CURRENT TRENDS AND PRESSURES IN THE DEVELOPMENT OF THE INTERNATIONAL COPYRIGHT CONVENTIONS

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Preface

In preparing a thesis upon the topic of how the Berne and Universal copyright Conventions have adapted to technological, political and sociological changes in international society over the last two decades, the subject-matter narrated above seemed to the writer to deal with the most cogent aspects of international copyright today. To speak of an international copyright system, one is dealing with the operations of two Conventions, one administered by the World Intellectual Property organisation in Geneva and the other by UNESCO in Paris. The former is the Berne Convention for the Protection of Literary and Artistic Works 1886 and the latter the Universal Copyright Convention 1952. Both Conventions have been substantially revised since their inception. There were Berne Revision Conferences in 1896, 1908, 1928, 1948, 1967 and 1971, while the UCC was revised in 1971, simultaneously with Berne, at Paris. The history of the Berne Convention shows that it was born of a Union of mainly European States who were exporters of literary works. The common interest of these states members of the Union was that some uniformity in the legal protection be extended abroad to domestic works. Actually, this system of limited geographical application served its members quite well but it failed to attract one major accession, that of the United States, which was a serious omission. Membership of Berne grew steadily, if unspectacularly throughout the 20th Century but apart from the United States it also failed to attract many countries who were desirous of gaining access to the cultural materials of foreign states but who could not afford them. The immediate post-Second World War period brought the problem sharply into focus and led to the establishment of the UCC, the basic purpose of which was to encourage a broad membership with global appeal. To that end it succeeded, many of these states which had not joined the Berne Union, acceded to the UCC. However, the levels of protection provided by the UCC are not as high as those of Berne and the increasing value of

intellectual materials and the complexity of international trade has encouraged an international reliance upon the development of the Berne Convention whose terms have traditionally been more explicit than those of the UCC. The existence side-by-side of two international conventions should not be assumed to mean that the membership of each is antagonistic towards the other. In fact, most members of Berne are also members of the UCC or vice versa and the Berne Union is considerably enhanced by the accession, in March 1989, of the United States of America. WIPO and UNESCO are co-ordinating much work on major copyright issues today and this programme of co-operation is bearing fruit. The main thrust of the Convention's attention is given over to the changing means of disseminating intellectual materials brought about by the "information society", in which technological advances play a major role, and the increasing cognisance of literary and artistic works as valuable commodities in international trade. It is with reference to these matters that this thesis is written. The writer feels that the content of the chapters noted above illustrates the diverse impetus for change in the international copyright system. It became apparent to the writer that the bifurcated, institutional effect of both WIPO and UNESCO as makers of the law of both Conventions upon members States and the content of municipal law was becoming supplanted by the use of copyright as an instrument of international trade in its own right. The result is that the very content of copyright law at both national and international law is presently undergoing metamorphosis which, in the writer's opinion, will sooner rather than later, take much subject-matter which is or should be currently protected by the Conventions into the domain of protection by these countries which are exporters of that subject-matter. This question is dealt with in Chapters 1, 3 and 4.

It is said that the "touchstone" of the Conventions is the rule of national treatment. In Chapter One, the writer examines substantive provisions which combine to affect the rule as it is applied by the Conventions but goes on to discuss how pressures have been brought to bear by some exporters of particular types of subject-matter, such as the United States,

the European Community and Japan who dislike the application of the rule and favour the introduction of reciprocity in trade in that particular subject-matter.

Chapter Four, the largest chapter, also describes this development which is considered to be to the denigration of the system of international copyright law as applied by the Conventions. Chapter Four goes on to deal with other features which technology has identified for the Conventions - These relate essentially to one question: whether a particular subject-matter or use of a subject-matter has copyright ramifications or not. The conclusion of this chapter is two-fold. Firstly, that the Conventions will require to identify and succinctly comprehend whatever new subject-matter that technology will devise to use the work of copyright proprietors as they are invented. The present retrospective approach will simply not satisfy those whose works may be utilised without their consent while debate is entered into by UNESCO and WIPO as to whether the new work or use is covered by *iure conventionibus*. The chapter goes on to relate how Joint Consultative meetings of WIPO and UNESCO are tackling this very problem by introducing a common set of minimum standards for worldwide introduction by means of the implementation of draft Guidelines and Principles. To this end the Conventions seek to introduce uniformity in the treatment of all types of subject-matter worldwide. The second conclusion is that such a process may be threatened by the development of *sui generis* treatment of certain subject-matter, for example, semiconductor chips, a unilateral development by countries such as the United States of America.

Chapter Three is concerned with the entry of the United States to the Berne convention which in the writer's view, has been achieved by WIPO in terms of pure expediency and with little real regard for the pure content of the Berne Convention. The recognition that Berne could not be a truly universal copyright convention without United States' adherence because of its sheer economic importance to other states which are exporters and importers of intellectual materials and the fact that the process of uniformity of protection between

states could be enhanced by that adherence has overcome the realisation that United States' law does not observe the provisions of the Berne Convention comprehensively.

In dealing with the question of copyright as an instrument of international trade, reference has been made to the influence of the General Agreement on Trade and Tariffs as a means of enforcement of standards, as well as uniformity of approach. Indeed, enforcement of standards is largely the content of Chapter Five of the thesis which deals with methods of ensuring that internationally agreed standards be implemented. The writer feels that concentration upon uniformity of protection and its enforcement have tangible results for the core content of copyright. It should no longer be viewed purely as a private contractual system of laws but rather one in which the public interest determines the respective rights of owners and users.

Chapter Two is concerned with the influence of less developed countries upon the content of both Berne and the UCC. Again, private contractual rights were harmonized at Paris in 1971, into a corpus of provisions which were intended to benefit whole nations. A subsidiary aim was the global extension of copyright law beyond the principal exporters of intellectual works. The conclusion of the chapter is that LDC's have tended not to implement the 1971 exceptions but rather upgrade their own domestic copyright laws so that they can eventually participate in the international trade of copyright as exporters as well as importers.

Hopefully, the foregoing study has identified the crises in modern copyright with which the Conventions are having to contend. Essentially, the thesis topic is this: Are the Berne and Universal Copyright Conventions effecting a uniformly enforceable law for the mutual benefit of owners and users of intellectual materials and to what extent is the recognition of copyright as an instrument of international trade assisting or detracting from the Conventions' work?

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CHAPTER ONE

THE NATIONAL TREATMENT RULES OF THE INTERNATIONAL COPYRIGHT CONVENTIONS

Introduction

One of the characteristics of a copyright law is the requirement of its adaptability, a dynamic ability to subsume unforeseen subject-matters which state legislatures may wish to be protected by this branch of the law of intellectual property. As the new technologies advance, so the demands of various classes of copyright owners to acquire new sets of rights in their works increase. In this chapter it is intended to assess both what pressures are exerted on the Conventions to encompass those new classes of works and rights created by new technology and the manner in which their protection is managed between states. Both considerations involve a study of the national treatment rules of both the Berne and Universal Copyright Conventions, since member states require to know how far they are bound to extend the benefit of their copyright laws in favour of other members of either convention. It will also be seen that although the principle of national treatment has not remained static yet the development of new works and classes of rights has still strained the traditional tenets of the conventions, and beyond. The result is creating a crisis in modern copyright.

The Principle of National Treatment in International Economic Law

The provenance of this standard of international law is not hard to find. As foreign owners of rights sought equality with national authors before the municipal law the demand for equal treatment became the more important when the subject-matter of protection became more and more transnational in character. The process had begun with the printed word in 19th Century Europe. The fundamental principle of the Berne Convention for the Protection of Literary and Artistic Works since its inception in 1886 has been that of national treatment,

"the complete assimilation of foreigners to nationals, without condition of reciprocity.[1]

The essential nature of copyright consists of bilateral, consensual dealings between author and user. It does not constitute a system of rights and obligations enjoyed and exercised by classes of juridical persons whose bargaining positions are made more equal by way of their collective interest. To ensure access to the law for individuals seeking to enforce individual private rights, the minimum standard of treatment granted by the earliest version of the Berne Convention (1886) was the strength of the original convention.

"The equality to be attained by the minimum standard can be ascertained by reference to relatively objective criteria. That aimed at by the standard of equitable treatment embodies objective and subjective elements. That to be secured by the other standards is purely subjective, that is, it depends entirely on the treatment meted out to each other's nationals by the contracting parties (identical treatment); to their own nationals by the contracting parties (national treatment). ... The subjective element inherent in all the standards, even in the minimum standard with its ever changing levels of behaviour among civilised nations - or nations which, at least, consider themselves as such - introduces an unavoidable degree of evaluation and, therefore, uncertainty, into the operation of the standards."[2]

Schwarzenberger continues,

"In any case, this subjective element has its compensations. In a rapidly changing economic environment, it gives a considerable degree of elasticity to the legal framework of international economic relations."[3]

Such elasticity was utilised by both the Berne and the Universal Copyright Conventions to create, in the beginning, a minimum standard of treatment, above which was thereafter instituted the rule of national treatment, raising the standard of protection. Finally, the convention standard of protection was arrived at by combining the principle of national

treatment with the rights "specially granted by the Convention". Thus from the humble beginning of a requirement of minimum protection, the higher convention standard of protection has been formed, combining the rule of assimilation with a greater uniformity between states of protected rights and works.

National Treatment in the International Copyright System

Purpose of the Principle

The first version of the Berne Convention granted only a minimum term of protection to authors and a translation right *iure conventionis*. There then developed a notion of Minimum Rights, which were supplemented by subsequent revision conferences.

