

# The Marrakesh treaty and the approach towards social inclusion

By Harsh Mahaseth

*You gave us a Treaty. Better still you gave us a good Treaty - one that will change the lives of millions of people.*

Maryanne Diamond, President, World Blind Union<sup>1</sup>

## ABSTRACT

While there have been numerous measures that have been taken by international institutions, led by the UN, to foster equality, one issue that has received little attention till now has been what scholars have described as the book famine.<sup>2</sup> Statistics show that the number of published books available in formats accessible for the print disabled people was less than 5% before 2013.<sup>3</sup> However, 2013 was a landmark year to combat this problem and eliminate the scarcity of books available for them. On April 20, 2013 the Informal Session and Special Session of the WIPO Standing Committee on Copyright and Related Rights (SCCR)<sup>4</sup> had prepared a draft version of a text of a Treaty with an aim to facilitate access of readable material to the visually impaired persons and persons with print disabilities. This was subsequently discussed and adopted as the Marrakesh Treaty in the same year. Around six hundred delegates from among one hundred eighty-six member states of the WIPO joined the debate which led to the adoption of the Treaty in the Kingdom of Morocco.<sup>5</sup>

India was the first nation to ratify the Treaty on June 24, 2014 at the twenty-eighth session of the

Standing Committee on the Copyright and Related Rights Act, 2000 in Geneva. On September 30, 2016 the Treaty came into force by formally gathering 20 nations that acceded the Treaty.<sup>6</sup> Hopefully the number of members joining the Treaty will increase in the coming years. To remove the barriers to accessibility this Treaty plays a vital role for the visually impaired persons and persons with print disabilities.

India is home to 63 million visually impaired people, of whom 8 million are blind. The Accessible India Campaign<sup>7</sup> is a benchmark for universal access of accessible material for the visually impaired persons. India has also begun implementation of the Marrakesh Treaty into its domestic laws through a multi-stakeholder approach: collaboration with key players i.e. governmental bodies, authorized entities, etc.<sup>8</sup> This has led to the launch of Sugamya Pustalaya, India's largest collection of online accessible books with over 200,000 volumes of material. It is hoped that Sugamya Pustakalaya will soon become a member of the ABC Book Service, thereby joining an international library-to-library service managed by WIPO in Geneva.

This paper will highlight the Treaty and its applicability, look at the different approaches taken by several developed and a few developing nations and also see how the Indian approach, even though being a developing nation, has been progressive and beneficial to the beneficiaries of the Treaty and should be seen as an inspiration for the other nations.

<sup>1</sup> Stevie Wonder Hails Landmark WIPO Treaty Boosting Access to Books for Blind and Visually Impaired Persons, WIPO Media Center, Marrakesh/Geneva, June 28, 2013, Available at [http://www.wipo.int/pressroom/en/articles/2013/article\\_0018.html](http://www.wipo.int/pressroom/en/articles/2013/article_0018.html).

<sup>2</sup> Kartik Sawhney, Perspective: End the 'book famine' with better technology, attitudes and copyright law, The State of the World's Children 2013: Children with Disabilities, UNICEF, Available at [https://www.unicef.org/sowc2013/perspective\\_sawhney.html](https://www.unicef.org/sowc2013/perspective_sawhney.html).

<sup>3</sup> Background Paper by Brazil, Ecuador and Paraguay on a WIPO Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons, SCCR/19/13, WIPO, Available at [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=130505](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130505).

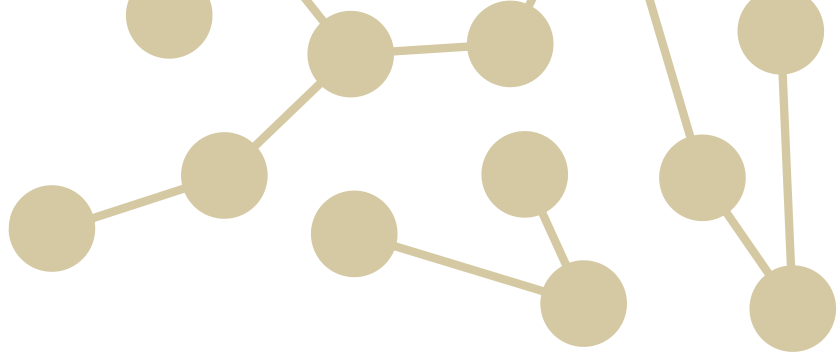
<sup>4</sup> Informal Session and Special Session of the Standing Committee on Copyright and Related Rights, SCCR/SS/GE/2/13, WIPO, Available at [http://www.wipo.int/meetings/en/details.jsp?meeting\\_id=29303](http://www.wipo.int/meetings/en/details.jsp?meeting_id=29303).

<sup>5</sup> Supra 1.

<sup>6</sup> Canada's Accession to Marrakesh Treaty Brings Treaty into Force, WIPO Media Centre, June 30, 2016, Available at [http://www.wipo.int/pressroom/en/articles/2016/article\\_0007.html](http://www.wipo.int/pressroom/en/articles/2016/article_0007.html).

<sup>7</sup> Accessible India Campaign, Available at <http://accessibleindia.gov.in/content/>.

<sup>8</sup> Francis Gurry, Making Books Accessible to all, The Hindu, November 01, 2016, Available at <http://www.thehindu.com/opinion/op-ed/Making-books-accessible-to-all/article15005883.ece>.



## 1. INTRODUCTION

*Without books to share, the dream of equal access will remain an unfulfilled dream. The Marrakesh Treaty is much more than a Treaty about books. It is an historic human rights instrument. Access to published works means the potential for blind and partially sighted children and adults to live integrated, productive lives.*

Frederick Schroeder, President,  
World Blind Union (WBU)<sup>9</sup>

The discourse on intellectual property has always had access to knowledge at the forefront, with such a system being seen as old as the Statute of Anne.<sup>10</sup> However, this encouragement for creativity and fostering of innovation has been with its limits. No copyright Treaty grants absolute rights to any individual. Both the Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade-related Aspects of Intellectual Property Rights require countries to limit copyrights and confine such limitations *to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.*<sup>11</sup> Despite this, the Marrakesh Treaty symbolizes an attempt to bring in a more balanced approach between the authors and users: it not only focuses on the protection of the rights of the author but also recognizes the interests of the persons who are visually impaired as well as people with physical disabilities, that prevent them from holding and manipulating a book.<sup>12</sup>

While this Treaty is a huge step forward towards inclusivity, the culmination of this Treaty took a long time. The WIPO-UNESCO report on this issue (The Report of the Working Group on Access by the Visually and Auditory Handicapped to Material Reproducing Works Protected by Copyright, Paris, October 25 to 27, 1982) was discussed nearly four decades ago. Promotion of access to knowledge for the visually impaired persons and persons with print disabilities should have been an uncontroversial issue in light of the principles of non-discrimination, equal opportunity, accessibility and full and effective participation as under the Universal Declaration of Human Rights. However, this step met with various issues related to copyright exceptions and limitations making the entire procedure long and complex.<sup>13</sup>

India was the first nation to ratify the Treaty on June 24, 2014 at the twenty-eighth session of the Standing Committee on the Copyright and Related Rights Act, 2000 in Geneva. It took three years for twenty governments to formally join the Treaty so it could enter into force.<sup>14 15</sup>

The Success of the Treaty lies in the ratification and effective implementation by the member states.

