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ORPHAN WORKS DILEMMA: TRACES FROM COPYRIGHT HISTORY OF US

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Introduction

Copyright is territorial laws which protect the creative contribution of an author against the unauthorized uses within the territory of the country. There is no such thing like 'International Copyright Protection'. However the nations protect the works of foreign origin with their domestic law being a part of international copyright treaties and conventions. The Berne Convention for the Protection of Literary and Artistic Works[2] is the most important international treaty that addresses international protection for copyright. It is considered as the base of modern copyright law. The idea of automatic protection introduced first in the Convention. Before the Berne Convention the copyright was just a territorial protection based on strict registration formalities. Marketing the creative works in foreign market was a tough task in the beginning. Later with the development of technology and international trade relations the protection of works in foreign country became a concern. The Berne Convention came as result of pressure from the part of author community.[3] Majority of the countries were not interested in implementing the Berne provisions in their domestic law in the beginning.

With all good changes the Berne Convention created a new problem- orphan works. The problem of orphan works that is copyrighted works whose owners cannot be located by a reasonably diligent search (David et al 2013) is by product of automatic protection. The 'orphan' status limits the commercial utility and the access to that work. Orphan work becomes a problem when a user desires use the work but she cannot identify or locate the owner of copyright. Use without permission amounts to infringement and the

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[2] First accepted in the year 1886.

[3] The Berne Convention was developed at the instigation of Victor Hugo of the Association Littéraire et Artistique Internationale.

threat of reappearance of copyright owner and the legal consequences prevent the user from using the orphan works. It results in the denial of access to many works which are of commercial, educational, social and cultural value. The issue of orphan works arose after the Berne Convention for the Protection of Literary and Artistic Works as it removed all the formalities required for getting the copyright protection. It is a ubiquitous issue in international copyright law.

Compared to other countries, the orphan works issue is more complicated in US. Their reluctance to withdraw from earlier copyright policies for a considerably long term is noticeable. This is an attempt to find out whether it is a reason for the orphan works issues in US. The paper is an analysis of roots of orphan works issue in the United States. It discusses how their policies on protection of foreign works and the late implementation of Berne Convention and the later developments contribute to the orphan works issue.

Background of U.S. Copyright Law

After the European settlement, America took time to become a self-reliant country. They were dependent on European countries for everything. They gradually developed their industries, creative sector and all other social field under the shade of European development. They owned nothing as their tradition or culture. So copyright had no role in America in the initial period. Later in 1790, they enacted their first ever copyright law[4] under the power granted by the US Constitution.[5] The act was a duplication of the Statute of Anne. In that copyright act there was a specific provision stating that "the author or authors of any map, chart, book or books . . ., being a citizen or citizens of these United States, or resident therein,.. .shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books..." (Copyright Act of 1790) The provision expressly excludes foreign authors from the coverage of copyright protection. The exclusion of foreign work from the protection was not a big thing because every country provided protection only for their domestic

[4] The protection was strict formality based. Authors were required to register their works with the clerk's office of the district court where they resided and to publish a record of the registration in one or more American newspapers for a period of four weeks. Within six months of publication, they were required to deposit a copy of the work with the Secretary of State. If they desired a second term of protection, they were required to record and publish a second time within the six-month period leading up to the expiration of the initial term.

[5] In 1789, US constitution came into force. The Constitution grants Congress the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" under Article I, section 8, clause 8.

creations. There was nothing wrong in that because it was for keeping the balance of trade which may affect by the increase in royalty for the foreign authors and publishers (Ochoa, 2014). Confirming the exclusion of foreign works from copyright protection, a proviso included under the section which permits free sale, reproduction and distribution of works of foreign origin in U.S.[6]This was to enable the free copying and dissemination of works of foreign origin and to make it available in the US market for a cheap price (Ochoa 2014).[7] In 1831 the US Congress made a revision to the copyright law which extended copyright term[8] in order to provide American authors equal protection as those in Europe. The protection of foreign works wasn't a consideration for this revision.[9]

