

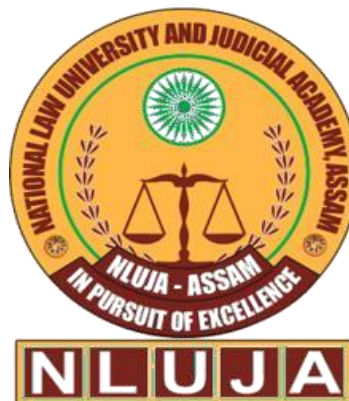
COMPULSORY LICENSING IN COPYRIGHT

Dissertation submitted to National Law University and Judicial Academy, Assam
in partial fulfilment for the award of the degree of
MASTERS OF LAWS

Submitted by
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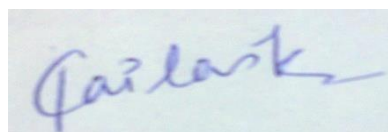
National Law University and Judicial Academy, Assam

June 2022

SUPERVISOR's CERTIFICATE

It is to certify that Ms. Rajkumari Chandrani Devi is pursuing Master of Laws (LL.M.) from National Law University, Assam and has completed his dissertation titled "COMPULSORY LICENSING IN COPYRIGHT" under my supervision.

Date: 10.07.2022



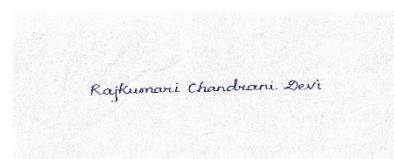
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DECLARATION

I, Rajkumari Chandrani Devi, pursuing Master of Laws (LL.M.) from National Law University, Assam, do hereby declare that the present dissertation titled “COMPULSORY LICENSING IN COPYRIGHT” is an original research work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise, to the best of my knowledge.

A rectangular box containing a handwritten signature in cursive script that reads "Rajkumari Chandrani Devi".

Date:11.07.2022

Rajkumari Chandrani Devi

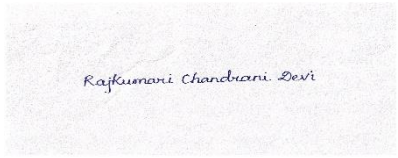
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Rajgunari Chandrani Devi

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1957- The Copyright Act

2010- Copyright (Amendment) Bill

2013- Copyright Rules

US:

1967- U S Copyright Act

TABLE OF ABBREVIATION

SL. NO.	ABBREVIATIONS	MEANING
1.	Art.	Article
2.	EU	European Union
3.	HC	High Court
4.	IP	Intellectual Property
5.	IPR	Intellectual Property Rights
6.	Sec.	Section
7.	SC	Supreme Court
8.	TRIPS	Trade Related Aspects of Intellectual Property Rights Agreement
9.	UK	United Kingdom
10.	US	United States
11.	WCT	WIPO Copyright Treaty
12.	WIPO	World Intellectual Property Organisation
13.	WPPT	WIPO Performances and Phonograms Treaty
14.	WTO	World Trade Organisation

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Chapter 1

INTRODUCTION

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The broad purpose of this dissertation is to analyse the effectiveness of compulsory licensing in copyright. Non-voluntary licensing also known as compulsory licensing gives the liberty to utilise the copyrighted work without taking permission from the copyright owner against the payment of reasonable compensation. The paper will specifically deal with the provisions in international law in context to compulsory licensing and its applicability in Indian copyright law.

1.1. Research Background

The absolute objective for the existence of law of copyright is safeguarding of public interest in dispersing knowledge and at the same time rewarding the authors of the work to encourage further creativity. Thus, the law of copyright tries to ensure that the protection provided to the copyright owner does not conflict the user's interest

in any manner or form. It is with regards to this context that exceptions and limitations to the absolute rights of the holder of copyright become admissible. The necessity for administering competition and industrial practices is also one of the reasons for inserting exceptions and restrictions to copyright. Limitations and exceptions thus are legitimate either to deal with possible difference of interests between the holders of copyright and users of materials which are safeguarded under copyright and to enforce a specific facet of policy concerning public.

Compulsory Licensing is one mechanism of assuring circulation of knowledge while at the same time awarding the copyright owner by giving him compensation. It harmonises the interests of copyright holders and the users by enforcing the copyright owner to permit the license requested by the user on payment of equitable remuneration.

Some have the perspective that compulsory license is nothing but a constraint on the rights available to the holder of copyright in choosing his contracting partner instead of putting any limitation on the extent of his rights available exclusively to him. It acts as a constraint on the holder of copyright when his enjoyment of rights is contradictory to the interests of public. However, unlike other mode of compensation-free exceptions and restrictions, compulsory licensing allows bulk access. Nonetheless, it extends its protection to the rights of the copyright owners by providing compensation for using the copyright work; so it cannot be deemed that the copyright owner interest is discriminatory in any manner. If we review its historical origin, it can be seen that the original intention was to include special circumstances like undersupply, over-pricing, non-availability of copyrighted work, ensuing non-access and so on. For instance, the intention behind the first compulsory licensing which was introduced in the UK by the “Literary Copyright Act” of 1842, was “to handle the circumstances of refusal to republish an already published work”.¹ The Act of 1911 expanded it to the cases where the author of the copyright was declining the grant of license permitting the work to be publicly performed. The

¹ Garnett, K.M. (Kevin M.), *Copinger and Skone James on Copyright*, 14th edition, Sweet & Maxwell, pp 1545, 1546.

applicability of the Act of 1911 was implemented to India with certain changes for making it applicable in India by the Indian Copyright Act of 1914.

Compulsory licensing basically came into existence by taking into consideration the extreme cases of denying access to copyrighted materials and to prevent the abuse of monopoly.² It permits the use of the copyrighted work to the widest possible manner when the owner of the copyright is determined to limit its use from the public and maintain its domination over the work.³

1.2. Research Problem

The copyright owners enjoy a bundle of exclusive rights associated with the work which has been copyrighted. If a person wishes to exploit the work in any manner either by reproducing, performing publicly, publicly displaying or in any other manner which falls within the ambit of the exclusive rights enjoyed by the copyright owner, he ought to obtain the copyright owner's permission to do so. However, the Copyright Act also provides for compulsory licenses for various works ranging from published, unpublished, to the benefit of disabled and so on for the benefit of public. The concept of compulsory license is not new, yet, the uses of compulsory licenses in India have not been utilised to the full extent. Most of the cases of compulsory licensing have either not been documented or reported. Therefore, in order to utilise the valuable copyright works for the benefit of the public, the people need to realise the effectiveness of compulsory licensing.

² T.G. Agitha, 'International Norms for Compulsory Licensing and the Indian Copyright Law' <<file:///C:/Users/user/Downloads/j.1747-1796.2011.00432.x.pdf>> accessed 10 May 2022.

³ Niwamanya Joshua Mugisha, 'Efficacy of Compulsory Licensing in Copyright Works: A case study of literary works' <https://www.academia.edu/43133646/Compulsory_Licensing_in_Copyright_Works> accessed 10 May 2022.

1.3. Literature Review

Compulsory License was established exclusively to guarantee the public's access to copyrighted content and the unrestricted exchange of ideas and information without violating the rights of the owner of the copyright.

1. LAW RELATING TO INTELLECTUAL PROPERTY RIGHTS (2013), By V.K. Ahuja, LexisNexis, Gurgaon, Haryana.

In this book, the author comprehensively covers legal aspects governing IPRs. The author also provides analytical study of various branches of IPRs such as Copyright Act, 1957.

2. LAW OF COPYRIGHT AND NEIGHBOURING RIGHTS: NATIONAL AND INTERNATIONAL PERSPECTIVES (2015), By V.K. Ahuja, LexisNexis, Gurgaon, Haryana.

In this book, the author critically examines various aspects of copyright. Since the 1990s, copyright law has undergone a sea change, both nationally and internationally. In India, the Copyright Act, 1957 has been amended in 1994, 1999 and 2012. The 2012 amendments were significant in nature and respond to the need of the society as well as technological developments. The author incorporates these changes adequately and provides inputs regarding Indian law and international law. The unique feature of the book is that the author discusses the multilateral conventions on copyright irrespective of whether India is a party to any particular treaty or not. In the last few years, the judiciary has come out with the number of landmark judgements which has been duly incorporated and discussed at relevant places.

3. LICENSING INTELLECTUAL PROPERTY LAW & MANAGEMENT (2011), By Raman Mittal, Satyam Law International

In this book, the author provides an integrated analysis of all aspects converging on the discipline of licensing.

The author treats licensing law as a distinct body of law and focuses on the legal and regulatory aspects together with management and strategy required for licensing of IP and provides practical guidance on drafting individual clauses and complete license contracts. The book also presents a comprehensive analysis of legal principles, statutory provisions and judicial precedents designed to provide a solid foundation for dealing with today's licensing questions and offers practical tips for embarking on an exercise of licensing both for the owner of IP and the prospective licensee.

4. LAW OF COPYRIGHT- COMPARATIVE PERSPECTIVES (2013), By Alka Chawla, Eastern Book Company.

In this book, the author provides a critical analysis of copyright in today's globalised world. It explores the subject through the lens of both national and international legislation and draws significant parallels between the law as it stands in India and the UK, the US and EU. Provisions of international treaties such as the Berne Convention, TRIPS, WCT and WPPT are discussed and compared with Indian copyright law.

With respect to the impact of a compulsory licensing, scholars believe such a license can foster a country to greater heights. Basalamah in his article believes that copyright protection can be in any respect an opportunity for the development of education, research and culture in developing countries.⁴

Furthermore, Bach examines the monopoly that is somehow created in copyright law. He believes copyright and literary properties are monopolies, which entitle the owner to prohibit various kinds of production. He goes on to state that the copyright monopoly, nonetheless is not without boundaries, henceforth it only creates a limited monopoly in the sense that it protects the owner only from unauthorised

⁴ Basalamah Salah, 'Compulsory licensing or translation: An instrument of development' [2000] The journal of the law and technology, research foundation of franklin pierce law Centre.

copying by others. Bach goes ahead to look at the limited monopoly versus the immediate public access to creative work. The immediate public access to creative works which is a goal of compulsory licensing conflicts with the dominant policy goals of the limited monopoly in copyright. He argues that if the limited monopoly policy applied to sound recordings, no one could record a composer's work without an express license.⁵

Additionally, in Carlos' working paper, he indicates that compulsory licensing has been widely adopted in other areas of intellectual properties. He states that developed countries have largely relied on such licenses in order to limit exclusive rights and prevent or remedy abusive practices in several areas. He also observes that the grounds and conditions on which compulsory licenses are granted in developed countries illustrate the flexibility and potential of the compulsory licensing system in addressing diversity of public interests and concerns.⁶

Jason rook analyses the constitutionality of judicially imposed compulsory licenses. In his study he examines the use of compulsory licenses in copyright law, and more specifically, he examines the increasing likelihood of judicially imposed compulsory licensing as a remedy in copyright infringement cases. He concludes with view that judicially imposed compulsory licenses are unconstitutional because they conflict with the core purposes behind copyright law.⁷

1.4. Aims

In this dissertation, the researcher aims to provide a thorough definition of compulsory licencing as well as an in-depth analysis of its numerous aspects. The researcher will also discuss the development of compulsory licencing during this

⁵ Bach, Scott, 'Music recording, publishing and compulsory license towards a consistent copyright law' (1986) , vol 14, Hofstra law review.

⁶ Carlos, M, Correa, 'Intellectual property rights and the use of compulsory licences: options for developing countries' [1999] University of Buenos, Argentina.

⁷ Jason. S. Rooks,' Constituionality of judicially imposed compulsory licenses in copyright infringement cases' [1995] 3 J intell. Prop l. 25.

process. The researcher will also examine global aspect, with a focus on India in particular. The researcher will also look into Indian court rulings on the matter and discuss the significance of public interest in compulsory licencing.

1.5. Objectives

- To study about how copyright and compulsory licensing has evolved over time.
- To identify the reasons for incorporation of compulsory licensing under the Copyright Act, 1957.
- To identify India's legal position with Regard to the TRIPS Agreement.
- To study the role of judiciary on compulsory licensing.
- To identify the significance of public interest under compulsory licensing.

1.6. Scope and limitations

The scope of this dissertation is limited to the following subject-matter:

- Understanding the history and evolution of copyright and compulsory licensing.
- Analysing the provision and legal framework relating to compulsory licensing.
- Understanding the significance of public interest under compulsory licensing.

1.7. Research Questions

- What are the reasons for incorporation of compulsory licensing under the Copyright Act, 1957?
- What are the factors that determine compulsory licensing of copyright work?
- What is India's legal position with Regard to the TRIPS Agreement?
- What is the significance of public interest under compulsory licensing?

1.8. Research Methodology

For the purpose of finishing this work, the researcher has chosen the doctrinal approach of research. In order to properly address the research questions, this study has been created with the research aims in mind. The researcher uses secondary sources of data to help the study reach a good and comprehensible conclusion in order to accomplish this. The researcher will review a variety of laws, books by both Indian and foreign writers, essays, and journals.

1.9. Research Design

Chapter 1

In the first chapter, the researcher has given a brief analysis of the research proposal which outlines the introductory of compulsory licensing along with research problem, literature review, aims and objectives and the research methodology of the paper.

Chapter 2

In this chapter, the researcher has focused on how the copyright and compulsory licensing has evolved over time and how compulsory licensing got associated with copyright.

Chapter 3

In this chapter, the researcher has given an overview of various Conventions and Treaties dealing with compulsory licensing in copyright. It also talks about the scope of compulsory licensing under the three-step test.

Chapter 4

This chapter basically focuses on compulsory licensing in India primarily the historical development along with the provisions available under the Copyright Act 1957 and legal Position of India with Regard to the TRIPS Agreement and Future Requirements. This chapter also deals with the judiciary's approach on compulsory licensing.

Chapter 5

This chapter explores how nations have embraced and valued the notion of compulsory licencing within their copyright laws primarily the European Union and USA.

Chapter 6

This chapter deals with compulsory licensing and public interest focusing on the concept of public interest and its link with copyright along with the significance of public interest in compulsory licensing.

Chapter 7

In this chapter, the researcher has given a conclusion of the study and also gave certain recommendations.

Chapter 2

AN OVERVIEW OF COPYRIGHT AND COMPULSORY LICENSING

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2.1 Evolution of copyright

Copyright law is a part of the wider body of law termed as “intellectual property” (IP) which basically refers to “the creations of the human mind”. By recognising the inventors’ and innovators’ ownership of their works, intellectual property laws protect their interests.⁸

Copyright basically relates to “literary and artistic creations”, which includes within its ambit books, paintings and sculptures, music, works based on technology like electronic databases and computer programs. Copyright is also known as “authors’ rights”. Even though the international law has brought certain confluence, many copyright systems nevertheless reveals a historical divergence in the development of these rights. The term “authors’ rights” refers to “the person who created an artistic work, the work’s author”, highlighting the fact that, as acknowledged by major laws, the creators have unique rights over their creations that can be exercised only by them. These rights which are frequently termed as “moral rights”, and includes the “right to avoid deceptive reproductions of the creation or work”. However, the third parties may exercise other rights like right to copy with the author’s consent. For instance, the author may grant license to a publisher to this effect.

⁸ P.L. Jayanthi Reddy, ‘Infringement of Copyright in India: A Critical Study of the Doctrine of Fair Use’ <<http://hdl.handle.net/10603/188175>> accessed 15 May 2022.

In essence, copyright refers to the “author or producer’s work as a literary property”. It is a positive law, often known as manmade law, meaning that the state created it to safeguard the rights of its people. It can be contested in court and gets its power from the state’s sovereignty.

The copyright provides the producer the sole legal authority “to print, publish, perform, film, or record literary, artistic, or musical material” and to grant others the same rights.

An ancient Irish text known as the Cathach is where the first copyright dispute can be found. The Cathach was the first Psalter manuscript still in existence. Latin translations of Psalms XXX (10) to CV (13) are included. Tradition has it that Saint Columba is responsible for the hastily made copy of a Psalter that was lent to Columba by St. Finnian in the dark. Then-King Diarmait Mac Cerbhaill ruled, “To every cow belongs her calf; therefore, to every book belongs its copy,” in response to a dispute over ownership.

Manuscripts were often penned by copyists before printing was invented, who either performed it for free or for pay. Although older authors criticised the errors of copyists and raised more than one angry objection to the jumbled manuscripts of the hasty servile transcribers, none of them actually criticised any copyright violations. Following the development of printers, copyright became increasingly significant.

Printing was introduced to Europe by German publisher and inventor Johannes Gutenberg. In England, Caxton established the first press in 1474. At first, the printers also served as the publishers. Initially, most of the books were Bibles, prayer books, etc.

