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Compulsory Licensing in India: Compatibility with International Norms

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Abstract: The link between a society's socioeconomic development and the availability of intellectual property is well established. Numerous studies have explored the effects of intellectual property regimes on various aspects of social and economic growth, including "international trade, foreign investment, competition, innovation, and access to new technologies." However, each society has unique needs shaped by its historical, economic, legal, and cultural context.

This paper briefly looks into the evolution of international law, in the context of compulsory licensing demands vehemently pushed by the developing world to ensure fair access to intellectual property given the fact that neither knowledge is built in a vacuum, nor does countries like the USA, was in favour strict regimes guarding intellectual properties during their development years. This paper focuses on India's pivotal role in international negotiations that shaped the global intellectual property framework and assesses the compatibility of compulsory licensing provisions in India's Copyright Act of 1957 ("the Act") with international standards. This compatibility is crucial as India emerges as a significant global power.

Keywords: *Intellectual property, Compulsory licensing regime, Compatibility, Berne Convention, Berne appendix, Three step test, Copyright Act.*

Introduction

The link between a society's socioeconomic development and the availability of intellectual property is well established. Numerous studies have explored the effects of intellectual property regimes on various aspects of social and economic growth, including "international trade, foreign investment, competition, innovation, and access to new technologies." However, each society has unique needs shaped by its historical, economic, legal, and cultural context.

This paper briefly looks into the evolution of international law, in the context of compulsory licensing demands vehemently pushed by the developing world to ensure fair access to intellectual property given the fact that neither knowledge is built in a vacuum, nor does countries like the USA, was in favour strict regimes guarding intellectual properties during their development years. This paper focuses on India's pivotal role in international negotiations that shaped the global intellectual property framework and assesses the compatibility of compulsory licensing provisions in India's Copyright Act of 1957 ("the Act") with international standards. This compatibility is crucial as India emerges as a significant global power.

Evolution of the International Compulsory Licensing Regime

The Convention for the Protection of Literary and Artistic Works ("Berne Convention"), the oldest international convention on copyrights, was born on 9th September 1886. India, like various other developing countries, has been a member of the Berne Convention since its inception because the convention was automatically extended to the Crown colonies through a declaration made by the protecting states, as allowed by the convention's provisions. In other words, India did not voluntarily choose to join the convention; however, after gaining independence, it did have the option to withdraw from the Union but chose not to do so.

Nonetheless, since the Berne Convention's history of various revisions, its life was not so troubled as it happened during the appearance of the developing world in the international arena. Such a notion of a "developing world" was introduced in the international copyright regime during the Stockholm Revision of the Berne Convention. However, such recognition by the developed world of the differential and unique needs and challenges of the developing world did not come smoothly. The vehement demand to acknowledge such a relative position of the developing world was already building up.

In 1963, the African Study Conference on copyright was jointly organized by UNESCO and BIRPI in Brazzaville, wherein recommendations such as a review of Article 7 of the Berne Convention to reduce the term limit of protection accorded to Intellectual property and the need to amend Article 20 of the Berne Convention so to permit bilateral agreements between the union's members to serve their unique needs were advanced.

Such, demands were reiterated via a resolution adopted in the New Delhi Conference, organised by India, wherein the need to allow for compulsory licenses for educational and translational purposes was also advocated.

Nonetheless, critical to note are also some parallel developments that took place in the 1950s, because of the blatant disregard by the USA for over two centuries, of the intellectual property rights of other countries. Several American Presidents proudly owned pirated editions of the "Encyclopaedia Britannica," which was a

British publication at the time. Even the American courts turned a blind eye to such acts of piracy. Thus to find some middle ground between the USA and the Berne Union, a compromise was to be reached, thus in 1952 the Universal Copyright Convention("UCC") was adopted in Geneva. As things stood then, UCC became a shield to guard the USA's interests.

Meanwhile, as the developing world was vehemently voicing its demand for recognition of their unique needs, and due to the effect of Article 19 of the Berne Convention ("Colonial clause"), various countries were automatically members of the Berne Convention. Thus, a solution was required. It was initially thought that UCC, being more flexible and better adapted to the needs of these countries, would act as the solution. However, it was not without cost- firstly, it would mean that the universality of the Berne Convention would be compromised, and secondly, the protection ensured by the Berne Convention would be waived for those countries which would leave the Berne Union to join UCC, in pursuance of Article XVII of the UCC.