> "The high level protection countries gave a lead to the lower level protection countries and it was hoped that the right owners of the lower level protection countries enjoying rights abroad which they did not have at home would bring pressure to bear on their governments to introduce them. These hopes proved amply justified."[4]

The adoption of minimum rights has assisted in the growth of the law of the conventions, the result being greater uniformity and higher standards. The guiding principle of the Berne and Universal Copyright Conventions is therefore the rule of national treatment or the assimilation of foreigners to the treatment extended to nationals. Since copyright essentially denotes the relationship of two juristic persons in a contractual, quasi-contractual or delictual relationship, the transnational aspects of that relationship depend upon the rule of national treatment to provide uniformity of protection. It is unlikely that there will ever be a truly universal law of copyright. The true measure of the degree of universality of protection effected by the Conventions requires an assessment of how far member states are required to make available to other member states the benefit of their own copyright laws. The impetus to move towards universality in the first place is underlined by the constant revision process that goes on at both national and international levels to assimilate the diverse methods of dissemination of original material made possible

by new technological means and the creation of new classes of rights owners seeking protection. That there can be no workable format for the treatment of foreign authors without the implementation of a rule which obliges one state to treat foreign nationals in the same way as it does its own was at the centre of the debates during the original Berne Convention Conferences between 1884 and 1886. The resultant Convention was in turn a reflection of the approach in early 19th Century bilateral copyright agreements. Successive revision conferences have led to refinements of the assimilation rules.

> "With each Berne Convention revision, states have undertaken to provide certain minimum standards of protection in addition to the fundamental requirement of national treatment but the latter principle has remained constant. The same is true of the UCC except that the minimum standards of protection are fewer. However, the demands of new technology and new classes of creative people and organisations have caused states to grant or consider granting new rights to new sorts of works not necessarily envisaged by the Conventions."[5]

National treatment has a different meaning in the UCC. The Berne Convention contains detailed provisions on a number of rights to which authors from member countries are entitled, whereas the scope of its application under the UCC itself determines the extent of foreign authors' protection. As has been observed, it is of utmost importance to authors that, as the UCC provides, their works enjoy in foreign member countries the same protection as these countries accord to works of their own nationals and that this rule will be faithfully applied in all member countries of the Convention. The difference is that the extent of applicability of the rule to either Convention is dependent upon the interpretation of "works" on the one hand and "rights in respect of works" on the other.

Historically, the national treatment provisions of first Berne and later the UCC have been the only method of protection of intellectual property on the international scale but it is a major contemporary problem that the effectiveness of protection which these provisions seek to ensure is being eroded by a perceptible weakening in the uniformity of that same

protection. Effectiveness and uniformity are two sides of the same coin that together necessitate the development of legal machinery to enable parties to the conventions to come to terms with advancing technology and modern commercial life in market-economy countries. It will be argued that the drive towards effectiveness of protection has endangered uniformity of copyright laws generally.

The principle of national treatment in international copyright laws owes much to the 19th century prolification of bilateral agreements in which the principles of private international law of *lex loci* were of fundamental importance to the establishment of jurisdiction over disputes in international economic law. The *lex loci* applies to the principle of country of origin of the work in which copyright is claimed.

> "This means treating a work like a person and saying that its nationality is either that of its father (the author) at the time of its birth, which would be the time of its creation if it remains unpublished or the time of its first publication, if published. Alternatively, it would be the nationality of its birthplace, that is the country of its first publication. Like a person the work would then, so to speak, have a passport and take its nationality with it wherever it goes. For example, if Nigeria is a convention country the work of a Nigerian author, first published in Nigeria, would have in the United Kingdom or France the same rights as it has in Nigeria."[6]

The disadvantage of the *lex loci* lay in the requirement of municipal courts often having to apply several foreign laws in the same dispute. The adaptation of the *lex fori* in international economic law led to the adoption of the principle of national treatment and permitted persons protected by the Convention to be able to claim in all contracting states the protection that the law of that state grants to its own nationals.

> "The advantage of the *lex fori* is that courts will always apply their own law. The disadvantage is that the same work will get varying levels of protection in convention countries according to the national law of the country where the protection is claimed ... (t)he general application of the principle

> of national treatment in international copyright means that the major problem arising in almost all other areas of private international law: 'which law is a court to apply in a situation with foreign elements?' hardly ever arises in copyright law. The choice of law is mostly determined by the conventions which apply the principle of national treatment with the result that any right owner who is a national of a convention member state, or who first publishes in a member state, is entitled in every other member state to the same protection as the nationals of that state. Thus the courts in the state where the infringement occurs nearly always apply their own national law."[7]

Freedom from registration and compliance formalities guaranteed by the conventions is an extension of the principle of national treatment, compelling national laws to grant rights to works from convention countries without making such rights subject to formalities which might otherwise be required in respect of domestic works.

The Limitations of the Principle

The operational limits of the principle of national treatment can be curtailed by the rule of reciprocity, be it "material" or "formal". "Material reciprocity" means that country A will protect the citizens of country B in the same manner as country B protects the citizens of country A. One of the advantages of avoiding material reciprocity in the copyright conventions is that the courts of member states are not required to interpret the laws of other member states to examine if protection is given in respect of a particular right or work, and enables them instead to apply their own law to foreigners. On the other hand national treatment encourages great disparity between the effective levels of protection so that those who receive high level protection at home sometimes receive less rights abroad whereas nationals of countries of low protection receive better protection in those higher level countries than at home.[8] "Formal reciprocity" in copyright conventions ensures that each member state will protect the works or citizens of other member states, in the same way as its own. The nature of the protection afforded by such reciprocity is uncertain, and instead, this is left to the rule of national treatment.

"The 'comparison of terms' under the Berne Convention is an example.[9] The term of protection is dealt with in the conventions by laying down a minimum term: 50 years *post mortem auctoris*, but countries are free to grant a longer term. Comparison of terms means that a country which grants a longer term than 50 years to its nationals needs only grant that longer term to foreigners if that term is also granted by their country of origin. For example, the Federal Republic of Germany gives 70 years pma, but Germany needs only give 50 years pma to United Kingdom right owners because that is the term of their own national law. It does not have to give the full 70 years it gives to its own nationals."[10]

The rights granted by the conventions can only be limited by reservations which give countries the opportunity to ratify them but to withhold the giving of some rights in whole or in part.

"The making of reservations is usually accompanied by the application of the rule of reciprocity so that the nationals of country A which has made the reservation can be deprived of the exercise of those rights in country B because the nationals of country B are not granted these rights in country A."[11]

The rule of national treatment, subject as above, has been that utilised by the international copyright conventions since their inception but it is nevertheless subject to the challenge of the new technologies.

"When a new right is being granted to copyright owners governments have the option of granting it as a new right in a separate law outside the copyright law. If the government decides to grant the new right as a copyright, the international conventions apply and the principle of national treatment may demand that foreigners who are nationals of convention countries which have not yet granted the new right have to be given the same right and thus become entitled to the remuneration which flows from it. If on the other hand the government decides to create the new right outside the copyright law

the conventions will not apply and foreigners will not be entitled to national treatment and therefore will not be entitled to participate in any remuneration for the use of the new right."[12]

The Works and Rights Granted the Protection of the Conventions

It is undoubtedly the demands of new technology and the creation of new classes of creative people which has caused states to grant new rights to new kinds of works. In this way the question of standard of treatment is closely related to protected rights and works. So long as the subject matter of protection remains uncertain, the application of the principle of national treatment will be subject to exceptions between convention member states. This in turn gives rise to the most pressing general debate in relation to the application of the conventions. To be truly effective, any instrument of international law has to express, and be evidence of, a communality of interest between member states. The means of promoting the efficiency of the provisions of such an instrument is to ensure that the object of the instrument's intentions is effectively achieved in practice and that achievement is accomplished in a manner uniformly observed by the states members. Effectiveness and uniformity are thus two sides of the same coin. Effectiveness and uniformity in particular regard to the Berne and Universal Copyright Conventions relate to the standards of protection afforded to intellectual works. They are not synonymous and it is for this reason that some regional approaches to copyright protection, notably in the Scandinavian and European Community countries, has taken place. The conventions have not responded to the need to increase standards of protection required by the development of new technology in a way which has dealt with both uniformity and effectiveness even-handedly. Instead, practical effectiveness has been viewed as a matter of pure pragmatism, while striving to obtain uniformity has meant considerable debate upon the nature of rights extended by the Conventions to works, the nature of works and the scope of protection extended to both rights and works.[13] The diversity of views held by member states in these regards is quite startling even in regard to matters relating to the core content of the conventions. We may take the reproduction right as an example of such diversity. The author's right to reproduce copies of his works is generally recognised

in all copyright laws and is a fundamental right of both international conventions although only recognised explicitly in the Berne Convention in the Stockholm text of 1967 and in the UCC at Paris in 1971. There is no right of unauthorised reprography of works, except in terms of "fair use",[14] but WIPO and UNESCO have failed to establish a common approach to some of the problems that the unauthorised reprography of works has raised. The technical improvement of the means of recording sound and audiovisual works has established such recordings as a norm of exploitation to the extent that it is no longer possible to continue to consider reproduction for private use as an exception to the right of reproduction.[18]

> "(T)hese new facts with which we are dealing, principally those relating to the private copy, require adequate responses, which we shall not find in the classical moulds of copyright... henceforth it will be necessary to characterise this new right as "a potential right of the author" in as much as this arises not from its use but from its possibility. What is new in this question is that it mixes what is contractual with what is an infringement in the following manner: faced with the problem whose base is a "possible harm" (*damnum infectum*) which creates a "potential responsibility" the juridical order responds with a solution of the "contractual" type in which the author (collectively through management societies) in return for payment in money, authorises the circulation in commerce, of equipment and materials which are "risky" to his right.[16]

While debate on the juridical issues raised in the foregoing quote continues in practice in comparative law, both Berne Union and UCC members are tending to reward unauthorised reproduction either by means of compulsory licensing measures or by compensation. The use of either tends to take author's rights to prohibit unauthorised reproduction of his works outside the copyright conventions, circumventing the operation of the national treatment rules. Since 1984 WIPO and UNESCO have jointly convened meetings of governmental experts dealing inter alia with private reproduction of works, and public rental and lending, resulting in the establishment of "Principles" intended to assist governments in tackling the treatment of private reproduction.[17] Although the principles

do not have any obligatory force they have been useful in drawing together the juridical bases upon which member states have founded their approaches to private reproduction,

> "and have the purpose of suggesting proposed solutions to safeguard the rights of the owners of literary and artistic works and other creations protected by copyright and connected rights, and to ensure them equitable treatment, furthering creative activity which is eminently necessary for the cultural development of any nation. For the other part, the solutions contained in the "principles" are intended to facilitate, for creators and for users, the utilisation of protected works, their representation, execution, etc."[18]

Principles AW2 and AW8 and PH3 to PH9(12), applicable to private reproduction, and Principles PH3 to PH7 are of particular relevance.[19]

PH3: The generalised practice of the reproduction of phonograms for private purposes is prejudicial to the legitimate interest of the owners of the copyright in literary and artistic works contained in phonograms. The participating states in the Berne Convention or the Universal Copyright Convention are obliged to alleviate this harm.