As we discussed nations those have copyright law only protected their work under their copyright law. However in the beginning of the 19th century European countries started entering into bilateral treaties with other countries to provide copyright protection on the basis of mutual reciprocity (Peter 2004: 323). The agreements made with relatively equal countries in order to balance the trade of copyrighted works. In 1852, France started providing unilateral copyright to all authors irrespective of nationality (Yu, 2004: 335). It was to encourage other countries to provide similar protection to the French authors.[10] The countries' interest of protecting foreign works increased with the growth of trade of copyrighted materials between them. They realized that the only way to protect their work in a foreign territory is to protect that country's works in their own jurisdiction. All these development led to the formation of Berne Convention. The Berne Convention adopted in 1886. US participated in the diplomatic conference that adopted the Berne Convention, but they chose not to participate in the convention. The reason was, that time the number of copyrighted quality works produced by the US was very less in number. Protection in a reciprocal manner was not economically beneficial for them. The payment as royalty to the foreign authors would be very high and they

[6] Nothing in this act shall be construed . . .to prohibit the importation or vending, reprinting, or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States.

[7] Tyler T. Ochoa, Copyright Protection for Works of Foreign Origin (2014)

[8] The term of protection of copyrighted works was extended to twenty-eight years with the possibility of a fourteen-year extension.

[9] In 1870, the charge of processing registrations and deposits shifted from the district court's clerk's offices to the Library of Congress. The revision did not extended the copyright term or formalities for the protection.

[10] The movement authors for the protection in the leadership of Victor Hugo started in France.

were not in a position to balance it with the royalty of their works. Above this, they promoted the free use of foreign works within their territory. They reproduced the foreign works without permission and marketed it at cheap price. The copyright law legalized such unauthorized uses. The European countries consider copyright as the authors natural right to earn benefit from their own work, at the same time US provide protection based on utilitarian theory that consider the copyright as an incentive for the encouragement of creation and dissemination of works (Ochoa 2014: 170).[11]

The idea of international copyright protection came after the Berne Convention. The Convention brought total change in the copyright law. It introduced the idea of automatic protection to all works of authorship. It eliminated all kind of formalities for the protection of works. And provided protection for literary, scientific and artistic domain, whatever.., the mode or form of its expression, irrespective of whether it is published or not. The minimum term of protection extended to life of the author plus fifty years. It made the copyright protection independent of the protection mechanism of the country of origin.[12] And according to the convention a work may be eligible for protection if an author from a non-member country either publishes in a country of the Union or publishes simultaneously in a country within the Union and one outside of the Union[13].

From the adoption of Berne Convention, the orphan works problem started. The elimination of registration, extension of scope of protection term extension, idea of international protection all contributed to the orphan works problem. At the beginning only few countries adopted the convention. US was one of the country that didn't make any change in the domestic law to in tune with the convention. Throughout the 19th century, foreign authors' especially British authors approached the US Congress many time for extending the protection to their works. However the petitions of the foreign authors remain unheard and they carry forward the restrictions for hundred years. When some of their authors got international prominence they started thinking about

[11]A reflection of this could beseen in U.S legislations, which is known for the absence of moral rights.

[12]Article 3 of Berne Convention: (1) The protection of this Convention shall apply to:.. (b) authors who are not nationals of one of the countries of the Union, for their works first published in one of those countries, or simultaneously in a country outside the Union and in a country of the Union.

[13]Article 3(1) and (4) of Berne Convention.

(4) A work shall be considered as having been published simultaneously in several countries if it has been published in two or more countries within thirty days of its first publication.

protecting others works in order to get protection for their works and the authors who got international recognition added their voice with the foreign authors. That is clear from the words of C. William Verity who was the secretary of Commerce in US (Orrin 1989: 171-178) "for most of our first century of nationhood, we were takers." We stole what others created. Nobody could match us in our disdain for the rights of foreign authors such as Dickens, Thackeray, or Gilbert and Sullivan. But we soon learned that our behavior came at a cost as other nations denied our own authors the rights we had denied theirs. When nations behave that way, all of them are net losers".[14]

The changes started in 1891; they adopted the International Copyright Act of 1891 also known as Chace Act.[15] After the long hundred years, the Act extended copyright protection to citizens and residents of foreign nations in reciprocal basis.[16] The copyright protection granted to the foreign author on condition that the work should be 'printed from type set within the limits of the US' on or before the day of publication in its country of origin'.[17] This provision is known as 'manufacturing clause'. The manufacturing clause was an additional requirement for the foreign works along with all other formalities required for the copyright registration. The foreign authors whose countries granted substantially equal protection to the US authors were still required to print their work in the US to protect their work. The reciprocity was not absolute because of this provision. The act was widely criticized for the manufacturing clause. The manufacturing clause helped US to keep the works of foreign origin in the public

[14] See The Berne Convention: Hearings Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary, 100th Cong., 2d Sess., 70-77 (1988) [hereinafter Hearings, 100th Cong.] (statement of Commerce Secretary C. William 22 *Cornell International Law Journal.* 171 (1989).

