 23, 25, 26, 27, 28, 31, 32.

⁵¹ United Nations Convention on the Rights of Persons with Disabilities (‘UNCRPD’), available at <http://www.un.org/disabilities/default.asp?id=259> (Last visited January 22, 2013).

⁵² Further information, available at www.sightsavers.org (Last visited on March 6, 2013).

⁵³ *Supra* note 15, Chronology 2, 14, 17, 21, 32, 47.

⁵⁴ See generally Mayura Janwalkar, *Free Copyright Control*, DNA (Mumbai) January 6, 2010; Dhavni Solani, *Your Signature Could Help*, MID-DAY (Mumbai) January 19, 2010; Joeanna Rebello Fernandes, *On the Blind Side*, THE TIMES OF INDIA (Mumbai) January 31, 2010; Manish Ratan, *Govt. Moves to Relax Copyright Act Lacks Vision*, MINT (New Delhi) February 3, 2010; Mayura Janwalkar, *World Wide Web at the Fingertips of the Visually Challenged*, DNA (Mumbai) April 20, 2010.

⁵⁵ Further information, available at <http://nhrc.nic.in> (Last visited on March 6, 2013).

⁵⁶ *Supra* note 15, Chronology 28.

Furthermore, the campaign constantly stressed upon the government's role and responsibility in building an inclusive society. It did this through written representations as well as face to face meetings with members of the political establishment. The potential objections of publishers were responded to in detail, mainly on the ground that the main markets of the publishers would not be detrimentally impacted by the amendment. This left the government with little room to succumb to pressures from the publishing lobby - be it directly at the national level or indirectly through international pressure groups.

The 'Publisher Contact Program' of the Daisy Forum of India ('DFI'),⁵⁷ an umbrella body of organizations working for persons with disability and interested in promoting print access, was an initiative designed to build credibility with major publishers.⁵⁸ This ensured that the experience of sharing accessible content with the DFI promoted a sense of confidence, which further ensured that needless objections would be avoided that could pressurize the government to create a half-baked amendment, devoid of any impact. The campaign is a classic illustration of how collaborations emerged among previously disconnected organizations. Hugh Hecklo (1978) uses the concept of 'issue network' and highlights their powerful role:

"In looking for the few who are powerful, we tend to overlook the many whose webs of influence provoke and guide the exercise of power. These webs or what we will call 'issue networks' are particularly relevant to the highly intricate and confusing welfare policies that have been undertaken in recent years. ... Issue networks ... comprise a large number of participants with quite variable degrees of mutual commitment or of dependence on others in their environment; in fact it is almost impossible to say where a network leaves off and its environment begins...Participants move in and out of the networks constantly."⁵⁹

The formulation of the disability exception, as also its advocacy, stemmed from a rather fluid coalition of individuals and organizations whose complementary competencies were channelized towards the realization of a single objective. The evolution of the movement from a single person driven agenda to a very broad spectrum of organizations did not happen overnight. It was a slow process, marked by specific growth and strategic alliances. The PACC, which was the first collaborative effort of seven organizations, took off on the initiative of the XRCVC. It subsequently received broad based support

⁵⁷ Further information about the DFI, available at <http://www.daisyindia.org/> (Last visited on March 6, 2013).

⁵⁸ *Supra* note 15, Chronology 10, 11, 17, 21.

⁵⁹ HUGH HECKLO, *THE NEW AMERICAN POLITICAL SYSTEM* 446, 448 (1978).

from different organizations. These organizations were all service providers. They also sought legal assistance to help draft an effective response.⁶⁰

The founding of the DAISY Forum of India, which was an umbrella body of organizations working for the print disabled, was another major landmark in the success story. The XRCVC office held the responsibility for 'Copyright and Publisher Relations' for the DFI. It thus could galvanize support from the DFI member organizations. The subsequent support extended by Inclusive Planet and the Centre for Internet and Society ('CIS'), imparted an increased vibrancy to the movement. The movement was given further impetus through the addition of national level organizations and the formation of National Access Alliance ('NAA'). What is significant about this 'issue network' is the fact that individuals, particularly IPR experts and scholars, also threw their weight behind the network.⁶¹

Aside from effective collaboration, perhaps one of the most critical factors that contributed to the success of the movement lay in it being able to voice the opinion of diverse groups unanimously. Given the fact that there were multiple organizations involved, there were bound to be divergent view points and priorities; however, strategic efforts were made by key leaders of the campaign to ensure that consensus was built around the core principles at stake.