However, it had just been about 15 years since its creation in 1465. The famous Roman statesman Cicero’s book *De Officiis* was attempted to be published by German printers Fust and Schoeffer. To make the original texts publishable, careful alterations were necessary. To make it simple for pupils to understand, the publishers sometimes had to interpret it themselves or enlist the aid of highly

educated scholars. When the book was finally finished after a long and grueling process, the publishers were furious when competing printers offered copies at a much lower price as they didn't have to pay for the scholars and other people who helped produce the first copy and took legal action.

Following that, the Senate of Venice enacted a decree giving John of Spira the sole authority for five years to publish the prints of Cicero and Pliny. The sovereign had notably used this privilege as an example of how to protect the remarkable merit displayed by a deserving citizen. Even though the privilege was only granted for a short time, it undoubtedly set a precedent. A precedent that has evolved and changed through time. Due to international agreements that apply to all of Europe, a book published in Venice at present is protected for a period of at least fifty years.

This practise of requesting special privileges from the state in order to produce books was becoming more and more common. It was the first time that copyright was granted to the author himself when Venice granted Italian lawyer Peter of Ravenna and a publisher for choosing the exclusive rights to print and distribute his work Phoenix in 1491. Italian states "encouraged printing and granted printers exclusive rights up to fourteen years to print certain classics."

Germany awarded its first privilege at Nuremberg in 1510. Only one edition could be protected by copyright at a time in France and if the works were reprinted, the publisher had to issue a second patent.

Richard Pynson, the chief printer for Henry VIII at the time, was the first to grant book cum privileges in England. His title page said that no copies could be imported or printed in England for a period of two years. The King granted Witinton's grammar the right to publish the second edition in 1533 to his rival Winken de Worde.

Without his consent, Peter Trevers had the first edition published ten years prior. Worde, who had been violated, opposed to this and filed for protection as a result. Once again, a man did not consider his rights until he felt he had been wronged. The persistent objections of artists who have been denied ownership over

or access to the fruits of their labour are what have accelerated the evolution of copyright laws over the years.

However, the privilege system mainly focused on controlling the book printing process. The authors had no authority or standing in this field. Depending on the agreements they had with their printer, individuals typically sold their books for a lump sum and received relatively little compensation, but these benefits were not recognised by the government.

All of this changed in the latter half of the seventeenth century as literature grew more secular and authors began to demand ownership rights over their works. With the rise in popularity of John Locke's labour theory during the civil rights era, this process was hastened.

As a result, Queen Anne of England signed into law the "Statute of Anne" or "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein specified" in 1709. This law gave the author themselves copyright privileges for the first time, as the title already suggested. This recently passed legislation was the result of a new equilibrium between political and economic power as well as demands brought about by philosophic advancements at the time. Despite having only, a fairly brief period of ownership which was 28 years, it established a standard for other countries like the USA.

Additionally, it aimed to regulate prices and end monopolistic activities among printers. After the Stationers' Company register was nullified, authors had to transmit copies of their works to the royal library and a few university libraries in order to obtain a copyright.

In the well-known case of *Donaldson v. Beckett*⁹, the House of Lords ruled that under common law, an author only had the right to publish their book once, after which, the right was nullified, meaning that authors no longer enjoyed unending

⁹ Donaldson v. Beckett (1774) 2 Brown's Parl. Cases 129, 1 Eng. Rep. 837; 4 Burr. 2408, 98 Eng. Rep. 257.

ownership of their creations. As a result, there was a demand for inexpensive prints of great works like Shakespeare and Homer.¹⁰

Although the Articles of Federation encouraged individual states to create their own laws, the Statute of Anne was not followed in America, it was eventually turned into federal law. Following the passage of the Copyright Act of 1790, American authors gained the “right to print, reprint, and publish their own works” for fourteen years, which might be extended on request for an additional period of fourteen years. This monopoly was established as a reward for young writers, artists, and scientists who produced original creation. To encourage and support new creative thinking in the arts and sciences, the work became public domain after 28 years.

Over the years, there have been a number of amendments. In 1976, registering to gain copyright was not required, although it is recommended to receive complete legal protection.

The first Convention where the copyright was acknowledged by nations on a global scale was the Berne Convention. In Berne, Switzerland, in September 1886, it was signed. Instead of the publishers, it sought to defend the authors. It abolished the criteria that all works needs to include a copyright notice. It also improved its moral rights in 1928, providing authors the non-transferable right to be named and the ability to object to the derogation of their work. Additionally, it made a few alterations for the copying of any creative or literary work.¹¹

2.2 Evolution of copyright in India

Over the course of 150 years, India gradually established the modern concept of copyright law. India’s first experience with copyright law was in 1847 passed under the rule of the East India Company. The English copyright law is applicable to India,

¹⁰ < https://www.icsi.edu/media/webmodules/IPR&LP_.pdf?cv=1 > accessed on 16 May 2022.

¹¹ Sneha Kolluru, ‘Historical evolution of copyright law’ (Law Times Journal) < <https://lawtimesjournal.in/historical-evolution-of-copyright-law/> > accessed on 16 May 2022.

according to an Act signed by the Governor-General of India. The 1847 statute stated that the copyright term could not exceed the period of forty-two years overall and was for the author's lifetime plus seven years after his death. The government had the right to provide a licence for its publication even though the author had declined after his death. Unauthorized printing of a copyright work for "sale, hire, or export," or "for selling, publishing, or exposing to sale or hire," was included in the act of infringement. According to this law, a lawsuit for infringement could be filed in the "highest local court exercising original civil jurisdiction".

The Act also stated clearly that the "proprietor, projector, publisher, or conductor" would be entitled to copyright in "any encyclopaedia, review, magazine, periodical work, or work published in a series of books or parts" under a contract of service. For all intents and purposes, it was determined that the copies of the infringing work belonged to the owner of the copyrighted work. Most crucially, unlike today, copyright was not automatically attached to a work. For the protection of rights under this legislation, registration of the work with the Home Office was required. However, the Act expressly reserved the author's copyright and his ability to sue for its infringement to the degree permitted by any other legislation aside from the 1847 Act. Copyright law had been evolving in Britain for more than a century when it was first introduced in India, and succeeding enactments were incorporated in the 1847 enactment.

While eliminating past laws on the subject, the Copyright Act of 1911 also extended its reach to all British territories, including India. The Indian Copyright Act, which was passed in 1914 made some of the provisions of the Copyright Act of 1911 effective in India, and introduced some new clauses. Until the Copyright Act 1957 took its place, the Indian Copyright Act of 1914 was still in effect.

2.3 Evolution of compulsory licensing

An exclusive right to “reproduce, perform, or distribute the work” is known as a copyright. A copyright is intended to safeguard the rights of the authors and make sure they are properly compensated for their contributions to the work. The authors cannot, however, be granted total control over the content they produce. It will be necessary to allow for fair usage and public knowledge with some room for negotiation. As a result, the idea of licencing a work protected by copyright was developed. With the previous approval of the copyright owner and in exchange for payment of a fee, licencing is a controlled right to “publish, broadcast, or otherwise communicate to the public copyrighted content”.

A statutory licence known as a “compulsory licence” allows for the use of a copyrighted work without the owner’s consent. To do an act in relation to the copyrighted work is an exclusive right. Every time a work protected by copyright is kept out of the public domain, compulsory licence is done.

In 19th century British legislation and in the early 20th century for copyright, compulsory licencing for IP was first introduced. In the 20th century, IP treaties started to advocate for compulsory licencing flexibilities as a crucial element of copyright law. The “Berne Convention on Literary and Artistic Works”, which was established in the early years of 1908, was the first Convention on Copyright Compulsory Licensing. Additionally, during the Berlin revision, Article 13 was changed to allow “conditions” to be placed on the (then-introduced) right to mechanically reproduce works of music. Additionally, the compulsory licencing of patents and copyright was a component of the formation of Anglo-American legal systems.¹² When deciding issues involving copyright, the Anglo-American courts articulated a judicial philosophy that highlighted the existence of the power to withhold injunctive relief at trial in favour of paying “reasonable royalty” damages

¹² David J Brennan ‘The first compulsory licensing of patents and copyright’ (SSRN) <<https://ssrn.com/abstract>> accessed on 20 May 2022.

for ongoing unauthorised exploitation. In favour of the defendant, the courts effectively instituted forced licencing through the legal process.

Compulsory licencing only transforms behaviour that would have otherwise been considered trespass or infringement into permissible activity without transferring any ownership of anything. A non-voluntary licence is more of a legal framework that strikes a middle ground between an exclusive exception and a free exception. Certain works protected by copyright may be required to obtain a licence. Such works are made available by statute.

These clauses are categorised as flexibilities under copyright law. As long as such access and uses do not unfairly jeopardise the legitimate interests of the copyright owners, these flexibilities are meant to promote beneficial access to and uses of works.¹³

The benefit of such licencing is that it makes the work accessible to the public, allowing them to utilise and profit from it for numerous purposes. Furthermore, when an author is determined to control the public and maintain dominance, compulsory licencing allows for the broadest usage of valuable IP.

¹³ Chris Armstrong, 'Summary and Conclusions, Jeremy De Beer, Access to knowledge in Africa: The role of copyright' (Juta, University of Ottawa, 2010).

Chapter 3

COMPULSORY LICENSING UNDER INTERNATIONAL LEGAL FRAMEWORK

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This chapter investigates whether a compulsory licence may be used to facilitate information diffusion while protecting the rights of copyright holders in a global environment. In the framework of the TRIPS Agreement, the issue of access to information from developed nations and the interpretation of the open-ended three-step test to enable such access are at the centre of this chapter.

3.1. Berne Convention

Special guidelines for the issuance of compulsorily issued licences have been established under the Berne Convention for the Union's developing nations. The Convention states that laws of developing Union member states may permit the issuance of "non-exclusive, non-transferable rights for the reproduction and translation of literary and artistic works". The Berne Convention's Appendix, which contains special provisions for developing nations, states in Article II that those nations have the right to substitute a system of "non-exclusive and non-transferable licences" for the exclusive right of translation granted under Art. 8 of the Berne Convention. There are a few requirements that must be met before a mandatory

licence can be granted. The licence may only be granted by the developing country's competent authority if the owner of the right to translation has not already published a translation of the work in a language that is widely spoken in that nation after a three-year period beginning on the date of the work's first publication. Any citizen of that nation may, in this situation, get a licence to translate the work into the relevant language and publish the translation in printed or similar forms of reproduction. If all of the translation's printed editions in the relevant language are out of print, a licence may still be issued.¹⁴

After one year has passed since the date of the work's initial publication, the licence may be given in cases where the work is translated into a language that is not widely spoken in one or more developed nations that are members of the Union.¹⁵

“No license obtainable after three years or one year shall be granted until a further period of six months or nine months respectively has elapsed from the date on which the applicant establishes either that he has requested and has been denied, authorization by the owner of the right to make and publish the translation, or that after due diligence on his part, he was unable to find the owner of the right¹⁶ or where the owner of the right cannot be found, the applicant for a license has sent, by registered airmail, copies of his application to the publisher whose name appeared on the work and to any national or international information center which have been so designated by the Government of the country in which the publisher is believed to have his principle of business.¹⁷ If during the said period of six or nine months, a translation in the language in respect of which the application was made is published by the owner of the right of translation or with his authorization then no license shall be granted.”¹⁸

¹⁴ Appendix of the Berne Convention, Article II (2) (b).

¹⁵ Appendix of the Berne Convention, Article II (3).

¹⁶ Appendix of the Berne Convention, Article II(4)(a) and IV (1).

¹⁷ Appendix of the Berne Convention, Article II (4) (a) and IV (2).

¹⁸ Appendix of the Berne Convention, Article II (4) (b).

The licence may only be used for academic, scholarly, or research purposes. Further, any licence granted under Art. II shall terminate if a translation of a work is published in the same language and with substantially the same content as the translation published under the licence and is priced by the owner of the right of translation or with his consent at a price reasonably related to that normally charged in the country for comparable works. Any copies created prior to the licence expiring may be disseminated until all of their stock has been used.¹⁹

No licence, however, shall be given when the author has withdrawn all copies of his work from circulation, in accordance with Art. II(8) of the Appendix of the Berne Convention.

Any broadcasting organisation may also be granted permission to translate a work if the following requirements are met:

- i. that the translation was created using a copy that was made and obtained in conformity with the laws of the relevant country;
- ii. that the translation will only be used in broadcasts that are only for educational purposes, or for the “dissemination of the findings of specialised technical or scientific research” to professionals in a certain field;
- iii. that the broadcast is created legally and is intended for recipients inside the boundaries of the relevant nation; and
- iv. that there is no commercial intent behind any usage of the translation.

Any other broadcasting organisation with its headquarters in that nation may utilise audio or video recordings of a translation that was produced by a broadcasting organisation under a licence.²⁰

The Berne Convention’s Art. III of the Appendix grants developing nations the authority to replace the exclusive right of reproduction granted under Art. 9 with a system of non-exclusive and non-transferable licences. There are a few requirements that must be met before a mandatory licence can be granted. The

¹⁹ Appendix of the Berne Convention, Article II (6).

²⁰ Appendix of the Berne Convention, Article II(9).

licence may only be issued by the developing country's competent authority if, after a period of five years (three years for works in the scientific and physical sciences, including mathematics, and in technology), the licence has not been previously given; copies of that edition of the book have not been distributed to the general public or in connection with systematic educational activities in that country by the "owner of the right of reproduction or with his authorization, at a price reasonably related to that normally charged" in the country for comparable works, for seven years (starting on the date of first publication of a particular edition of the book). Any citizen of that nation may then purchase a licence to copy and publish that edition for use in connection with involved educational activities for that price or less.

If after the expiration of the applicable period, no involved copies of that edition have been sold for a period of six months in the country in question to the wider populace or in relation with comprehensive instructional activities at a fee fairly relevant to that normally charged in the state for similar creations, then a licence to reproduce and publish that edition may also be granted.²¹

"No license obtainable after three years shall be granted until a further period of six months has elapsed from the date on which the applicant establishes either that he has requested, and has been denied, authorization by the owner of the right to reproduce and publish the edition, or that after due diligence on his part, he was unable to find the owner of the right or where the owner of the right cannot be found, the applicant for a license has sent, by registered airmail, copies of his application to the publisher whose name appeared on the work and to any national or international information center which have been so designated by the Government of the country in which the publisher is believed to have his principal place of business. Where licenses are obtainable after other periods i.e., five years or seven years and the identity or the address of the owner of the right of reproduction is unknown, no license shall be granted until a period of three months has elapsed from the date of the dispatch of the copies of the application. Further, if during the period

²¹ Appendix of the Berne Convention, Article III(2)(b).

of six or three months, as the case may be, a distribution has taken place, no license shall be granted”.²²

No permission shall be granted for the “reproduction and publication of an edition” if the author has removed all copies of that edition from circulation, as stated in Art. III(4)(d) of the Appendix.

Any licence granted terminates if copies of an edition of a work are made available in the nation to the general public or in conjunction with systematic educational activities, either by the owner of the right of reproduction or with his consent, and at a cost that is reasonably related to what is typically charged in the nation for comparable works. Before the licence expires, any copies made may be distributed until all of their stock is gone.²³

The licence must often be obtained for work that has been printed or other similar means of replication. The licence may, however, be extended to the audio-visual reproduction of legally created audio-visual fixations, including any protected works integrated therein, as well as to the translation of any included text into a language commonly spoken in the nation where the licence is requested. The aforementioned audio-visual fixations must be created and distributed with the express intent that they be involved in conjunction with involved educational activities.²⁴

As per Article IV (4), licences issued for the translation and reproduction of the work do not include the right to export copies, and any such permission is only valid for publication of the translation or reproduction, as applicable, within the borders of the nation in which it was requested. The country granting license is obliged to make due provision at the national level to ensure:

- i. that the licence must give appropriate compensation that is appropriate with the level of royalties available on licences freely negotiated between individuals in the two

²² Appendix of the Berne Convention, Article III(4).

²³ Appendix of the Berne Convention, Article III(6).

²⁴ Appendix of the Berne Convention, Article III (7).

countries in question in benefit of the holder of the “right of translation or of reproduction”, as applicable, and

- ii. that payment is made in a currency that is convertible internationally or one that is equal.²⁵

Additionally, the broadcasting or communication rights of authors of literary and artistic works as mentioned in Article 11 bis (1) are subject to what is essentially a compulsory licence as these rights may not be exclusive rights in those countries where legislation determines the circumstances under which these rights may be exercised. But neither the author’s moral rights nor his entitlement to fair compensation, which, in the absence of an agreement, shall be set by competent authority, shall be adversely affected by these requirements. The right to get fair compensation is, thus, effectively granted.

The exclusive right granted to the creator of a musical work and the creator of any words, the recording of which has already been authorised by the latter, “to authorise the sound recording of that musical work”, and with such words, if any, is similarly provided under Article 13(1) of the Convention. However, each nation of the Union may enforce for itself reservations and restrictions on this right. The rights of these writers to receive fair compensation, which, in the absence of an agreement, shall be set by competent authorities, shall not be adversely affected by these reservations and conditions, though.