[15] As a direct result of the Chace Act, the U.S. quickly entered into reciprocal copyright agreements with its major European trading partners, including the United Kingdom, France, and Germany.

[16] The statute provided that: *"…this act shall only apply to a citizen or subject of a foreign state or nation when such foreign state or nation permits to citizens of the United States of America the benefit of copyright on substantially the same basis as its own citizens; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States of America may, at its pleasure, become a party to such agreement. The existence of either of the conditions aforesaid shall be determined by the President of the United States by proclamation . . ."*

[17] International Copyright Act 1891,"Provided, That in the case of a book, photograph, chromo, or lithograph, the two [deposit] copies. . .shall be printed from type set within the limits of the United States, or from plates made therefrom, or from negatives, or drawings on stone made within the limits of the United States, or from transfers made therefrom. During the existence of such copyright the importation into the United States of any book, chromo, lithograph or photograph, so copyrighted, or any edition or editions thereof, or any plates of the same not made within the limits of the United States, shall be, and is hereby prohibited [with certain exceptions]."

domain. In that period it was not possible for all foreign authors and publishers to comply with the manufacturing clause. In effect the first International Copyright Act of US did nothing to protect international works. The Act incorporated another formality that every published copy should have a copyright notice. The works published without copyright notice wouldn't get copyright protection. The manufacturing clause was inserted in order to satisfy the American publishers who opposed extending protection to the foreign works.

The next revision happened in 1909. The manufacturing clause amended in this revision. The act extended the time for registration for the foreign books or periodicals in the Copyright Office to 60 days from the publication abroad and granted four months for starting manufacturing of the work in US after the registration.[18]The registration is ad interim, if the foreign authors fail to print an American edition within 6 months of first publication abroad, US copyright protection was irretrievably lost. Even if it was helpful for the foreign authors it gave American publishers time to release an authorized edition. And two major changes made to the manufacturing clause in 1949 amendment. The period for ad interim registration of a book or periodical in the English language was extended from 60 days to 6 months after first publication abroad and permission was granted to import 1500 copies during the 5 years after first publication abroad after the publication in US (Columbian Law Review, 50(5)(May,1950)). Except these small changes US didn't deviated from its policy towards the protection of foreign works during first half of 20th century. The manufacturing clause and the strict formalities kept all most all of the foreign works outside the sphere of copyright protection. All that work fell into public domain and the publishers of America used that works without permission and without paying royalties.

In the 2nd half of 19th century, the situation changed. The after effects of world wars reflected in every sector. US emerged as superpower. The technological and industrial sector flourished and they became leading international power. They got prominence among the world. Developments in the industry and software sector upturn their interest in IP. The technological developments made severe impact on copyright. The means for infringements increased with the technology. The software copyright was also a concern for the US. A change in the existing copyright system which is insufficient to address the new problem became necessary. Along with this the changes happened in the

[18] Copyright Act of 1909: (1) registration of the book or periodical in the Copyright Office within 60 days of publication abroad; (2) manufacturing of the work in the United States within 4 months after that ad interim registration.

international relations was tremendous. US wanted to be part of all international negotiations, and trade relations. However the other prominent countries were displeased with the method of protecting foreign works and their remoteness from the Berne policy.

To overcome all this criticisms and disputes US revised its Copyright law in 1976. The intention was to bring US copyright law into accord with the international standards. The provisions of the act were parallel to the Berne provisions. The 1976 copyright Act abolished the renewal and registration requirements for works created prior to 1978. Automatic protection provided to all works fixed in a medium. Registration is required only to bring infringement suits. However they retained the copyright notice requirement for published copies and extended the notice requirement to all copies of the work, published anywhere in the world.[19] One of the major changes was that the extension of copyright term. The protection term fixed to life of the author plus fifty years as required under the Berne Convention. And the Act reformed the scope and subject matter, exclusive rights, copyright infringement, fair use and other exceptions etc. from the past policies. It was not an implementation of Berne provision but the 1976 act raised the standard of their copyright law similar to the Berne Convention.