PH4: The most appropriate form of alleviation of the harm mentioned in principle PH3 consists in the institution of a levy on recording apparatus and/or the supporting virgin materials (magnetic tapes, cassettes). This levy should be paid by the manufacturers or importers and collected by the organisations charged with the collective management of the rights in question, and should not be used for other ends (fiscal for example) than the alleviation of the harm mentioned in principle PH3. The purchasers of recording apparatus and/or supporting virgin materials for which the tariff has been paid are authorised to reproduce the phonograms for private purposes by means of such apparatus and/or supporting materials.

PH5: Recording apparatus and supporting materials exported to another country should be exempt from any levy in the country of manufacturer. The exceptions to the obligation to pay the tariff can equally be justified in cases where the reproduction has certain educational purposes and for incapacitated persons as such reproduction does not serve commercial ends.

PH6: The collecting organisation should - after deduction of their actual and strictly necessary administrative costs have been made - distribute the sums received between the different copyright owners as a function of the presumed frequency of the reproduction of their works for private purposes (for example, in proportion to the frequency of the diverse forms of public use, such as broadcasting, sale and rental of video cassettes).

PH7: Without the authorisation of the copyright owners involved or the organisations which represent them, the sums received by the collecting organisations should not be used for other purposes (general cultural or social, for example) than those mentioned in principle PH6, paragraph PH8. Foreign copyright owners should enjoy the same rights as national owners. The collecting organisation should apply to them the same principles of distribution of the product of the payments as to national owners. Principle PH7 applies in the same way to foreign copyright owners: without the authorisation of the collective management organisation representative of such copyright owners, the sums which are due to them should not be used for other ends than those mentioned in principle PH6. In this case the total sum paid should be greater than if it were only to attenuate the harm caused to copyright owners. Principles PH5 to PH8 apply also *mutatis mutandis*, to the case of artists, interpreters or performers, as in the case of phonograms producers and broadcasting organisations.

We witness in the principles the placing of an emphasis firmly upon effective protection in virtue of a uniform response to a perceived problem. Unfortunately, the uniformity promoted by the principles encourages a non-copyright solution, a solution which replaces

actual use of works with presumptive use. Quite how the principles can be reconciled with the Conventions themselves remains to be seen. The rule of national treatment must suffer as a consequence.

> "Thus by the simple device of calling the right to compensation something other than a copyright and introducing it by a separate piece of legislation the application of the principle of national treatment can be avoided. Particularly in cases where the compensation is paid out of a government fund which can be called taxpayers' money, the temptation to restrict it to nationals is considerable. If that device is generally used by governments when dealing with the new uses of copyright material arising from new technology and new means of communication, the fundamental principle of national treatment and with it the copyright conventions based on it, could be seriously eroded in the near future."[20]

The Scope of National Treatment: Economic Rights and Works in which they exist

Article 7(1) of the Berne Convention refers not only to the rights accorded currently to nationals by the law of the country where protection is claimed but also to the rights which may be accorded subsequently and these last words mean that Berne authors are entitled to the benefit of any new rights which are added subsequently to the rights accorded to native authors. In relation to new kinds of "work" and the "rights" to be attached to those works, states have to enquire of themselves what their Berne Union or UCC membership entails. Therefore, the ability of the national treatment rules of the Berne Convention and the UCC to deal with new phenomena in communication of intellectual works should be discussed in order to ultimately assess whether they are flexible enough to encompass those phenomena within the traditional concepts of copyright, or whether the rules as presently drafted are encouraging the kind of international disaffection which appears to be at the root of a perceptible move towards the introduction of reciprocity in relation to some kinds of intellectual property, a theme to which the writer will return later. What "works" and what "rights" then are subject to the international copyright conventions? Articles 5(1) and 5(2) of Berne state that

"1. Authors shall enjoy in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

2. The enjoyment and exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work."

Consequently, apart from the provisions of this Convention, the extent of protection as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country whose protection is claimed.

The reference to protected works has its origin in Article 2(6) which says that the works

"mentioned in this Article shall enjoy protection in all countries of the Union."

Article 2 contains an illustrative list of those works which it is intended that Berne members protect but because the list is non-exhaustive (it refers to what is covered by inclusion of specific examples of protected works, while also including the generic term "literary and artistic work"), exactly which works are permitted protection is unclear. One commentator summarised the obligations on a Berne member as follows:

"a. A state must grant foreign member states' "authors" for their protected "works" those "rights" which a state grants now or in the future to its own nationals,

b. A foreign author seeking protection in the state for his/her work will have his/her rights determined according to the state's law, whatever protection his/her work enjoys in its country of origin ...

c. The state must provide those "rights specially granted by this Convention" to foreign authors. Apart from the provisions imposing minimum standards of protection that all states must extend, the precise nature of the works protected and the rights granted are by and large left to a state's legislative discretion."[21]

The Universal Copyright Convention makes lesser mention of specific kinds of works than Berne and gives states greater discretion in the nature and degree of protection which they extend to works than Berne. Article I says: "Each Contracting State undertakes to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and painting, engravings and sculpture." Articles II(1) and II(2) reject the principle of material reciprocity and endorse the principle of national treatment since UCC nationals "shall enjoy the same protection" for their published and unpublished works in another UCC state as nationals of the latter. These provisions remain basically unaltered between the original 1952 and the revised 1971 versions. Article I imposes two obligations, firstly that members must "provide for the adequate and effective protection of the rights of authors and other copyright proprietors in (their) works", which gives UCC members greater flexibility in deciding what rights must be acceded the Convention's protection (Berne's Preamble requires its members "to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works"), and secondly that the rights, like Berne, must be those of "authors and other copyright proprietors in (their) literary, scientific and artistic works". States have therefore to ensure that all works qualifying as literary, scientific or artistic are included in their copyright laws, except where *travaux préparatoires* would delimit the range of possible inclusions. Again, the categories of protected works was intended to be non-exhaustive, in order to encompass those means of dissemination of works not envisaged as late as 1952 and 1971. Anything that is not however capable of the attribution "literary, scientific or artistic" is not protected.[22] The *travaux préparatoires* also support this view.[23] There is, however, much contemporary debate about whether certain categories of works may be

excluded under Article I yet be accepted under Article II.[24] There is a similarity, according to the foregoing analysis, between Articles 2(1) and 5(1) of Berne and Articles I and II of the UCC. Vaver suggests this was no accident, rather

> "the result was no doubt intended both by RBC (Revised Berne Convention) adherents to the UCC familiar with the RBC structure and by the non-RBC states that looked on the UCC as a bridge towards future adherence to the RBC. A contrary interpretation unnecessarily forces the word "work" in Article II to carry some indeterminable and unbounded meaning that it has hitherto not had: anything a state in its own discretion chooses to call copyrightable subject-matter."[25]

The protection of Article 1 of the UCC extends to the "rights of authors" in "literary, scientific and artistic works", words obviously deliberately chosen to echo the sentiments of Berne. The intention was to ensure that whatever works were protected by Berne should also be protected by the UCC. One might ask why Article I simply does not incorporate the wording of Article 2(1) of Berne but it is most likely that the final wording was chosen because enumeration of the many different examples of protected work in Berne might mean the generic terms, "literary, scientific and artistic works",

> "might be read limitatively and because the inclusion of certain works would make it difficult for certain countries to join the Convention."[26]

Vaver espouses the view, as does Bogsch, that just as the list of protected works in the UCC is shorter than in Berne, this in itself does not mean that some works protected by Berne are not protected by the UCC. For example, Vaver says that choreography and mime can qualify as a UCC "dramatic" work. Books and pamphlets can qualify as UCC "writings", if fixed; if unfixed, they may qualify simply as "literary works".[27] Dr Bogsch's view of the interpretation of Article I is a very flexible one. He feels that, while accepting that the words in Article I cannot be interpreted by each state as it thinks fit, the phrase "literary, scientific and artistic works" contains overlapping categories which means

that it can encompass "works susceptible of copyright protection", and categories such as those that "are recognised as works by the custom of the civilized countries".[28] The analogy is all too vague to constitute a practice which WIPO and UNESCO may wish to use to establish whether a particular category of work is one which is deserving of copyright protection.

The resolution of what the word "works" means as contained in Article 5(1) of Berne and Article II of the UCC is still the subject of considerable debate. One view is that "works" is unqualified and inclusion of something as a protected work has only to be determined to be such by a national legislature, or considered as a provision permitting expansion of "literary and artistic works" so that if a sound recording is called a "work" (as it is, for example, in the British Copyright, Designs and Patents Act 1988) whether or not other states members of either Convention so specify it is irrelevant. It must be given national treatment, even though sound recordings are not protected *per se* by either Convention.