3.2. Universal Copyright Convention (UCC)

Articles V(2), *Vter*, and *Vquater* of the UCC permit the Contracting States to limit the rights conferred thereunder. All member countries (developed and developing) are covered by Article V(2), while developing countries are covered by Articles *Vter* and *Vquater* covering the “translation right and the reproduction right”, respectively. States establishing mandatory licences must establish processes for

²⁵ Appendix of the Berne Convention, Article IV (6).

each of the three scenarios. The applicant for a licence must demonstrate that either he has asked for a licence and been turned down, or that after using “due care,” he has been unable to locate the appropriate owner in question. If permission is denied, it must be made clear in the authorization addressed to the right owner that the refusal could be used as justification for requesting a compulsory licence. The legality of the mandatory licences issued by each nation’s government is left up to its respective courts.

Any citizen of a Contracting State may be given a compulsory translation licence under Art. V(2) if certain requirements are met. Legislation must set the expectations. The translation has to be from “writings.” The term has a fairly broad definition and, in addition to books, magazines, etc., it also encompasses “dramatic works, cinema dialogues, which are frequently written form, dramatico-musical works, and, the texts of songs if they exist in written form and are published”.

After a period of seven years from the date of the first publication of a writing, any citizen of that Contracting State may obtain a non-exclusive licence from the competent authority thereof “to translate the work into that language and publish the work so translated” if a translation of the writing has not been published by the owner of the right of translation or with his authorization. On every copy of the published translation, the work’s original title and the author’s name must be printed. The “translation of the work” must be accurate, and the owner of the right must receive fair compensation that complies with international standards.

The same requirement to provide developing nations exclusive translation rights is imposed by Art. Vter, but it also allows for compulsory licences after three or one year periods if certain circumstances are met.

According to the guidelines outlined in Art. Vquater, developing nations may provide compulsory licences for reproduction rights after five years and for particularly specified works after seven or three years, respectively.²⁶

²⁶ VK Ahuja, *Law of Copyright and Neighbouring Rights: National and International Perspectives* (Second Edition Lexis Nexis 2015).

3.3 TRIPS Agreement

By reference, the TRIPS Agreement includes all of the Berne Convention's terms pertaining to access requirements. The Berne Convention (1971) and its Appendix shall be complied with by Members, according to Article 9.1 of the TRIPS Agreement. Additionally, there is no express provision authorising compulsory licencing under the TRIPS Agreement. In addition to the Berne regulations, Articles 13 and 21 set forth the three-step test as the prerequisite for member countries to apply limitations. These clauses govern copyright restrictions and exceptions. As a result, the three-step test is mentioned twice in the TRIPS Agreement: once in Art. 13 and once in Berne Art. 9 (2), which the TRIPS Agreement incorporates by reference. There is a distinction, though. While only the exclusive reproduction right is covered by Art. 9(2) of the Berne Convention, all copyrights are covered by Art.13 of the TRIPS Agreement. Some believe that Article 13 controls all copyright limitations envisioned by the TRIPS Agreement since it might be interpreted as adding additional requirements for limitation or exception provisions to be qualified as legitimate.

Since the Berne *acquis* was not excluded from the TRIPS Agreement's integration of Articles 9 (2) 1 through 21 of the Berne Convention and its Appendix, it is clear that compulsory licencing is covered by Article 13 of the TRIPS Agreement as well. The WTO panel stated that "in the absence of any express exclusion in Art. 9.1 of the TRIPS Agreement, the incorporation of Articles 11 and 11bis of the Berne Convention (1971) includes the entire *acquis* of these provisions including the possibility of providing minor exceptions to the respective exclusive rights." They believed that the same reasoning might be used to justify compulsory licencing, which is a component of the Berne Convention's 9(2) *acquis* (1971). The identical reasoning used by the WTO panel to determine whether the TRIPS Agreement recognises the small reservations doctrine also holds true in this situation. The panel came to the conclusion that the "minor exceptions doctrine" was a part of the "context" of Articles 11bis and 11 of the Berne Convention (1971) as

per Art. 31 (2) (a) of the Vienna Convention and was thus a part of the Berne *acquis* after thoroughly examining the drafting history of those two articles. In response to the question of whether the TRIPS Agreement has acknowledged the “minor exceptions doctrine” while implementing the Berne provisions, the panel took the position that Art. 9.1 of the TRIPS Agreement would have explicitly stated as much if the incorporation of Berne articles 1–21 was intended “to cover only the text and not the entire Berne *acquis*” relating to these articles. The fact that initial draft of TRIPS Article 9.1 only referred to “the substantive provisions” of the Berne Convention (1971) provides additional support for the panel’s interpretation, showing that the intention was to incorporate the entire Berne *acquis* rather than just the literal wording of the individual articles. If the panel’s interpretation is accepted, there will be no difficulty in determining that compulsory licencing is recognised by the three-step test outlined in Article 13 of the TRIPS Agreement. This is because, as is clear from the drafting history of Art. 9(2) of the Berne Convention, compulsory licencing was a component of the Berne *acquis* and entered the TRIPS through the incorporation of Berne provisions.²⁷

3.4. Scope of Compulsory Licence under the Three-Step Test

There was no system in place prior to the TRIPS Agreement to monitor the application of the three-step test in the national laws incorporating restrictions and exceptions. The three steps are that the relevant restriction:

- 1) should be confined to “certain special cases”;
- 2) it should “not conflict with a normal exploitation of the work” and
- 3) it must “not unreasonably prejudice the legitimate interests of the right holder”.

²⁷ TG Agitha ‘International Norms for Compulsory Licensing and the Indian Copyright Law’ (Researchgate) <https://www.researchgate.net/publication/264597651_International_Norms_for_Compulsory_Licensing_and_the_Indian_Copyright_Law> accessed on 20 May 2022.

As a result of the WTO Agreements' introduction of the WTO Dispute Settlement Mechanism, the TRIPS Agreement is at present in a different scenario. Although the WTO panel's rulings do not set any precedents, they do establish a body of law that cannot be disregarded. The only approach to investigate potential applications of the three-step test is to analyse WTO panel rulings. Determining how the WTO panel in the copyright context interpreted the three steps and how the jurists assessed the panel decision is therefore appropriate. When doing this, it's important to keep in mind the WTO panel ruling that these three elements must be met in order for a limitation to be legal, and that if any one of the three requirements is not met, the Art. 13 exception will be refused.

Certain Special Cases

Varied jurists and the WTO panel for dispute settlement have different interpretations of this condition. The potential applications of the three-step approach for establishing whether limitations under international copyright law are valid were highlighted by the WTO panel judgement. The WTO panel applied a restricted interpretation to the first criterion of the three-step test. The panel understood the words "certain" and "special" to mean that "an exception or limitation under national legislation must be clearly defined" and that "an exception or limitation must be limited in its field of application or exceptional in its scope".²⁸ So, according to the panel, the first requirement of Article 13 merely states that "a limitation or exception in national legislation should be clearly defined and should be narrow in its scope and reach." This is unquestionably a very limited interpretation, particularly in light of the panel's express rejection of the idea of public policy as a basis for an exception. According to the panel, "It is difficult to reconcile the wording of Art.13 with the proposition that an exception or limitation must be justified in terms of a legitimate public policy purpose in order to fulfil the

²⁸ US Copyright Act 1976 Section 110 Clause 5.

first condition of the Article”. The panel considered the public policy goals cited by legislators when implementing a limitation or exception to be useful solely from a factual standpoint for drawing conclusions regarding the extent of a limitation or exception or the precision of its definition.

Numerous jurists challenged the WTO panel’s decision to ignore the policy goals of national legislation. Martin Senftleben criticised this position as being a quantitative assessment and was of the opinion that it should be rejected in light of the drafting history of 9 (2) of the Berne Convention and also on the grounds that the rejection of the qualitative test would reduce the first step of the three-step test to merely an investigation into the conflict with the work’s typical exploitation, depriving it of any independent meaning. He consequently believes that the introduction of copyright limitations must be supported by a specific rationale of public purpose. Furthermore, he criticised the panel’s interpretation, claiming that it adheres to the “civil law approach” of narrowly defined exceptions, and that if this approach were to be adopted, “open-ended norms evolving from the Anglo-American copyright system would automatically be rendered incapable of surmounting the first hurdle of the three-step test”. He believes it is better to assume that the word “certain” was added because the three-step test’s drafters had in mind a number of restrictions that were in place at the national level at the time of the Stockholm Conference, and the interpretation of the French text demonstrates that the word “certain” was not acknowledged to bring a further significant requirement in addition to the claim of specialty. Instead, he believes that “certain special cases” must be equated with “some special cases,” as he feels it is necessary to do so.

Given that “no exemption, however worthy the policy underlying it, will survive scrutiny if it conflicts with the normal exploitation or unreasonably prejudice the legitimate interests of the right holder,” Jane C. Ginsburg believes that such a stance was unnecessary. If there are trade misrepresentations, then the second

and third criteria will not be met, which will thus lead Art. 13 to take care of the issue.²⁹

According to Ricketson, the word “special” must be understood to suggest that the restriction or exception’s purpose is “supported by some evident cause of public policy or some other unusual condition.” He believes that there might be some obvious political goal or rationale, such as promoting freedom of speech, public awareness, or public information, etc. In contrast, he alters this position in the second version of this book, which he co-authored with Ginsburg, and maintains that the more “practical” meaning of the phrase “certain unique instances” is that the restrictions should be constrained in number and time.

Regarding the three-step test, it is noted in the preparations for the World Intellectual Property Organization (WIPO) Diplomatic Conference:

“When a high-level protection is proposed, there is reason to balance such protection against other important values of the society. Among these values are the interests of education, scientific research, the need of the general public for information to be available in libraries and the interests of persons with a handicap that prevents them from using ordinary sources of information.”³⁰

Similar to this, the WIPO Copyright Treaty’s preamble acknowledges the need to strike a balance between owners’ rights and the broader public interest. It has been accepted that Contracting Parties are allowed “to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment” in accordance with Art. 10 of the WCT (WIPO Copyright Treaty). Despite the fact that some people believe the agreed-upon statement has no legal implications.

²⁹ Jane C. Ginsburg, ‘Berne Without Borders: Geographic Indiscretion and Digital Communications’ (SSRN) <

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=292010> accessed on 25 May 2022.

³⁰ < https://www.wipo.int/edocs/mdocs/diplconf/en/crn_r_dc/crn_r_dc_4-part12.html> accessed on 25 May 2022.

Withholding of copyrighted works from the public, whether they are domestic or foreign, overpricing, and the resulting difficulty in the general public accessing the work are just a few special cases where India wanted to permit compulsory licencing. These situations envision a compulsory licencing law far restricted than the compulsory general licencing, which Indian delegates asserted for in the Stockholm Conference. These circumstances are covered by it even if the WTO panel's narrow meaning of "certain special" is accepted.

Normal Exploitation

Although the panel acknowledged that equating "normal exploitation" with comprehensive use of those restricted works granted by copyright and every use of a work that, in theory, is protected by the ambit of exclusive rights and involves monetary profit would render Art. 13 of the TRIPS Agreement meaningless (as hardly any limitation could then pass the second test under Art. 13), the panel's final conclusion was to the effect that "normal exploitation" includes all uses of a work that, in principle, is covered by the scope of "an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work (i.e. the copyright or rather the whole bundle of exclusive rights conferred by the ownership of the copyright), if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e. the copyright) and thereby deprive them of significant or tangible commercial gains"³¹. The end result of this approach is that every usage that puts the copyright owner in economic rivalry with him interferes with his typical exploitation. If such a restriction "deprives them (the copyright owners) of significant or tangible commercial gains," then there is economic competition. This view eliminates nearly all restrictions and exceptions, not to mention licence requirements. When evaluating the validity of this interpretation, it is important to consider if the sole purpose of copyright legislation is to guarantee

³¹ US Copyright Act 1976, Section 110 Clause 5.

each copyright owner substantial or concrete financial advantage from her creations. It might not be difficult to understand “normal exploitation” in a situation if the transmission of information is a goal of copyright law that is equally significant. Normal exploitation includes not only all feasible exploitation methods but also the degree of exploitation. Therefore, while understanding “normal exploitation,” it is important to consider what the typical pricing pattern should be in the context of developing countries. “Normal exploitation” cannot be taken to mean unrestricted, interference-free exploitation. If so, it is absolute rather than usual. It allows interference when things are out of the ordinary. It is not possible to compare “substantial or tangible business profits” with “normal exploitation”. There cannot be a “conflict with normal exploitation” if an equitable compensation is guaranteed to rein in excessive pricing or to guarantee access. Simply put, it is what the compulsory licencing restriction accomplishes.

Hugenholtz and Okediji questioned the WTO panel’s assessment of the second step as “essentially economical and consequently restrictive.” They believe that as technology advances, the range of typical methods of deriving economic value from a work has expanded, leading to an increase in “normal exploitation” and a steady erosion of the ability of States to enact or uphold restrictions.³²

Jane C. Ginsburg also agrees that the “normal exploitation” of a work may change as technology advances because uses whose control required disproportionately large transaction costs are increasingly vulnerable to effective licencing and therefore fall under the definition of “normal exploitation.”³³

³² P. Bernt Hugenholtz and Ruth L. Okediji ‘Conceiving an International Instrument on Limitations and Exceptions to Copyright’ (SSRN) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2017629> accessed on 25 May 2022.

³³ Jane C. Ginsburg, ‘Berne Without Borders: Geographic Indiscretion and Digital Communications’ (SSRN) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=292010> accessed on 25 May 2022.

According to Ricketson, the second stage of Art. 9 (2) does take non-economic factors into account when determining whether the owner of copyright should have control over a specific type of use. He does not specify the kinds of non-economic factors that might be important and believes that the second phase is open-ended and unknown. He contends that this leaves the option of achieving this equilibrium through the national laws.

Senftleben believes that automatically excluding new fields of normal exploitation brought about by technological advancement from the purview of the national legislator would severely limit his capacity to respond to the new circumstance in line with a certain concept of public policy. Therefore, rather than the member states, the market would be the true sovereign. Because such an interpretation would severely restrict the interests of the user, he is unwilling to accept an interpretation that covers every possible way to profit financially from a work. Senftleben argues that a conflict with the normal exploitation should only be established if the limitation results in significant market harm, using the US Supreme Court's ruling in *Campbell v. Acuff Rose Music Inc.*,³⁴ as support. He asserts that marketplaces that have neither been formed nor been authorised to do so will no longer be covered by this criteria. He believes that this must be the case in the context of digital technology, where new opportunities are made possible, because a contrary viewpoint would make the second criterion in the three-step test unsurmountable for nearly all limitations, rendering the provision containing the three-step test meaningless and rendering all limitations impermissible.

Heide stated in the perspective of the evolution of the internet that it would have sufficed to use the term "any" exploitation rather than the term "a normal" exploitation if "normal exploitation" was intended to embrace all exploitations that could be gathered by the copyright owner. According to him, "such an interpretation could potentially reduce the three-step test to a single step in a setting where virtually nothing prevents the copyright owner from entering into a direct contract with the

³⁴ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

end user and where online contracts and technological tools allow the copyright owner to monitor the use of the copyrighted work.”

Another potential issue with the emphasis on economic relevance is one that Jane C. Ginsburg brings out. She worries that even historically favoured uses, like research or satire, could be considered “normal exploitations” if any commercially significant utilization that the right holder can personally licence falls within the purview of a “normal exploitation.” She states that although the panel’s analysis’s predominately commercial focus may be highly helpful in examining “market failure” and other exceptions with a similar economic motivation, it shouldn’t be the standard by which an exception might be completely abolished. She believes that leaving it to be reviewed at the test’s third, more accommodative step is the best option.

It is pretty evident that the second condition is the biggest obstacle to a compulsory licence being TRIPS Agreement compliant. No exemption or restriction could pass this test if it was based on the straightforward criterion of “economic competition with the ways that right holders normally extract economic value from that right to the work.” The use of compulsory licencing, however, is compatible with Article 13 of the TRIPS Agreement if it ensures normalcy in the “modes of exploitation and the extent of exploitation”, as well as the control of monopolistic practises. This is because there is no significant market impairment when compulsory licencing is permitted. Additionally, because they call for payment of compensation, compulsory licences frequently encompass markets that the owner of the copyright is hesitant to enter or markets that are otherwise unreachable to him. Therefore, there is little concern about a significant market impairment when compulsory licences are granted in both non-access and regulation of industrial practise scenarios.

Unreasonably Prejudice Legitimate Interests

The panel also construed the third requirement under Article 13 of the TRIPS Agreement in a restrictive manner. According to them, “prejudice to the legitimate interests of the right holders reaches an unreasonable level if an exception or limitation causes or has potential to cause an unreasonable loss of income to the copyright owner”.³⁵ “If the concern of the third step also is loss of income the question precisely is what, then, is the difference between the second and third tests?”