Given that the movement was led by those that were not part of older and more established NGOs, issues with respect to credibility arose initially. However, owing to the commitment of the leaders and their constant reaching out to the old guard for their views and support, these issues eased off in no time. Another key distinguishing character of the movement was its emphasis on engaging stakeholders through constant dialogue.⁶² The movement advocated its cause by employing four tactical approaches, namely, highlighting the human rights issue, showing publishers that their interests were not being jeopardized, stressing on the fact that the Indian society was a special case in point and emphasizing that international practices were effective.

Through the entire process, technology was used to powerfully demonstrate the 'access' deficit faced by the disabled.⁶³ Illustratively, the presentation by campaign members (including the authors), before the Parliamentary

⁶⁰ *Supra* note 15, Chronology 2, 4, 5, 6.

⁶¹ Prominent amongst them was Professor Shamnad Basheer, the MHRD IP Professor at WBNUJS, and one of the authors of this piece, who played a significant role in helping draft the text of the proposed amendment.

⁶² *Supra* note 15, Chronology 5, 6, 7, 9, 11, 15, 17, 18, 19, 20, 22, 23, 25, 26, 27, 28, 31, 32, 34.

⁶³ *See generally Copyright Representation by P.A.C.C.*, available at http://www.xrcvc.org/pdfs/copyright_suggestions.pdf (Last visited on January 29, 2013) (These technologies included Talking Books, Screen Reading Software, Optical Character Recognition Software, Reading Machines, Refreshable Braille Displays, Screen Magnifiers/Large Print).

Standing Committee⁶⁴ proved to be extremely effective, as most parliamentarians had not seen these technologies at work and realized that a limiting clause would do more harm than good. To supplement the dialogical process, the campaign buttressed it with extensive research, including a detailed documentation of the international and comparative positions.⁶⁵

The campaign was never a rigid one but remained flexible throughout. It found a way to work around new hurdles and refused to get enmeshed in bureaucratic skirmishes. Over the 6 years that the campaign effectively took to achieve its goal, it had to adapt itself to multiple factors (social and political). This posed potential threats to the campaign's very survival. In particular, it bears noting that those who were actively involved in the campaign were professionals in various fields. Given their multiple preoccupations and the fact that the draft amendment barely progressed with regard to the legislative process, the campaign could have floundered with its core team losing interest.

This could have resulted in the use of language that would not have been seen as appropriate by the advocacy groups. Constant monitoring and vigilance had to be maintained, to ensure that not even a minuscule part of the legislative process slipped through without being appropriately responded to. A classic case in point is a comment by the HRD Minister during a meeting with a small group of activists⁶⁶ stating that they had nothing to worry about as the amendment would not insist on special formats, provided that the organizations making accessible copies in mainstream formats apply for a compulsory license. Such a situation would have worked to the detriment of organizations and print disabled persons.

A licensing regime for the 'not for profit organizations' was seen as totally inappropriate on account of bureaucratic hurdles and other factors.⁶⁷ Those involved with the movement had to immediately adapt their existing strategy in order to persuade the government to see the error of its ways. This adapted strategy involved critiquing the compulsory licensing system,⁶⁸ using a three pronged approach, which included bringing opposition pressure to bear on the government,⁶⁹ pressurizing the HRD Ministry from within the ruling party⁷⁰ and creating a groundswell of opinion that would serve to sustain pressure.⁷¹

⁶⁴ *Supra* note 15, Chronology 26, 27.

⁶⁵ *Supra* note 15, Chronology 1, 5, 6, 7, 9, 12, 13, 18, 19, 23, 26, 27, 32.

⁶⁶ *Supra* note 15, Chronology 18.

⁶⁷ Dr. Sam Taraporevala, *Limitations of the Licensing System to Create Accessible Copies for the Print Impaired: A Policy Paper*, available at <http://www.xrcvc.org/copyright.php> (Last visited on January 23, 2013).

⁶⁸ *Supra* note 15, Chronology 19.

⁶⁹ *Supra* note 15, Chronology 22.

⁷⁰ *Supra* note 15, Chronology 25.

⁷¹ *Supra* note 15, Chronology 17, 22, 23, 25.