## 2. PRIMARY OBJECTIVES

The Treaty, aimed at the creation of a solid legal foundation for ensuring the widespread dissemination of accessible content, recognizes in the preamble:

*The aim of the Treaty is to build a solid foundation to ensure the widespread dissemination of accessible material recognizing that many Member States have established limitations and exceptions in their national copyright laws for persons with visual impairments or with other print disabilities, yet there is a continuing shortage of available works in accessible format copies for such persons.*<sup>16</sup>

<sup>9</sup> Inaugural Marrakesh Treaty Assembly, Accessible Books Consortium, October 10, 2016, Available at [http://www.accessiblebook-consortium.org/news/en/2016/news\\_0013.html](http://www.accessiblebook-consortium.org/news/en/2016/news_0013.html).

<sup>10</sup> Statute of Anne, 8 Ann. c. 21.

<sup>11</sup> Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) (adopted 15 Apr. 1994, entered into force 1 Jan. 1995) 1869 UNTS 299; (1994) 33 ILM 1197.

<sup>12</sup> J Reinbothe and S von Lewinski, The WIPO Treaties on Copyright (OUP 2015) ch 18; DJ

Gervais, International Intellectual Property: A Handbook of Contemporary Research (Edward Elgar Publishing 2015) 6.

<sup>13</sup> On Copyright and rights of persons with disabilities: WIPO Treaty for the blind, Kluwer Copyright Blog, April 19, 2013, Available at <http://copyrightblog.kluweriplaw.com/2013/04/19/on-copyright-and-rights-of-persons-with-disabilities-wipo-Treaty-for-the-blind/>.

<sup>14</sup> Canada's Accession to Marrakesh Treaty Brings Treaty into Force, WIPO Media Center,

Geneva, June 30, 2016, Available at [http://www.wipo.int/pressroom/en/articles/2016/article\\_0007.html](http://www.wipo.int/pressroom/en/articles/2016/article_0007.html).

<sup>15</sup> Marrakesh Treaty: Revolution for the print disabled, The Pioneer, October 15, 2016, Available at <http://www.dailypioneer.com/columnists/oped/marrakesh-Treaty-revolution-for-the-print-disabled.html>.

Article 19 of the International Covenant on Civil and Political Rights protects the freedom of expression, which also includes the freedom to seek, receive and impart information and ideas of all kinds.<sup>17</sup> The Treaty has been conceived in line with this as well as the principles enshrined under the Universal Declaration of Human Rights and the United Nations Convention on the Rights of Persons with Disabilities.

The primary objective underlying this Treaty is the creation of exceptions and limitations in member states' copyright laws for the creations and sharing of accessible work. The Treaty attempts to increase the availability of accessible works as different countries will be able to each produce accessible versions of materials which can then be shared with each other instead of duplicating efforts by adopting the same work. As copyright law is territorial, the exemptions will not cover the import and export of the accessible formats. A negotiation must proceed between the right holders to exchange such material across borders.<sup>18</sup>

The Treaty recognizes that though different member states have different exceptions and limitations, a uniform international framework needs to be followed to ensure cross-border exchange of books in an accessible format for the visually impaired persons and persons with print disabilities.

It also needs to be ensured that the exceptions within the copyright laws comply with the Three-Step test as laid out in the Berne Convention and later provided in TRIPs Agreement, WCT, etc.

### 3. BENEFITS

This Treaty will foster a discourse on the book famine and raise awareness regarding the need for policies that benefit the visually impaired persons as well as people with physical disabilities that prevent them from holding and manipulating a book.

The Treaty stresses on the role of educational institutions and how accessible formats for the visually impaired persons can help in an equal access to education. This greater access to education would in turn help in the transformation of our society.

The Treaty also underlines on the need for social integration and cultural participation of the visually impaired

persons. Such is only possible if everyone can avail equal access to knowledge and information.

This Treaty will contribute to poverty alleviation and the development of the national economies. Once information is available in accessible formats, development of individual facilities is certain. Assisting in professional growth, this Treaty aims to make the visually impaired persons more self-sufficient and able to contribute to their local economies.

The Accessible Books Consortium (ABC) was developed by the WIPO to supplement this Treaty. Its aim is to increase the number of books worldwide in accessible formats (braille, audio and large print) and to make them available to people who are blind, visually impaired or otherwise print disabled. The ABC is a crucial step in the realisation of the Treaty and its underlying aims. The benefits of the ABC include The ABC Global Book Service, Capacity Building and Accessible Publishing.<sup>19</sup>

### 4. THE WORKS COVERED UNDER THIS TREATY

Article 2(a) of the Marrakesh Treaty defines "works covered". This refers to the types of material which can be transcribed or distributed under the terms of the Treaty.

A major dispute amongst the developed and developing delegations has been regarding the types of work covered by the Treaty. There were various proposals which covered a spectrum of works. A proposal by the African nations was extensive enough to include "artistic, literary, dramatic, musical or scientific type, regardless of the mode, format or form of expression."<sup>20</sup> The proposal by Brazil, Ecuador and Paraguay also included films and non-copyrighted elements of databases.<sup>21</sup> The motion picture industry<sup>22</sup> as well as the United States of America<sup>23</sup> argued that audiovisual works should be excluded. As a result works such as literary and artistic works in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media have been covered by the Treaty. This definition is rather narrow as it does not cover the ambit photographic works, cinematographic works, sound recordings, dramatic works, broadcasts, performances, etc. The Treaty only covers published works. The exclusion of audiovisual works, films and databases is seen as a rather unfortunate choice.

<sup>16</sup> Preamble, Marrakesh VIP Treaty.

<sup>17</sup> International Covenant on Civil and Political Rights art. 19(2), Dec. 19, 1966, 999 U.N.T.S. 171.

<sup>18</sup> Historic Treaty Adopted, Boosts Access to Books for Visually Impaired Persons Worldwide, WIPO Media Center, Marrakesh/Geneva, June 27, 2013, Available at [http://www.wipo.int/pressroom/en/articles/2013/article\\_0017.html](http://www.wipo.int/pressroom/en/articles/2013/article_0017.html).