Many believe that the third stage, which seeks to precisely balance copyright interests, is the “kingpin” of the three-step test. According to Senftleben, it is the sole instrument competent to address threats to the balance of copyright, particularly during chaotic periods brought on by technological advancements. Thus, it is clear that the third stage does not just concentrate on the income loss but also on a larger political framework of interest balancing. The third phase emphasises on a few requirements that the limitation must meet in order to be recognised under Art. 13 of the Convention. The restriction only becomes invalid when it unnecessarily impairs such legitimate interests; its validity need only be challenged if it hinders the copyright holder’s legitimate rights.

According to Senftleben, using the word “interests” rather than “rights” puts IP owners and users on an equal terms. Only the owner’s legitimate rights need to be taken into consideration when determining whether a restriction is legitimate, and the legality of a restriction is only impacted when the discrimination to those interests becomes “unreasonable” because every restriction results in some “prejudice” to the copyright owner. In the three-step test, the word “unreasonable” takes on a distinct meaning on a global scale. According to Senftleben, the political prerogative of the lawmaker is crucial in this situation. The balance of a nation’s copyrights is up to the national legislature to determine.

³⁵ US Copyright Act 1976, Section 110.

According to Heide, the three-step test is adaptable enough to give room for creating inescapable exceptions in order to meet crucial “social and cultural needs”. In order to avoid making a lengthy list of restrictions accessible to the member states, the open-ended three-step test was adopted at the conclusion of the Stockholm revision Conference. However, because it is open-ended, national legislators are free to interpret it however they see fit and can incorporate their own policy considerations.

Senftleben claims that the third element of the “three-step test” has always been considered to allow for compulsory licencing. By allowing for the payment of equitable recompense, national policy can prevent unjustified harm to legitimate interests.

In relation to “legitimate interests of the author,” Heide also believes that, in view of the WCT’s preamble, the author’s legitimate rights should be construed to involve the greater interest of the public. It would enable a balance of interests that does not prioritise the author’s economic bias, so enabling social benefits to be covered by the three-step test. He believes that this interpretation would also demand, at the very least, that the assessment of “normal exploitation” and “legitimate interests” appear on an equal footing given that modern technology can make every exploitation a “normal-exploitation.” He believes it is inappropriate to compare the three-step test to a “economic prejudice test” in the context of the digital world.

The third condition should ideally be based on “political considerations”, as this will guarantee the political independence of member nations when resolving public interest matters. Given that balancing interests is a political choice, this is the best course of action. Furthermore, just this will set the second test apart from the third, which might involve economic factors. As a result, the third stage unquestionably permits compulsory licencing in light of the “economic balancing” achieved by fair compensation.³⁶

³⁶ TG Agitha ‘International Norms for Compulsory Licensing and the Indian Copyright Law’ (Researchgate) <https://www.researchgate.net/publication/264597651_International_Norms_for_Compulsory_Licensing_and_the_Indian_Copyright_Law> accessed on 27 May 2022.

It is firmly believed that the open-ended nature of the three-step test and the ambiguity regarding the extension of the three-step test's scope in the context of articles 11bis (2) and 13 (1) need to be interpreted in order to balance the interests of copyright owners and users, rather than pursuing an interpretation that supports copyright holders more, as done by the WTO panel in the copyright case. Copyright restrictions and exemptions are necessary to guarantee information access. Such constraints and exceptions should only be subject to restrictions that prevent arbitrariness without making them irrelevant.

Chapter 4

COMPULSORY LICENSING IN INDIA

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India, a developing nation and a signatory to the Berne Convention, has integrated provisions for the granting of compulsory licences in accordance with the particular rules established by the Berne Convention for developing nations in the Copyright Act, 1957. In a few specific instances, the Act allows for the issuance of obligatory licences for Indian work that serves the public interest.

4.1. Historical development of compulsory licensing

In 19th century British legislation and in the early 20th century for copyright, compulsory licencing for IP was first introduced. In the 20th century, IP treaties started to advocate for compulsory licencing flexibilities as a crucial element of copyright law. The Berne Convention on Literary and Artistic Works, which was

established in the early years of 1908, was the first “Convention on Copyright Compulsory Licensing.”

Initially, the Berne Convention’s International Copyright Law left it up to national laws to set restrictions and exceptions. The broad provision recognising reproduction rights was originally incorporated to the Berne Convention in the Stockholm Act. With the introduction of the “three-step test” under Art. 9(2) of the Berne Convention, significant constraints have been placed on the ability of the countries of the Union to establish restrictions and exceptions to the author’s exclusive right of reproduction.

Compulsory licencing is not explicitly recognized by the three-step test, hence it is necessary to specifically address the issue of its legality within the three-step test’s framework. According to documents related to the Stockholm Conference and the completion of the Paris Act of the Berne Convention, the three-step test under article 9(2) was the result of efforts to reconcile divergent viewpoints voiced by Berne Union members, and the ability to provide for compulsory licences was a crucial component of this compromise. The fundamental preoccupation of these developing and least developed countries was their economic, social, and cultural growth through the methods of education and research after the Second World War, when several colonies became independent sovereign states. They most desired widespread, low-cost access to knowledge in order to accomplish this goal. The issue of bulk access was brought up during the Stockholm Conference by developing nations, particularly India, who asked for a mandatory broad licencing clause. India saw mandatory licencing as a suitable solution to stop monopolies from growing and to promote the spread of information and culture. Even though the Conference rejected this demand, the final article 9 (2)’s three-step test was a compromise step, and it was stated that the open-ended clause would permit compulsory licencing as well. India, however, objected to the three-step test’s inclusion for fear that it would severely restrict the options for compulsory licencing under the Indian Act of Copyright. They most desired widespread, low-cost access to knowledge in order to accomplish this goal. The issue of bulk access was brought up during the

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Although the Main Committee I rejected the Indian proposal to allow for mandatory general licencing, which led to the adoption of the three-step test, article 9 (2) of the Berne Convention nonetheless allowed for mandatory licencing with a considerably more limited scope. According to the Stockholm Conference documents, the idea was implicitly accepted, and as a result, it became a component of the Berne acquis. A treaty must be read in accordance with the ordinary meaning to be ascribed to its contents in their "context" and in light of its object and purpose, according to Article 31 (1) of the Vienna Convention on the Law of Treaties. Thus, "context" is defined in Article 31 (2): "the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty...". According to the WTO panel, undisputed interpretation provided at a conference, such as by the chairman of the drafting committee, may qualify as an agreement that is a part of the context. Ulmer, the Main Committee I's Chairman, said during a discussion that "a rather large number of copies in industrial undertakings may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid". This declaration was made official because it was mentioned in the Main Committee I

³⁷ TG Agitha 'International Norms for Compulsory Licensing and the Indian Copyright Law' (Researchgate) <[https://www.researchgate.net/publication/264597651 International Norms for Compulsory Licensing and the Indian Copyright Law](https://www.researchgate.net/publication/264597651_International_Norms_for_Compulsory_Licensing_and_the_Indian_Copyright_Law)> accessed on 30 May 2022.

Report, as can be seen. This shows that the Stockholm Conference implicitly agreed that exceptions under Art. 9 (2) might be either absolute exceptions or mandatory licences. As a result, even though article 9(2) did not expressly include compulsory licencing, it was included in the Berne acquis.³⁸

The process under the three-step test differs significantly from the compulsory general licence required by India in that the latter does not require proof that the limitation is not in conflict with the owner of the copyright's normal exploitation of the work or that it does not unreasonably prejudice the right holder's legitimate interests; only the presence of instances validating compulsory licence needs to be proven, provided an agreement exists between the parties. However, according to the three-step test, payment of compensation only meets the third requirement; without also meeting the first two requirements, a forced licence will not be legal. Furthermore, the limitation is once again unlawful if even the payment of an adequate compensation cannot undo the unjustified harm done to the author's legitimate interests. It is clear from this that the three-step test severely limits the application of the obligatory licence clause. India specifically objected to the three-step test's establishment for this reason.³⁹

India's objection, though, did not go unanswered. A "Protocol Regarding Developing Countries" was formed in the Stockholm revision, which would have given developing countries general permission to restrict rights of translation and reproduction. However, the Paris Act of 1971, which made substantial changes to the protocol and appended an appendix to the Berne Convention, effectively replaced it. It is ironic that the Berne Appendix, which was intended to provide developing nations preferential consideration, ended up being more difficult than the three-step test. The "special provisions" are now on the edge of being nonsensical due to restrictions in the form of convoluted and unreasonable procedures. The prerequisites for making a declaration in accordance with Article V of the Appendix and for renewal every ten years, the requirement that an application

³⁸ Ibid.

³⁹ Ibid.

for a compulsory licence for the “translation or reproduction of the work” could only be made after a specified period of time between one and seven years after its first publication, and the additional requirement for a six-month waiting period before the owner of copyright is permitted to “translate or reproduce the work”, because of the commercial deterrent effect of the clause stating that a compulsory licence will end upon publication of a translation or reproduction of the work by the copyright owner at a fair price, etc., no sensible person who means business will attempt to submit any applications for compulsory licences under the Berne Appendix. It makes sense that underdeveloped countries have hardly ever used the provisions in the Appendix. The House Report on the Berne Convention Implementation Act of 1988’s assertion that the Berne Convention is relatively stable after the Paris revision and that no mandatory licences have been issued in the countries that chose to benefit from the Berne Appendix shows that this was the purpose of those who navigated to modify the Stockholm Conference Protocol Regarding Developing Countries in this way. Therefore, it is evident that the Berne Appendix’s compulsory licence provision is useless for developing nations, whereas the three-step test’s compulsory licence provision is more advantageous to them because it imposes no procedural limitations and may therefore be handled by national law.⁴⁰

Even though it might appear that article 9 (2)’s option for compulsory licencing has been eliminated by the Berne Appendix, the fact that both the “Protocol Regarding Developing Countries” and the three-step test were introduced at the same Stockholm Conference, as well as the historical context of article 9 (2), which reveals that the three-step test permits compulsory licencing, make it abundantly clear that this perception is entirely baseless. The compulsory licencing option under Art. 9 (2) also has a wider application because it is equally available to developed and developing nations, in contrast to the Berne Appendix’s compulsory licencing provision, which was created specifically for developing nations and is intended to be more liberal despite its illogical procedural requirements.⁴¹

⁴⁰ Ibid.

⁴¹ Ibid.

4.2 Reasons for provisions of compulsory licenses in the Copyright Act

Every licence is a copyright, and the idea of a contract stands for freedom—the freedom to manage one’s own creations and assets. In that regard, the phrase “compulsory licence” seems contradictory. The following justifications for the inclusion of obligatory licences in the Copyright Act are revealed by an analysis of the pertinent sections under the Copyright Act.

- “To make available works which are unreasonably withheld from public;
- To make available Indian or foreign works which are not available in India;
- To make available Indian or foreign works which are not available in India at reasonable price;
- To make available works to disabled persons;
- To provide for statutory licenses for cover versions;
- To provide for statutory licenses for radio broadcasts;
- To publish and bring to public those unpublished works which authors are unknown or untraceable;
- To allow production and publication of translations of Indian and foreign works into Indian languages;
- To permit broadcasting of translations for teaching and dissemination of research results.⁴²

4.3 Compulsory License in Copyright Act, 1957

Chapter VI of the Copyright Act has been examined in relation to the license-related clauses. Any interest in the right may be granted by the copyright owner in an existing work or the potential owner of a copyright in a future work through a written licence signed by him or by his properly appointed representative. The Copyright

⁴² Raman Mittal *Licensing Intellectual Property law & Management* (First edition Satyam Law International 2011).

Board has the authority to issue compulsory licences for works under specific conditions and with proper terms and conditions.⁴³

Exclusive and non-exclusive licences are the two types of licenses. Exclusive licence refers to a licence that grants any right included in a work's copyright to the licensee or other individuals authorised by him at the expense of everyone else (along with the copyright owner). The copyright holder in the case of a non-exclusive licence, retains the option of granting the right to use the copyrighted work to multiple parties. He can also use the work for his own benefit at the same time.⁴⁴

Additionally, a licence may be voluntary or compulsory. While compulsory licences are issued by the Copyright Board under specific conditions that will be covered in more detail later in this chapter, voluntary licences are those that are granted voluntarily by the owner of the copyright.

Parameters for the grant of compulsory licenses

The following criteria must be taken into account by the Copyright Board when making a decision about a compulsory licence application:

- i. the relevant work ought to have been published or presented in public;
- ii. given the reasons why the work is being kept from the public, the owner of the copyright or sound recordings should have prohibited republication of the work or allowed it to be performed in public; and
- iii. the owner of the copyright has refused to permit a broadcaster to communicate the work on terms that the Board must deem reasonable.

The Act aims to strike a balance between the public's interest in having access to the works on the one hand and the interest of the copyright owner in safeguarding

⁴³ 'India: Assigning & Licensing IPR In India (mondaq)
<<http://www.mondaq.com/india/x/87398/Trademark/Assigning+Licensing+IPR+In+India>> accessed on 5 June 2022.

⁴⁴ V.K. Ahuja *Law of Intellectual Property Rights In India*, (Second Edition Lexis Nexis 2015).

his work on the other. The scope of the owner's rights to protection in relation to the public interest and the work for which he has acquired copyright depends on the legal provisions.

- **Compulsory Licence in works withheld from public**

When work is being kept from the public, a compulsory licence is obtained. When the author is not taking the required steps to communicate the work, the main goal of the award of a compulsory licence is to make the work accessible to the public. The rules governing compulsory licences are intended to balance societal rights and needs for the greater good.

Before the 2012 amendment, the only person who could acquire a compulsory licence for an Indian work that had been kept from the public was the complainant. After 2012, it might be given in relation to any work that was kept from the public, whether it was an Indian or international work. As a result, the section's scope has been increased.

The exclusive reproduction right granted to the copyright owner in certain situations is restricted under Article 9(2) of the Berne Convention through the use of a compulsory licence. Article 9 (2) of the Berne Convention reads:

“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”

The Berne Convention's Article 9(2) establishes a three-step examination for the exceptions that can be made for the granting of compulsory licences. The three-step test is as follows:

1. The first step implies that special cases be the only exceptions;

2. The second step emphasizes that exceptions must not clash with the work's usual exploitation; and

According to the third step, such exceptions must not unreasonably hinder the author's rightful exceptions.

The three-step test was the subject of numerous amendment proposals at the 1967 Diplomatic Conference in Stockholm. The most notable of these was an Indian proposal to include a fourth paragraph that would have permitted a general compulsory licence on the grounds that such a clause was required "to ensure that monopolistic interests did not restrict the dissemination of works that had been made lawfully available to the public." The Conference flatly rejected this and other similar suggestions before approving a compromise put out by the UK that aimed to include all potential exceptions in an unified standardized exception.⁴⁵

The Indian Copyright Act's Sections 31 and 31A address the idea of compulsory licencing. When it comes to any "published copyrighted work", Section 31 (1) of the Copyright Act stipulates that if a complaint is submitted to the Copyright Board alleging that the copyright owner has refused to:

- a) "publish or perform or re publish or re perform the work due to which the work is withheld from public;"
- b) "allow communication of the work by broadcast or in case of sound recording get the work recorded, on terms which the complainant considers reasonable,"

If the Copyright Board after holding any appropriate inquiries and providing the copyright owner of the work with a fair opportunity to be heard, determines that the reasons for the refusal are not reasonable, it may order the Registrar of Copyrights to grant the complainant a licence to republish the work, perform the work in public, or communicate the work to the public, as applicable, in exchange for payment to the owner of the copyright in the work.

The licensee is thereafter subject to the following requirements:

⁴⁵ <<http://copyright.com.au/wp-content/uploads/2015/08/CCS0202-Rickeston.pdf>> accessed on 7 June 2022.

- a) pay the required amount;
- b) make payment to the copyright owner;
- c) any other terms and conditions that the Copyright Board decides to include.

Every request to “republish a work or perform it in public” must be supported by sufficient proof that the copyright holder has refused to do so, or has permitted the “republishing of the work, or has refused to permit the performance of the work in public”, together with a justification for the rejection.⁴⁶

The procedure to be followed in cases of works withheld from the public is covered in Chapter IV of the 2013 Copyright Rules.

According to Rule 6, an application for a compulsory licence under this clause must be for a single work,. A request made pursuant to this section must be supported by substantial proof demonstrating the copyright owner’s refusal to publish, permit republication of, or permit public performance of the work, as well as the grounds for that refusal.

Application for “communication of the work to the public” by way of broadcast is covered by Rule 6(4), which states that such an application must be accompanied by sufficient proof that the owner has refused to permit both (a) the communication to the public by way of broadcast and (b) in the scenario of sound recordings, the reason the applicant finds the terms unreasonable.

The Copyright Board may grant a licence to the complainant to republish, broadcast, or record the work as the case may be if it is determined that the reasons for the refusal are not reasonable, after conducting an investigation it deems reasonable, and after providing a reasonable opportunity to be heard. The licence could be subject to meeting the remuneration and condition requirements set by the Copyright Board. In line with the Copyright Board’s instructions and upon payment of any applicable fees, the licence may also be granted to any further individuals the Copyright Board determines to be qualified to receive one.