This was the first time US awarded automatic formality free protection. It extended copyright protection to the unpublished works also. It provided protection to the foreign works as equal to the domestic works. It was the point where the actual orphan works problem started in US. The act was proactive in nature; it was applicable to the works created after 1978.[20] Extremely long terms, high statutory damages, and removal of formalities for copyright protection by the act created the possibility of orphan works. The protection to the unpublished work also contributed to the issue. The statistics says that a large part of orphan work is unpublished works. Nature of protection given to already existing works registered under the 1909 Act, did not change. The renewable term of the works automatically got renewed. The problem created by the act was future. The proactive nature of implementation of the act reduced the chances of orphan works possibilities.

[19] Section 401 of the 1976 Act stated: *"Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section shall be placed on publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device."*

[20] On or after January 1, 1978, the effective date of the 1976 Act

International Copyright and the United States

After Berne Convention, many other copyright cooperation agreements came into effect and also the countries entered into bilateral and multilateral treaties between themselves. Even though U.S. was not interested to participate in Berne they participated in some other international copyright treaties.

One of them was Buenos Aires Convention. US became party to Buenos Aires Convention in 1911. It was before the major amendments made to the US copyright law. That time US was giving protection for shorter term. The US finds it more convenient for them than Berne Convention. The terms of the convention was more favorable for the policy that followed by the US. The majority of the parties were Latin American countries. Among them US has an upper hand. It was to provide mutual recognition of copyrights where the work carries a notice containing a statement of reservation of rights. Copyright protection under the Convention is granted for the shorter of the terms of the protecting country and the source country of the work. The provision allows that signatory countries can limit the duration of copyright they grant to foreign works under national treatment, to at most the copyright term granted in the country of origin of the work. The provisions of the convention were in tune with the existing copyright system of US, so they could enter into the convention without making much change to their law. And it also helped them to deal with the other member countries with their copyright law.

The next international treaty in which US was a party is the Universal Copyright Convention (UCC, 1952). The UCC was developed by United Nations Educational, Scientific and Cultural Organization (UNESCO) as an alternative to the Berne Convention. The states disagreed with terms of the Berne Convention joined UCC with the intention to participate in some form of multilateral copyright protection. US became a party in 1955. The UCC permits those states which had a system of protection similar to the United States for fixed terms at the time of signature to retain them. It is the important copyright document after the Berne convention. Like Buenos Aires Convention, the participants in the convention were Latin American countries and some other developing countries. The members of Berne Convention were the Western, developed, copyright-exporting nations, and they benefited from the strong copyright protections granted by the Berne Convention. The other set of countries that were not ready to that strong protection became parties to the UCC along with US. Some of the Berne countries were also participated in UCC in order to protect their works in the

non-Berne countries. UCC allowed continuing copyright formalities; their standards were similar to the US standard.

With these two Conventions and other bilateral agreements US tried to protect their works without signing Berne. At that time the demand for American works in the developed countries was very less and in US they were using the works from the European countries especially from England. Their market was Latin American countries and other developing countries. This was their reason to be part of these conventions when they decided not to participate in Berne. The participation in these conventions helped them to maintain beneficial trade relation with the member countries, without changing their domestic law and the impact of these conventions in the copyright law was almost zero.

United States and Uruguay Round Agreement

After the mid twentieth century, US was seriously considering the acceptance of Berne Convention for the protection of their works in the foreign countries. The participation in other treaties and the 1976 Act were part of their preparation.

After the World War II, International trade negotiations became stronger. GATT[21] was one of the strongest multilateral trade agreements discussing promoting the international trade by reducing or eliminating the trade barriers like tariffs and quotas. US signed this agreement in 1948 and also actively participated in its rounds. The discussion for an intergovernmental body for the regulation of international trade continued even after the failure of ITO[22] negotiations. In Tokyo Round the discussion for the formulation of the trade regulation body was strong and from the discussions it was clear that the establishment of such a system is not so far. The copyright Act 1976 enacted during the Tokyo Round discussion. They knew that for participating in a trade international trade regulating body, their law should be internationally acceptable. Even though they were not ready for accepting Berne Convention, they had no other option. The dilution of policy was the result of international pressure and their interest in participating in the trade agreements.

