

# Protection of the Rights of Copyright Users with Special Attention to Visually Handicapped People under Sri Lankan Intellectual Property Regim

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*Abstract* Today, the validity of intellectual property has been trumped the validity of all kinds of movable and immovable property. Due to its importance, a specific international organization which was known as World Intellectual Property Organization (WIPO) has been established. Among various types of intellectual property right, the significance of copyright has been recognized by almost all countries in the world. Thus, many international instruments like Burn Convention; Trade Related Aspects on Intellectual Property Rights (TRIPS) Agreement, 1996 WIPO Copyright Treaty, etc. has been formed.

However, the current world has gradually recognized that the rights of a copyright user have not been sufficiently protected. In Sri Lanka too, though there are number of specific section in Intellectual Property Act to protect the rights of copyright owner, author, as well as the rights of performers, producers, even broadcasting organizations, etc. the rights of a copyright user cannot be seen.

Thus, due to this unfortunate situation, though the work is so eminent, the accessibility to that work is sometimes problematic. For instance, it seems that the current intellectual property law has forgotten the rights of visually handicapped users. It is needless to mention about their limited access to books, audio-visual works, etc.

The equality clause (Article 12) of the Constitution of the Democratic Socialist Republic Sri Lanka has implied the protection of disabled people's rights without discrimination. Thus, according to my view, it is high time to amend the Intellectual Property Act in Sri Lanka including the rights of copyright users. In this article, I hope to build the foundation in achieving this aforementioned

purpose by analysing the importance of right to accessibility to a copyright work.

For the purpose of this article, I did a field survey in combination of both quantitative and qualitative research methods. I collected information from visually handicapped peoples by using questionnaires. Anyway, here, I mainly attempted to find details in the variety of their age, the level of their education, income and vision. In addition to that, I collected information qualitatively from legal professionals and academics on Intellectual property law by the form of interview. However, for convenience, I have limited this research to Colombo area.

Due to using very small sample for the field survey, the importance of library research cannot be disregarded. I found primary and secondary sources by using the library of University of Colombo, as well as the internet.

Anyway, I purport in this article to reflect the importance of the rights of a copyright user and give my recommendations for a positive movement. Ultimately, I want this article to be an effective foundation to protect the rights of copyright users, especially the visually handicapped people's rights.

**Keywords**— Intellectual Property, Copyright, User Right, Rights of Visually Handicapped Users

## I. INTRODUCTION

Today, the world has been moved away from product based economy to knowledge based economy. It has been developed up to computer programs not limiting to literary, artistic and scientific works. The vulnerability and not having

trans-boundary limitation is the main dangerous significance of these types of work. Thus, various laws have been timely formed to protect this variety of intellectual works.

## II. ANALYSIS

By repealing the Code of Intellectual Property Act of 1979, a developed version of intellectual property law was introduced by Intellectual Property Act No 36 of 2003. There, the law on copyright is very much identical to Bern Convention.

Copyrights issues are very important to users rather than other types of issues like patent, trademarks, industrial designs etc., because it impact on a considerable amount of human life without having any distinction of age, intelligence, occupation etc. it is because, according to Section 5 of the Act, all literary, artistic and scientific creations are considered as intellectual works.

The same section has defined copyright author as the physical person who creates the work. Accordingly, the author can obtain the material interest of his/her work (Universal Declaration of Human Rights, 1948, s. 27).

Section 9 and 10 discusses about the author's economic and moral rights against third parties for his/her all lifetime and additional seventy years (Intellectual Property Act No 36 of 2003, s. 13). Accordingly, the author can earn money by letting his/her work to be referred by the user.

Section 11 and 12 of the Act has discusses about the concepts of fair use. Accordingly, the purpose and nature of a copyright work usage is considered. C.C.H Canadian Ltd v. Law Society of Upper Canada (2004) SCC 13 SC has added character, amount alternatives, effect of copyright to it. So, using copyrights work for news reporting, giving comments and criticisms, non-profit educational use etc. without the permission of the copyright author is not a violation of an economic or moral right.

It was strongly accepted even in Cramp and Sons Ltd v. Frank Smyth's and Ltd (1944) AC 329, that the author should have considerable skills, labour and judgment to be accepted his/her work.