<sup>19</sup> Report on the Accessible Books Consortium, Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind,

Visually Impaired or Otherwise Print Disabled (MVT), MVT/A/2/INF/1, August 2, 2017, Available at [http://www.wipo.int/edocs/mdocs/govbody/en/mvt\\_a\\_2/mvt\\_a\\_2\\_inf\\_1.pdf](http://www.wipo.int/edocs/mdocs/govbody/en/mvt_a_2/mvt_a_2_inf_1.pdf).

<sup>20</sup> World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers: Proposal by the African Group, 15 June 2010, SCCR/20/11.

<sup>21</sup> World Intellectual Property Organization,

Standing Committee on Copyright and Related Rights, Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU), 25 May 2009, SCCR/18/5.

<sup>22</sup> James Love, "Knowledge Ecology International (KEI) Opening Statement at Marrakesh Diplomatic Conference", Knowledge Ecology International, 19 June 2013 <[keionline.org/node/1754](http://keionline.org/node/1754)>, visited on 3 December 2013.

“Accessible format copy” refers to a broad format that allows a person to access the content as easily as possible including digital formats as well. It is defined to mean a copy of a work in an alternative manner or form in order to enable people with visual impairments to have access to these works *as feasibly and comfortably as a person without visual impairments or print disabilities*. The scope of this definition is rather expansive.

## 5. BENEFICIARIES

Article 3 of the Marrakesh Treaty defines “Beneficiary Persons”. The beneficiaries under the Treaty include:

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

The inclusion of the ‘print disabled’ as a beneficiary has been done to further the objective of non-discrimination and equal opportunity. A print disabled can be anyone who cannot access print due to any form of disability. The definition of beneficiary is given as *someone affected by one or more in a range of disabilities that interfere with the effective reading of printed material*. The exception under the Treaty is aimed at visually disabled persons, people with dyslexia, etc. This definition is broad enough to include persons who are visually impaired as well as people with physical disabilities preventing them from holding a book. However, it does not cover people with auditory issues, mental disability, etc., who also have problems with accessing printed works. Furthermore, Article 3 of the Treaty does not clarify the qualifying indicators for ‘blindness’, ‘visual impairment’, etc. An initial proposal also wanted to include “persons with any other disabilities”<sup>24</sup> which was eventually narrowed down by the negotiation parties.<sup>25</sup> The Treaty leaves the specifications of the spectrum of impairments and disabilities to be decided by the national laws. It is a hope that all the nations follow a social model of disability and include all those who are in real need.

## 6. INTERNATIONAL EXCHANGE OF ACCESSIBLE WORKS

Copyright laws are territorial and considering both the jurisdictions of the importer and exporter countries complicates the international exchange of accessible works.<sup>26</sup> Such complications have led to duplication in production of accessible formats. Due to this there are exchange possibilities only when special agreements between the nations are undertaken. Countries’ freedom to adopt flexibilities under the Treaty has led to a lack of limitations and exceptions, or adoption of ones that are badly-crafted. At the same time, the territorial nature of copyright has not stopped the international community from adopting minimum standards of protection for copyright and related rights. Moreover, the principle of national treatment means that authors enjoy a minimum level of protection everywhere.

Regulation of the possibility to import and export accessible formats on the international and national level would facilitate the flow of resources between the developing and developed nations and also assisting in better access to the former. This also skips the repetition and reproduction of material preserving resources.

The preamble of the Treaty recognizes the lack of access to the material despite the availability of copyright limitations and exceptions. Recognizing that many Member States have established limitations and exceptions in their national copyright laws for persons with visual impairments or with other print disabilities, yet there is a continuing shortage of available works in accessible format copies for such persons.

<sup>23</sup> Fedro D. Tomassi, ‘Audiovisual Materials in the Classroom and the WIPO Treaty for copyright exceptions for persons with disabilities’, Knowledge Ecology International, 8 June 2013, <[www.keionline.org/node/1738](http://www.keionline.org/node/1738)>, visited on 4 December 2013.

<sup>24</sup> World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU), 25 May 2009, SCCR/18/5.

<sup>25</sup> Brendan Kirwin, ‘Addressing the “Book Famine”: The WIPO and VIP Accessibility’, 15 August 2012, p. 15, <[www.bkirwin.net/scholarship/](http://www.bkirwin.net/scholarship/)>, visited on 4 December 2013; Fedro D. Tomassi, ‘Audiovisual Materials in the Classroom and the WIPO Treaty for copyright exceptions for persons with disabilities’, Knowledge Ecology International, 8 June 2013, <[www.keionline.org/node/1738](http://www.keionline.org/node/1738)>, visited on 4 December 2013.

<sup>26</sup> Judith Sullivan Study on Copyright Limitations and Exceptions for the visually impaired [World Intellectual Property Organization (WIPO) Standing Committee on Copyright and Related Rights (SCCR), SCCR/15/7, 20 February 2007] at 58.

## 7. LIMITATIONS AND EXCEPTIONS IN CROSS-BORDER EXCHANGE

Article 4(2) of the Treaty seeks to address the exceptions created by the member states in their national copyright laws. It seeks to enable “authorized entities” to make accessible format copies of works that are lawfully obtained and to disseminate them amongst legally entitled beneficiaries on a not-for-profit basis. This gives them the right to reproduce, the right to distribute, the right to make it available to public and the right to make changes to the work to convert it into an accessible format. Article 2(c) of the Treaty defines an “authorized entity”. To qualify under this definition of authorized entity, there is no specific process, thus, any entity meeting the criteria can claim to be an authorized entity under this Treaty. The definition is manifold including governmentally recognized, not-for-profit organizations, etc. that provide access to information to beneficiaries on a not-for-profit basis.

Moreover, the Treaty mandates that such copies be shared only with beneficiaries and be made from lawfully obtained copies. However, Article 5(2) of the Treaty read with Article 6 gives the authorized entities access to the material from the importing country without the prior consent of the copyright owner and such material can be distributed to other authorized entities or beneficiaries in other Contracting Parties’ territories. Article 11 does order that the governments carve exceptions in their copyright laws to ensure that the interests of the authors are not unreasonably prejudiced.

The Marrakesh Treaty mandates national laws to allow the cross-border exchange of the works in accessible formats to other member states. However, for this to be done there are two conditions that need to be satisfied:

1. The accessible works are exclusively distributed to disabled persons; and
2. The limitations and exceptions satisfy the Three-Step Test as laid down in the Berne Convention and later provided in the TRIPs Agreement, WCT, etc.:
  - The exception or limitation must be a special case;
  - The exception or limitation does not conflict with the normal exploitation of the work; and;
  - The exception or limitation does not prejudice the legitimate interests of the copyright holder.