> *"While neither UCC nor Berne commit a member state to extend copyright protection to sound recordings, in the event a country decides to include sound recordings in the group of copyrightable works, it follows that it is a party to either Berne or the UCC and unless its national law contains a specific provision to the contrary, protection is extended to nationals of member states."*[29]

An alternative view is that taken by Bogsch, the current Director General of WIPO which administers both the UCC and Berne, who is convinced that "literary, scientific and artistic works" is a composite term meaning "works susceptible of copyright protection" which leads to the conclusion that as "additional categories are recognised as works by the custom of civilized countries they become subject to mandatory protection".[30] This view would allow a "custom and usage" flexible interpretation of the UCC and has also found expression in WIPO's publication entitled "Guide to the Berne Convention" published in 1978 which, when dealing with Article 2 says the expression "literary and artistic works"

must be understood to as include all works capable of being protected. In order to illustrate this, paragraph (1) of Article 2 gives an enumeration of protected works. The use of the words "such as" shows that the list is purely one of examples and not limitative: it is a matter of providing a number of guides for the national law-makers.[31] The narrowest view, and it is submitted, the correct one, is that "works" means the "literary and artistic works" and other works of authors that the Conventions specifically oblige or entitle states to protect, and that no class of work is entitled to national treatment simply because a state so chooses to grant it that protection. "Literary, (scientific) and artistic works" have a meaning that member states must observe.[32] Vaver puts it thus,

> "To the extent that states place a different or more extensive meaning in their domestic law on those terms, they act voluntarily outside the protection of the Conventions."[33]

Applying this logic to the phenomenon of new means of dissemination created by the new technologies, the following analogy may be used as a role model for means of communication to be invented in the future. Taking computer programs as an example of intellectual property which might be protected by the suggested approach, many states now recognise these as protected works under domestic copyright laws. WIPO, with some hesitation, has accepted that the Conventions may (not must) apply to computer programs.[34] The Conventions have to take a more positive and more precipitate stance if international copyright is to be developed in a manner that does not have to depend upon taking cognisance of custom, usage or state practice. WIPO should be providing authoritative guidance for its members. Model provisions on the Protection of Computer Software[35] did nothing to achieve certainty because they introduced concepts compatible with the protection available to most other works protected by the Conventions. In particular, the duration of protection in terms of Section 7 of the Provisions expired between 20 and 25 years after first use of a program. The whole tenor of the Model Provisions suggested a *sui generis* approach which was not acceptable to most states because it guaranteed no international consensus of protection. In relation to the legal protection

of computer programs within the Conventions,[36] the approach which has been applied by many member states, of which the United Kingdom is one example, is to assimilate the requirement of protection with the "readability" of the particular program by humans 'trained of course in the art of computer programming'. If it is readable in this way then it becomes a "literary (scientific) or artistic work" for the purpose of the Conventions. A juridical discussion of the copyright content of computer programs had not been carried out either by UNESCO or WIPO until December 1987 when WIPO produced a memorandum of the Secretariats entitled "Questions Concerning the Protection of Copyright in Respect of the Printed Word".[37] The brief to the Secretariat had been an explicit recognition of the need for a new approach to copyright questions of topical interest and the aim was to arrive at certain "principles" which could serve as guidance for governments dealing with those topical issues. They are thus not binding but their provenance is both enlightening and stimulating. In particular regard to computer software, there was for the first time a firm correlation drawn between the category of work and the rights of the author said to be affected by it. Principle PW9(1) says that

> "the storage in computer systems ... of writings and graphic works is covered by the author's exclusive right to authorise the reproduction of his work."

Further, it was noted that the right to make or authorise translations, adaptations or other derivative works, the right to make the work available to the public by direct communication and the so-called "moral rights"[38] were affected by the use of works in computer systems. Taking the reproduction right as an example of the Memorandum's approach, the following was agreed. Under Article 9(1) of Berne

> "(a)uthors of literary and artistic works ... shall have the exclusive right of authorising the reproduction of these works, in any manner or form."

WIPO is of the view that the notion of "reproduction" covers not only the production of copies from which the works are directly perceptible,

> "but also any material fixation from which the work can be rendered perceptible to the human senses, with the help of appropriate equipment."

Article 9(3) of the Convention makes this even more clear by stating that

> "(a)ny sound or visual recording shall be considered as a reproduction for the purposes of this Convention."

Storage within a computer's central memory or on separate magnetic or other tapes constituted the production of copies affecting the author's exclusive right of reproduction. Article IV *bis* (1) of the UCC also recognises "(t)he exclusive right to authorise reproduction by any means". The words "reproduction by any means" suggest that this expression is to be understood in the same sense as in Berne.

> "(Prima facie) where no deviation was intended, the UCC is to be interpreted in the same manner as the Berne Convention."[39]

Therefore both under Article 9 of the Berne and Article IV *bis* of the UCC any sound or visual recording is to be regarded as a reproduction whether it is fixed in a material form that is directly or indirectly perceptible to the human senses. These examples illustrate that the interpretation of what "works" are covered by Article 2 of Berne and Article 1 of the UCC is dependent upon the relationship with the rights which the Conventions bestow in relation to those works. Those rights are contained in Articles 6, 8, 9, 11 and 11 *bis*, 11 ter, 12, 13, 14 and 14 ter of Berne and when taken as a whole represent a corpus of author's rights whose consequence is a minimum level of protection of uniformly available to authors in all countries of the Union. In practice, those rights will overlap with the

protection provided by virtue of national treatment. The relationship between national treatment as espoused by Article 5(1) and "the rights specially granted by this Convention" shows a close interrelation between two specific tiers of protection. National treatment involves no requirement of material reciprocity on the part of Berne Union members (material reciprocity in the sense that one country grants the nationals of another country the same protection as the latter grants to nationals of the former) which means that there can exist imbalance between the levels of protection available in different states, as indicated earlier,

> "with the consequence that authors from a state with a lower level will be advantaged in a state with a higher level, and there will be a corresponding detriment to authors from the second state when they seek protection in the first".40

To lessen the effect of imbalance, the additional obligation contained in Article 5(1), requiring Union members to accord to foreign authors

> "those rights specially granted by the Convention was included. Because in practice these special rights will overlap with the protection provided by way of national treatment, they will not apply separately to Union authors but will have the effect of defining the central content or core of the protection which the latter will receive under the principle of national treatment."[41]

In relation to which rights must be awarded to protected works in terms of the UCC, Article II uses slightly different language from that of Article 5(1) of Berne by speaking of the published works of nationals of a contracting state enjoying in each other Contracting State

> "the same protection as that other state accords to works of its nationals first published in its own territory, as well as the protection specially granted by this Convention."

There would seem to be the intention to achieve the same result as Berne since the right in question has to be an "author's" right. Article IV *bis* of the 1971 text of the UCC states that the rights under Article I "shall include the basic rights ensuring the author's economic interests" which leaves it open to include basic rights ensuring author's non-economic interests. The historical legacy of the Continental approach to the rationale of copyright, which is the approach adopted by the Berne Convention and echoed in major respects by the UCC is at this point important to grasp. What is being protected at all times is a physical manifestation of an intellectual creation ("the work"), produced by the copyright owner ("the author"), but more importantly the owner's exclusive rights in relation to that work. Berne accepts Kant's Theory of Personal Right as providing the true rationale of copyright in that it prohibits any other person from using the property of the creator. The work stems from a creative effort by the author and represents a continuation of his personality, so that the personality of the author becomes the central concern. The patrimonial aspect remains but is subordinated. All of an author's prerogatives are personal so that when he transfers any rights he does not cede the substance but the exercise of copyright which is inseparable from his personality.[42] This is why Berne, besides recognising the exclusive rights of exploitation that an author has in relation to reproduction, broadcasting or other dissemination of his works which have financial implications, also includes provision for what have come to be known as "Moral Rights". Article 6 *bis* states,

> "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation."

Article II *bis*(2) of Berne states that where the author's right to authorise public radiodiffusion of his works may be regulated or censored by a state, his moral rights must

not be impinged nor his right to equitable remuneration. While the UCC makes no specific mention of moral rights,

> "the travaux (préparatoires) reveal no intent to remove moral rights from the concept of author's rights. Rather, they emphasise that the "adequate and effective protection" states undertook to provide did not necessarily include moral rights. If a state did voluntarily extend moral rights protection to authors, the obligation under Article II to provide the "same protection" to foreign works would apply to moral rights."[43]

Indeed, Article V(2), dealing with the author's right to permit the translation of his work, contains provisions requiring the licensee under the compulsory translation envisaged by that article to acknowledge the original author's moral rights of paternity and integrity.

It is recognised by most members of both Conventions that there is an obligation to include moral rights within their domestic copyright statutes and indeed reference to them appears for the first time in the British Copyright, Designs and Patents Act of 1988.

Let us sum up the position as thus far discussed. The Conventions protect the "works" of "authors" and grant those authors certain exclusive rights. The works themselves are not accurately and exhaustively set out within the Conventions but rely for an assessment of which works are protected upon a consideration of which "rights" are granted by the Conventions. Those rights are of both an economic and non-economic nature. The extent of the applicability of the national treatment rule in each Convention is dependent upon the interpretation of "works" on the one hand and "rights in respect of works" on the other. It is submitted that each classification is not exclusive of the other and it is the interrelationship between them that allows states to identify when they need to apply national treatment to the works of foreign authors. Thus, Articles 2 and 5 of Berne have to be read together and not separately. The interpretation of "works" and "rights" requires synthesisation if we are ever to achieve the truly universal copyright law which was the

aim of the participants at the original Berne Conferences. Given that the categories of protected works are left open by both Conventions the proper focus for the application of the rule of national treatment is not how rights are to be enforced but rather what rights are to be enforced in relation to what works. The contemporary problem associated with the foregoing statement has been whether states require by reason of Convention membership to treat certain emerging rights of authors in a manner which does not prejudice foreign authors who seek to implement them. If a state chooses to grant copyright protection to a particular class of work which it considers meritworthy, do the Conventions require other members to accord it, even though they themselves do not protect that class of work?

> "The basic problem is that of the interpretation of the national treatment clause and in particular whether states are free under the Conventions to grant rights to authors within or outside copyright protection, applying the national treatment rule only to rights included in the copyright law itself. It is true that under the copyright conventions the freedom of states to grant more rights than the minimum protection provided for in the respective Conventions remains untouched. From this fact the argument is drawn that states are also free to decide whether a right granted above the minimum protection shall be included in, or apart from the copyright law."[44]

Steup argues that the major premise of this argument is wrong: that it tends to the view that the freedom of states members of an international treaty to decide whether to grant or to withhold rights does not include a freedom to decide whether a right once granted belongs to the subject matter of the treaty or not.