Thus, it shows that Sri Lankan law on copyright concerns the rights of the authors of literary, artistic and scientific creations – commonly known as works – and the legitimate interests of the users of such creations (Karunaratna, p. 57). “It mainly encompass protected works, protected rights and management and enforcement of the protected rights” (Karunaratne, p. 57). However, though it has mentioned that the legitimate interests the copyright users has been protected under the Act, it seems that they were not able to identify the main legitimate interest of the copyright user: the interest to obtain a proper accessibility to the copyright work.

Section 2(b) of the Marakesh Treaty has defined ‘accessible formed copy’ as a “copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability. The accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons.” However, under the current law of Sri Lanka, the accessibility of a copyright work to a copyright user is problematic.

The aforementioned paragraphs make clear about the privileges of copyright author. However, its fairness is very much problematic when it is considered in the user's side, especially for visually handicapped users, because though the author can earn unlimited amount of money due to the protection given by the Act, it seems that the same Act has ignored the rights of users. For instance, a visually handicapped user cannot refer a book unless it is in brail or accessible version. However, the author's permission is essential to convert the book into the brail or accessible version. The ultimate result of it is the visually handicapped user has to pay more to refer the book. In most times, he/she is not entitled to refer the work at all even by paying more. It is a clear violation of their right to equality and non-discrimination which has been protected under Article 12 of Sri Lankan Constitution.

According to Aristotle, that violation of equality and non-discrimination can be resulted to a social combat (Wikramaratne). Yeck Wo v. Hopkins defines equality as not treating any party in deferent manner. Thus, one cannot say there will be no unrest due to ignoring users' intellectual property rights. The preamble of the Marakesh Treaty itself has recognized the principles of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in society.

Truly, restricting the accessibility to a work is an informal violation of the freedom of expression, right to equality, right to lawful occupation etc. which was guaranteed under Sri Lankan Constitution. Also, it is a clear violation of one's right to education, right to privacy, right to information, etc.

As mentioned previously, the quality of the work is highly concerned in granting copyrights under the law. However, users are the people who should measure the quality of a work, but in a situation where there is no proper accessibility to the work; its real quality cannot be measured. In other words, though the work is so eminent, its usefulness is weakened due to not having a proper accessibility to it. It has been said that "There are over 129 million book titles in the world, but persons with print disabilities can obtain less than 7% of these titles informants that they can read" (Harpour and Suzor, p. 745)

As pointed out by Marakash Treaty 2013, most visually handicapped peoples live in developing countries. So, "the situation is most acute in developing countries, where less than 1% of books are accessible" (Harpour and Suzor, p. 745) "According to Census 2001, the total population of India is 1,028,610,328. The total disabled population is 21,906,769, i.e. 2.1%. Out of this, visually disabled population is 10,634,881 i.e. 1.0% are visually challenged persons" (Government of India, 2001). Thus, as a developing country, discussing the issues of Marakesh treaty is very essential.

According to National Federation of the Blind and American Council of the Blind File Discrimination

Suit v. Arizona State University (2009), "Many publishers are selling access to e-books through digital distribution channels, but these are subject to encryption that restricts access to authorised devices. The encryption schemes of these platforms often prevent people with print disabilities from using adaptive technologies (including screen readers) to access the underlying text. However, "public funds have not been made available to digitise books on a large scale, and the one private attempt to do so by Google has stalled in the face of copyright infringement suits brought by rights-holders and their representatives (The Authors Guild Inc v Google Inc, 05 CIV 8136 (SDNY DC, 2011)

In the case study of Amazon Kindle E-Book Reader following pressure from publishing houses, Amazon decided to allow publishers to disable the accessibility feature. There, the Kindle reader which was introduced by Amazon included a screen reader and was fully accessible for persons with low vision and blindness. This decision resulted in persons who rely on screen readers being disabled and excluded from using this e-book reader. "The social model highlights that in this situation, a person is not print-disabled because of their low vision or other impairment; the cause of disablement was the decision by Amazon to allow publishers to turn accessibility features off" (Harpour and Suzor, p. 758).

According to Hyde Park Residence Ltd v. Yalland (2000) RPC 604, the test of ordinary reasonable man should be used in determining the right to fair use. Thus, it is needless to say that it is not unfair of taking measures to make a copyright work accessible to peoples with disability. It has been said that a fair use has two extreme ends. Definitely, it should be author's rights and user's rights. It also proves that a copyright user cannot be forgotten in discussing about copyright issues. It is linked to the US doctrine of first-sale. Accordingly, this right can be obtained only by a lawful user, but if the lawful author is a visually handicapped person, he/she cannot enjoy those rights without a proper accessibility to the work.