Thus, protecting the universality of the Berne Convention, the developed world thought it fit to agree on some limitations and exceptions in favour of developing countries. Therefore, the preparatory work for the revision of the Berne Convention was initiated by the BIRPI group.

Originally, the Berne Convention provided for imposing limitations and exceptions to copyrights to national legislation. Nonetheless, by curtailing such a power, the Stockholm Act imposed serious restrictions via the Three-step test, under Article 9(2) of the Berne Convention. India vehemently opposed the introduction of the test, as it feared that such a move would seriously hamper its compulsory licensing provisions under the Act. However, India's protest led to the addition of the "Protocol Regarding Developing Countries", which allowed developing countries to limit copyrights concerning translation and reproduction.

Nevertheless, such powers were altered by the Paris Act, which introduced significant revisions to this protocol and, thus, introduced an Appendix to the Berne Convention. Scholars like Agitha have pointed out that the absurdity of such a move was that, the Appendix which was supposed to provide beneficial treatment to developing countries, ended up becoming more arduous as compared to normal restrictions via which a country may impose restrictions on the copyrights subject to three-step test under Article 9(2) of the Berne Convention.

Subsequently, the TRIPS agreement incorporated all the provisions related to copyright access via a reference clause under Article 9.1 of TRIPS.

Hence, the effectiveness of such Berne Appendix remains compromised, however, this paper shall look at the compatibility of India vis-a-vis the International compulsory licensing regime. Such shall be discussed in the following part.

Compatibility of Compulsory Licensing Regime in the Copyright Act with the International Regime

This part examines the compatibility of the compulsory licensing regime under the Act with the international framework. Part I outlines that there can be two parallel routes for imposing limitations and exceptions on copyrights: Article 9(2), which allows any country to impose restrictions subject to the three-step test, and the Berne Appendix, which was "supposedly" tailored for developing countries.

Berne Appendix:

The complexity and irrationality of procedures have pushed these "special provisions" in the Protocol to the brink of absurdity. The requirements, such as making a declaration under Article V of the Appendix and renewing it every 10 years, along with the stipulation that applications for a compulsory license for translation or reproduction of a work can only be made after a waiting period ranging from 1 to 7 years following its initial publication, and an additional 6-month waiting period to allow the copyright owner to translate or reproduce the work, as well as the provision that a compulsory license will be terminated if the copyright owner publishes a translation or reproduction at a reasonable price, are so commercially discouraging that no rational businessperson would consider applying for a compulsory license under the Berne Appendix. Thus, the Berne Appendix fails to meet the needs of developing countries, rather it comes across as an "obsolete, inappropriate, bureaucratic, and extremely limited attempt to provide an air valve for developing countries." Such is evident as only a few countries have informed the Director General of WIPO about their interest in the Appendix provisions. Secondly, some countries that have implemented mechanisms in their domestic law similar to those of the Appendix have not informed the Director General of WIPO about this adoption due to the mechanism's lack of utility.

Nonetheless, even if one ventures to check the compatibility of compulsory licensing provisions under the Act, one shall be amused to look at the clear contradiction with the Berne Appendix. For instance, Section 31(a) allows issuance of compulsory licensing related to any work that has been published and has subsequently been refused by the author to be republished, which leads to withholding of such work from the public is in clear contravention with clause 8 of the Appendix i.e, No license shall be granted under this Article when the author has withdrawn from circulation all copies of his work.

However, such has been the case with various countries across the globe, wherein developing countries have adopted "idiosyncratic solutions into their domestic law to mitigate the limitations of the mechanism provided by the Berne Convention."

Thus, the limited scope of the Appendix and frustration with developing countries is visible by the fact that as soon as the Paris Act came into force, various interest groups, and scholars raised their concern to withdraw from the Berne Convention.

The key question is whether India, as it assumes leadership roles in international forums, can ensure its compulsory licensing provisions remain compatible with the international regime. The following sub-part will demonstrate this compatibility.