⁴⁶ V.K. Ahuja *Law of Intellectual Property Rights In India*, (Second Edition Lexis Nexis 2015).

According to Rule 7, such a licence must include the following information:

- a) “The duration of the licence;
- b) The amount of compensation or the rates at which royalties are to be paid; and
- c) Such terms and conditions as the Board may deem appropriate.”

Additionally, this rule requires the Board to notify the public as soon as practicable that a licence has been granted.⁴⁷

Procedure for Evaluating Royalties

The process for calculating royalties when works are kept from the public is described in Rule 8 of the 2013 Copyright Rules. According to Sec. 31 of the Copyright Act of 1957, the Board will decide how much money will be paid in royalties or compensation to the copyright owner. The Board shall consider the following factors when calculating royalties:

- i) When republishing a work or performing it in public, the following information must be provided:
 - a) the suggested “retail price of a copy of the work” or the rate at which it will be performed in public;
 - b) the standard rate of royalties;
 - c) any additional information that the Board deems pertinent.
- ii) In the event that a work is communicated via broadcast, the following factors must be taken into account:
 - a) the times during which the broadcast occurs and the various rates for those times, including the repeat broadcast;
 - b) the various rates for various classes of work;
 - c) the current standards of royalties that must be paid in this case for such a work; and
 - d) any other matter that the Board may deem relevant.⁴⁸

⁴⁷ Copyright Rules 2013 Rule 7(4) & (5).

⁴⁸ Copyright Rules 2013, Rule 8.

Extension of the license's validity time

The licencing period may be extended upon request from the licensee and after giving notice to the copyright owner if the board determines that there are adequate grounds why the licensee is unable to publish the work.⁴⁹

Revocation of the License

The Copyright Board may revoke a licence after giving the licensee a chance to be heard for the following reasons:

- a) “the licensee failed to publish or communicate the work to the public, in the case of broadcast, within the time period specified or within an extended period of time;
- b) the licence was obtained through fraud or misrepresentation; and
- c) the licensee violated any of the licence's terms and conditions.”⁵⁰

- **Compulsory Licence in unpublished works**

Section 31A addresses compulsory licences for unpublished works. Amendment of 2012 change to the provision substitutes “or published work” for “Indian Works.” Section 31A (1) states:

“Where, in the case of any unpublished or any work published or communicated to the public and the work is withheld from the public in India the author is dead or unknown or cannot be traced, or the owner of copyright in such work cannot be found, any person may apply to the Copyright Board for a licence to publish or communicate to the public such work or a translation thereof in any language.”

⁴⁹ Copyright Rules 2013, Rule 9.

⁵⁰ Copyright Rules 2013, Rule 10.

The applicant must publish his idea in one issue of a daily English newspaper before submitting an application under the aforementioned rule. Every time a request is made for translation into a different language, that language's daily newspaper should also publish the request.⁵¹ The application must be submitted on the appropriate form and include the appropriate fees as well as a copy of the newspaper advertisement.⁵²

After conducting such an investigation, the Copyright Board instructs the Registrar to give the "licence to publish a work or a translation of it" in cases where an application is made in accordance with this provision. The licence is contingent on the payment of a royalty and any further conditions that the Copyright Board may prescribe.⁵³ The licence holder must notify the licensee if the licence is terminated in accordance with this clause.⁵⁴

To facilitate the "author and his legal heirs and representative" to retrieve the money at any time, the applicant may be asked to deposit the royalties in the public account of India. The licence must also include the following information:

- a) The time frame during which the work must be published, communicated, or translated to the public;
- b) The cost of copies of the work to be sold;
- c) The amount of royalties that must be deposited and the account into which they must be deposited; and
- d) In the case of a translation, the language in which the work must be published.
- e) The media in which the work is to be disseminated to the public, if that is the case.⁵⁵

The Central Government may, if it deems it vital for national interest and the original creator of the work which is copyrighted is deceased, order the author's "heirs or legal representatives" to publish the work within a given time frame. For the "publication of the works by the heirs or executors", the Central Government

⁵¹ Copyright Act, 1957, Section 31 A (2).

⁵² Copyright Act, 1957, Section 31 A (3).

⁵³ Copyright Act, 1957, Section 31 A (4).

⁵⁴ Copyright Rules, 2013 Rule 15.

⁵⁵ Copyright Rules, 2013 Rule 11 clause 5.

shall define a minimum term of six months and a maximum length of one year.⁵⁶ The Copyright Board may approve the publication of such a work upon the request of any other person and following a hearing with both parties. The licence is contingent upon the payment of any applicable royalties.⁵⁷ The Govt. is required to rapidly disclose the fact of the licence granted in the official Gazette.

Procedure for Evaluating Royalties

The Board must figure out how much of royalty is required to be paid to the owner in royalties. When deciding royalties, the Board considers the following:

- a) The current royalties for that particular work, as well as
- b) any other issues that the Board deems important.⁵⁸

Revocation and Extension of Licence

If the Board is convinced that the licensee is unable to publish, disseminate, or translate the work for adequate reasons, the Board may decide to extend the licence.⁵⁹

The licence may be revoked by the copyright board for any of the following reasons after providing the licensee a chance to be heard:

- a) the licensee has failed to create or publish the work within the stipulated or extended time frame;
- b) The licence was obtained fraudulently with regard to any material fact; or
- c) the licensee has violated any of the license's terms and conditions.⁶⁰

- **Compulsory Licence for the benefits of Disabled**

The topic of compulsory licencing for the benefit of disabled people is covered in Section 31 B. Anyone working to advance the interests of people with disabilities may submit an application to the Copyright Board for the issuance of a compulsory

⁵⁶ Copyright Rules, 2013 Rule 16.

⁵⁷ Copyright Act, 1957 Section 31 A (7).

⁵⁸ Copyright Rules, 2013 Rule 12.

⁵⁹ Copyright Rules, 2013 Rule 13.

⁶⁰ Copyright Rules, 2013 Rule 14.

licence in any copyrighted work using the approved form and upon payment of the required fees. Works to which “clause (zb) of Sec. 52” does not apply are not covered by this section.

Section 52 (1): The following act are not considered to be violations of copyright, namely: “(zb) the adaptation, reproduction, issue of copies or communication to the public of any work in any accessible format”, by—

- (i) anybody who wants to make it easier for people with disabilities to access works, including sharing such accessible formats for “private or individual use, educational purposes, or research”; or
- (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 non-profit 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 only by persons with disabilities and takes reasonable steps to prevent its entry into ordinary channels of business.”

Explanation— For the purposes of this clause, “any organisation” refers to any entity recognised under “Chapter X of the Persons with Disabilities (Equal Opportunities, Protection of Rights and full Participation) Act, 1995 (1 of 1996), registered under Section 12A of the Income-tax Act, 1961 (43 of 1961),” or receiving government grants for facilitating access to people with disabilities or an educational establishment.⁶¹

Section 52(1)’s new clause (zb) allows for the “fair use of the work for the benefit of the disabled.” This clause aims to make it easier for people with disabilities to access protected works through adaptation, reproduction, issuance of copies, or communication to the public of those works in any accessible format, including

⁶¹ Copyright Act 2012.

sharing those works with anyone with a “disability for private or personal use, educational purposes, or research.”⁶²

After giving the copyright owner a fair hearing and learning more about the applicant’s qualifications and good faith, the Copyright Board may issue the applicant a compulsory licence if it is determined that doing so will benefit disabled people.

The manner and format of publication, the duration of the compulsory licence, the number of copies that may be published, and the amount of royalties must all be specified in every compulsory licence issued under this section. Additionally, any application submitted in accordance with this provision ought to be resolved as quickly as possible. An attempt should be made to decide on the application within two months of receiving it.⁶³

In addition to terms like current royalty levels and the amount at which works are sold, copyright organisations must also cover the costs associated with creating accessible versions for people with disabilities. If the copyright holder can demonstrate that the requirement of the copyright can be fulfilled by releasing in the very same format for which the copyright licence was awarded for the same or lower prices, apart from fraud, failure, or violation of the terms of the licence, the licence may be revoked under this section.⁶⁴

Process for Issuing a License

The owner of the copyright must receive a copy of the application by registered mail, and if the owner is unknown or cannot be located, the application must also be served by registered mail to the publisher whose name is listed on the work. The applicant and the copyright owner must both have a chance to be heard by the Board, who will also take the appropriate evidence about the application and, whenever

⁶² Abhay Pandey, ‘Development In Indian IP Law: The Copyright (Amendment) Act 2012’ (Intellectual Property Watch) <<http://www.ip-watch.org/2013/01/22/development-in-indian-ip-law-the-copyright-amendment-act-2012/>> accessed on 10 June 2022.

⁶³ Copyright Act, 1957, Section 31B Copyright Act, 1957.

⁶⁴ Copyright Rules, 2013 Rule 21.

possible, any other party claiming an interest in the work's copyright as it deems appropriate.

If the Board determines that the applicant, or if there are multiple applicants, the applicant it believes would best serve the interests of the disabled people, may be granted a licence for publication of the work in the format requested, it will direct the Registrar of Copyright to grant the licence in that manner. The license granted under Sec. 31B is to specify⁶⁵:

- a. the time frame for publication;
- b. the format and medium used to produce and publish the work;
- c. the quantity of copies to be made;
- d. the rate at which royalties related to those copies are to be paid to the copyright owner of the work, and other factors.
- e. the party to whom the royalties are to be paid.⁶⁶

Method of calculating royalties:

The Board will decide the amount of royalties that are due to the copyright owner in accordance with Section 31B subsection (4). When calculating royalties, the Board shall take into account the following factors:

- a) the suggested cost at which a copy of the work shall be made available to disabled persons;
- b) the current standards of royalties with regard to such works;
- c) the cost associated with creating accessible formats for the disabled person; and
- d) such other factors as may be considered pertinent by the Copyright Board.

The Board may extend the licencing period after receiving an application if it determines that the licensee had good cause to delay production and publication of the work beyond the allotted time.

⁶⁵ < <https://link.springer.com/book/10.1007/978-981-10-3984-3> > accessed on 11 June 2022.

⁶⁶ Copyright Rules, 2013 Rule 18(4).

Revocation of the licence

After providing the licensee with a chance to be heard, the Board may cancel the licence on the following grounds⁶⁷:

- a. the licensee's failure to "produce and publish such work" within the license's stated deadline or within the extended deadline;
- b. if the licence was acquired through deception or false representation of any material fact;
- c. if the licensee has violated any of the license's terms and restrictions;
- d. by publishing in the same format for the same or lower price for which the required licence was granted, the copyright owner has satisfied the disabled person's request.⁶⁸

2013 saw the adoption of the Marrakesh Treaty, which aims to make it easier for people who are "blind, visually impaired, or otherwise print-disabled" to access published works. The Treaty intends to make it easier for people who are blind, visually challenged, or have trouble seeing print to publish works in Braille, big print text, and audio books. The Marrakesh Treaty was ratified initially by India.

4.4 Legal Position of India with Regard to the TRIPS Agreement and Future Requirements

Compulsory licences are covered by Sections 31, 31A, 32, 32A, and 32B of the Copyright Act of 1957 of India. There were only provisions 31 and 32 in the original version of the Copyright Act of 1957. Except for the addition of "broadcast" in place of "radio diffusion" and "sound recording" in place of "record," Section 31 remained mostly intact. In order to "benefit" from the Berne Appendix, India updated her laws in 1983, adding sections 31A, 32 (1A), 32A, and 32B, as well as

⁶⁷ < <https://link.springer.com/book/10.1007/978-981-10-3984-3> > accessed on 11 June 2022.

⁶⁸ Copyright Rules, 2013 Rule 21.

making the required amendments to the sections 31 and 32 that were already in place.

The 1983 Amendment Act object and reason reads: "... As a developing country it will be in our interest to adhere to the 1971 Paris Act of the Berne Convention so as to avail of the benefits of the compulsory rights". However, as required by Article I (2) of the Berne Appendix, India has not renewed the declaration.

The general compulsory licencing provision is covered by section 31 (1) (a) of the Indian Copyright Act, which can be traced back to the British Copyright Act 1911 and was gradually expanded to India by the Indian Copyright Act 1914.

However, section 31 (1) (b) is governed by situations covered by article 11bis (2) of the Berne Convention. Section 32 (1) can be linked back to the Copyright Act of 1914, which set a 10-year time limit on the only right to "produce, reproduce, perform, or publish a translation of a work" that was first published in India. The other special provisions, which rely on the Appendix to Berne, were added into India's copyright law in order to "take advantage" of India's status as a developing nation.

A published "Indian work" may be kept from the public under Section 31(1)(a) if the author refuses to republish, permit republication, or permit performance in public. In these circumstances, the Copyright Board may, after providing the copyright owner with a hearing opportunity, grant a compulsory licence to the complainant, subject to the fulfilment of the terms and payment of the compensation that the Copyright Board deems appropriate. It is ironic that India, which vociferously advocated for compulsory general licencing to give newly independent colonies affordable access to the wealth of knowledge of developed countries, restricted her own laws specifically for compulsory licencing to "Indian works" despite the Copyright Act of 1911 having no such restriction. It was not required by any international treaties to confine any exceptions or limitations to works created by its own citizens. It is noteworthy that section 32, which refers to compulsory

licence for creating and publishing translations in any language, did not contain such a restriction.

Nevertheless, the Copyright Amendment Act of 2012 removed the section 31 definition of “Indian work” and replaced it with the phrase “any work” (1). In light of the allegations made by various stakeholders before the Parliamentary Standing Committee and the Copyright Amendment Act, which broadens the application of Section 31 (1) to “any works,” regardless of whether the work is Indian or foreign, it is pertinent to examine the applicability of Section 31 (1)(a) under Article 13 of the TRIPS Agreement.

“In The Two Hundred Twenty-Seventh Report of the Department-Related-Parliamentary Standing Committee on Human Resource Development on the Copyright (Amendment) Bill (2010) it was stated that a number of stakeholders such as Motion Picture Association of India, Indian Music Industry, South Indian Music Companies Association, Indian Performing Right Society Ltd., Federation of Indian Publishers and Indian Reprographic Rights Organisation etc., alleged that such a move would make Copyright Board non-compliant with the Berne Convention and consequently TRIPS Agreement, exposing India to the possibility of sanctions in WTO.”

“It is undeniable that situations where works are withheld from the public fall under the category of “certain special cases,” and that such a situation justifies state intervention by placing restrictions on the exclusive rights of the owner of copyright because copyright protection necessitates the sharing of information. There is no reason for copyright protection if the work is kept from the public. Senftleben’s explanation that “special case” must be equated with “special purpose” based on the documents of the Berne Convention is the preferred approach to the first test. The circumstance under analysis clearly passes the first test because the section’s intent is to unequivocally indicate that copyright protection is meaningless if a work is protected by it but is withheld from the broader public (as different from the withdrawal from public of the work by the author himself). Regarding the second criteria, there is no “conflict” with the usual exploitation of the work in the event of

keeping it from the public because there is no exploitation of the work in such a situation. The third step is likewise satisfied because the requirement of payment of compensation as set by the Copyright Board satisfies the reasonable interest of the copyright holder to be compensated for uses of the work. The phrase “does not unreasonably affect the legitimate expectations of the copyright owner” can be handled by the term “compensation.”

In the context of a required licence, “withholding from the public” is an exceptional case that could unquestionably pass the three-step criteria. However, it is argued that section 31 (1) (a) can also apply where the works are not accessible to the general public at a reasonable cost. It should be mentioned that, particularly for poor nations, the effect of lack of acceptable pricing availability is equivalent to “withholding the work from public”. If such a provision could pass the three-step criteria, it has to be investigated. Overpricing may be a good justification for government intervention through compulsory licencing if policy reasons are sufficient to demonstrate “unique” case situations. Additionally, this will make it easier to set a fair price for the work, raising the quantity of consumers who might not have purchased it in the absence of mandatory licencing. Therefore, the mandatory licencing may not negatively affect the copyright owner’s finances. The “normal exploitation” of the copyright owner’s right must not be impacted by the limitation in order to pass the second phase. It would be comparable to giving copyright connotations that it is unable to have to argue that a criterion for fair pricing will impede “normal exploitation.” Because the Copyright Board is allowed to set compensation while granting compulsory licence and after giving the copyright owner a chance to be heard, the legitimate interests of the owner of the copyright are not unfairly affected. This permits the member nations to decide politically to guarantee access to the copyrighted work in the right circumstances, after obtaining compensation for the copyright owner and therefore complying with the third stage, as the damage caused, if any, is then not unreasonable.