[21] General Agreement on Tariffs and Trade (GATT) 1947.

[22] International Trade Organization was a proposed international institution for regulating the international trade.

The Uruguay Round started in 1986, in which the creation of World Trade Organization got finalized. Immediately after commencement of Uruguay Round, US started planning accepting Berne Convention in hurry. US enacted Berne Convention Implementation Act in 1988, during the Uruguay Round. Still the provisions of the act weren't sufficient to implement the whole Berne Convention. They eliminated formalities for the protection of copyright and provided equal protection to the foreign works but they omitted some of the provisions of Berne. The Berne Convention entered into force in the US on March 1, 1989. And an express provision incorporated in the Act to clarify the effectiveness of the Act, the Act took effect from the date on which US entered into the Berne Convention and the provisions were not applicable for the pending cases (The Berne Convention Implementation Act, 1988). The prospective nature of the Act was violative of Berne Convention. The Article 18 of Berne Convention requires that protection should be provided to all the works which have not yet fallen into the public domain in the country of origin.[23] To comply with the provision of the Berne Convention, the implementation of that in domestic legislation should be retroactive in nature. Prospective implementation of the Berne provisions violates Article 18. The works which are eligible for protection under the Convention but fell in public domain due to the non-acceptance of the Convention remained in public domain. This made other countries unhappy with the level of commitment by the US, because many foreign works protected in the country of origin remained in public domain even after the implementation of Berne Convention in US. In Berne there is no enforcement mechanism to monitor the level of implementation of the Convention after the signing of the document.

[23] Article 18 of Berne Convention: Works Existing on Convention's Entry Into Force: 1. Protectable where protection not yet expired in country of origin; 2. Non-protectable where protection already expired in country where it is claimed; 3. Application of these principles; 4. Special cases]

(1) This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.

(2) If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected as new.

(3) The application of this principle shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.

(4) The preceding provisions shall also apply in the case of new accessions to the Union and to cases in which protection is extended by the application of Article 7 or by the abandonment of reservations.

The Uruguay Round discussed the working and establishment of WTO mechanism and derived the focal points of it. And the Trade Related Aspects of Intellectual Property Rights Agreement was also negotiated at the end of Uruguay Round. TRIPS establishes as an international legal agreement between the members of WTO for setting minimum standard for IP. The decision of Uruguay Round to adopt intellectual property protection in all signatory country was a big win for the US. This provision was very favourable for the worldwide pharmaceutical, software, film, publishing industries etc. in which US was growing and leading. Along with this there was total elimination of foreign tariffs imposed on US goods by such major markets like the European Union, Japan, Canada, Australia, New Zealand etc. The scope of gain of US increased with the tariff elimination and IP.

Immediately after the conclusion of Uruguay Round, in 1994, US enacted Uruguay Round Agreement Act. It was to implement U.S. obligations under GATT provisions and to amend the domestic law according to the Uruguay Round understanding. Under the act they incorporated a provision to amend copyright law[24] in order to comply with the rest of the Berne provisions. GATT section 514 require the inclusion of §104A to restore copyright of the works which are eligible for protection but public domain. This provision gave protection with retrospective effect. The international pressure and US' interest in TRIPS and WTO is not only the reason for the enactment but the TRIPS Agreement mandates the implementation of first 21 articles of Berne convention.[25] Unlike Berne Convention TRIPS has a strong enforcement mechanism under the WTO. There was no other option for US other than implement the Berne provisions in order to take part in TRIPS and international trade relations. This is how US became complaisant to Uruguay Round and Berne Convention.

Restoration of Copyright and Orphan Works

The URAA amended section 104a of the copyright law to restore US copyright to certain foreign works those were in the public domain in the United States but protected in their countries of origin. The section provides automatic protection to the restored works for the remaining term.[26] Copyright ownership of a restored copyright will vest

[24] Title V of the URAA deals with intellectual property and subtitle A deals with the copyright provisions.