Articles 9 to 14 delegate the administrative functions to

the International Bureau of the WIPO, which in turn will assist in the facilitation of cross-border exchange of accessible formats of material encouraging the voluntary sharing of information. Moreover, an Assembly to maintain and develop the Treaty has also been created with each member state having one representative and one vote each.

Cross-border exchange of copyrighted works in accessible formats is one of the primary aims of the Treaty. Technologically advanced developed nations have the capability to convert works into various formats, whereas the developing nations may not have the same capabilities. The Treaty enables easy access to converted works across borders. This is a giant step for ensuring access. However, since the Treaty text uses the word ‘may’ and gives an impression that this provision is non-mandatory, the US and EU could take advantage of such language.

## 8. BARRIERS TO ACCESS FOR THE VISUALLY IMPAIRED

As Braille evolves to digital formats, new technologies have presented themselves as more easily produced and distributed accessible works.<sup>27</sup> The rapid emergence of technological avenues may obviate the necessity of the Treaty in the coming decade.<sup>28</sup> Therefore, governments need to restructure their copyright laws in a positive way in order to ensure that the commitment to the visually impaired persons does not merely remain confined to words.<sup>29</sup>

The Accessible Books Consortium<sup>30</sup> (ABC) is a public-private partnership led by the World Intellectual Property Organization (WIPO). It includes organizations that represent people with print disabilities such as the World Blind Union (WBU); libraries for the blind; standards bodies, and organizations representing authors, publishers and collective management organizations. The goal of the ABC is to increase the number of books worldwide in accessible formats - such as braille, audio, e-text, large print - and to make them available to people who are blind, have low vision or are otherwise print disabled.

The intersection of technology, market failure and copyright laws create a complex access dilemma for the visually impaired that deprives them of equal opportunity.<sup>31</sup> When a published work is available only in certain electronic forms, it deprives the visually impaired from the use and enjoyment of that work.<sup>32</sup>

There are market factors that limit the creation and

<sup>27</sup> Marc Maurer, National Federation of the Blind, Comments on the Topic of Facilitating Access to Copyrighted Works for the Blind or Other Persons with Disabilities, 3 (2009), Available at <http://www.copyright.gov/docs/ssccr/comments/2009/maurer.pdf>.

<sup>28</sup> William Fisher, CopyrightX: Special Event – Negotiating Copyright Treaties, The Berkman Klein Center for internet & Society, YouTube, April 29, 2014, Available at <https://www.youtube.com/watch?v=rWJC50Ng35k>.

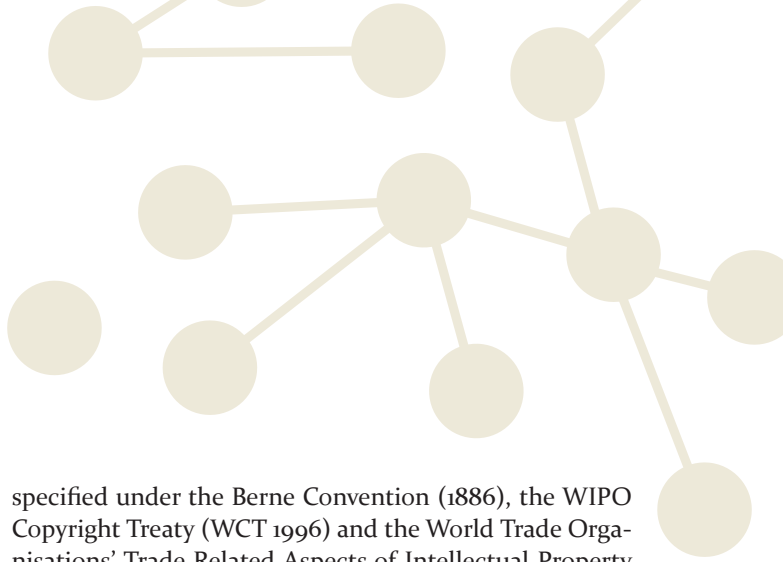
<sup>29</sup> Swaraj Paul Barooah, Guest Post: Translating the Miracle of Marrakesh into Concrete Action – the Journey so Far, SpicyIP, January 25, 2016, Available at <https://spicyip.com/2016/01/guest-post-translating-the-miracle-of-marrakesh-into-concrete-action-the-journey-so-far.html>.

<sup>30</sup> Accessible Books Consortium (ABC), Accessible Books Consortium, Available at <http://www.accessiblebooksconsortium.org/portal/en/index.html>.

<sup>31</sup> United States of America, Statement on Copyright Exceptions and Limitations for Persons with Print Disabilities, 1 (Dec. 14-18, 2009), Available at [http://www.uspto.gov/ip/global/copyrights/wiposccr\\_19session.pdf](http://www.uspto.gov/ip/global/copyrights/wiposccr_19session.pdf).

<sup>32</sup> Krista L. Cox, The Right to Read for Blind or Disabled Persons, LANDSLIDE, May-June 2012, 32.

<sup>33</sup> Allan Adler, Am. Association Of Publishers, Comments In Response To Notice Of Inquiry On Facilitating Access To Copyrighted Works



distribution of accessible material. Most authors and publishers do not see an economic profit in the market for the visually impaired.<sup>33</sup> The high production costs of the material discourages the creation and distribution. Due to this, the market is primarily served by not-for-profit, non-governmental and charitable organizations.<sup>34</sup> As such, due to limited resources the number of accessible works produced and distributed is constrained. Furthermore, the addition of a copyright licensing fee would impose a substantial burden on the already existing constraint.<sup>35</sup>

A solution that the WIPO employed was through voluntary stakeholder agreements. Through the WIPO Stakeholder Platform publishers opposed to the Marrakesh Treaty they at the same time established a forum in which stakeholders reached voluntary agreements which permitted the lawful transfer of licensed material in accessible formats.<sup>36</sup>

## 9. THE INTERNATIONAL POSITION

*While the signing of this Treaty is a historic and important step, I am respectfully and urgently asking all governments and states to prioritize ratification of this Treaty so that it will become the law of the land in your respective countries and states*

Stevie Wonder, Marrakesh/Geneva, June 28, 2013<sup>37</sup>

A total of 35 nations have contracted to the Marrakesh Treaty.<sup>38</sup> Several nations considered making accessible formats for the visually impaired persons as an infringement of copyright law. In a 2007 WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired, it was reported that only 57 countries had created specific exceptions and limitations to copyright for the benefit of the visually impaired persons.<sup>39</sup> While some countries permit making such material accessible, some consider cross-border transfer of such material to be an infringement of copyright law.