In contrast to the unavailability of copyrighted works at a reasonable price, section 31(1)(a) views “withholding from the public” as the only rationale for

offering compulsory licensure. India argued that some adjustments to the traditional view of copyright protection had to be made by those nations as early as 1960, at the meetings of the “Intergovernmental Committee of the UCC and its General Conference,” in order to allow for the freer circulation of their works in developing countries. India was concerned about the high costs and periodic shortages of labour from the industrialised nations. The topic of giving poor countries extra assistance was first raised in relation to the UCC rather than the Berne Union. The Conference agreed to this proposal and passed a resolution authorising the Director General to look into these matters and others like them “in order to help in the formulation of suitable programmes for cheap production of scientific and technological books in the underdeveloped countries, on a national and a regional basis”.

Given the discussion above, it is questionable why India did not implement compulsory licencing based on the lack of domestic or international works that were readily available for a fair price. Unfortunately, the new Copyright Amendment Bill 2010 does not suggest adding “non-availability at affordable price” to the list of reasons for issuing compulsory licences. Given that developing country courts worry about the compatibility of the TRIPS Agreement, it is safer to be upfront about the position, even though it may be possible for the judiciary to link a lack of availability at a fair price with withholding from the public.

In accordance with Article 11bis (2) of the Berne Convention, Section 31(1)(b) permits the Copyright Board to issue a compulsory licence when an Indian work that has already been published or publicly performed is denied permission to be shared with the public via broadcast of that “work or the work recorded in sound recording” on terms that the complainant deems reasonable. The clause is notably different from 31(a) in that it is not restricted to situations in which information is kept from the general public. In order to avoid monopolistic tendencies among record manufacturers and collecting societies, this provision places less emphasis on the interests of the society and more on striking a balance between the interests of competing businesses.

Even though the Copyright Act of 1957 has a provision for compulsory licencing from the beginning, it wasn't often used until lately, especially in regard to traditional literary, theatrical, musical, and artistic works. The astonishingly rapid growth of communication technology and its effects on the entertainment sector may be the cause of the rising need for compulsory licencing. The instances show that the entertainment business is more in need of using compulsory licencing provisions than the printing and publishing sector. This fact is illustrated by a wide variety of incidents involving the broadcasting of sound recordings. In cases like, "*Music Broadcast Pvt. Ltd. v. Phonographic Performance Ltd. (2003)*, *Music Choice India Private Limited v. Phonographic Performance Ltd. (2004)*, *Phonographic Performance Ltd. v. Music Broadcast (P) Ltd. (2004)*; *Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd. (2008)*" the main issue is the music industry's refusal to provide various broadcasting businesses licences to transmit music. The issues are:

- a. Can others use the provision if at least one broadcasting business has been given authorization to broadcast music, since there is no concealing of information from the public in such circumstances? Is the applicability of the clause only applicable to situations in which the public is kept in the dark because the creator refuses to make the work available to them via broadcast?
- b. Considering section 31 (2), is it possible to issue more than one corporation a compulsory licence under the aforementioned provision?

In its recent decision in *Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd. (2008)*, the Supreme Court made the following ruling with regard to the first issue:

If it is acknowledged that the owners entered into voluntary licence agreements with All India Radio and other radio broadcasters, it will be sufficient to bar anybody else from approaching the Copyright Board. Another argument for not granting an application under Sec. 31 of the Act is that if it is delivered to a satellite channel or space radio, the same would likewise serve the same function.

Given that the court reached this conclusion after taking into account the following passage from Copinger and Skone James on Copyright (Garnett et al. 1999), it is interesting to note that:

“. . . In the case of a statutory licence the rate is fixed by law, in the case of a compulsory licence the rate is left to be negotiated, but in neither case can use be refused or prevented”

However, the court decided with regard to the second point that compulsory licence could be granted to more than one broadcaster that it is permissible after taking into account the “ground realities” of the number of broadcasters operating over the entirety of India, it is “not correct to contend that having regard to the provisions of Sub-section (2) of section 31, compulsory licence can be granted only to one and not to more than one broadcaster”.

It is disappointing that the Indian Supreme Court did not understand the legal ramifications, did not respond to the query of “withholding” in relation to 31 (1) (a) and 31 (1) (b), and did not consider the applicability of 31 (2) to 31 (1) (a) and 31 (1) (b). The court also disregarded the Bombay High Court’s more logical conclusion in *Phonographic Performance Ltd. v Music Broadcast (P) Ltd.*⁶⁹ which stated that the goal of enacting Clause (b) of subsection (1) of section 31 was to treat the field of broadcasting separately and to remove it from Clause (a) of subsection (1) of section 31. The Court feels that “if clause (b) was not separately drafted, communication to the public by broadcast would have been covered by clause (a) of Sec.31 (1) and thus it is clear that clause (b) is in the nature of a proviso or exception to Sec. 31 (1) (a)”. The HC of Bombay was of the view that “the field of broadcast has been given a differential treatment by the Legislature and the refusal of the holder of copyright in the work to re-broadcast the work or allow re-broadcasting of the work need not result in withholding the work from the public.”

In other words, a complaint may be filed even if the copyright holder himself made the rebroadcast of the work or authorised others to do so. The provisions’

⁶⁹ (2004) 29 PTC282 (Bom) (DB).

language is very clear, and there is no question about importing the idea of a refusal that results in withholding the work from the public into the realm of broadcasting because the Legislature's objective in that regard is unmistakable. The HC of Bombay further stated that the operation of subsection (2) of Sec. 31 must be limited to the instances covered by Clause (a) of subsection (1) of Sec. 31 in order to make the scheme in Sec. 31 feasible. In spite of these clear pronouncements of the law, the SC used convoluted reasoning to permit compulsory licencing in the realm of broadcasting where there is no concealing of information from the public. The Amendment Bill 2010, however, proposes changes to this clause that can address the problems brought on by the current rules and address the concerns highlighted by these rulings. In order to allow the Copyright Board to award compulsory licencing to more than one person, it is proposed that in section 31 (1) of this bill, "such person or persons who, in the opinion of the Copyright Board, is or are qualified to do so" be substituted for the words "licenced to the complainant" and that subsection (2) be omitted. The TRIPS Agreement conformity of Sec. 31 (1)(b), which is based on Art. 11bis (2) of the Berne Convention, must be examined based on that provision's TRIPS Agreement compatibility, which has already been done elsewhere. However, opposition to this amendment has been voiced on the grounds that it is arbitrary because no qualification criteria are mentioned in the Bill and because it gives the Copyright Board broad authority to grant individuals other than the complainant, jeopardising the interests of copyright owners. It is believed that just changing every instance of the word "complainant" in the section to "complainants" would have been sufficient to express clearly that under Section 31 (1)(b), a compulsory licence might be given to more than one individual. The process of awarding a compulsory licence under Sections 31(1)(a) and (b) should have been discussed individually to make the distinction between the two evident.

Adopted on the basis of the Berne Appendix, Section 31A enables the publication of unpublished Indian works or their translations in any language, regardless of the language in which the author is dead, unknown, or unable to be tracked down. The Copyright Amendment Bill 2010 suggests that Section 31A be

changed to expand its application to include foreign works as well as unpublished works and any published or communicated to the public work that is being kept from the Indian public because the author is deceased, unknown, or untraceable or the owner of the copyright to such work cannot be located.⁷⁰ The Berne Convention and TRIPS Agreement could be violated, and the extension of applicability to all foreign works (including film, DVDs, etc.) appears to fall short of the minimum requirements imposed by such instruments, according to the Parliamentary Standing Committee on Copyright Amendment Bill. The provision must adhere to international regulations when it covers foreign works. In other words, there is nothing wrong with expanding the proposed section 31A to foreign works if its content can satisfy international obligations.

There is no specific provision addressing orphan works in either the TRIPS Agreement or the Berne Convention, with the exception of the Berne Appendix, to which India is no longer able to refer. Therefore, based solely on the three-step criteria, the TRIPs Agreement or Berne compatibility must be investigated. Although the rule refers to what are frequently referred to as “orphan works,” Indian Copyright Law has never utilised this word. In circumstances where the author is missing, deceased, unable to be located, or the owner of the copyright to the work cannot be located, the addition to section 31A was intended to encompass both unpublished works and published works concealed from the public. It is therefore clear that India has no plans to stray from the traditional definition of orphan works.

Public interest requires that there be a mechanism in place to make unpublished works accessible to the general public if the author is deceased, unidentified, unable to be tracked down, or the owner of copyright in such work cannot be located. There would have been no recourse if the author had been alive and available and had willingly chosen not to publish the work, as the choice to publish or not to publish the work is fundamentally based on the “legitimate interests of the author”. If the author of an unpublished work or a work that has been published but is being kept from the public is deceased or cannot be located, it is

⁷⁰ Copyright Amendment Bill, 2010 Section 16.

considered a “exceptional circumstance” since the public is being denied access to a wealth of important information. As there is no utilization of the work by the copyright holder, there is “no conflict with the normal exploitation” in such circumstances. There is “no unreasonable prejudice to the legitimate interests of the copyright owner” because forced licencing guarantees payment of royalties. If the creator cannot be located or is deceased, published works may be withheld from the public; this is a special instance, and since the work is not being exploited, there is no contradiction with the usual exploitation. The lawful rights of the right holder are protected by the payment of royalties. In the usual “orphan works” scenarios, there is concern over accessibility to “orphan works”; yet, it is generally agreed that if availability is guaranteed without breaching the three-step test requirements, it is a workable solution. As we’ve seen, mandatory licencing is a solution that could solve the issue while adhering to the three-step test criteria.

Section 32 (1) of the Indian Copyright Act 1957 originally allowed any person “to apply to the copyright Board for a licence to produce and publish a translation of a literary and dramatic work in any language if the translation of the work in that language was not published by the copyright owner or by any person authorized by him for 7 years after the first publication of the work, or if published, is out of print.” Such a person should have requested and been denied permission from the copyright owner to create and publish such translation before to making such an application. If the author has not removed “copies of the work from circulation,” the Copyright Board may grant the applicant a licence if it is satisfied with the applicant’s competence and ability to publish an accurate translation of the subject work and to pay royalties to the copyright owner at the rate determined by the Copyright Board after giving the copyright owner, whenever possible, an opportunity to be heard. Section 32 was amended in 1983, incorporating section 32 (1A) for availing of the Berne Appendix “benefits”. The new provision allows remission for the waiting period if the translation is for certain purposes such as teaching, scholarship or research and if the translation is in a language not in general

use in any developed country. However, certain additional conditions were also incorporated as required by the Berne Appendix such as

“(1) the licence shall not extend to export of copies of the translation of the work outside India and every such translation shall contain a notice in the language of such translation that the copy is available for distribution only in India,

(2) the requirement that a further period of 6 months has to be elapsed from the date of making the request to the copyright owner for authorization for producing or publishing a translation to grant a licence to see if either the copyright owner or any person authorized by him is publishing a translation within that time.”

These additional requirements discourage any prospective licensee from approaching the Copyright Board for the issuance of compulsory licences under provisions based on the Berne Appendix, along with section 32B, which was introduced in 1983 in accordance with the Berne Appendix and provides for termination of the compulsory licence if the copyright owner publishes the translation of the work for which the compulsory licence was granted at any time after the grant of it. Although the Berne Appendix criteria discourage potential licensees, the easing of the waiting period in section 32 (1A) is a welcome move. The original 32 (1) should be kept with the modification of relaxing the waiting period rather than adhering to Berne Appendix conditions because India lost her right to use the Berne Appendix provisions by failing to re-notify and the three-step test is a more welcome requirement than the Berne Appendix ideal.

It will be fascinating to find out if section 32 (1), as changed, satisfies the criteria of the TRIPS Agreement without using the Berne Appendix. As long as there is no conflict with the copyright holder’s normal exploitation of the work and there is no unjustifiable harm to the legitimate expectations of the copyright holder, limitations may be allowed in special cases like “teaching, scholarship or research, or translation” into a language that is not widely spoken in any developed country. The third requirement is met because, as has already been established, the requirement that royalties be paid at a rate established by the Copyright Board protects the

legitimate interests of the copyright holder and strikes a fair balance between those interests and those of the users of the translation of the copyrighted work. The second step might be taken care of by the waiting time, even though it is shorter now, and the restrictions on the circumstances that allow for such a shorter waiting period because they guarantee that the copyright holder won't suffer a significant market damage.

Another provision, Section 32A, was introduced and is based on the Berne Appendix. It allows for the distribution of literary, scientific, or artistic works to the general public or for educational purposes at prices that are reasonable compared to what is typically charged in India for these kinds of works. If copies of literary, scientific, or artistic works are not made available in India, or if they are not sold in India at a reasonable price typically charged in India for comparable works for a period of six months after the expiration of the relevant period, or in connection with systematic educational activities, a compulsory licence may be issued under section 32A. The same requirements that apply to section 32 (1A), including section 32B, compulsory licencing for translations of works also apply to section 32A compulsory licencing.

The grounds for both sections 31 (1) (a) and 32A include the public's withholding from or lack of accessibility to copyrighted works. In the latter, lack of reasonable availability is also a defence, but in the former, the application can be made at any time while the copyright is still in effect. As a result, a compulsory licence can only be issued if there is a lack of reasonable availability for 6 months after the relevant period has passed. In other words, no waiting is prescribed under the former provision. Section 31 (1) (a) is applicable to "any work" whereas the application of section 32A is limited to "literary, scientific and artistic works" alone. Apart from the other conditions attached to section 31 (1) (a), the additional conditions such as

"(1) grace period of 6 months after a request for authorization to publish or reproduced under Clause (a) of the proviso to section 32A was made,

(2) termination of licence on reproduction or publication by the copyright owner or a person authorized by him as per section 32B,

(3) prohibition of exportation of the copies produced under compulsory licensing etc., as already stated, render section 32A unfeasible.

Thus, a comparison between section 31 (1) (a) and section 32A reveals that “if the applicability of the former provision is extended to “any” works (Indian or foreign), and ‘non-availability at a reasonable price’ is included among the grounds for granting compulsory licensing, it will render the latter provision redundant, as both serve the same purpose and the former has a wider coverage than the latter without the conditions attached to the latter provision.””

4.5 Indian Judiciary approach on Compulsory License

In *Phonographic Performance Ltd. v. Music Broadcast Pvt. Ltd.*,⁷¹ the Division Bench of Bombay HC observed that the Legislature wanted to make a provision for grant of license to all the persons who were seeking the same if they were willing to offer reasonable terms. The Legislature in its wisdom had provided in the scheme of the legislation itself that the field of broadcast was to be treated differently than other modes of communication to the public. The Court stated:

“Clause (b) of sub-section (1) is in the nature of proviso or exception to clause (a) of sub-section (1) of Sec.31. The purpose of enacting clause (b) of sub-section (1) of Sec. 31 was to take the field of broadcasting from clause (a) and to deal with that field separately. Different treatment that has been given by the Legislature to the field of broadcast is that refusal of the holder of the copyright to re-broadcasting of the work need not result in withholding the work from public. In other words, even if the copyright holder in a work himself re-broadcast the work or is allowing others to broadcast the work, still a complaint can be made.”

⁷¹ [2004] 29 PTC 282 (Bom).

In *Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd.*,⁷² a complaint was filed by Entertainment Network, running a Radio FM Channel under the brand name “Radio Mirchi” against Super Cassettes Industries Ltd. (SCIL), who is not a member of PPL. Complainant made several attempts to obtain a license for SCIL to play its sound recordings but it was not issued to it for one reason or the other. The Copyright Board held:

“A plain reading of Sec.31 makes it clear that a person gets a right to move the Copyright Board where in the case of a sound recording the terms are not such which the complainant considers reasonable. Reasonability is not here the test that is usually employed in the law of Torts or under Art. 19 of the Constitution. The measure is not a reasonable man. Reasonability here is to be judged solely by the complainant. If the complainant subjectively comes to the conclusion that the terms are not reasonable, he acquires the right to move to the Copyright Board.”

In *Entertainment Network (India) Ltd. v. Super Cassette Industries Limited*,⁷³ “the respondent was one of the leading music companies engaged in the production and acquisition of rights in sound recordings. It had copyright over a series of cassettes and CDs commonly known as “T-series”. It also had copyrights in cinematographic films and sound recordings. Appellant M/s Entertainment Network (India) Ltd. (ENIL) broadcasts under the brand name “Radio Mirchi”. It is a leading FM radio broadcaster. Disputes and differences arose between Bennett Coleman & Co. Ltd., the holding company of the first respondent and Phonographic Performance Ltd. (PPL) as regards the playing of the songs of which copyrights belong to the first respondent in their FM radio network. Appellant is a company which holds license for running FM radio stations in various cities across India.”

The main issues raised for contemplation in these appeals were:

- i) Whether the Copyright Board has jurisdiction under Sec. 31 (1) (b) of the Copyright Act, 1957 to direct the owner of a copyright in any Indian work or a registered

⁷² [2004] 28 PTC 131 (CB).

⁷³ [2008] 37 PTC 353 (SC).

copyright society to issue compulsory licenses to broadcast where such work is available to the public through radio broadcast?