[25] Article 9 of TRIPS in Relation to the Berne Convention: *"1. Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom."*

[26] § 104A (a)(1) of URAA

initially in the author or initial right holder, as determined by the law of the restored work's source country[27]or as determined by the owner of an exclusive right in the United States. The act considers only certain works which fulfill the conditions specified under the act. There are some criteria specified in the act to get copyright restoration. To be eligible for protection the work must meet all that requirements. First of all at the time the work was created, at least one author must have been a national or domiciliary of a country that has copyright relations with the US by way of the Berne Convention, the WTO, or a presidential proclamation extending restored copyright protection to that country on the basis of reciprocal treatment to the works of US citizens or residents; As of January 1, 1996, the work should not be in the public domain of the country of origin, only still protected works are considered under the act; The work was in the public domain in the US because the work did not comply with formalities imposed at any time by the US law; And the work was not published in the US within 30 days of its first publication abroad. The works that are in US' public domain due to any reasons other than failure to comply formalities or copyright relation with the source country is not eligible for restoration. There is no need to take further step to make the restored copyright enforceable. It will get copyright protection for the rest of the copyright period and can be enforced like any other copyrighted work. The copyright term of the works which are published before January 1, 1978[28] fixed as 95 years. A foreign work published in 1935, not protected in US will be protected through 2030. All the works published after that will get protection for a term life of the author plus seventy years. Even though the restoration is automatic for the eligible works the act directs the copyright owners of restored works to notify the reliance parties[29] regarding their intention to enforce the right since they were legally using the works in the public domain. It is called Notice of Intent to Enforce. The owner of restored copyright cannot enforce his right against the reliance party unless he/she notify them. The copyright owner can provide Notice of Intent to Enforce to the reliance party directly or can file it with the Copyright office. If he/she chooses to notify the reliance party by filing the NIE with the copyright office he/she must file it within two years from the restoration. The act directs the copyright office to maintain a public record containing the list of identified restored works for which NIE is filed.

[27]Id. § 104A (b).

[28] The works before the enactment of 1976 Copyright Act.

[29] A reliance party is typically a business or individual who, relying on the public domain status of a work, was using it before the enactment of the URAA on December 8, 1994.

Orphan Works

A copyrighted work is called orphan when it is when it is difficult or impossible to find the copyright holder. The problem started with the introduction of Berne Convention. It removed all formalities and extended the term of protection to a long period. In a strict formality based system there is no possibility for orphan works issues. US was holding their formality based system for too long. They implemented the Berne provision in pieces. The orphan work problem grew with the changes in domestic copyright legislation. US started providing automatic protection under 1976 Act. Later they acceded Berne Convention. All this changes paved way to the orphan works problem, even though they only created possibility of orphan works. These laws were prospective in nature; it didn't affect the existing works which are registered formally. When it became automatic protection, no documentation is available for a new copyrighted work. It creates only future orphan works. The real issue started with the restoration of copyright.

URAA restored copyright foreign works. The copyright of the works satisfying the conditions specified in the act will restored automatically. It restored copyright of countless works. The US was following strict formalities for copyright protection. Initially they were not protecting foreign works. Later, start protecting works with strict formalities. They removed all the formalities and started providing equal protection to foreign works only in 1988. Before the BCIA majority of the foreign works protected in their country of origin was in US' public domain. As per the provisions works from the year 1923 were eligible for the restoration. The works which were not protection for the last 73 years for the reasons noncompliance with the formalities and copyright relation with the country of origin were restored. By the end of 20th century almost all countries became party to the Berne Convention, so works from all these countries became eligible for the copyright restoration. The restored copyrighted works can divide into three categories: works published in countries that had copyright relations with US; works that entered the public domain due to lack of copyright relation; and sound recordings.[30]

Vast number of works suddenly withdrawn from public domain to 'protected' status that too without any formality. Many of them were in use by the public freely. The only requirement for the enforcement was that the NIE. The copyright holders of restored

[30] Sound recordings fixed before 1972 were not then protected by federal copyright law. Those sound recordings will receive the remainder of the term they would have received had they been protected by such copyright when published.

copyright need to notify the user who are using it as public domain work. If the work is not using currently then the NIE is not required, that means for a future user it will be difficult to determine whether that is a copyrighted work or not. It is not an easy task for a user to obtain permission from the copyright owner. Then the case of an old work which was in public domain, finding of the copyright owner is very difficult. The details regarding the copyright owner or publishing house may be available for the works which is properly published in US. The act directs copyright office to keep a list of restored copyright for the public inspection. However they can only provide details of the works for which the owner filed NIE with the copyright office. The act gives two options to the copyright owner intended to enforce his/her copyright. Either they can notify the user directly or can file NIE with the copyright office. The details regarding the direct notification may not be available to the copyright office. It creates confusion to the users.