> "Even where an international treaty refers to rights granted under national law, such reference does not mean in itself that only those rights are covered that under national law are qualified as part of the treaty and are 'labelled' accordingly. A reference in an international treaty to the national legislation on the respective national laws relates to the legislation on the subject matter of the treaty, whatever that subject matter is called in national law and in whichever national law the subject

> matter is treated. The subject matter of the treaty, its contents and extent, are governed by the treaty itself and must be interpreted, when necessary, by the rules of interpretation of international law."[45]

Since it is a question of the qualification given by the international conventions which is decisive and not those provided at national level, the question then is what is meant by the protection of works according to international law? The principles of interpretation which are applicable are Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969, which came into force in 1980. Article 31:1, while espousing the view that a treaty should be interpreted according to the ordinary meaning of its terms in their context, makes it clear that that meaning should not be paramount when in conflict with the purpose of the treaty as a whole. In ascertaining the purpose of the treaty, the intention of the parties to it falls to be assessed.

Just as the intention of the parties in private law contracts falls to be objectively judged so too the intention of states parties to treaties. The general rule applicable to that objective judgment is that treaty provisions should be interpreted in good faith in accordance with the ordinary meaning to be given to them in their context and in the light of their object and purpose. Again, there is an obvious parallel in this approach to that employed by courts in the private law field. While the intention of the parties is of crucial importance there exist divergences between proponents of the view that there must be a presumption that the parties intentions are reflected in the text of the treaty itself and those who favour direct reference to the objects and purposes underlying the preparation of the treaty to establish that intention.

Vaver clearly supports the latter view, although it is submitted that examination of the *travaux préparatoires* in a way which displaces examination of the text itself is not the intention of Article 31:1 of the Vienna Convention. "The *travaux préparatoires* of a treaty, together with the circumstances of its conclusion, are characterised as

"supplementary means" of interpretation which may be resorted to to confirm the meaning resulting from the application of the general rule, or to determine the meaning when the interpretation according to the general rule leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable".[45a]

Indeed, the International Law Commission's draft article, which later found largely unchanged expression in Articles 31 and 32 of the Convention itself were based on the view that there is a strong presumption that the embodiment of the treaty, its text, is the authentic expression of the intention of the practice. Recourse to *travaux préparatoires* is not an alternative, autonomous or substitutional rule of interpretation, divorced from the general rule, rather the Convention expresses the value and weight of the elements to be taken into account in the process of interpretation rather than the process of interpretation itself.

What Vaver argues is that the imposition on an author of simple remuneration, in compulsory licensing situations for example, represented a substantial movement away from the spirit in which the Berne Convention had been born. He would argue that at that time the perception of authors' exclusive rights could not have endured an imposition that an author's right to withhold publication could be circumvented by any legislative means. Because such a capricious interpretation might be said to be implicit in the Convention, the search for the explicit purpose, not readily discernible from the text alone, justified a close scrutiny of the *travaux préparatoires*. Article 32 permits *travaux préparatoires* to be used as a guide to construction.[46]

Vaver concludes from this that the extent of application of the national treatment rules of Berne and the UCC requires to be examined in light of linguistic usage at the time of conclusion of the conventions, but bearing in mind that the original drafters were aware they were dealing with subject matter which is given to change by technological advance. No problems arose in relation to protection so long as copyright was intended to grant

authors the same exclusive rights and correlated means as were granted to nationals. The difficulties began when authors were granted, besides exclusive rights, certain other rights to a financial compensation for use of their works.

> "There has been a growing tendency in a number of states to grant authors financial benefits as a compensation for certain uses of their works."[47]

In this way, the basic problem re-emerges: how far are states free under the conventions to grant rights to authors within or outside copyright law and to apply the national treatment rule only to rights included in copyright law?

Some "New Rights" which it is the practice of some countries to extend to authors may be evidence of a new state practice which will be seen to limit the future application of the national treatment standard.

The Public Lending Right and the Droit de Suite

The phenomena of new classes of work and new rights consequently awarded to them has made the future application of national treatment of crucial significance as we reach the end of the 20th Century. The current treatment of some of these phenomena will illustrate the problem adequately. Let us take as our examples the following: the public lending right (the right of the author to a financial compensation paid directly or indirectly by libraries for the public lending of protected works), the droit de suite (the right of authors to claim compensation for having failed to capitalise on the financial rewards of their works prior to the first assignment of these works, for example, the sale by a starving artist of a painting for very little reward which a decade later is sold by the purchaser for a vastly increased sum), and the treatment extended to salaried or employed creators of intellectual works. Taking firstly the public lending right (PLR), this is regulated in some countries by copyright law, while in others it is regulated under some other branch of the

law. In Great Britain, it was introduced by the Public Lending Right Act of 1979, an Act which does not distinguish between books published in Great Britain and those published elsewhere, whether those countries are members of Berne or the UCC or not, suggesting an equality of treatment which may not be mirrored in, say, Eire, where the PLR is not recognised at all, or in Italy, where it is protected by copyright and where therefore there exists no prerequisite of registration of the work which is sought to be protected in virtue of Article 5(2) of Berne and Article III of the UCC. The PLR is not the subject of any conventional rule,[48] but Vaver feels that the obligation to protect it as a copyright is one which Berne demands of member states.

> "Whether or not a state includes the scheme in its copyright legislation is irrelevant to the obligation to provide national treatment."[49]

He equates the right to receive remuneration under the PLR with an "author's right" in terms of Article 5(1) of Berne and similar to a right of distribution. However, he adds that since many states compensate authors for public lending by establishing a fund from contributions from general taxation or specific duties on lending facilities, this kind of scheme is more a form of welfare legislation directed towards a particular class rather than a form of "author's right" against any uses or lending facility in respect of a particular use of the author's work and as such is outside the scope of Article 5(1). Since many states have introduced the PLR in the latter manner, the right is an example of states' current dissatisfaction with the principle of assimilation. Under the British scheme, there is a requirement that foreign authors (represented by collecting societies) register under the Public Lending Right Scheme, prior to claiming compensation. That the British Government itself considers the PLR not to be a "right" for the purposes of the Conventions may be adduced from the simple fact that Berne does not countenance any form of requirement by foreign authors of compliance with registration prerequisites of domestic copyright laws.[50] The British fund will be distributed on the basis of the frequency of use of the work or rather by the frequency of lending of books. This is a

notion more properly to be associated with the means used by performing rights societies in the distribution of income from such as radio stations to musical artistes. The fact that the PLR in Britain is not conceived as a copyright in turn means that agreements with foreign collecting societies will be made on the basis of reciprocity. Foreign authors will be paid out of the British fund only if they are nationals of a country where the PLR exists and where UK authors are paid when their books are borrowed from that country's libraries. Such an approach to bilateralism has been ascribed the nature of a "canker".[51] The approach of the United Kingdom is thus to be viewed with caution because the effectiveness of the international conventions will be measured partly by the degree to which there is an international consensus as to the genus of rights which copyright is thought properly to engender.

> "On the other hand in Sweden and in Germany, the Public Lending Right is conceived as a copyright, it is dealt with in copyright law and the funds are distributed according to copyright rules. One of the consequences of this distinction is that if PLR is conceived as copyright, the revenue is subject to the international copyright conventions and foreign right owners participate according to the principle of national treatment ..."[52]

Stewart adds that

> "the problem of categorisation of rights is not new in international copyright, it is merely an old problem posed in a new form. It is interesting to note in this context that when the Brussels Revision Conference of the Berne Convention in 1948 created a "droit de suite" for works of arts it applied to it the reciprocity rule rather than the general rule of national treatment, probably with similar considerations in mind."[53]

The bipartite approach to the position of the PLR under the Conventions is however subject to the following argument. As stated above, neither Berne nor the UCC contains any provisions about the PLR and granting such a right is not an obligation of any country

party to those conventions but Article 5(1) of Berne and Article II of the UCC, to reiterate the import of those articles, ensure that countries party to those conventions are obliged to grant the same rights to the authors of other countries who are party to the same conventions as those which their own authors enjoy in respect of protected works. Since writings and graphic works included in books and similar publications and the PLR are rights that authors enjoy in respect of such works, it follows from both conventions that if member states grant a PLR to authors, they should grant the same right to authors of other countries who are also members. The Memorandum of the Secretariats of WIPO and UNESCO addressed the confusion in a paper entitled "Questions Concerning the Protection of Copyright in Respect of the Printed Word".

> "(A)s a general rule, the countries party to these conventions are not exempt from the obligation to grant foreigners national treatment just because they provide for rights of authors in a law other than the copyright law or just because they call these rights something other than copyright. The fact that the rights of authors in respect of the use of their works serve certain social purposes (such as guaranteeing appropriate conditions for creative activity) does not change the legal nature of this right either. Copyright does serve such purposes, it is one of its fundamental functions". (Emphasis added)

The Memorandum accordingly included in Principle PW21(2),

> "if the public lending right is recognised in a country party to the Berne Convention or the Universal Copyright Convention, foreign authors should be granted the same right in accordance with Article 5(1) of the Berne Convention and Article II of the Universal Copyright Convention respectively."

It should be noted that PW21 has since been retained by the later Memorandum on the Evaluation and Synthesis of Principles on Various Categories of Works, but in brackets, to indicate that several delegations did not consider the PLR a copyright institution. Does the above constitute a derogation from the position taken by Steup, Vaver, David and

Ulmer, namely that the categories of works protected by the Conventions are to be assessed by reference to the Conventions alone and not by reference to whether a particular member state chooses to protect a certain category? It is submitted that there is no derogation because the Memorandum is dealing with the assimilation of "rights" as opposed to the assimilation of "works".

In relation to the droit de suite, up to 1948 there was general accord between Berne members that it was excluded from the rights covered by Article 5(1) and the Brussels Revision Conference adopted a "wait-and-see" approach to it in partially invoking the right in terms of Article 14 *bis*, now Article 14 ter. The Rapporteur-General commented thus at the time.

> "The careful drafting of Article 14 *bis*,[54] which asserts in favour of the author or the persons or institutions that succeed him, an irretrievable right to an interest in any sale of the work subsequent to its first disposal, thus strikes up as having rather the function of a magnet: the future will show whether in fact it has exerted its attractive force on national legislation."