Thus, member states can carry out their responsibilities envisaged under the other treaties without affecting any of the provisions of this Treaty; however, the member states need to comply with their international obligations as

specified under the Berne Convention (1886), the WIPO Copyright Treaty (WCT 1996) and the World Trade Organisations' Trade Related Aspects of Intellectual Property Rights (TRIPS, 1995).

### 9.1. THE BRITISH POSITION

The British Government has made the accessibility of materials for the disabled easier. Previously there were exceptions to copyright law that allowed visually-impaired persons and organizations to make accessible versions of certain materials. However, such exceptions were restricted to certain impairments and not including other forms of impairments, such as dyslexia, while these did not apply to all types of copyright.<sup>40</sup>

The law has now changed to include anyone who suffers an impairment that prevents them from accessing copyright works and such persons, including not-for-profit organizations and educational establishments, will now be able to benefit from the exception.<sup>41</sup> Furthermore, the law has been simplified so that organizations no longer need to go through a bureaucratic designation process to produce accessible material. The law allows acts such as:<sup>42</sup>

- *Making Braille, audio or large-print copies of books, newspapers or magazines for visually-impaired people*
- *Adding audio-description to films or broadcasts for visually-impaired people*
- *Making sub-titled films or broadcasts for deaf or hard of hearing people*
- *Making accessible copies of books, newspapers or magazines for dyslexic people.*

However, it is legal to reproduce material only if suitable accessible copies are not commercially available. Organizations that do produce copies of accessible material have a duty to keep records and provide them to the copyright owner of the material.

For The Blind Or Other Persons With Disabilities 7 (2009), Available at <http://www.copyright.gov/docs/scrr/comments/2009/adler.pdf>.

<sup>34</sup> Patrick Hely, A Model Copyright Exemption to Serve the Visually Impaired: An Alternative to the Treaty Proposals Before WIPO, 43 VAND. J. TRANSNAT'L L. 1369, 1372 (2010).

<sup>35</sup> Ng-Loy Wee Loon, Visually Impaired Persons and Copyright, 41 INT'L REV. INTELL. PROP. & COMPETITION L. 377 (2010).

<sup>36</sup> See Vera Franz, Back to Balance: Limitations

and Exceptions to Copyright, in ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY 516, 525-27 (2010).

<sup>37</sup> Supra 1.

<sup>38</sup> Contracting Parties > Marrakesh VIP Treaty (Total Contracting Parties: 35), WIPO Administered Treaties, WIPO, Available at [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&Treaty\\_id=843](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&Treaty_id=843).

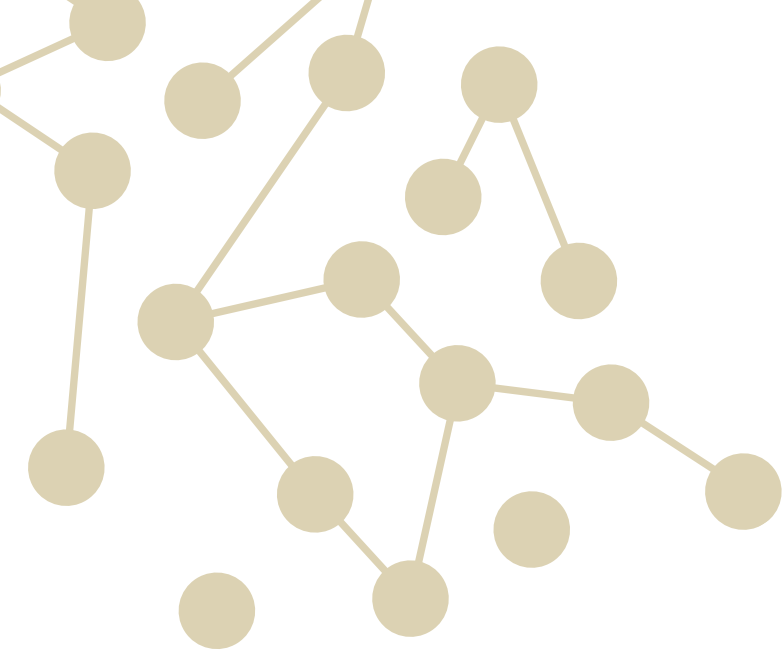
<sup>39</sup> World Intellectual Property Organization, Study on Copyright Limitations and Exceptions

for the Visually Impaired, 28, SCCR/15/7 (Feb. 20, 2007), Available at <http://www.wipo.int/meetings/en/doc-details.jsp?docid=75696>.

<sup>40</sup> Exceptions to copyright: Accessible formats for disabled people, Intellectual Property Office, 3, Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/375952/Accessible\\_formats\\_for\\_disabled\\_people.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/375952/Accessible_formats_for_disabled_people.pdf).

<sup>41</sup> Id.

<sup>42</sup> Id at 4.



## 9.2. THE AMERICAN POSITION

The Chafee Amendment created a copyright infringement exception to make accessible copies more efficient and to expand access to published works for the blind or other persons with disabilities. This Amendment authorised the reproduction and distribution of previously published works and did not require remuneration to be paid to the author. The American copyright law also provides the defence of fair use when the production of accessible material falls outside of the scope of the Chafee exception.<sup>43</sup> However, this has failed to provide better access.<sup>44</sup> Building upon the precedent of the Chafee Amendment, the Marrakesh Treaty advances the goal of copyright exceptions for the print disabled. The support of the United States would herald a disability-inclusive goodwill and also show that the United States recognizes the copyright barriers for the print-disabled and, even though they have not ratified the CRPD, they are willing to undertake measures to alleviate the barriers present to them.<sup>45</sup>

The United States should support the Marrakesh Treaty as this would increase access to the accessible material not just in the United States, but also worldwide. As the Chafee Amendment has become outdated,<sup>46</sup> there is an impending need to create a lawful global platform to share accessible material, and the Marrakesh Treaty presents this opportunity. While the Marrakesh Treaty itself is not a means to an end, it does provide an opportunity to update the United States own national laws. By updating and complementing the Chafee Amendment the United States can achieve equitable access and alleviate the copyright barriers for the print-disabled.<sup>47</sup>

## 9.3. THE EUROPEAN UNION POSITION

Following its adoption in June 2013 there was a slow start to the ratification process which caused the member states to question the legality of ratifying the Treaty.<sup>48</sup> With the Maltese presidency forming an agreement with the European Parliament on implementing the legislation, a proposal was agreed to which would introduce EU legislation with a mandatory exception to copyright rules, in line

with the Marrakesh Treaty.<sup>49</sup> This proposal allows beneficiary persons and organizations to make copies of works in accessible formats, and to disseminate them across the EU and in third countries party to the Treaty.