For a foreign author enforcing his/her rights after this long period in another country may not be easy. Authors or right holders of many works may not exist or they may not be in position to do the formalities required for the enforcement. The right holders of the works with less economic value may not have the interest to enforce their right in other jurisdiction. These works for which the rights are not claim may remain as orphan works. Even if the copyright holder is in position to claim his/her rights and interested to enforce it there exist some difficulties. Finding all the current users of the work is difficult for foreign author. So the option of the restored copyright holder is to file his/her NIE with the copyright office. However the time for filing NIE with the copyright office is only two years from the date of restoration. The filing window is closed for most of the copyright owners as two years is a very short period for a foreigner to know and to take steps to enforce their rights. After two years they can only do direct notification. If the copyright owner fails to notify properly then also chances of work getting abandoned become high and that may result in user's inability to find the copyright holder. The failure to file NIE is not the end of rights. It only limits them from preventing the already existing users. So the work remains copyrighted with the litigation rights of the copyright owner. There is a grumble that the copyright office is not updating the details regarding the restoration. Copyright office is widely criticized for their working with regard to the restoration procedures.

Also it creates problems for the users. The restored rights contain the right to sue. The user should be more vigilant while using public domain works. After restoration it became tough to determine whether the work is protected or not. If the copyright owner decides to file NIE with the copyright owner he/she need to check it with the copyright

office for continuing his/her use. All this confusions and legal uncertainties contributed to the orphan works problem. The works created after the year 1923 got restored. Countless number of works covered under restoration provision. Information regarding all the restored copyright is not available. Any work on which the details leading to the copyright owner became orphan. The free use of such works got interrupted. The user always has the fear of getting sued by the copyright owner. Act is silent about the negotiations for the further use. After giving NIE, if the user wants to continue his/her use there is no negotiation terms or any relaxation for the user specified in the act or it assign Copyright Office to interfere in this matter.

After the implementation of URAA the congress enacted Copyright Term Extension Act in 1998. The CTEA extended the copyright term from life of the author plus fifty years to life of the author plus seventy years. It extended the copyright term of all the works which were protected at that time. The copyright term of all restored works also got extended. The extension of copyright term increased the difficulties in tracking down copyright holders of older and more obscure works with minimal commercial value. Somehow the extension of copyright for this long term results in the creation of orphan works. The Act covered all the works whose copyright is not expired on the date of enforcement of the Act. So term of all restored copyrights, on which confusions exists also extended. The extended term upturns chances of losing data, inability of copyright holder to claim protection and uses without permission etc. The CTEA proliferated the chance of generation of orphan works as well as it created confusion regarding the existing works especially the restored ones.

In the case Eldred v. Ashcroft (123 S. Ct. 769, 154 L. Ed. 2d.) the constitutionality of the CTEA challenged on the ground that it the retroactive extension of copyright violate the copyright clause of constitution. It only requires securing useful arts and science for limited period.[31] And the petitioners also claimed that it is against the first amendment to the US Constitution[32] which balances the freedom of speech and the interest of copyright and violate the public trust doctrine[33] by withdrawing materials from the

[31] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries

[32] The First Amendment prevents Congress from making any law regarding an establishment of religion, prohibiting the free exercise of religion, or abridging the freedom of speech, the freedom of the press, the right to peaceably assemble, or to petition for a governmental redress of grievances.

[33] The public trust doctrine is the principle that the sovereign holds in trust for public use some resources such as shoreline between the high and low tide lines, regardless of private property ownership.

public domain. However the Supreme Court upheld the constitutional validity of the CTEA in 2003. The court didn't even considered the orphan works issue which may arise as a result of long copyright period. After Eldred case, Golan v. Holder (565 U.S. 302) challenged URAA copyright provisions on the same ground in which the CTEA challenged. The case discussed the constitutionality of Section 514 of the Uruguay Round Agreements Act. In the case the issue of orphan works is also discussed. The petitioners were mainly orchestra conductors, musicians, publishers, and others who formerly enjoyed free access to literary and artistic works. Restoration of rights to the public domain works affected their profession. The litigation started in 2001 and the Supreme Court finally decided the case in 2012. The case decided in tune with the Eldred case and upheld the decision constitutionality of URAA provisions. The dissent judge shared concern regarding the orphan works issue and argued the decision would exacerbate the orphan works problem. In response the majority held that the orphan works problem is not limited to foreign works is not limited to foreign works pursuant to URAA and orphan works are not a matter appropriate for judicial, as opposed to legislative resolution.