The Brussels Revision Conference thus included the right under the reciprocity rule rather than national treatment. This was not done as an exception to the national treatment rule but rather as the provision of a right in addition to the standard of protection ensured by national treatment.

> "In legal literature the decision of the Brussels Revision Conference and the reasoning behind it was not generally accepted."[55]

However, the decision at Brussels was supported on the basis firstly that the droit de suite was not a copyright in the strict sense, that it was thought better to include it in a "neighbouring rights" convention, and that it granted no exclusive rights as would a copyright, but rather only to a claim for compensation on the contingency of a re-sale of a

work. As far as the UCC is concerned, the droit de suite is not regarded as an "author's right" and therefore not subject to national treatment.[56] The conclusion to be drawn from the Conventions' treatment of the right is that, at least as far as Berne is concerned, express provision for the mode of its implementation is included in the text which is not the case with the PLR or the last example of exploitation of rights to be considered, that of the position of employed authors under contracts of assignation or licensing between authors and the publishers, broadcasters or producers of their works.

> "These are matters that are commonly dealt with under municipal laws relating to contracts and proprietary rights, although a number of Union countries have laws that relate specifically to (employed) authors."[57]

The situation of the employed author is not dealt with in domestic laws in asymmetric patterns because individually these laws are founded upon fundamentally different assumptions. To take the UK Copyright Act of 1956 as an example, Section 4 thereof presupposed the existence of a contractual relationship between employer and author, whereas other countries invest the author with the copyright despite a contractual relationship with his employer yet conversely restrict his ability to exploit those rights. The reasons why there is such a varied approach to the situation is because this is an area of intersection "between three different sets of legal rules: (1) the law of copyright, which sets out to protect the interests of the author by virtue of the fact that he, as author, is deserving of reward, (ii) industrial relations law, which seeks to harmonize the dealings of employers with their employees so as to give protection to the interests of each, and (iii) the law of contract, whereby legal recognition is given to the private will of contracting parties, at least to the extent that it does not conflict with the interests of the public."[58]

The exact legal relationship between the two parties is interesting because it does not simply consist of the production of an article, ie the actual words or pictures produced by the author but the right to use the product in a way which aggrandises the value of the

thing itself, and more subjectively there exists a potential for use of the product which may threaten the enterprise of the employer.

In 1978, Dr A Dietz of the Max-Planck-Institute in Munich conducted a survey of how the position of the employed author is dealt with by members of the European Community. In all of those jurisdictions, the exploitation rights in copyright works lie with the employer and not the creators. Thus while the final legal result attained in each country is the same, it is so attained by the application of different rules and principles. The fundamental copyright principle espoused by both Berne and the UCC is that the author shall be recognised in all cases as the author of his work and that in him alone it should vest. The UCC undertakes to protect "authors and other copyright proprietors" in terms of Article 1. The point is of crucial significance to our perception of copyright as a legal phenomenon. Phillips argues that it is necessary to distinguish between

> "the nature of the creative activity of employers and that of the author on the ground that the author is the causa sine qua non of the work's creation, while the employer is never more than a causa causans at the very most, and may be less ... (I)n the absence of the author there is no written work, and can be none, however great the incentives and efforts of the employer"[59]

Phillips suggests that by investing the employer with the copyright in the work, a sledgehammer is being used to crack a walnut, because the employer, apart from the exclusive economic rights which he obtains in virtue of the contractual relationship he enjoys with his employee, also has the additional benefits of the right to public performance or broadcast of the work. One could say that the employer's interests could safely be dealt with by way of an exclusive licence to exploit the work.

> "Instead the totality of rights which constitute the copyright is vested straightaway in the employer."[60]

Dr Dietz's survey of European states other than the United Kingdom revealed that in the states which follow Berne and the UCC's basic principles, the employer gains from the author only such rights in the work as the contract between the parties allows. All these examples tend to display a lack of consensus amongst the international community as to what rights and works copyright protection should be extended to.

> "In the field of public lending and in the field of reproduction and public communication, where new technologies are and will be used to a growing degree for a broad scale multiplication of copyright works, the grant of exclusive rights and the necessity for prior authorisation by an extremely large number of authors, whose works are used, would put an extreme burden on the user."[61]

The temptation is for national legislators to provide simple remuneration to authors for the use of their works and divest them of the exclusive rights to which they would otherwise be entitled. To do so is simply to award delictual damages analogous to a civil wrong, compensating the author for a premeditated derogation from what ought to be in his complete ownership and control. The danger to foreign rights owners is obvious. As the methods of dissemination of works multiply the numbers of potential uses and users of these works increase accordingly. If the only claim that authors can have in relation to these methods is one for compensation, and the rule of national treatment continues to be given its contemporary content, the protection of foreign authors will disintegrate. There is a tendency for the Conventions to deal with the legal ramifications of individual works and rights which may be endemic to the larger problem but which do not conclusively solve it. The approach has therefore been piecemeal to date, dealing with individual categories of rights or of particular classes of work. WIPO is still struggling with the question of how various categories of works can be synthesised into the general law of copyright.[62] As work in this respect is designed to identify the inherent and underlying copyright concepts with which a particular res, a particular item of intellectual property is endowed, the attempt is clearly to evaluate how all known methods of dissemination of works may be granted copyright protection amongst all members. It is submitted that the

uniformity of protection throughout the Berne and UCC Membership which WIPO seeks has become submerged within the subordinate problem of the effectiveness of that protection. The erratic introduction of the PLR is testament to that assertion. The effect of a lack of consensus as to which rights and which works are entitled to copyright protection and consequently which are protected by national treatment is that there is a

> "real danger of losing that great benefit of the past 100 years, national treatment, over the whole of the industrialized world, for some of the most important areas of development at the frontiers of technology. This has the effect of making the web of intellectual property less coherent and less internally consistent. The credibility of this system of law in the eyes of the public is weakened. And the operation of the law is made more complicated".[63]

Having considered the position of new classes of works like computer programme and new rights such as the PLR, the future application of the national treatment provisions may have more to do with expediency than an interpretation of the Convention texts themselves. Two quotations from Vaver illustrate the present position accurately.

> "Whether rights should be extended to a work is more a question of political pragmatism depending upon the strength of a particular interest group than a question depending upon the type of creativity involved in the work's production"[64]

and Berne and the UCC

> "were both drafted to ensure that many new developments may fairly fall within their coverage. But lines inevitably have to be drawn in texts designed to be dynamic yet bounded. The sometimes unpalatable conclusion may have to be reached that a newly emergent problem or solution cannot, upon a good faith purposive interpretation of the treaties, be included within their coverage. Rather than engaging in semantic gymnastics to fit the unfittable into the ambit of the Conventions, one may have to conclude that persuading recalcitrant states to adhere to and ratify the latest texts of existing

conventions or arranging new treaties may be the only means available to cope with the problems of developing technology and lack of international uniformity."[65]

Modern Technology and National Treatment

The effect of the modern technologies upon the perceived priorities of states endowed with their production has been a qualitative re-appraisal of the desirability of applying the national treatment rules. How the Conventions will deal with one example of new technology may serve as a template for how the national treatment rules may fare in the future. The chosen example is that of the phenomenon of semiconductor integrated circuit chips, the layered, three-dimensional composite of computer programs integral to so many modern appliances, of which, according to WIPO, the United States and Japan produce 80 per cent of the global output. The fact they are so readily copied has persuaded these countries to pass legislation protecting their output by way of a narrow economic self-defence. The employment of the principle of reciprocity in place of national treatment by chip producers is to be regarded as disturbing. This is so because the market protection aspects of copyright were historically never conceived as greater than the economic and social benefits to be derived from the circulation of intellectual works and it was on such a hypothesis that the principle of national treatment as the cornerstone of international copyright was adopted: that there is a need to give rights to foreigners who may not provide in their own legislations for the provision of equivalent rights in return. The adoption of national treatment by the conventions depended upon international acceptance that

"the measure of obligation between participant countries is not that each must guarantee to the nationals of another country only such degree of protection as that country itself confers within its own borders, but something that is one step more generous and trusting of others."[66]

The thrust of this argument has always been the encouragement of states outside the conventions to become members themselves. Reciprocity threatens the level of that

encouragement, abandoning a traditional tenet in favour of the protectionism of specific works or rights. At the heart of the principle of reciprocity lies the requirement of security of markets and what is implicit in the principle is the anticipation of complete parity between exporters and importers of intellectual property which may be appropriate between countries or groups of countries which possess not only a large consumer basis for consumption of intellectual works but also a sound exporting capability. It is inappropriate where relations between the dual exporting/importing states and those which do not have those capacities are concerned. The growth of the use of reciprocity represents a trend towards bilateralism in the international trade of intellectual property. By bilateralism is meant the interaction of benefit between perceived regions of interest, a recognition that the export and import of certain works which should properly be covered by copyright has a tangible geographical reality. It is this reality which is given the broadest expression in the United States Semiconductor Chip protection Act of 1984. Interestingly, the US Senate Committee discussions prior to the Act did not concern themselves with the question whether semiconductor chips, or "mask works" as they came to be known, constituted a new "work" that might by Berne or UCC standards be considered capable of conventional protection. Rather, there came to be attributed to the chip itself a perceived "topography right". The argument was that here was a new form of intellectual property that was neither patentable nor copyrightable, and that *sui generis* protection should be granted to the new property right instead of protecting it by reference to copyright laws, where computer programs are thought to fit nicely.[67] The decision of the United States in enacting their statute was less the result of juridical discussion[68] than practical expediency. The demands of the technology in question, principally extremely high investment, and the limited life-span and appeal of chip products led to the adoption of reciprocity; that protection of foreign designs in the United States is dependent upon equivalent protection for American designs in the foreign country. Japan soon followed the USA's lead, as did the European Community. WIPO, with all this precipitate action happening around it, produced a Draft Treaty on the protection of Intellectual Property in respect of Integrated Circuits.[69] The Draft begins that the Contracting States are:

"... convinced that protection against unfair practices concerning the layout-design of integrated circuits is required by justice, is an incentive to the creation of new devices serving economic progress, and promotes the acquisition of foreign technology"

and continues

"... that the States are desirous in concluding the Treaty to serve justice, technological progress and the international exchange of technological achievements."