A regulation will implement the Union's obligations under the Marrakesh Treaty with respect to the exchange of accessible format copies for non-commercial purposes between the EU and third countries that are party to the Marrakesh Treaty.<sup>50</sup> A directive will incorporate the obligations under the Marrakesh Treaty into national domestic legislation. This will ensure an improvement in the availability of accessible format copies for beneficiary persons and their circulation within the internal market. The regulation and the directive will have to be formally adopted by the European Parliament and the Council. Afterwards, the provisions of the directive will be enacted in each national legislation within a maximum period of 12 months. Following the adoption of a Council decision authorising the conclusion of the Marrakesh Treaty, the EU will be able to deposit the ratification instruments of the Treaty.<sup>51</sup>

While the EU nations may have a uniform legislation with regards to the Treaty, there is an apparent lack of detail in the EU legislation, as well as some optional provisions, which needs to be advocated against to bring the best possible result for the persons with print disabilities.

EBLIDA, IFLA and EIFL, in cooperation with the European Blind Union, are supporting libraries in the EU nations to make the case for a good transposition. When the legislation is fully transposed in domestic law, libraries can then perform the range of services envisaged by the Treaty: the creation and distribution of accessible format copies to people with print disabilities.<sup>52</sup>

## 9.4. THE CANADIAN POSITION

For many years, the unauthorized making of a copy in an accessible format such as braille, electronic text or audio, and its distribution constituted an infringement of the reproduction and distribution rights in Canada. Similarly, the export or import of accessible format copies could trigger infringement liability.

To improve access, the government of Canada amended the Copyright Act in June 2016 with specific provisions on access to copyright works. Bill C-11<sup>53</sup> introduced three main changes in the copyright act.<sup>54</sup>

First, the bill permits non-profit organizations acting on behalf of persons with a print disability to reproduce copyrighted works (not films or music) in accessible formats without the permission from the copyright holder, provided that the work is not commercially available in a similar format.

Second, the Bill reduces the restrictions on exporting accessible materials regardless of the authors' nationality by allowing non-profit organizations to make the work available in other countries that are part of the Treaty. Prior to the amendments, cross-border exchanges of an accessible format copy were allowed only where the author of the work was a Canadian citizen, a permanent resident, or a citizen of the destination country.

Third, the Bill also exempts electronic books from the

digital lock rules enacted in the 2012 copyright reforms that protect right-holders against the circumvention of popular consumer products. At the same time, the bill adopts a restrictive approach in the implementation of the Marrakesh Treaty by requiring the non-profit organization to pay royalties to the copyright-holders.

## 9.5. THE ISRAELI POSITION

In 2014 Israel became the first non-signatory country to amend its copyright law according to the stipulations of the Marrakesh Treaty.<sup>55</sup> The State of Israel, as a non-signatory, constitutes a unique case for three main reasons. First, in contrast to other Berne Convention member states, Israel's copyright law did not provide an exception for disabled people to use accessible formats of materials protected by copyright. Secondly, even countries that had a particular exception for the disabled were not attentive to the complex meaning of the concept of disability, excluding many disabilities from the scope of the exception they have adopted. Thirdly, the Israeli way of embracing the stipulations of the Marrakesh Treaty showed why the boundaries of intellectual property should not be tied to international agreements only, and that such agreements should be used as a baseline for extending the protection of those they aim to protect.

## 9.6. THE IRANIAN POSITION

While the authorized entities in countries that are not member states of the Berne Convention, but are members of the WCT, can distribute or make their work available in other jurisdictions, the question regarding a country that is party to neither of them remains unsolved. This has come to be known as the "Berne gap".<sup>56</sup> Iran is a party to the Marrakesh Treaty but is not to the Berne Convention or the WCT. While Iran can receive accessible copies from

authorized entities, it is not clear whether the authorized entities of Iran can distribute their works to other jurisdictions. The copyright laws in Iran protect the right to distribute copyright works.<sup>57</sup> However, considering that this will pass the Three-Step Test, the authorized entities will be probably able to distribute their works beyond the jurisdiction of Iran.

## 9.7. THE CHINESE POSITION

China has ratified the Convention on the Rights of Persons with Disabilities and also signed the Marrakesh Treaty. China has one of the largest population of visually impaired people in the world. With the language having several different pronunciations and homonyms of the words in local dialects, there are pressing challenges to translations in Braille. However, China has several organizations and even the National Research Center for Sign Language and Braille which has been trying to provide accessible material to the blind.<sup>58</sup> While China's current copyright law has an explicit provision permitting an exception for the creation of braille formats, in order to comply with the Treaty, a new exception will have to be introduced".

## 9.8. THE FIJIAN POSITION

Fiji has signed the Convention on the Rights of Persons with Disabilities in 2009 but is yet to sign the Marrakesh Treaty. The people with disabilities are likely those of the poorest section of the population who face social stigma, a lack of job preparation and employment opportunities. Fiji can rely on the text of the Marrakesh Treaty in drafting amendments to its copyright laws to allow for the import and export of accessible formats. It needs to include provisions allowing for the creation and distribution of accessible formats.<sup>59</sup>

<sup>43</sup> Sony Corp. Of Am., 464 U.S. At 455 N.40; United States Of America, Statement On Improving Accessibility To Copyrighted Works For Blind And Visually Impaired Persons, 1 (May 25-29, 2009), Available at [Http://www.copyright.gov/docs/sccr/statement/us-intervention.pdf](http://www.copyright.gov/docs/sccr/statement/us-intervention.pdf).

<sup>44</sup> Patrick Hely, A Model Copyright Exemption To Serve The Visually Impaired: An Alternative To The Treaty Proposals Before WIPO, 43 VAND. J. TRANSNAT'L L. 1392, 1372 (2010).

<sup>45</sup> James Love, Knowledge Ecology Int'l, Comments To The Copyright Office And The USPTO Regarding The WIPO Draft Proposal To Facilitate Access To Copyrighted Works For Persons Who Are Blind Or Have Other Reading Disabilities 2 (2009), Available At [Http://www.copyright.gov/docs/sccr/comments/2009/comments-2/james-love-knowledge-ecology-international.pdf](http://www.copyright.gov/docs/sccr/comments/2009/comments-2/james-love-knowledge-ecology-international.pdf).

<sup>46</sup> Scorr Lissner, Association for higher education and disability, Copyright Office Comments 2 (2009), Available at [Http://www.copyright.gov/docs/sccr/comments/2009/lissner.pdf](http://www.copyright.gov/docs/sccr/comments/2009/lissner.pdf).

<sup>47</sup> Shae Fitzpatrick, Setting Its Sights on the

Marrakesh Treaty: The U.S. Role in Alleviating the Book Famine for Persons with Print Disabilities, 37 B. C. Int'l & Comp. L. Rev. 139 (2014).