Three-Step Test:

Although the three-step test did limit the powers of countries to impose limitations and carve out exceptions to copyright protection, nonetheless application of the test to look at the compatibility of compulsory licensing provisions in the Act would prove otherwise. Additionally, the benefit of relying upon the test comes from the absence of any "procedural restrictions stipulated under the three-step test, which meant that national legislation can take care of it."

T. G. Agitha has pointed out that the incorporation of compulsory licensing provisions under the test. For such, he relies upon Article 31 of the Vienna Convention on the Law of Treaties and the W.T.O. Panel interpretation given after the Stockholm conference, which made compulsory licensing part of Article 9(2); hence, it formed part of the Berne acquis. The subsequent incorporation of articles 9 to 21, including the Appendix, and no specific exclusion of the Berne acquis of the Berne Convention in the TRIPS gave compulsory licensing a place in Article 13 of the TRIPS agreement.

Sections 31, 31A, 32, 32A, and 32B of the Act address compulsory licenses. Initially, the Act only included Sections 31 and 32. Section 31 remained largely unchanged, with minor updates such as replacing "radio diffusion" with "broadcast" and "record" with "sound recording." In 1983, India amended its laws to take advantage of the Berne Convention, adding Sections 31A, 32(1A), 32A, and 32B, and making necessary revisions to the existing Sections 31 and 32.

Section 31(1)(a) provides for the issuance of compulsory licensing by the commercial court if any work has been published and has subsequently been refused by the author to be republished, which leads to the withholding of such work from the public. Thus, applying the three-step test, withholding works from the public falls under "certain special cases," justifying state intervention to limit the copyright holder's exclusive rights. Copyright protection assumes the dissemination of information, so when a work is withheld, the rationale for protection fades. Senftleben suggests interpreting the first test as addressing a "special purpose," reflecting the Berne Convention's historical context. This situation meets the first test since copyright protection is meaningless if the work is inaccessible due to withholding. The second test is satisfied because if the work is withheld, there's no "conflict" with the “normal exploitation of the work.” The third test is also met, as the requirement for compensation ensures the copyright owner's legitimate expectations are not unreasonably prejudiced.

Coming to Section 31(1)(b), aligns with Article 11bis(2) of the Berne Convention, allowing the Registrar of Copyrights to issue a compulsory license if a published or publicly performed work is denied permission for public communication through broadcasting or sound recording under terms the complainant considers unreasonable. The compatibility on the same lines, as elucidated above, has been done by scholars like Ricketson and Ginsburg.

Section 31A was introduced based on the Berne Appendix, and it allows for the granting of compulsory licenses for unpublished works when the author is deceased, unidentified, or cannot be located, or when the copyright owner is untraceable. This provision enables the publication of such works or their translation into any language. Agitha argues that the works which are unpublished in the public interest require a mechanism to make these works accessible. If the author were alive and chose not to publish, there would be no remedy, as this falls under the author's "legitimate interests.” When unpublished or withheld works have an untraceable or deceased author, it's considered a "special case" due to the public's loss of valuable information. In such instances, there is "no conflict with normal exploitation" since the work is not being utilised by the copyright owner. Furthermore, ensuring royalty payments avoids "unreasonable prejudice" to the copyright owner's interests.

Nonetheless, importantly various sections of the Act were amended, and certain new provisions were incorporated to take the benefit of Berne Appendix Provisions, thus they remain in congruence with Berne Appendix. For instance, Section 32 was updated in 1983 to include Section 32-A, aligning with the Berne Appendix. This provision waives the waiting period for translations used for teaching, scholarship, or research in languages not commonly used in developed countries. Conditions include: (1) translations cannot be exported and must be labelled for distribution only in India, and (2) a 6-month waiting period after requesting permission from the copyright owner. These conditions, read with Section 32B, terminate the compulsory license if the copyright owner later publishes their translation. These provisions, along with Section 31B, introduced in line with the Berne Appendix, comply with the international regime.

Conclusion

The compatibility of India’s domestic law with the International Regime is quintessential, as it moves confidently towards a better, progressive and more assertive global future. This paper, while pointing out the failure of the Berne Appendix, establishes the compatibility of India's copyright compulsory licensing regime with a three-step test. This highlights that despite the major limitations that were imposed by the three-step test on the powers of national legislation to curtail copyrights, such a route remains more promising than the Berne Appendix.

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