What the draft Treaty failed to tackle was whether there really was a need to create a new genre of intellectual property. There was no debate on the basis of comparison with practical examples of intellectual property in relation to the degree of inventive step or the social and economic importance of the new subject matter to be protected, and consequently no discussion as to whether there was any qualitative difference between existing works given copyright protection and mask works. It certainly does not satisfactorily assess the rights of society as regards the promotion of collective well-being and the dissemination of technological knowledge, as against the benefits of protection. There are problems with the technical detail of the draft Treaty in several specific respects, namely a positive definition of the subject matter to be protected, the possibility of limiting the exclusive rights granted to it, the extension of protection to products containing circuits, the formalities for deposit and registration of the matter to be protected (including retroactivity and trade secrecy) and the term of protection to be afforded. In particular, the lack of limitation of protection, granted to uphold the interests of most convention states in economic development, indicates a shallow approach and a hasty response to a perceived threat. It is necessary to carry out an appropriate revision of the draft Treaty in order to make it compatible with the presented accepted principles of proprietary protection. The Memorandum of the Director General of WIPO in relation to the Committee of Experts on Intellectual Property in respect of Integrated Circuits reveals an ambivalent approach which has done nothing to alleviate the uncertainty caused principally

by the United States. The Memorandum anticipates that some states will protect chips within their copyright legislation, as Great Britain and Australia do, but there is no discussion as to whether integrated circuits require to be protected as works by virtue of Berne or the UCC. Paragraph 12 of the Memorandum illustrates a confused position.

> "The obligation of a State ... that protects layout designs as works under its copyright legislation and that is a party to the (proposed Draft) Treaty and also to any one or both of the Copyright Conventions is to grant national treatment to layout-designs originating in another State party to the Berne Convention and/or the Universal Copyright Convention ... The national treatment to be given by the first State would consist of copyright protection. (Layout designs originating in the first State would, in the other State, enjoy copyright protection if the national copyright legislation of the other State protects layout designs as works, and they would enjoy sui generis protection if the national legislation of the other State (party to the new Treaty) gives sui generis protection to lay-out designs.)"

Given that the draft Treaty sets out to permit dual possibilities for the protection of semiconductor chips, uniformity of protection is difficult to achieve. It was always understood that the European Community's approach would be to mirror, as far as possible, the United States approach. It is submitted that, without the unilateral lead taken by the United States, sui generis treatment for semiconductor chips would not have been adopted in view of the state practice of most of the countries which have acceded to the Berne Convention to treat new technological advances in terms of the general law of copyright. WIPO itself is moving in the direction promoted by the USA. To adopt the approach embraced in the Regulations means a significant step away from traditional copyright principles which have taken a very long time to mature. The term of protection imposed by the USA, Japan and the EEC is less than the 50 years *post mortem auctoris* period provided by the Berne Convention[70] and the 25 year period acknowledged by the UCC.[71] In addition, specific registration with the requisite public authority of a claim of exclusive rights in a particular chip will be a prerequisite of continued protection. Additionally, it

will be possible to restrict the new property right by the possibility of "reverse engineering" which basically means to copy it, and by forming "innocent infringers" there is immunity from civil action. These two restrictions constitute stark derogations from the exclusive rights which creators of literary, scientific and artistic works are entitled to under copyrights. It is submitted that it is perfectly logical to subsume semiconductor chips into that area of law which we recognise as copyright law, and not to apply *sui generis* treatment to them. There is no doubt that microchips are essentially the product of intellectual labour, set down in a manner which is intelligible, albeit to those with special qualifications in a form analogous to writing. By adoption of the Regulations,[72] the European Community has certainly achieved its aim of granting to European microchips the same standard of protection it will give to American ones, which is no doubt economically desirable to encourage European production. The end, however, cannot be said to justify the means because in the writer's submission there does not seem to be a valid juridical basis underlying the approach of the major producer states. The attitude of the United States is quite readily appreciable given that country's somewhat chequered history of involvement in matters of copyright, the 1984 statute being yet another in a long line of protectionist acts in relation to intellectual property which have historically prevented its accession to the Berne Convention. It is well known that there was a lobby in the United States prior to the passing of the 1984 Act, for microchips to be granted copyright protection. However, to choose copyright as the avenue to adopt would have meant the following situation arising. The United States is a member of the Universal Copyright Convention where the standard of protection is far below that which binds most Western European states who prefer their Berne member status. The USA would have had to provide foreign subjects of UCC Contracting States with the same level of copyright protection as its own nationals. This reciprocal approach could not in practice be met because most foreign states have not yet got the length of protecting semiconductor chips for their own nationals, far less for American ones.

"The way out seemed to be to organise this new American form of protection not as copyright but as a sui generis intellectual property protection outside the scope of the Universal Copyright Convention with its national treatment rule."[73]

It was for purely protectionist reasons, therefore, that the American Act was framed in the way it was, and consequently it is difficult now to escape the conclusion that it is American economic muscle in relation to the merchandising of a product which admittedly had its birth in that country which is forcing Europe to play the same tune. It is sensible that protection of microchips achieves uniform treatment in the states which are producers but treatment should always be applied for reasons which have a discernible juridical foundation. Given that the essential nature of reciprocity discriminates against states which do not export mask marks, even-handed treatment of most Convention members is impossible. It may be that traditional copyright will have to evolve further in order to embrace the types of intellectual property which technology is producing with great alacrity, and to admit that some uses of new products are not to be admitted to its protection, but until sound legal reasoning emerges as to why semiconductor chips should be endowed with the status of a new property right, the writer is left with the inescapable conclusion that might has triumphed over right.

Perhaps somewhat surprisingly, there was no objection from UNESCO to the United States' action and the febrile activities of other states in lodging petitions with the US Government confirming their compliance with the reciprocal requirement has given no time at all for discussion whether the United States was entitled to provide rights in respect of works which might properly be considered the province of copyright. Contracting States of the UCC are entitled to bring just such a matter of interpretation before the International Court of Justice[74] but it appears that the political motive to do so is entirely lacking. Had the majority of members themselves been producers of semiconductor chips, there might have been an outcry but since the United States became a full member of the Berne Union in March of 1989, will reciprocity of treatment for chips be discussed by WIPO as an

unacceptable exception to the national treatment rule, or will it be accepted as a *fait accompli*? The documents of the WIPO Committee of Governmental experts on the Evaluation and Synthesis of Principles of Various Categories of Works, published in October/November 1988 and consisting of the memorandum and Report of the Secretariats of both WIPO and UNESCO, do not mention semiconductor chips at all, yet the fact that the United States has gotten away with the creation of a new intellectual property right outside its copyright legislation is a tactic which was disavowed by the Secretariats in discussions on "The Printed Word" in late 1987.

> "(C)ountries party to these conventions are not exempt from the obligation to grant foreigners national treatment just because they provide for rights of authors in a Law other than the copyright law or just because they call these rights something other than copyright."[75]

Sensing that employment of *sui generis* protection for semiconductor chips was a challenge to the juridical basis on which the international copyright conventions seek to deal with the new technology, the 1986 Draft Treaty had attempted to apply copyright language to its subject matter. For example, when dealing with "reverse engineering" the copying of chips, in Article 3(4)(i) it states

> "... no Contracting State shall consider unlawful the copying of the lay-out design without the authorisation of the proprietor in the following cases:
> (1) if the copying is solely for the purposes of analysis, evaluation or reverse engineering, provided that, where the reverse engineering results in the production of (semiconductor) lay-out design, such lay-out design is, in itself, original."

The use of the words "solely" and "original" indicate WIPO's keenness to clothe the indeterminate nature of integrated circuits in copyright garb. "Original" is defined at Article 1(vii) as follows:

"the lay-out design of (a semiconductor) integrated circuit shall be considered "original" if it has been copied and is the result of intellectual effort."

WIPO has also suggested that if a member state wishes to bring integrated circuits within the scope of its copyright legislation it is *ipso facto* accepting that integrated circuits attract the benefit of both Conventions.[76] Of this imputation, it has been suggested that "the content of a Statute is a matter of legislative convenience and need not be confined to obligations under a particular Convention."[77] The arguments that are put forward by the advocates of *sui generis* protection are principally based on the need to adjust the law of property as it relates to articles produced in and for industry in the light of technological progress. To accept such an argument would be to grant a concession recognising the inability of the law to assimilate the legal implications not of ideas or concepts but rather of physical objects. Such an approach has no juridical validity and even less basis in common sense. Ownership of a motor car in no sense displaced or varied the rights which its owner would have had in a coach and four. The question is always how the law may be adapted to deal with the function of the new invention. That process may well involve consideration of the physical assets and attributes of the thing in question but this in itself is no excuse for assessing the rights in that piece of property as being of a kind hitherto unknown to legal systems. Again, to do otherwise makes the essential error of confusing the nature of the work with the rights which it bestows upon its owner and it is between these two stools that it is submitted the United States Act of 1984 falls, and whose precepts Japan, Europe and most of the developed world seek to follow with such lemming-like propensity. It has been commented that granting semiconductor chips *sui generis* protection is much less the result of extended legal reflection of the character of the protected article itself than a practical response to concerns of a basically economic nature.

"However, it is this very characteristic element, that is to say to cite the alleged legal loopholes in the conventional system of protection to justify the prior intention of defending economic investments, that has led to the dead end at which we now find ourselves and to the political problems raised by any

process of negotiation aiming to set up a multilateral framework for the international protection of integrated circuits."[78]

In any event, it was just this kind of pressure which led WIPO to produce the Draft Treaty. While *sui generis* protection is one thing at national level, it is quite another for it to be accepted on an international scale, especially without a comprehensive assessment of the effects of its introduction on the existing systems of intellectual property protection, and to date consideration of this kind has been sadly lacking. Dr Almeida's paper, given in an address to the WIPO Worldwide Forum on the Impact of Emerging Technologies on the Law of Intellectual Property in 1988, contended that the multilateralisation of chip protection on the American model was to enhance the profitability of the protected article by means of an "additional plus-value" obtained from the non-producer countries. Since one of WIPO and UNESCO's main functions is to promote development and worldwide co-operation and cushion less fortunate states from the "historical inequity" of the international economic order, the Draft Treaty would appear to enhance the structural inequality of the order of things.