<sup>48</sup> Implementing the Marrakesh Treaty in European Union Member States: A Guide for Libraries, IFLA, EBLIDA, October 1, 2017, 7, Available at [http://www.eblida.org/Documents/Marrakesh%20Treaty/01\\_eu\\_marrakesh\\_transposition\\_guide.pdf](http://www.eblida.org/Documents/Marrakesh%20Treaty/01_eu_marrakesh_transposition_guide.pdf).

<sup>49</sup> Marrakesh Treaty on access to published works for blind and visually impaired persons: EU paves the way for ratification, European Council, Council of the European Union, Available at <http://www.consilium.europa.eu/en/press/press-releases/2017/05/10/marrakesh-treaty/>.

<sup>50</sup> Supra 48.

<sup>51</sup> Id.

<sup>52</sup> Id.

<sup>53</sup> Bill C-11: An Act to Amend the Copyright Act [access to copyrighted works or other subject-matter for persons with perceptual disabilities], Open Parliament, Available at <https://openparliament.ca/bills/42-1/c-11/>.

<sup>54</sup> Bassem Awad, How the Marrakesh Treaty makes the Intellectual Property system more inclusive, OpenCanada.org, September 29, 2016, Available at <https://www.opencanada.org/features/how-marrakesh-treaty-makes-intellectual-property-system-more-inclusive/>.

<sup>55</sup> Law for Making Works, Performances and Broadcasts Accessible for Persons with Disabilities (Law Amendments) No 5774-2014 (enacted 19 March 2014) (Israel).

<sup>56</sup> WIPO Standing Committee on Copyright and Related Rights Draft Report of the Informal Session and Special Session held at Geneva, 18 20 April 2013 (SCCR/SS/GE/2/13/3 PROV, 31 May 2013).

<sup>57</sup> Act for Protection of Authors, Composers and Artists Rights (Copyright Law) 1970 (Iran), Art 3.

<sup>58</sup> UNDP (2015). Our right to knowledge: Legal reviews for the ratification of the Marrakesh Treaty for persons with print disabilities in Asia and the Pacific, 47.

<sup>59</sup> Id at 54.



## 9.9. THE INDIAN POSITION

In June 2014, India became the first country to ratify the Marrakesh Treaty.<sup>60</sup> In order to comply with the Treaty India had to proceed with an amendment to the Indian Copyright Act. Under Section 52 of the Act, which concerns with fair use/fair dealing, there exists an added provision Section 52 (1) (zb) regarding "before "exceptions with the exceptions which would not amount to a copyright infringement. This provision permits the conversion of a work into an accessible format exclusively for the benefit of a differently abled people. Although this amendment was introduced much before the Marrakesh Treaty coming into picture, it may have been upheld to be a beacon for other countries during the Marrakesh Conference.

While India does not have access to many books due to the price and stringent intellectual property laws, this Treaty can enable cross-border exchange which would serve the needs of the visually impaired persons ensuring harmonization with regards to the limitations and exceptions. This cross-border exchange allows the abridging of the technological gap found between the developing and developed nations, with the former gaining easy access to the converted material. However, one problem that can be faced is the use of the word 'may'<sup>61</sup> in the Treaty, thereby making this act optional and non-obligatory, something that the developed nations may take advantage of.

The Accessible India Campaign<sup>62</sup> is a benchmark for universal access of accessible material for the visually impaired persons. India has also begun implementation of the Marrakesh Treaty into its domestic laws through a multi-stakeholder approach: collaboration with key players i.e. governmental bodies, authorized entities, etc.<sup>63</sup> This has led to the launch of Sugamya Pustalaya, India's largest collection of online accessible books with over 200,000 volumes of material. It is hoped that Sugamya Pustakalaya will soon become a member of the ABC Book Service, thereby joining an international library-to-library service managed by WIPO in Geneva. Today, as the Marrakesh Treaty sits as a benchmark for social inclusion, India's multi-stakeholder approach should also be seen as a model for other nations to follow.

Bentech has also received a grant from USAID, World Vision and the Australian Government to provide students at the primary level with accessible formats in their mother tongue, in the State of Maharashtra.<sup>64</sup> This project is expected to reach a target of 30-35 percent of the primary level students within the span of two years. Other multilingual nations can evaluate this project and determine its effectiveness in improving literacy rates among its student population.

India has worked with a number of organizations to ensure that the beneficiaries, as defined under Article 3 of the Treaty, can fully enjoy their rights under it and help address the book famine. India has shown that adopting an exception has led to the creation and distribution of accessible copies, and such exception has not made an adverse impact on publishers or has been abused in any way.<sup>65</sup>

It is absolutely necessary for nations to create exceptions for the visually impaired persons and the first step towards this can be the ratification of the Treaty, at the earliest.<sup>66</sup>

## 10. CONCLUSION

*The Marrakesh Treaty proves that positive change can be made even in giant global institutions and against great odds*

David Hammerstein, World Blind Union (WBU)<sup>67</sup>.

This Treaty may be the first international legal instrument that seeks to address a specific impediment i.e. the issue of book famine for the visually impaired persons. As Professor Justin Hughes notes, this Treaty provides an alternative narrative of how a compromise can be sought between the social purposes of copyright law vis-à-vis safeguarding the interests of the author.<sup>68</sup> Such a balance reaffirms the proposition that the competing interests can be reconciled to ensure that copyright law remains an

<sup>60</sup> Manisha Bansode, Shivani Jadhav & Anjali Kashyap, Voice Recognition and Voice Navigation for Blind using GPS, Vol. 3 (4), Intl J. of Innovative Research in Electrical, Electronics, Instrumentation & Ctrl Eng., Apr. 2015, Available at <http://www.ijireeice.com/upload/2015/april-15/IJIREEICE%2020.pdf>.

<sup>61</sup> Supra 16, at Art 5.

<sup>62</sup> Accessible India Campaign, Press Information Bureau, Government of India, March 09, 2017, Available at <http://pib.nic.in/newsite/printrelease.aspx?relid=159009>.

<sup>63</sup> Francis Gurry, Making books accessible to all, The Hindu, November 01, 2016, Available at <http://www.thehindu.com/opinion/op-ed/Making-books-accessible-to-all/article15005883.ece>.

<sup>64</sup> Pappas, Kristina, 'Benetech Wins All Children Reading: A Grand Challenge for Development Grant to Improve Literacy for

Primary School Students with Disabilities in India' [5 February 2015], <http://benetech.org/2015/02/05/benetech-wins-all-children-reading-a-grand-challenge-for-development-grant-to-improve-literacy-for-primary-school-students-with-disabilities-in-india/>.