Another instance of the proactive and adaptive approach can be seen in the Publisher Contact Program that has been discussed earlier.⁷² The movement elicited the support of the media to create more awareness. In particular, the campaign focused on creating awareness amongst specific target groups in a customized manner. The XRCVC, Inclusive Planet and CIS, actively participated in/hosted seminars where the Amendment and the book famine were discussed. The MHRD IP Chair of WB NUJS, who played a critical role in shaping the text of the amendment, helped generate public support amongst IP practitioners and others in the IP arena through the popular blog, SpicyIP.⁷³ The R2R campaign across some of the major cities in India also helped create basic awareness amongst key constituents.⁷⁴ The April 2010 press conferences aimed at significantly mounting pressure on the government, also played an effective role in assisting the movement.⁷⁵

Although the movement evolved from a small group of 7 organizations to a much larger alliance, there were no formal positions designated. There was no hierarchy and each of the constituents played to his/her strength. The alliance never raised funds as a collective to espouse their agenda. For the most part, members of the alliance paid from their own reserves and contributed their expertise and time. These valuable inputs culminated in a process that was driven by highly motivated persons committed to the necessary transformation. The communication network was essentially based on email and phone. An 'R2R mailing list', including all NAA members, was created as means for members to communicate amongst themselves. Teleconferences were held from time to time. Meetings in person were rare and they mainly took place in the context of visits to New Delhi to meet government representatives or Parliamentarians for pushing the advocacy forward.

Given that the events described above spanned several years, there was a strong possibility that the campaign could run out of steam. However, the reverse occurred, i.e., the campaign grew in strength with more supporters joining the fray each year and adding to the potency of the movement. Key persons in the campaign ensured that they remained in constant touch with the government and publishers. More importantly, the need for an amendment was

⁷² *Supra* note 15, Chronology 11.

⁷³ *See generally Towards an Enlightened Copyright Regime*, September 04, 2011; *A "Special" Copyright Victory for the Disabled*, November 25, 2010; *Andhaakaanon: An Obtuse Copyright Exception for the Disabled*, February 25, 2010, available at <http://spicyipindia.blogspot.in/search/label/Disabilities>; *Copyright Access for the Disabled and Collaborative IP Policy*, November 18, 2009, available at <http://spicyipindia.blogspot.in/2009/11/copyright-access-for-disabled-and.html> (Last visited on January 23, 2013) (Spicy IP articles dealing with the amendment relating to disability).

⁷⁴ *See* Annexure 1, Chronology 17 (One such event was held at WBNUJS).

⁷⁵ *Supra* note 15, Chronology 23.

used as a rallying call to unite all disparate sections, including the opposing political parties.⁷⁶

B. COMPOSITE VIEW

The genesis, development and success of the advocacy campaign can be located and understood in the wider context of the confluence of a number of important factors, actors and processes. *Firstly*, the disability discourse has long since moved away from the medical model of disability, marked by an emphasis on the disease and a ‘cure’, to a social model. The latter recognizes that it is the societal context more than the inability caused by the impairment, that leads to stigmatization and labeling of ‘disability’.⁷⁷ It lays emphasis on equalizing opportunities through appropriate inclusive measures.⁷⁸ This understanding helped trigger policy responses such as the present one where the disabled are given an opportunity to access copyrighted works and savour the world’s literary, cultural and social heritage (in the form of written works) in order to enable them participate more effectively in society.

Secondly, the progress from first generation human rights (civil and political) to second generation rights (marked by its emphasis on social, cultural and economic rights) gave a fillip to the disability rights movement and in particular, to the advocacy campaign under consideration. The United Nations General Assembly Declaration on the Right to Development, 1986, fostered a collective emphasis on civil and political rights on the one hand, and economic, social, and cultural rights on the other.⁷⁹ It is this holistic understanding of the interrelationship and indivisibility of all the human rights that the disability rights movement has sought to advance.

Thirdly, globalization⁸⁰ impacted the movement in several ways, including by fostering the rise of network societies that significantly influenced the focus and strategies of the advocacy initiative.⁸¹ We see a clear utilization of networks, technologies, media and social groupings in the diverse approaches

⁷⁶ *Supra* note 15, Chronology 22, 25.

⁷⁷ Tarshi, *Sexuality and Disability in the Indian Context*, 18, Working Paper 2010, available at http://www.tarshi.net/downloads/Sexuality_and_Disability_in_the_Indian_Context.pdf. (Last visited on January 23, 2013).