It has been said by Josaph P Liu that copyright users have unlimited rights to play, view, read and

listen to the work, as well as to transfer the ownership of the copies. Thus, according to the concept of reciprocity, there is a reciprocal duty both to copyright users and to copyright authors in protecting each party's rights.

Here, the finding of my research also proves my view on Sri Lankan Intellectual Property Law. Almost all visually handicapped participant has been isolated due to not having sufficient resources. Students and employees are mainly facing difficulties, because of that fact and the current situation has discouraged them heavily. Only one library is helping them by providing books in brail version. The situation makes clear that those disabled students have been ignored by the intellectual property law even though the works can be freely accessible for non-profit educational works. In addition to that, it shows that the current law has helped to isolate them as a marginalized group by not giving intellectual resources which may be the only objects they can use to enjoy their lives.

Thus, it is essential to amend the Sri Lankan Intellectual Property Act to include user right into it. It can be taken as an effective use of Article 12(4) of Constitution which has been stated that "Nothing in this article shall prevent special provision being made, by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons."

Enacting new laws regarding disability rights and other related issues is also essential. Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 (India) can be taken as an example. There, developing the relevant law by amending Protection of the Rights of Persons with Disabilities Act, No. 28 of 1996 will be more effective.

Developing variety of policies is also essential. 1986 National Education Policy, 2005 Right to Information Bill, in India can be taken as such example. The meeting of Indian Government on 13<sup>th</sup> of June, 2008 was decided to make universities and colleges barriers-free for visually handicapped people. That decision cannot be

practically implemented unless making copyright works accessible to those. Here, a policy on library is also useful.

Implementing the provisions of the Marakesh treaty is also important, there permitting authorized entities without the authorization of the copyright right-holder, to make an accessible format copy of a work, obtain from another authorized entity an accessible format copy, and supply those copies to beneficiary persons by any means, including by non-commercial lending or by electronic communication by wire or wireless means, and undertake any intermediate steps to achieve those objectives is useful (Article 4(2)a). There, the trans-boundary issues should be taken into account. Because of involving cross boarder issues, intellectual property rights in information and communication industry especially relevant to computer programs operates as a global phenomenon and do not limit to a country or a region (Abeyrathne, p. 26). Providing adequate legal protection and effective legal remedies against the circumvention of effective technological measures is also needed to recognize the positive impact of new information and communication technologies on the lives of persons with visual impairments or with other print disabilities. Anyway, the attention should also be paid to the taking down procedure of copyright works (Pessach, 2011)

Though all of these recommendations were implemented, its effectiveness cannot be obtained if the relevant laws and policies have not been properly reflected to the public at large. Thus, those non-legal social strategies like conducting public awareness programs etc. should not be disregarded.

### III. CONCLUSION

As a human being who has born into this world, one cannot be isolated from accessing to intellectual property work merely because of being disabled. Thus, as mentioned by Critical Legal Studies movement, one's experience should be taken into account in creating a law. Thus, as mentioned by the Preamble to the Marakesh Treaty, emphasizing the importance of copyright

protection as an incentive and reward for literary and artistic creations and of enhancing opportunities for everyone, including persons with visual impairments or with other print disabilities, to participate in the cultural life of the community, to enjoy the arts and to share scientific progress and its benefits is very essential.

Nonetheless, these protections should not be a result of a violation of the copyright author's right (C.C.H Canadian Ltd v. Law Society of Upper Canada, 2004 SCC 13 SC). Otherwise, it may discourage the authors in doing new creations. Thus, striking a balance between the rights of the copyright authors and users is very essential. It also implies of striking a balance between economic rights which has been linked to the author and the civil rights which has been linked to the user, because according to Social Cost theory and information cost theory, the additional payment which should be beared to protect visually handicapped users' right should be bared by the society, not the author. However, it is a barrier of social development. Thus, socially benefited user concept can be taken taken as a balanced concept which has not misused those both type of rights. Reverse exclusion concept is very important to establish the social beneficial users concept.

On the whole, the ultimate point of these discussion can mentioned as wide speed distribution v. Limited copies for private use (C.C.H Canadian Ltd v. Law Society of Upper Canada (2004)

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