- ii) Whether in any event such a compulsory license can be issued to more than one complainant in the light of Sec. 31 (2)?
- iii) What would be the relevant considerations which the Copyright Board must keep in view while deciding on-
 - a) Whether to issue a compulsory license to a particular person? and
 - b) The terms on which the compulsory license may be issued, including the compensation.

The court ruled that the Board may occasionally exercise its powers when acting in the capacity of a statutory authority. Therefore, the claim that only one broadcaster can receive a forced licence and no more can under the terms of Section 31 subsection (2) is untrue.

The Scheme also demonstrates that an owner of the copyright has total freedom to reap the rewards of his labour by collecting a set price or royalty on the sale of licences. As a result, the copyright owner is allowed to profit from the rewards of his labour by selling licences in exchange for a set fee or royalty. However, this right is not unqualified. It is contingent upon both the conditions under which such a licence may be issued and the right of others to acquire a compulsory licence.

It was decided that a compulsory licence could be issued even if the public has access to the work and it is not kept from them. When the proprietor forbids a broadcaster from airing the work, this can happen. Refusing to provide permission entails requesting a high royalty or fee or placing unfair restrictions.

In *Supercassette Industries Ltd. v. Music Broadcast Pvt. Ltd.*,⁷⁴ The SC addressed the powers granted to the Copyright Board in Section 31. In cases where the owner of a copyright in a work has withheld it from the public, it was noted that the Copyright Board has the authority to direct the Registrar of Copyrights to grant the complainant a licence to “republish the work, perform the work in public or

⁷⁴ [2012] 50 PTC 225 (SC).

communicate the work to the public by broadcast, as the case as may be,” subject to payment of such compensation to the owner of the copyright and with such other terms and conditions as the Board may specify after giving the owner of the copyright in the work a reasonable opportunity to be heard, after conducting any necessary inquiries, and after being satisfied that the grounds for withholding the work are not reasonable.

The language employed in the Section makes it clear that a final decision will be made following a hearing and an inquiry to determine whether the reason for withholding the “work from the public” was legitimate or not. There is no indication that the Board has been given any authority to establish temporary arrangements, such as the granting of temporary obligatory licences, while a final decision on an application is pending.

As the single relief envisioned by Section 31 of the Copyright Act, the grant of the final relief is what is requested to be credited to the Copyright Board in the current instance. An interim relief giving the final remedy should only be granted after exercising extreme caution and in unusual and uncommon circumstances, even in cases covered by Order XXXIX Rules 1 and 2 and Sec. 151 of the Civil Procedure Code. Since the Copyright Board in this instance does not even have this authority, the issue of providing temporary relief through the issuance of an intermittent compulsory licence is not one that can be raised.

The petitioner in the case of *Pune Video Theatres Association v. Cinemaster*⁷⁵ is a group of video parlours in Pune that have a licence under the Maharashtra Cinema Regulation Act. The members’ line of work involves showing motion pictures captured on videotapes to the general public in exchange for remuneration. The copyright holders gave them permission to show the movies, and the members couldn’t show the movies without those holders’ approval. For exhibiting through TV and other channels, annual fixed licence fees of Rs. 20,000 and Rs. 30,000 were required to be paid. The Court further noted that more than 1200 films were

⁷⁵ [2002] 24 PTC 242 (CB) (Delhi).

permitted to be held by 75% of the video parlours functioning in Maharashtra. The plaintiffs argued that the fees levied by the owners were unlawful and that they were unable to show the video copies of the movie because it would have been unprofitable for them to do so given the licence cost. Any rights under Section 31 of the Act must be supported by evidence that:

- i. that the copyright holder has denied to permit performance of that work in public and as a result, the work is being withheld from the public;
- ii. the Board must be satisfied that the reasons for the owner's refusal are not reasonable; and
- iii. where the Board, after making the inquiry it deems necessary, is convinced that the circumstances call for issuing a licence to the complainant in exchange for payment of the compensation it may determine, it can grant a compulsory licence subject to the terms and conditions as it deems appropriate.

This section's goal is to grant a compulsory licence so the work can be published. In other words, the licence enables the public to use the work by allowing publication and public performance of previously unavailable works. The Court determined after looking into the facts that the complainant does not fit the description given in the provision. This legislative requirement's primary goal is to prevent the owner from making more money, not to serve the public. The Court has acknowledged that the creator has a significant claim on his creations and is entitled to profit from them in a legal manner. This clause is activated if the defendant conceals the films and refuses to permit them to exhibit them. The Board may be contacted by the complainant to use its authority and set a fair licence charge before giving them a licence. In this instance, the petitioners already held valid licences and had obtained authorization to screen all of the movies. The complainants cannot seek a remedy under Section 31 of the Act based only on the allegation that the fee is excessive because the films were not withheld from the public.

Chapter 5
COMPULSORY LICENSING’S LEGAL STATUS OF OTHER
COUNTRIES

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As the topic of international trade continues to gain strength, foreign impacts on domestic intellectual property law have been and will continue to become more and more inevitable. An important tool for regulating and facilitating trade, information, and knowledge in innovative and creative goods and services is the protection of intellectual property rights. It’s critical to understand the connection between intellectual property rights and global trade as the proportion of knowledge-based items in global trade increases.⁷⁶

Therefore, this chapter explores how nations have embraced and valued the notion of compulsory licencing within their copyright laws.

5.1. In the European Union, Compulsory Licensing: TRIPS Approach

TRIPS Agreement is a legal document that has been ratified by every member state of the European Union.

The TRIPS Agreement, which still stands as one of the world’s most carefully crafted agreements regarding intellectual property rights, was essential in bringing IPR into the realm of international trade. The terms of the TRIPS Agreement, which mention compulsory licencing in relation to intellectual property rights, including

⁷⁶ <<https://reports.weforum.org/global-agenda-council-2012/#view/global-agenda-council-2012/councils/the-intellectual-property-system/>> accessed on 25 June 2022.

copyright, in Article 31 of the agreement, are binding on all member states of the European Union.

With regard to the TRIPS Agreement, compulsory licencing is the right granted by the government to a private party to use copyrighted (or any other material that is recognised as IPR material without the permission of the copyright holder for an intended task and a specific time frame in a certain aspect after all attempts to acquire a voluntary licence have failed, with the exception of situations of national or extreme emergency. It is not necessary to have taken action to obtain a voluntary licence in such exceptional or national emergency situations. It would be reasonable to even directly issue a copyright compulsory licencing order. Additionally, individuals of all EU nations who engage into compulsory licence agreements are required to use copyrighted content only for domestic purposes, and copyright owners should be compensated for the licence depending on factors including the “economic value of the authorization.”⁷⁷

In the case of *Volvo AB v. Erik Veng (UK) Ltd.*⁷⁸ in Europe the United Kingdom law “authorized the granting of compulsory licenses when, due to the conditions imposed by the patentee on the grant of a license a market for the export of any patented product made in the United Kingdom was not being supplied, the working or efficient working of any other patented invention which made a substantial contribution to the art was prevented, or the establishment or development of commercial or industrial activities was unfairly prejudiced under article 48(3)(d) of the United Kingdom Patent Act as revised in 1977.”

In the European Union, “refuse to deal” on the part of the copyright or patent owners is a recognised justification for issuing a compulsory licencing. The European Court of Justice (ECJ) clarified how refusal to negotiate might be a justification for awarding a compulsory licence for the use of IP in its decision in the Magill case on April 6, 1995. In its ruling, the Court ruled that only Radio Telefis

⁷⁷ ‘Compulsory licensing in Copyright post 2012 amendment to the Indian Copyright Act, 1957’ (Law Wire) < https://lawwire.in/compulsory-licensing-in-copyright-post-2012-amendment-to-the-indian-copyright-act-1957/#_ftnref5> accessed on 27 June 2022.

⁷⁸ [1988] Case 238/87.

Eireann (RTE) and Independent Television Publications Limited (ITP) were the only sources of basic information on programme scheduling, which is a necessary input for creating a weekly television guide. The Court also ruled that RTE and ITP could not rely on national copyright provisions to deny providing that information to third parties. The European Court of Justice ruled that this reluctance to negotiate constituted an abuse of a dominating position in accordance with Article 86 of the Treaty of Rome rather than the exercise of a property right related to its particular subject matter.⁷⁹

Since RTE and ITP were the sole sources of the data needed to create weekly television programming guides in Ireland, the court argued that they maintained a dominating position in the market. By simply refusing to share the information, they were able to eliminate any secondary markets for weekly television guides and maintain their monopoly. The Court held that, without mitigating circumstances, it is not always possible to establish that a refusal to give a licence for the use of IPR constitutes an abuse of a dominant position. These instances included:

- the absence of a weekly television guide, either actual or projected;⁸⁰
- the presence of a particular, ongoing, and consistent need for such a guide;⁸¹
- the fact that by refusing to give Magill a licence to create such a guide, a new product that RTE and ITP did not give was prohibited from entering the market.⁸²

In 1995, the Belgium courts ordered two copyright collecting organisations to get a mandatory licence in support of two cable distributors whose request to transmit German Cable SATI programmes via cable had been denied. Abuse was considered to have occurred if authorization for a fair compensation was denied.⁸³

⁷⁹ Treaty of Rome, Article 86.

⁸⁰ 'Compulsory licensing in Copyright post 2012 amendment to the Indian Copyright Act, 1957' (Law Wire) <https://lawwire.in/compulsory-licensing-in-copyright-post-2012-amendment-to-the-indian-copyright-act-1957/#_ftnref5> accessed on 27 June 2022.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

5.2. Compulsory Licensing in United States of America

It is essential to analyse the compulsory licencing systems of India with the USA while discussing compulsory licencing in copyright. This allows for a comparison of commonwealth and federal systems and aids in gaining a comprehensive viewpoint.

In the United States of America, compulsory licencing is largely used in the music industry. In the USA, anyone, entity, or group may re-record and redistribute a song that has already been recorded and made available to the public without the copyright owner's consent so long as they provide the copyright owner with notice, pay the required fee for the redistribution, and only use the recording for non-dramatic purposes.

The US Copyright Office establishes a mandatory penalty that a third party using a copyrighted work without permission of the owner of the copyright must pay to the copyright owner. In 2017, the US Copyright Office set a statutory charge of 9.1 cents per song (or 1.75 cents per minute of the playing time)⁸⁴. This would imply that the copyright holder of a song should receive \$910 if a third party wants to re-record a three-minute song and re-distribute 100 cassettes of the same music.

Additionally, a third party may re-record and redistribute a musical work without the owner of the copyright's prior consent only if the musical work is not intended for dramatic uses, such as "in a drama, TV show, or opera." The third party must contact the copyright holder and get specific permission to re-record and disseminate the musical piece if it is to be utilised for theatrical purposes. In these situations, the owner of the copyright will choose the fee to be paid by the third party based on the terms of the contract they have made. However, in cases when the owner of the copyright is unable to determine the fee, he may report the issue to the US Copyright Office.

⁸⁴ Mechanical License Royalty Rates, <<https://www.copyright.gov/licensing/m200a.pdf>> accessed on 28 June 2022.

A fundamental aspect of compulsory licencing in the USA is that a third party may proceed without the express consent of the copyright owner, provided that the primary melody or the fundamental essence of the musical composition is not altered, however the payment of a fee is required. However, if the melody or the core of the musical composition is altered, the third party must request explicit consent from the copyright holder for the modification.

There have also been situations in the USA where compulsory licencing would not have normally applied in the particular case, but the US Courts normalised compulsory licencing through a court order and permitted the continuation of the use of the copyrighted song without the copyright owner's prior consent.

With its ruling *eBay Inc. v. MercExchange LLC*⁸⁵, on May 15, 2006, the Supreme Court disproved the notion that a patent or copyright can be automatically enforced as an exclusive right. The ruling focused on the first owner's capacity to secure remedies in cases of infringement rather than the purported rights under a patent or copyright.

The method of granting an injunction in patent matters is consistent with how injunctions are handled under the Copyright Act. A copyright holder has "the right to exclude others from utilising his property," just like a patent owner. The Copyright Act states that courts "may" provide injunctive relief "on such terms as it may deem reasonable to prevent or stop infringement of a copyright" similar to how the Patent Act does. In cases like *New York Times Co. v. Tasini* (quoting *Campbell v. Acuff-Rose Music, Inc.*) and *Dun v. Lumbermen's Credit Assn.*, the Court routinely rejected requests to substitute customary equitable considerations with a rule that an injunction follows a finding that a copyright has been violated.

The Court held "the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must

⁸⁵ 126 S. Ct. 1837.

be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards.”⁸⁶

The Court stated that under “well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief.”⁸⁷

A plaintiff must show that they have experienced the following:

- that they have sustained a harm that is irreparable;
- the legal remedies, such as financial damages, are insufficient to make up for the harm;
- that an equitable remedy is necessary given the relative burdens experienced by the plaintiff and defendant;
- A permanent injunction would not serve the public interest.

Following the eBay ruling, American courts have rejected numerous requests for temporary and permanent injunctions in patent disputes, as well as at least one request for a permanent injunction for copyright infringement.

Also in *Lorain Journal Co. v. United States*⁸⁸, the defendant, a newspaper corporation, held a dominant position in that field for a very long time. The only daily newspaper was that one. There was a large amount of regional and national advertising on it. Up until 1948, the publication held a monopoly on the widespread distribution of local and national news and advertising. The WEOL radio station’s local Lorain advertisers were identified by the journal by listening to their radio broadcasts. Contracts with the journal for those using the station were terminated, and they could only be renewed by stopping their advertising through WEOL. As a result, many businesses in Lorain County either stopped advertising or gave up on their efforts to do so. Whether the journal’s activities in this case breached Section

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ [1951] 342 U.S. 143

2 of the Sherman Act was at dispute. The newspaper was ordered to accept advertisements after the court granted the order since it was deemed an essential form of advertising. The court further declared that the claimed right, which was a right to conduct private business, was neither absolute nor exempt from restriction.

United States of America laws governing the compulsory licencing of copyright

According to Section 115 of the Copyright Act of 1967, after a phono record of a work has been distributed to the public in the United States with the permission of the copyright owner, and subject to certain terms and conditions of use, a compulsory licence is required to make and distribute phono records. Such a licence grants the required licensee the ability to deliver digital phono records of non-dramatic musical works via distribution or authorization of distribution of such records via digital transmission.

The steps that must be taken in order to apply for a compulsory licence have been outlined in detail by the United States Copyright Office. The process for notifying someone of their intention to get a compulsory licence for the production and distribution of phono recordings of nondramatic musical works has been outlined in Section 201.18 of the US Copyright Act, 1967. For the purpose of creating and disseminating phono recordings of nondramatic musical works, Section 37 CFR Part 210 specifies royalties and statements of account under a compulsory licence. Additionally, Section 115 specifies the mechanical licence royalty rates.

If specific extraordinary circumstances apply, a Notice of Intention (NOI) may be sent to the Licensing Division of the Copyright Office in accordance with the process outlined in Section 115 and 37 CFR 201.18. Such NOIs must be delivered to the office either digitally or on paper.⁸⁹

⁸⁹ 'Compulsory licensing in Copyright post 2012 amendment to the Indian Copyright Act, 1957' (Law Wire) <https://lawwire.in/compulsory-licensing-in-copyright-post-2012-amendment-to-the-indian-copyright-act-1957/#_ftnref5> accessed on 30 June 2022.

Chapter 6

COMPULSORY LICENSING AND PUBLIC INTEREST

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6.1. Concept of Public Interest

We are familiar with the term “public interest” since we frequently hear or see it in the news or on television. The role of government is frequently defined as serving or advancing the general welfare. In addition, most individuals would choose the former if asked “whether public policy should be in line with the public interest or with corporate interests.” But what does it mean to define the public interest? Most political scientists would agree that it is impossible to provide the concept an objective definition that is widely agreed, especially in substantive terms. As a result, the public interest is frequently portrayed as a myth by which legislation, no matter how particularistic, can be justified as being in the general interest and therefore made more popular.

Let’s think about the following issues first before attempting to determine what the public interest is, since this will be beneficial to us. The majority’s interests or the public interest? If so, how can we figure out what kind of policy the majority actually favours? If so, is it in the interests of consumers, who make up a sizable group? If individuals “thought clearly and acted logically,” is that what they would want? So forth. According to the wide range of people who appreciate it, some theorists differentiate between two types of interest: “public interest and private interest.” In contrast to private interest, which relates to an utility that only certain members of society obtain, public interest denotes a benefit enjoyed by all or the majority of individuals. The term “public interest” does not necessarily imply that

all people in society can benefit from it; rather, it may simply imply that the majority of people can. In this context, “society” can apply to an entire world, a country, a province, etc.