⁷⁸ *Id.*, 12.

⁷⁹ G.A. Res. 41/128, A. /RES/41/128 (December 4, 1986), available at <http://www.un.org/documents/ga/res/41/a41r128.htm> (Last visited on January 22, 2013).

⁸⁰ ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 64 (1991) (Globalization as a process may be seen as “the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa”).

⁸¹ JAN VAN DIJK, *THE NETWORK SOCIETY: SOCIAL ASPECTS OF NEW MEDIA* 6 (1991); MANUEL CASTELLS, *THE THEORY OF NETWORK SOCIETY* 15 (2006).

that were in evidence throughout the process.⁸² Simultaneously, local influences have also helped shape the global discourse. The movement can therefore be seen as embodying a ‘glocal’ character. To borrow from Robertson 1997, we see in the movement, “the simultaneity... of both universalizing and particularizing tendencies”.⁸³

IV. IMPACT OF THE INDIAN COPYRIGHT AMENDMENT ON THE INTERNATIONAL TREATY

From an international standpoint, it is startling to note that more than 30 years have elapsed from the time that the access issue was first brought to the notice of WIPO, to the time that a potential treaty is in the offing.⁸⁴ A brief history of this international development is given below, along with an exposition of India’s role.

The discussions underpinning the need for an international treaty on copyright exceptions for the disabled began as early as in 1981, when the governing bodies of WIPO and United Nations Educational, Scientific and Cultural Organisation (‘UNESCO’) agreed to create a Working Group on Access by the Visually and Auditorily Handicapped to Material Reproducing Works Produced by Copyright.⁸⁵

In May 2002, the World Blind Union intervened at the WIPO Standing Committee on Copyright and Related Rights (‘SCCR’) and highlighted the problems faced by persons with visual impairment in accessing books, thereby requesting WIPO to study this issue in detail. At the 16th session of the WIPO SCCR (March 10, 2008 to March 12, 2008), the delegations of Brazil, Chile, Nicaragua and Uruguay formally endorsed a broad work program for Limitations and Exceptions (L&E). The relevant WIPO report stated that, “The Committee noted with approval the forthcoming study on exceptions

⁸² Examples of this can be seen in the Work on Civil Aviation Regulations for Air Travel for Persons with Disabilities; Working on Electronic Delivery of Services to be made accessible to persons with disabilities; Inputs given to the National Policy for Children to ensure that they are adequately modified to address the requirements of children with disabilities; Lobbying with the Ministry of Social Justice and Empowerment to have effective and Uniform Guidelines for Conducting Examinations (Practicals and/or Theory) for Blind and Low Vision Persons.

⁸³ Roland Robertson, *Comments on the “Global Triad” and “Glocalization”*, available at <http://www2.kokugakuin.ac.jp/ijcc/wp/global/15robertson.html> (Last visited on February 3, 2013).

⁸⁴ The WIPO Treaty for Visually Impaired Persons/Persons with Print Disabilities shall finally be referred to a diplomatic conference. The said conference is to be held in Morocco in June, 2013.

⁸⁵ Knowledge Ecology International, *The 1982 WIPO and UNESCO Working Group on Exceptions for Access to Protected Works for Visually and Auditorily Handicapped Persons*, May 30, 2009, available at <http://keionline.org/blogs/2009/05/30/1982-wipo-unesco-meeting> (Last visited on January 22, 2013).

and limitations for the benefit of educational activities, including distance education and the trans-border aspect thereof, in particular for developing and least developed countries”.⁸⁶

The Committee acknowledged the special needs of visually impaired persons and stressed the importance of dealing with those needs without delay and with appropriate deliberation.⁸⁷ Additionally, it emphasized on the importance of holding discussions at the national and international level, on possible ways and means to facilitate and enhance access to protected works.⁸⁸ In July 2008, The World Blind Union brought together copyright experts to prepare a possible draft text of a Treaty and to address the issues faced by persons with disabilities.⁸⁹ The resulting draft Treaty text was submitted to WIPO in October 2008.⁹⁰ In 2009, Brazil, Ecuador and Paraguay proposed the WBU Treaty at the WIPO SCCR.⁹¹ In December 2012, the WIPO General Assembly decided to convene a diplomatic conference scheduled for June, 2013.