The Supreme Court did not consider the orphan works problem as a serious matter in both the cases. In the digitization era the impact of restoration is high on the orphan works. The act contributes a lot to the already ruffled copyright law of US. The main focus of the case was not the orphan works issue but the limitation on the use of the works which withdrawn from the public domain. However the orphan works issue continues as unruly.

Vagueness in the provision made the more confusion. Innumerable works covered by the act, that was a major reason for the orphan works issue and it was impossible for the authority to list all the works for which the copyright restoration is applicable. It also failed to take adequate administrative measures to regulate the enforcement of rights of the copyright holder and to address the users' issues.

Orphan work is still an unsolved issue in US. With the development of the possibilities of digitization the issue of orphan work become more complicated. The US Copyright Office made two studies about orphan works in 2006 and 2015 and proposed a legislation dealing with the orphan works issue. However they failed to pass the bill in the Congress.

Conclusion

TRIPS Agreement mandates the implementation of the Berne provisions in all participating countries. Almost all the countries are parties to the TRIPS Agreement. All these countries are facing the orphan works problem in different levels. However, we can see that in US it is much more complicated than in other countries. From the traces of copyright history we can see that it is a result of the former copyright policies. The way they rectified it complicated it more. Unlike other countries, US changed, eliminated, inserted formalities through various amendments and revisions for then need of them. All these made their law ambiguous and complicated. When they started protecting the works automatically, all these complications in the act made confusions regarding the implementation of rights. When the author or the copyright holder is in confusion the implementation of the rights gets affected.

Without referring the restoration of copyright, the orphan works issue in US cannot be discussed. The only intention behind the implementation of the act was to be a party to TRIPS Agreement and to avoid WTO actions for non-enforcement of TRIPS mandate to follow the Berne provisions. However the consequence of the amendment was beyond the expectation. Same time it created problems to the copyright holders, users and to the whole copyright system. The restoration was only for certain foreign works. Domestic works which lost protection due to noncompliance of formalities didn't consider under the act. Whether it is domestic or foreign work, finding copyright owner of an old work is not easy. In the case of book, it contain the name of the author, publishing house and many other details but in a work like photograph there is no data is available on the work. So with the passing of time the inability to identify or locate the creator or copyright owner increases. If it is a foreign work, it becomes more complicated. The users are not concerned about the details of a work in public domain because anyone can use that without any kind of permission or procedures. Even the author is not worried about a work fell in public domain. Using it for long time, without considering the details of author or publisher will result in loss of data. When the work which was a part of public domain for a long time withdraws, it creates confusion. The public domain contains immeasurable quantity of works. Automatically restoring copyright of a part of it is a very risky. Identifying that particular part of public domain which is no more public domain is a task. The US Congress restored it without much preparation. It restored works which were in public domain for the last 73 years in US. Even the he authority has no idea about how many works are withdrawn from the public domain.

Foreign authors may not be that vigilant to follow their works in public domain of another country unless it has high commercial value. The provision related to NIE is also not convenient for the foreign authors. Only the foreign authors or publishing houses that have means to claim the new development in US tried to enforce their copyright, that too for their economically insignificant works. Along with the difficulties to find the copyright holder disinterest of them in enforcing right created problem for user. Threat of being sued followed the users and confusion regarding what all works are withdrawn from public domain was also there.

The US dragged the implementation of Berne Convention to the last. When they implemented it, it was partial. The problem of restoration could be minimized if the BCIA implemented retroactively. Their reluctance to provide protection to the foreign works finally resulted in mess. US is one of the countries where orphan work is headache. They don't have a proper legislation or copyright provision to address the orphan works issue.

The orphan works issue is not a less serious issue. In the modern period, it limits the scope of access even after the technological developments happened in the area. The public has the right to access and it is the duty of the authority to remove all the difficulties in accessing knowledge. The US created possibility of creating orphan works and it affected the users as well as copyright owners. There should be a balance between the access and protection and users' right and owner's right. The proper laws and administrative measures should be there for solving the orphan works issue and to make access to all valuable orphan works.

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