The fundamental definition of public interest is the acknowledgment, defence, and advancement of the rights and wellbeing of the populace. There is no agreement on how to define the public interest, regardless the accomplishment of collective well-being and public welfare.⁹⁰

When defining public interest, Justice Bhagwati said the following, which is quoted: “Redressing public injury, enforcing public duty, protecting social, collective, ‘diffused’ rights and interests or vindicating public interest.”⁹¹

As quoted by RIAA’s Neil Turkewitz “Copyright protection advances the public interest, and good public policy must properly consider the role of intellectual property as a tool for economic emancipation, a catalyst for cultural diversity, and a powerful protector of individual dignity and fundamental human rights,”⁹²

6.2. Copyright and Public Interest

In the information economy of today, anything with a commercial value is protected by IPRs in one way or another. IPRs are monopolistic rights that give the owner of an IP right the sole ability to commercially utilise their IP. In other words, such rights prohibit or limit the use of such IPRs by third parties without the permission

⁹⁰ Rishika Taneja and Sidhant Kumar, *Privacy Law Principles, Injunctions and Compensation* (Eastern Book Company, 2014).

⁹¹ S.P.Gupta v. UOI AIR 1982 SC 149

⁹² ‘Inside Views: Copyright And The Public Interest: Not Necessarily Competing Forces’ (Intellectual Property Watch) < [79](https://www.ip-watch.org/2015/07/07/copyright-and-the-public-interest-not-necessarily-competing-forces/#:~:text=By%20Neil%20Turkewitz%2C%20RIAA%20Copyright%20protection%20advances%20the,and%20fundamental%20human%20rights%2C%E2%80%9D%20argues%20RIAA%E2%80%99s%20Neil%20Turkewitz.> accessed on 1 July 2022.</p></div><div data-bbox=)

of the right holder. However, legislation in many nations, including India, do make some exemptions to such exclusive rights in the benefit of the general people.⁹³

Creators of “literary, dramatic, musical and artistic works and producers of cinematography films and sound recordings” have a legal privilege known as copyright. In actuality, it is a collection of rights that includes, among other things, the rights of “reproduction, communication to the public, adaptation and translation of the work”. Depending on the work, there could be a few minor differences in how the rights are composed. The nature of the protected work determines the extent and length of the protection offered by copyright law. These rights are established by law. Copyright can be transferred.

First with regards how these rights were established. Someone must generate “original literary, dramatic, musical and artistic works and produce cinematographic films and artistic work” in order to have copyright protection. Work cannot be covered by copyright protection if it is not original. Creation and production are safeguarded by copyright. Without this protection, the author or producer will incur losses. They will feel duped because these kinds of works also have emotional and artistic significance. The effective protection of creators’ rights is required to foster and safeguard creativity. Copyright has another branch, most of the times the author may not be the owner of the copyright and may have granted copyright to another party. These other copyright holders will likewise experience financial losses in the absence of any protection against unlawful use.

If we use the phrase “copyright” in another way, we mean the owner of those rights. These are individual liberties. These rights signify individual interests. How to strike a balance between copyright and public interest is now under issue. First, it’s important to comprehend Public Interest in this context.

In terms of copyright, “Public Interest” refers to the general public’s access to “literary, dramatic, musical and artistic works and cinematography films and sound

⁹³ <<http://www.lex-warrier.in/wp-content/uploads/2019/02/Public-interest-issues-in-copyright.pdf>> accessed on 1 July 2022.

recordings.” In general, if a copyright owner is compensated fairly and his legitimate criteria are met, he will never refuse access to protected work. However, there are situations when the owner of the copyright may refuse to permit republication, republishing, or public performance of the work, keeping it from the public as a result. When this happens, the public suffers as a result of the owner’s actions. It may occur when the creators deny to consent to the public’s communication of the work by broadcast or, in the event of a sound recording, the work contained in the recording on conditions that the complainant deems reasonable. A overly stringent interpretation of the copyright protection concept impedes the social, economic, and cultural advancement of a society.

In these circumstances, it becomes imperative to safeguard the “Public Interest” while respecting the copyright holder’s rights. Without the explicit consent of the copyright holders, “a fair deal of research, study, critique, review, and news reporting, as well as the use of works in libraries, schools, and legislatures,” are permitted. Some exceptions to the rules for certain uses of works protected by copyright have been established in order to protect the interests of users. The following are some uses of the work that are exempt:

- i. for the purpose of private study or research,
- ii. for comment or evaluation,
- iii. for covering current affairs,
- iv. in relation to a legal procedure,
- v. performed by an amateur group or society if it is delivered to an audience who is not paying, and
- vi. the production of sound recordings of musical, theatrical, or literary works under specific circumstances.

6.3. Significance of Compulsory license under public interest

Any system of IPR must strike a balance between encouraging and rewarding the right holder on the one hand, and facilitating access to, wide distribution of, and

adoption of the results of invention and innovation on the other. Therefore, the task is to establish and optimally balance the interests of the innovator or creator with those of society. Without relevant and suitable constraints and exceptions, the grant or exercise of rights without restriction has major negative long-term effects that affect not only development priorities but also the creative and innovative itself. Users, creators need the right amount of access, and users, who are also potential creators, need the right kind of incentive system. Compulsory licencing is enabling positive concept that make sure that IP law achieves its main goal of advancing important facets of the public interest. Compulsory licencing allows the public to utilise material that would otherwise be protected by IPRs in a variety of socially beneficial ways, which directly promotes fresh creation and economic growth.

Therefore, whether in common law or civil law countries, the concept of compulsory licencing to IP is at the very core of the ratio *legis* of legislation of all IP laws. “While IP grants corresponds to a monopoly that society grants to authors or inventors over their creative work, compulsory licencing to these exclusive rights appear to be a form of *quid pro quo*, allowing individuals, under certain conditions, to use a work without requiring authorization from the owner of the right, which shows that in granting the owner a monopoly, account has been taken of the need to balance the interests of both parties, namely the right holder and society, which undertakes to protect the author’s or inventors creative work.”

The legislative and judicial response towards compulsory licencing was extremely important and delicate for each and every IP system, while remaining the basic aspect and pillar of IPR.

We exist in a world where intellectual property laws like copyright impede development and the general benefit of society. Countries would advance at a fantastic rate, and the general public would gain, if the entire potential contained in all works protected by intellectual property could be released. As a result, courts frequently rule against the authors of works protected by copyright in favour of their users. This is done to further public interests, such as facilitating easy access to and use of works protected by copyright. However, in order to help the public profit

from the creations of intellectual property, compulsory licences have been included in international accords.

The importance of compulsory licencing of works is primarily for the benefit of the general people. Compulsory licencing of copyrighted works is crucial for a number of reasons, including the fact that it gives people access to works that have been unfairly kept out of the public domain. The public has access to it, allowing for a variety of productive and educational uses. As is well known, it grants licences for a variety of works, including orphan works and works created by individuals with disabilities.

It is particularly significant because, in circumstances of unpublished works when the author passes away before the work is published, compulsory licencing may be obtained, allowing the work to be placed in the public domain. Any person may ask the board for a licence to publish an unpublished work because it may have writers who are unknown, deceased, or who cannot be located.

The recent decision in the case of *Music Broadcast Pvt Ltd vs. Phonographic Performance Ltd* at the Copyright Court seems to indicate that the Buggles may have been a little too quick to predict the untimely demise of the radio. The Board determined that it was in favour of giving compulsory licences under Section 31(1)(b) of the Copyright Act of 1957 to FM radio company complainants against music publishers like Phonographic Output Limited in order to cover nine cases (PPL). In light of this, Section 31(1)(b) grants the Board the power to grant compulsive licences if it is persuaded that the copyright holders have refused to allow the public to report the work and that such a refusal is unfair. The licensee would also be required to cover costs, abide by the Board's rules, and pay the licensor's fees in accordance with the agreed-upon terms.

In this instance, the question at hand was whether the FM radio industry may require obligatory licences for songs owned by music providers like PPL. This was founded on the idea that the latter was unfair in demanding expensive prices from

FM radio station vendors for songs owned by the latter, which in turn affected the general interest of the public.

The government's plan to involve the private sector in FM radio transmission in the years after the start of the first privatisation process in 1999 led to the development of the public interest justification. It was clear that the government wished to support the expansion of private FM radio broadcasting as a social engineering platform for the dissemination of knowledge, education, and entertainment to India's most rural regions. Interestingly, the Board concurred that while being set up as for-profit businesses, FM radio stations today had a social responsibility to support national development. In order to support the industry, the government itself had switched from the onerous fixed licencing fee structure to one where 4 percent of the government's overall revenue was to be provided.

It was questioned if radio station airing was in the public interest as well as whether the fees paid by the rights providers were reasonable. The Board examined the respondent music providers' claims, but ultimately decided not to take them into consideration. The Board first ruled that it was improper to compare the price of programmes for TV broadcasters and radio service providers. While the latter could and did charge the viewers, the former was required to be a "free to air" programme by the Government Directive (where it does not charge any public subscription). Additionally, it was discovered that the comparison of the royalties paid on All India Radio (AIR), a state-owned organisation, and FM radio enterprises in the private sector, was totally incorrect. For decades, AIR had virtually controlled the radio industry and was able to collect royalties. However, the fledgling FM sector, which was already losing money, found it challenging to pay the hefty royalty rates of 14–15% demanded by music suppliers, especially given that, unlike AIR, it had too many restrictions on the kind of content it could broadcast.

The music producers also made a concerted effort to argue that playing their music on radios would negatively impact the sales of their music on physical media like CDs and cassettes. The Board properly noted, however, that the respondents had not attempted to ascertain how much of the reduction was attributable to

emerging multimedia formats, including piracy. In fact, the complainants' counterargument appeared to imply that the radio stations' popularisation of music would benefit the music business.

The Board concluded that the music providers' fixed royalty arrangement would result in reduced public access to the work given that radio service providers are operating at a loss and have few options for earning cash due to restrictions. The "needle per hour" principle, which determines the licence price irrespective of the size of the radio service providers and their reach, was ineffective and unfair (listeners and advertisers). The Board determined that the licensee's willingness to pay should be compared to the advertising revenue it produces.

The Board determined that, given that the radio service providers, while being for-profit businesses, operated within the framework of the government's social development strategy, the only appropriate licence fee model was for the music providers to charge a predetermined proportion of net advertising revenue. The Board contends that in actuality, more broadcasters would be eager to participate in the nationwide venture that would increase revenue, which would result in significantly more income for music suppliers.

Based on the aforementioned justification, the Board established a set of terms and conditions and directed the Registrar of Copyrights to grant licences to the complainants under a revenue-sharing model that would set aside 2% of each FM radio station's net advertising revenues for music providers to pay. While the ruling is undoubtedly favourable for the FM radio industry, it is unclear if it will contribute to the realisation of the public interest function upon which the ruling was predicated. On his way to work, the average city resident will undoubtedly be able to listen to his daily dose of "top 10 90s hits," but it is unclear whether this will genuinely encourage the growth of the private radio sector in tribal or rural areas, where the cash garnered is likely to be smaller.⁹⁴

⁹⁴ < <https://www.sonisvision.in/blogs/post/compulsory-licensing-under-copyright-law> > accessed on 5 July 2022

The primary goal of compulsory licencing is to make the work accessible to the public so that people may use and profit from it for various purposes. It is also crucial to remember that the work should be used fairly and that no unethical behaviour should be engaged in. With some restrictions, making copyrighted works accessible to everyone can improve national progress. Much work needs to be done to educate the people about India's rules governing the compulsory licencing system in order for the country to realise its full economic potential.⁹⁵

⁹⁵ < https://advocatespedia.com/Significance_Of_Compulsory_Licensing_Under_Copyright_Law > accessed on 5 July 2022.

Chapter 7

CONCLUSION AND RECOMMENDATIONS

Any system of IPR must strike a balance between encouraging and rewarding the right holder on the one hand, and facilitating access to, wide distribution of, and adoption of the results of invention and innovation on the other. Therefore, the task is to establish and optimally balance the interests of the innovator or creator with those of society. Without relevant and suitable constraints and exceptions, the grant or exercise of rights without restriction has major negative long-term effects that affect not only development priorities but also the creative and innovative itself. Users, creators need the right amount of access, and users, who are also potential creators, need the right kind of incentive system. Compulsory licencing is enabling positive concept that make sure that IP law achieves its main goal of advancing important facets of the public interest. Compulsory licencing allows the public to utilise material that would otherwise be protected by IPRs in a variety of socially beneficial ways, which directly promotes fresh creation and economic growth.

We exist in a world where intellectual property laws like copyright impede development and the general benefit of society. Countries would advance at a fantastic rate, and the general public would gain, if the entire potential contained in all works protected by intellectual property could be released. As a result, courts frequently rule against the authors of works protected by copyright in favour of their users. This is done to further public interests, such as facilitating easy access to and use of works protected by copyright. However, in order to help the public profit from the creations of intellectual property, compulsory licences have been included in international accords.

Copyright and literary properties are monopolies, which entitle the owner to prohibit various kinds of production. The copyright monopoly, nonetheless is not without boundaries, henceforth it only creates a limited monopoly in the sense that it protects the owner only from unauthorised copying by others. With respect to the

impact of a compulsory licensing, scholars believe such a license can foster a country to greater heights. The immediate public access to creative works which is a goal of compulsory licensing conflicts with the dominant policy goals of the limited monopoly in copyright. For instance, if the limited monopoly policy applied to sound recordings, no one could record a composer's work without an express license.

The copyright law aims to strike a balance between the public's interest in having access to the works on the one hand and the interest of the copyright owner in safeguarding his work on the other. The scope of the owner's rights to protection in relation to the public interest and the work for which he has acquired copyright depends on the legal provisions.

On the basis of the aforementioned analysis, it can be said that compulsory licencing has evolved into a standard aspect of the modern world and has been applied to IPR, including copyright and patent. Developed countries have taken a very active role in defending rights by relying on licences to restrict exclusive rights and stop or offer redress for unfair conduct in a number of fields. The government may issue forced licensure in a number of fields in both developed and developing nations.

Recent legal revisions demonstrate that the compulsory licencing system is not very ancient and has undergone recent evolution. Although recent case law has revived the use of compulsory licencing in copyright-related domains, this does not negate the system's ability to affect the behaviour of copyright owners. The system's vitality would seem to suggest that it is a resource that may be helpful in a variety of situations to lessen the constrictive impact of exclusive rights and find a middle ground between the title-holders' interests as well as those of public in the dissemination of knowledge and the access to, and affordability of, the results of innovation and creativity.

The international agreements only mention the granting of compulsory licencing when specific requirements are met, such as the creator having been properly

informed and an offer for the payment of compensation or royalties having been made in accordance with the agreement; they do not contain any strict provisions regarding the implementation of compulsory licencing.

According to the researcher, the system of compulsory licencing is a crucial component of the copyright law. Without the compulsory licencing scheme, writers would have total control over their copyrighted works and the public's access to information would be severely constrained. The mandatory licencing system is not, however, always advantageous. There are certain issues with its applications.

It should be noted that India's compulsory licencing system has been successful so far since the Copyright Board of India and the Judiciary have a good working relationship. Because conditions are always changing, compulsory licencing is a crucial step toward improving the copyright regime

The courts determined in *Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd.*⁹⁶ that the absence of a compulsory licencing order in copyrights requires the existence of an unreasonable and complete restriction on public awareness in order to be enforced. The researcher, however, believes that this requirement for irrational and complete secrecy to the public is a very strict prerequisite for the execution of compulsory licencing. There should be the option of offering a compulsory licencing as long as it is sufficiently demonstrated that fair use has been hindered.

According to the TRIPS Agreement, a party may approach the Copyright Office for a compulsory licence and it will be granted in any situation when attempts to obtain a voluntary licence have been made but have not been positively reciprocated. This TRIPS Agreement clause has expanded the parameters for obtaining a compulsory licence. In order to ensure that more parties may profit from compulsory licencing and that they do not have to wait for the existence of a severe state of unjustified and absolute restraint to become known to the public, Indian law must follow a similar strategy.

⁹⁶ Civil Appeal 5114 of 2005, Supreme Court of India

Furthermore, copyright licencing cannot be granted in the form of an interim order; rather, it can only be granted in the form of a final order in the relevant case, according to Indian courts' positions in a number of cases, including *Reliance Broadcast Network Limited v. Super Cassettes Industries Limited*⁹⁷ and *Super Cassettes Industries Limited v. Music Broadcast Pvt Limited*⁹⁸. Once more, this limits the application of mandatory licencing in India. In the proper sequence of events, interim instructions are granted; they may or may not be formalised in the final orders. However, they do offer the concerned parties temporary relief. There are no drawbacks in allowing compulsory licencing to be issued in the form of an interim order. The court may revoke the judgement and ask the party who received the interim order to fairly compensate the aggrieved party if additional examination of the matter reveals that the interim order was wrong. However, if the interim order issued is accurate, it may save the recipient of the interim order time and money because he has not forfeited his right to a compulsory licence while the trial is pending, which in India may be a laborious and protracted procedure.

⁹⁷ Civil Appeal Nos.4196-4197 of 2012 arising out of SLP(C) Nos.26581-26582 of 2011.

⁹⁸ [2012] 50 PTC 225 (SC).

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