India first supported the WBU Treaty at the WIPO SCCR in December 2009. The WIPO Report for the SCCR states that, “India also believed that there was a need to move towards positive international obligations to facilitate access to copyrighted material in special formats for disabled groups, and supported the draft treaty proposed by the delegations of Brazil, Ecuador and Paraguay”.⁹² This support was reaffirmed at the subsequent SCCR. However, India did not play an active part in furthering the Treaty discussions, since at that time it did not have a copyright exception within its national law. However, after the Copyright (Amendment) Act was passed in May 2011, India began playing a more active role and the stance it adopted in relation to the Treaty was two-pronged.

Firstly, India’s copyright exceptions were broader than those proposed under the Treaty.⁹³ India’s concern here was that the Treaty should

⁸⁶ Standing Committee on Copyright and Related Rights, WIPO, Eighteenth Session, Geneva, *Draft Conclusions of the SCCR*, May 25-29, 2009, available at <http://www.ip-watch.org/weblog/wp-content/uploads/2009/05/sccr-conclusions-final-may-09.pdf> (Last visited on February 8, 2013).

⁸⁷ Standing Committee on Copyright and Related Rights, WIPO, Seventeenth Session, Geneva, *Report*, November 3 -7, 2008, available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_5.pdf (Last visited on January 23, 2013).

⁸⁸ *Id.*

⁸⁹ See Knowledge Ecology International, *Background and Update on Negotiations for a WIPO Copyright Treaty for Persons Who Are Blind or Have Other Disabilities*, April 7, 2011, available at <http://keionline.org/node/1089> (Last visited on January 23, 2013).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Standing Committee on Copyright and Related Rights Report, WIPO, Nineteenth Session, Geneva, available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=140270 (Last visited on January 23, 2013).

⁹³ For instance, the beneficiaries under the Treaty were limited to persons with visual impairment and persons with print disabilities while the beneficiaries under the Indian copyright

not require India to narrow down its recently introduced exceptions and that it should be allowed to have broader exceptions in its national law. To this end, India vehemently negotiated at WIPO to include a provision in the Treaty to the effect that the Treaty should only provide minimum standards for exceptions, so that Member States can go beyond it in their national laws. India was successful in the end, with the SCCR recognizing the concept, though the precise wordings are still being discussed.⁹⁴

Secondly, given the reality of the global accessible format conversion ecosystem where large collections of accessible format books were created in the US and UK, it was essential that the Treaty permitted as many organizations in developed countries to export accessible format copies of books to developing countries. Under the United States proposal, only ‘trusted intermediaries’ could export accessible format copies of works.⁹⁵ A ‘trusted intermediary’ was defined as “a governmental agency or a non-profit entity with legal personality that has as a primary mission to assist persons with print disabilities by providing them with services relating to education, training, adaptive reading, or information access”.⁹⁶ This definition was highly restrictive since it would leave out mainstream libraries and educational institutions that nevertheless served persons with visual impairment. It is to be noted that the Hathi Trust⁹⁷ in the United States, a mainstream library, has more than 10 million books in accessible formats and libraries like the Hathi Trust would not qualify as a Trusted Intermediary under the United States proposal.

Here too, India’s forceful intervention ensured that the term ‘trusted intermediary’ was replaced by a milder term, ‘authorized entity’ which was defined as “an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis”.⁹⁸ The term also included within its ambit, a government institution or non-profit organization that

exception extended to persons with all disabilities including for example, people who were deaf. Similarly, the Indian copyright exception extended to all works including cinematograph films while the Treaty extended only to literary works.

⁹⁴ *Supra* note 92.

⁹⁵ Standing Committee on Copyright and Related Rights, WIPO, Twentieth Session, Geneva, *Draft Consensus Instrument, Proposal by the Delegation of United States of America*, 3, June 21-24, 2012, available at <http://www.copyright.gov/docs/scrr/drafts/us-draft-consensus-instrument.pdf> (Last visited on January 29, 2013).

⁹⁶ *Id.*

⁹⁷ More information, available at www.hathitrust.org (Last visited on March 6, 2013).