<sup>65</sup> Supra 58, at 29.

<sup>66</sup> Open Letter to PM Modi on Intellectual Property Rights issues on His Visit to the United States of America in September, 2015, The Centre for Internet & Society, Available at <http://cis-india.org/a2k/blogs/open-letter-on-intellectual-property-rights-issues-during-your-visit-to-the-united-states-of-america-in-september-2015>.

<sup>67</sup> Supra 9.

<sup>68</sup> Justin Hughes, The Media Institute, Available at <http://www.mediainstitute.org/IPI/2013/080513.ph>.

<sup>69</sup> William Fisher, CopyrightX: Lecture 1.4, The

Foundations of Copyright Law: Multilateral Treaties, The Berkman Klein Center for Internet & Society, January 20, 2016, YouTube, Available at <https://www.youtube.com/watch?v=00Bq5n7wYn0>.

<sup>70</sup> Sugandha Nayak, India: Historic Marrakesh Treaty: For Visually Impaired/Print Disabled Persons, Mondaq, September 12, 2013, Available at <http://www.mondaq.com/india/x/262396/Copyright/Historic+Marrakesh+Treaty+For+Visually+Impaired>.

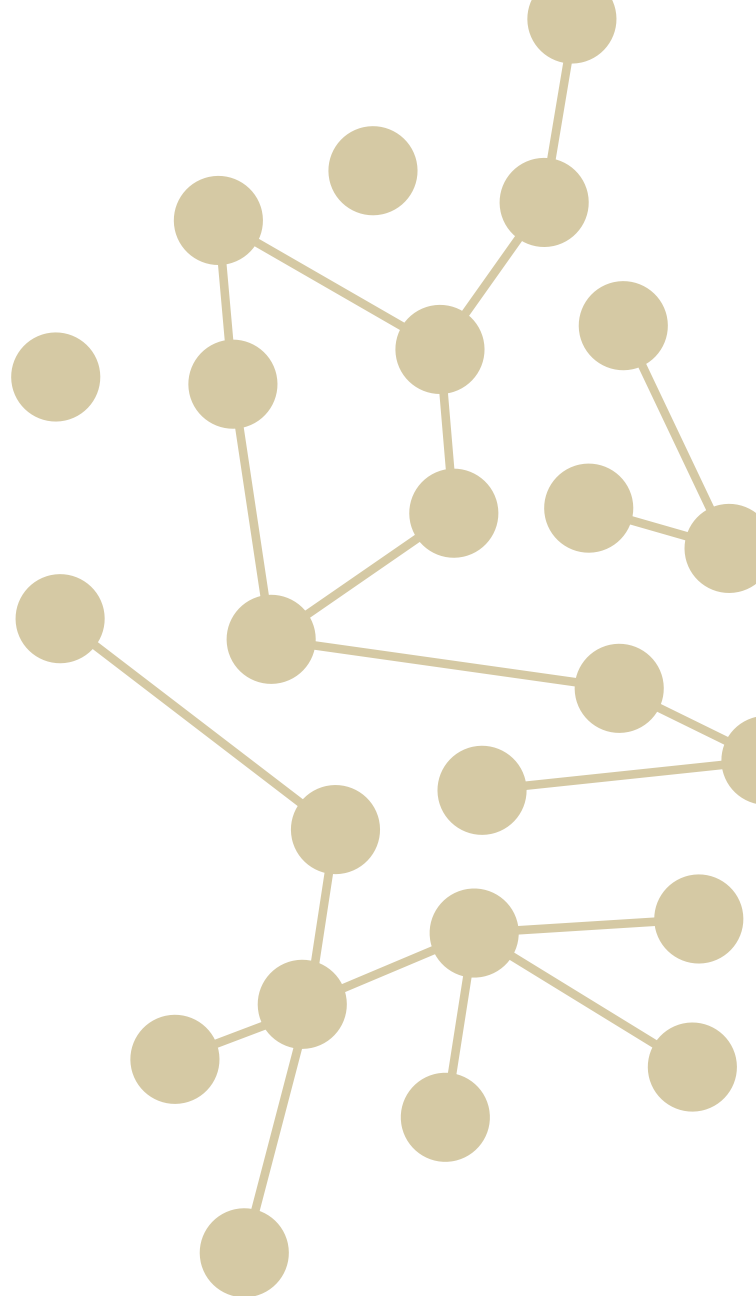
<sup>71</sup> Supra 32.

<sup>72</sup> Supra 23.

<sup>73</sup> The Treaty of Marrakesh explained, World Blind Union, Available at <http://www.worldblindunion.org/english/news/Pages/The-Treaty-of-Marrakesh.aspx>.

engine of expression, wealth creation, and cultural renewal. As opposed to the other multilateral intellectual property treaties this is the only Treaty which seeks to limit the scope of copyright protection.<sup>69</sup>

Prior to this Treaty, there was a barrier amongst nations to send accessible format books directly to authorized entities. This led to the authorized entities in some nations being stuck behind national borders and not being able to make the books accessible to the visually impaired persons and persons with print disabilities in other countries. With this Treaty coming into effect, the requirement of cross-border sharing has been reiterated with the accessibility of digital books, e-books, as well, subject to certain limitations and exceptions with no exploitation of the work or anything that may constitute unreasonably prejudice the legitimate interest of the right-holder.<sup>70</sup> However, only 35 nations have signed this Treaty.<sup>71</sup> The reasons for the non-acceding of the Treaty vary. There seems to be a fear that the Treaty would set a dangerous precedent for the commercially profitable books to enter into ordinary channels of business where the rights of the authors and publishers would be undercut. Therefore, while there were several nations that agreed to sign the Treaty, most of them lacked the political will to ratify it and align their copyright laws with the Treaty's mandate.<sup>72</sup> While the Treaty does not take into account the interests of the persons with other disabilities, and does not adequately cover the issues emerging from modern technology, it does provide a crucial legal framework that countries can adopt into their national copyright laws to help in the accessibility revolution, the method to start the elimination of the book famine. To completely end the book famine, countries would need to sign, ratify and implement its provisions, and it looks like India has taken a step forward and this is something that the other nations should look at and take inspiration from.<sup>73</sup>



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Harsh Mahaseth is currently pursuing a degree in law from the National Academy of Legal Studies and Research (NALSAR), Hyderabad, India. His numerous publications in prestigious journals have earned him the Best Law Student and Emerging Scholar Award and his internships with various international organizations such as the SAARC Secretariat, UNICEF and UN-Habitat have directed him towards the areas of Public International Law and Human Rights. With an aim to go back to Nepal and help establish peace and prosperity, he has been dedicated to these areas, with them forming his prime areas of interest.