⁹⁸ Standing Committee on Copyright and Related Rights, WIPO, Twenty-Fifth Session, Geneva, *Draft Text of an International Instrument/Treaty on Limitations and Exceptions for Visually Impaired Persons/Persons with Print Disability*, 7, November 19-23, 2012, available at http://www.wipo.int/edocs/mdocs/copyright/en/scrr_25/scrr_25_2.pdf (Last visited on January 29, 2013).

provides the same services to beneficiary persons as one of its primary activities or institutional obligations.⁹⁹

In this instance as well, the advocacy campaign engaged with the Indian Government from time to time and played a significant role in shaping India's international position at WIPO and other fora.¹⁰⁰

V. CONCLUSION

The Indian copyright disability exception marks a watershed in the history of copyright and disability jurisprudence. This paper attempts to track the trajectory of a potent advocacy campaign that propelled this exception to fruition. This campaign, assessed through the lens of new rights advocacy, is an apt illustration of how a diverse set of people with different skill sets can come together as part of civil society, find common ground and deploy their complementary competencies to shape laws with far reaching impact. Furthermore, the paper serves to highlight the impact that a democratic dialogical process and mass sensitization can have, for the success of an advocacy movement.

In his address to WIPO delegates, the inimitable Stevie Wonder noted, "Your love is the key to unlock the blinders that block access to materials...for those with print disabilities".¹⁰¹ The Indian amendment significantly unlocked blinders for the disabled community and helped build significant momentum for an international treaty. One hopes that the love that Wonder speaks about will inspire many more to do what India did.

⁹⁹ *Id.*

¹⁰⁰ It bears noting that Rahul Cheriaan was a legal advisor to the World Blind Union on the Treaty and could therefore track the proceedings very closely and advise the government. Both Professor Basheer & Professor Taraporewala were also routinely consulted by the government on this issue.

¹⁰¹ Stevie Wonder, *Address to the 48th Assemblies of the World Intellectual Property Organisation*, available at http://www.wipo.int/export/sites/www/pressroom/en/articles/2010/doc/stevie_wonder_speech_10_09_2010.pdf (Last visited on February 8, 2013).

ANNEXURE 1: CHRONOLOGY OF EVENTS

S.R. No	Date	Initiative/ Activity	Remarks
1	January 4, 2003	Presentation by Prof. Vinod Sena to a special committee of the Government of India urging for the introduction of an exception clause.	This was essentially an individual initiative. Prof. Sena proposed a copyright exemption for accessible formats during discussions on amendments to the Persons with Disabilities Act in 1994. While this came to naught, on 4th January, 2003, he was invited to testify before the Jagdish Sagar Committee set up to revise the Copyright Act.
2	March 2006	The Xavier's Resource Centre for the Visually Challenged (XRCVC) launches Project Access.	This project was designed to, <i>inter-alia</i> , help reduce the book famine that its constituents (largely students) were experiencing. The prevailing copyright provisions were identified as a major hindrance, and hence the need to campaign for a suitable amendment arose. In furtherance of this objective, XRCVC launched Project Access. In October 2007, Sightsavers, a UK based organisation that works towards eliminating avoidable blindness and equalization of opportunities for disabled, extended its support to Project Access <i>via</i> its collaboration with XRCVC.
3	April 2006	Government invites responses to the draft amendment to the Copyright Act, 1957.	Apart from a number of suggested amendments, a new §52(za) was proposed. This clause was designed to serve as the exception in favour of persons with disabilities.

S.R. No	Date	Initiative/ Activity	Remarks
4	April 2006	Formation of the Publication Access Coordination Committee (PACC).	The XRCVC convened the PACC which comprised initially of 7 organizations including Shruti Information Centre run by Prof. Vinod Sena. Its aim was to make appropriate representations to the government from time to time, on the need for a copyright disability exception.
5	May 12, 2006	PACC submits representation to Copyright Office.*	This representation evaluated clause 52(za) and found that it was limiting in terms of its scope as it provided only for 'specially designed formats'. This excluded the effective usage of mainstream applications such as digital formats.
6	July 16, 2006	Presentation before the Intellectual Property Law Practitioners' Association (IPLPA).	The issue was elaborately explained to senior members of the IPLPA. The presentation was instrumental in eliciting their support in terms of incorporating an inclusive clause in the amendment.
7	July 2006	Alternate Law Forum (ALF) submits representation.	Following PACC's cue, ALF began lobbying for § 52 (za) to be amended, so that it could be made more meaningful.
8	February 2007	Submission of study on copyright limitations and exceptions for the visually impaired to WIPO prepared by Judith Sullivan.	This study entailed a cross-jurisdictional analysis of the copyright legislation in different countries. It was submitted as a report to the Standing Committee on Copyright and Related Rights (SCCR) for WIPO.
9	March 2007	Release of the audio visual – The Blind Act	This short documentary produced by the XRCVC was prepared to further assist the advocacy campaign by highlighting the issue across the country.

S.R. No	Date	Initiative/ Activity	Remarks
10	April 2007	Formation of the Daisy Forum of India (DFI)	This umbrella body, currently comprising of over 90 organizations working to promote print access for the print disabled, orchestrated the unification of large user groups in this campaign.
11	April 2008 onwards	Launch of Publisher Contact Program of DFI	This initiative of the DFI was designed to gather soft copy content from publishers whose work could then be converted into DAISY format. It also served the function of communicating the special needs of this group to the publishers'. Some of the publishers who signed on and started sharing content included Oxford University Press, SAGE Publications, Cambridge University Press, Sheth Publishers, S. Chand & Co Ltd, Zubaan Books, Pratham Books, Himalayan Publishing House, Other India Press, Sahitya Academy, etc.
12	May 2008	Inclusive Planet founded.	It was set up to explore the possibility of providing products and services for persons with disabilities. It became one of the most ardent advocates of the campaign and played a crucial role in bringing together a number of people with complementary skills to work for the campaign.
13	June 2008	Launch of the Center for Internet and Society (CIS).	This NGO was set up to explore "the shape and form of the internet, and its relationship with the political, cultural, and social milieu of our times". It went on to become an active part of the copyright disability campaign.

S.R. No	Date	Initiative/ Activity	Remarks
14	July 2008	WBU works on a treaty for providing copyright exemptions for blind persons.	Mr. Rahul Cherian, one of the founders of Inclusive Planet, participated in the discussions in Washington DC, in his capacity as a copyright lawyer.
15	August -October 2008	Launch of Bookshare,* India.	Bookshare.org, the world's largest online library for people with print disabilities, launched its India chapter with tie ups with Worth Trust, Chennai, XRCVC- Mumbai and the Saksham Trust, Delhi.
16	March 2009	MHRD IP Chair (NUJS) joins campaign.	Professor Basheer, the MHRD IP Chair at WB NUJS joins the campaign and plays a critical role in drafting the text of the proposed copyright exception that would adequately cater to the campaign's concerns.
17	August 2009 onwards	Launch of Right to Read Campaign* in major Indian cities.	The campaign was launched in India in September 2009 in Chennai and later spread to Kolkata in November. The objective of the campaign was to sensitise the public to the needs of the print impaired. Phase 3 of the campaign was taken up in Mumbai by the XRCVC in January 2010. The last leg of the campaign culminated in New Delhi at the World Book Fair 2010. The campaign garnered the support of over 600 authors and publishers. The DFI maintained a presence at the Book Fair through a stall. Its representatives worked at creating awareness among publishers and the general public at the fair.

S.R. No	Date	Initiative/ Activity	Remarks
18	November 24, 2009	Meeting with HRD Ministry.	A small delegation of people working for the campaign, including us, met the Minister Shri. Kapil Sibal. In particular, the campaigners highlighted problems with the clause proposed by government.
19	March 2010	Policy paper on Limitations of the Licensing System to create Accessible Copies for the Print Impaired.*	This paper drafted by some of the campaigners including us, critiqued the potential introduction of a compulsory licensing system as proposed by the government and made out a strong case for a format neutral, non-discriminatory (within and between disabilities), end user focused format. Additionally it recommended licensing only in the case of for-profit activities.
20	March 2010	Representation to Minister of HRD to constitute a stakeholders committee on the exception clause.	The rationale was to ensure that an effective balance could be struck through the formal co-opting of the stakeholders who could build consensus through the sharing of views.
21	March 2010	Formation of National Access Alliance (NAA).	The NAA was a strategically wider network including the PACC, CIS, Inclusive Planet, DFI, MHRD IP Chair (NUJS), National Association for the Blind (India), the National Federation for the Blind (NFB), All India Confederation for the Blind (AICB) and Sightsavers. NAA reconciled whatever perceptual differences existed between the various constituent members so as to ensure a common front and objective. This resulted in the drafting of a new clause articulating a comprehensive copyright exception for the disabled.

S.R. No	Date	Initiative/ Activity	Remarks
22	April 2010	Mobilizing support from government and opposition.	NAA members began seeking support from government representatives and even opposition members (such as the BJP and Left Parties), so as to ensure support across party lines.
23	April 15, 2010 onwards	Press campaign.	The NAA launched an active media campaign by hosting press conferences in Mumbai, Delhi and Bangalore. The media campaign was designed to build a groundswell of support prior to the tabling of the Bill in the Rajya Sabha.
24	April 19, 2010	HRD Minister tables the government version of the Bill in the Rajya Sabha.	This draft was immediately opposed by the opposition who raised objections that had been forwarded to them by the NAA. Consequently, the Bill was referred to a Standing Committee. The clauses of the Bill were very limiting as they permitted only special formats.
25	April 21, 2010	Meeting with Rahul Gandhi, General Secretary of the All India Congress Committee.	NAA concerns were brought to the attention of Mr. Rahul Gandhi. Simultaneously, NAA had also initiated an active campaign to reach out to key ministers and Parliamentarians so as to build bi-partisan support base.
26	May 2010	Submissions to Standing Committee.	A detailed response was drafted and submitted as a collective response (NAA).

S.R. No	Date	Initiative/ Activity	Remarks
27	June 15, 2010	Presentation before the Parliamentary Standing Committee.	Representatives of the NAA, including us, made a joint presentation to the Standing Committee. They critiqued the proposed clause in the Bill tabled by the government, noting that the limitation on special formats was severely restrictive. Additionally, the presentation also showed them the various access technologies that the visually impaired used, which would be excluded under the government clause. This was followed up with a written response to the Committee on certain key questions that they had asked.
28	June 25, 2010	Support from National Human Rights Commission (NHRC).	The NHRC writes in a support letter to the Parliamentary Standing Committee asking for the incorporation of a comprehensive copyright exception as recommended by NAA.
29	June 2010	Ad hoc accreditation given to Inclusive Planet and XRCVC at the Standing Committee on Copyright and Related Rights (SCCR) of the World Intellectual Property Organization (WIPO).	This observer status gave an international platform to NAA members to engage in global discussions on exceptions and limitations for the blind. It also gave an opportunity to work more closely with the copyright office in India and share its concerns on the Copyright Amendment.

S.R. No	Date	Initiative/ Activity	Remarks
30	November 23, 2010	Tabling of Parliamentary Standing Committee Report.*	The Parliamentary Report accepted almost all the arguments made by the NAA. It critiqued the faulty government clause and recommended that the clause be made more comprehensive to adequately cater to concerns of the disabled.
31	November 26, 2010	Follow up with HRD Minister Shri. Kapil Sibal.	A follow up with the HRD Minister was initiated to ensure that the positive recommendations of the Standing Committee were incorporated in the final version of the Bill that had to be drawn up. NAA continued its engagement with the copyright office to work out an appropriate clause.
32	May 2011	A representation to the Ministry of Human Resource Development on India's stand at the Geneva discussions on the WBU Treaty was submitted to the concerned authorities in the ministry by the XRCVC on behalf of the National Access Alliance.	This stand was in consonance with the NAA recommendations at the national level.
33	August 2011	The Rajya Sabha schedules the Copyright (Amendment) Bill.	On account of disruption of Parliament, the same was not taken up.

S.R. No	Date	Initiative/ Activity	Remarks
34	April 2012	NAA intensifies its efforts to get the bill tabled and passed.	NAA representatives engaged in dialogue with opposition leaders urging that Parliament allow the Copyright Amendment Bill to be tabled and passed. A special communication was released which was sent to Parliamentarians.
35	May 17, 2012	Rajya Sabha passes the Copyright Amendment Bill.	§52(1)(zb), encapsulating the copyright disability exception, is closely aligned to what the NAA had proposed. This clause received a special mention in the Rajya Sabha, and the efforts of the advocacy movement were lauded.
36	May 22, 2012	Lok Sabha passes the Copyright Amendment Bill. The Copyright Amendment Bill is then sent to the president for approval.	
37	May 22, 2012	WBU President commends the Indian initiative.	In an email, Maryanne Diamond, President – WBU congratulated the Indian advocacy campaign and hoped that this would serve as a catalyst for orchestrating an international initiative to secure an appropriate Treaty for the blind.
38	June 2012	Final formalities completed.	The President's approval is given and Gazette notification is issued.