"(T)he true need to create a new title of intellectual property has never been established on the basis of practical examples as regards the degree of inventive step on the social and economic importance of the subject-matter to be protected."[79]

Considerations directed towards the effect that *sui generis* protection would have on the dissemination of technological knowledge and its application to the promotion of collective well-being are not to be found in the Draft despite the terms of its Preamble. An example of this stultifying approach is that compulsory licences, which are included in most national Laws and Conventions for reasons of public interest, are not mentioned at all. It remains to be seen whether a Diplomatic Conference for the Conclusion of a Treaty on the protection of Intellectual Property in Respect of Integrated Circuits to be held soon in Washington will reflect a more comprehensive approach. It is still necessary, though, to

assess the effect that the application by WIPO of principles arrived at by deduction from its present thinking will have on the rights and works which are currently protected by the Conventions, and the manner in which that protection is effected. If the Draft Treaty has as its main objective the defence of the commercial interests of those involved in chip production,

> "(T)he machinery available for this purpose is that of secrecy and non-disclosure of the creation that it is sought to favour. In other words, the Treaty on the international protection of integrated circuits is a trade secret treaty and aims, in fact, to increase returns on the investments made and, finally, to create a new international model within the system of protectionof the proprietary riches ... This tendency is accompanied by a strengthening of bilateralism in international relations and, above all, by confirmation of its most anachronical aspect, consisting in a unilateral threat to those countries or partners who are not necessarily in agreement with the rules that the dominant centre of world economy intends to impose. At a multilateral level, one has been able to observe a strengthening of the tendency to internationalise rules of domestic law, having recourse, where necessary to economic and commercial pressure and to disproportionate measure of retaliation."[80]

Such a trend has a parallel in the question of application of national treatment to matters affecting the introduction of the New International Economic Order[81] and in particular the formulation of a Code of Conduct for Transnational Corporations[82] which includes the requirement of transnational corporations to be treated in host states in the same way as the treatment afforded to domestic enterprises. It has been suggested that the imposition of such a requirement diminishes the bargaining power of developing host states.[83] The WIPO draft Treaty goes further by effectively demanding a non-sequitur from developing countries who can grant the standard of protection to foreign chips required by the treaty but who have no domestic chip industry from which to export. The lack of encouragement in the draft Treaty to engender the creation of such an industry is thus contrary to the developmental objectives of WIPO and UNESCO.

Having considered the position of new classes of works like semiconductor chips and new rights such as the PLR, it appears that the future application of the national treatment provisions may have more to do with expediency than interpretation of the Convention texts themselves.

CONCLUSION

The principal conclusion to be drawn from an examination of the application of the national treatment provisions of both the Berne and Universal Copyright Conventions is that the interpretation of which rights and works fall under the conventions cannot be an expansive one. That is for two reasons. The first is that the terms of the Conventions themselves do not admit of such an expansive interpretation and secondly, those rights and works which some seek to have encompassed within the conventions are the product of economically powerful groups which are reticent to permit the protection of goods abroad by means of the rules of assimilation. Much new technology is owned by a handful of states. The reservation of new rights and works to producers is virtually guaranteed to a monopoly of countries between whom works are regularly transferred. The provenance of WIPO's Semiconductor Chip Treaty has been documented and for a similar approach to be adopted for future technological developments will virtually refuse third world countries members of both conventions access to these new goods. They cannot offer reciprocity in respect of such works and consequently, their access to these important new advances is excluded. The resultant discouragement to international trade constitutes a perverse movement away from the intention of the conventions *quoad* the application of works of the mind for the better understanding between nations and for the public interest in utilisation of works, all as evinced by our traditional notions of copyright.

We have identified in this chapter the perception by Convention members of the fact that the flexibility of the conventions in subsuming emerging kinds of literary and artistic works is not finite. However, if this new decade is to witness the protection of rights and works in a *sui generis* manner, incorporating reciprocal conditionality in the international trade works, it should not be assumed that such a development is the result of the Conventions being versed in terms and language which are outmoded and in need of update. Such has been the thrust of argument revealed in many WIPO/UNESCO discussions over the past decade. While it is fair to say that both the Berne Convention and the Universal Copyright Conventions were drafted to ensure that many new developments may fairly fall within their coverage, pre-occupation with the primacy of the dynamic character of the convention texts has led us into juridical confusion. We may now be forced into the realisation that some new works and rights may not be capable of convention protection.

Whether intentionally or not, the *sui generis* treatment emphasis witnessed in modern intellectual property protection is simply a response to dissatisfaction with the national treatment provisions of the conventions. The desirability of same is quite another question, detracting as it does from the promising progress towards international uniformity in the content of municipal copyright laws. To a great extent the future of the conventions will depend upon the future application of the national treatment rules. This in turn depends upon the following postulation: the assimilation of works and attendant rights to the convention will assume great significance and until a persuasive juridical rectitude is established to encourage a political acceptance of the privacy of the Conventions over emerging technological advances, uncertainty will prevail and initiatives created by WIPO and UNESCO for the subsuming of these advances are likely to be ignored.

FOOTNOTES
(Chapter 1)

1. WIPO "Guide to the Rome Convention for the Protection of Literary and Artistic Works" (Geneva 1978) p 32.

2. G Schwarzenberger, "The Principles of International Economic Law" Vol 117 1966 Hague Recueil at 68.

3. Ibid at 68.

4. S M Stewart, "International Copyright and Neighbouring Rights" Butterworth 1989 (2nd edn) at 40.

5. W R Cornish, "The Canker of Reciprocity" [1988] 4 EIPR 99.

6. Stewart, ibid at 37-38.

7. Ibid at 38.

8. E Ulmer, "Copyright Problems in Relations between East and West" 1 (1970) IIC 32 at 44.

9. Article 7(8).

10. Stewart, ibid at 41.

11. ibid at 42.

12. Ibid at 42.

13. See generally Chapter 4 infra.

14. A concept adopted by most national legislations to denote limited use for private study or research.

15. Limited exceptions to the reproduction right are contained in Article 9(2) of Berne.

16. H Della Costa, "The 'Potential Right' of the Author in relation to Private Recording" (1985) UNESCO Copyright Bulletin No 1 at 13. See further P Masouyé (1982) Copyright 81-90 and V Hazan (1982) Copyright 32.

17. See further again Chapter 4.

18. C A Villalba and P Lipszyc, "Private Copying of Musical and Audiovisual Works" 5 (1989) Copyright World 16 at 22.

19. UNESCO/WIPO/CGE/SYN/3-II.

20. Stewart, ibid at 43.

21. D Vaver, "The National Treatment Requirements of the Berne and Universal Copyright Conventions" (1986) 17 IIC 577-607, 715-733 at 585-6.

22. A Bogsch, "The Law of Copyright under the Universal Copyright Convention" (3rd rev ed) Leyden, London 1968 at 7 & 11.

23. UNESCO "Records of the Intergovernmental Copyright Conference Germany 1952" 1955 at 74.

24. See E Ulmer, "The droit de suite in international copyright law" 6 (1975) IIC 12 at 21.

25. Vaver, ibid at 724.

26. UNESCO, Records, ibid at 74.

27. Vaver, ibid at 727.

28. Bogsch, ibid at 9.

29. H Dawid, "Basic Principles of international Copyright" (1973) Bull Cop Soc USA 1 at 7.

30. Bogsch, ibid at 8.

31. Bogsch, ibid at 13.

32. Ulmer, ibid note 19 at 20-21.

33. D Vaver, "Copyright in Foreign Works: Canada's International Obligations" (1987) Canadian Bar Review 76 at 83.

34. R Braubach, "Computer Software - International Protection" [1980] EIPR 225.

35. See generally, Chapter 4.

36. See again, generally, Chapter 4.

37. UNESCO/WIPO document CGE/PW/3-I & II, dealing not only with the prolems of storage in and retrieval from computer systems of protection works, but also the use of computers in the creation of works themselves.

38. "Moral Rights" are these explicitly recognised in Art 6 of BC etc, see also infra, Chap 3.

39. E Steup, "The Rule of National Treatment for Foreigners," (1977) 25 Bull Cop Soc USA 279 at 283.

40. Steup ibid at 283.

41. S Ricketson, "The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986" published by Kluwer at 205.

42. Kant, "Éléments métaphysiques de la doctrine du droit" p 297.

43. Ricketson, ibid at 206.

44. Steup, ibid at 281.

45. Steup, ibid at 281.

45a. I Sinclair, "The Vienna Convention on the Law of Treaties" (2nd Edn) (1984) Melland Schill Fund 115.

46. Wetzel & Rauschning (eds) "The Vienna Conference on the Law of Treaties: Travaux Preparatoires", 1978, 250-251.

47. Steup, ibid at 280.

48. Ricketson, ibid at 209-210.

49. Vaver, ibid at 720. See also Steup, ibid at 281-282.

50. Article 5(2), Article III of the UCC.

51. W R Cornish, "The Canker of Reciprocity" [1988] 4 EIPR 99.

52. S M Stewart, "International Copyright in the 1980s" (1981) 9 EIPR 264.

53. Stewart, ibid at 264.

54. Article 14 ter(2) of the 1971 version of Berne states, "The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where their protection is claimed."

55. Steup, ibid at 285.

56. Vaver, ibid at 720. Hauser, "The French droit de suite, etc" (1958) Bull Cop Sec USA 110.

57. Ricketson, ibid at 904.

58. J Phillips, "The Employee as Author and Owner of Literary Copyright" [1979] EIPR 274.

59. Phillips, ibid at 275.

60. Phillips, ibid at 276.

61. Steup, ibid at 276.

62. Committee of Governmental Experts on the Evaluation and Synthesis of Principles of Various Categories of Works, Geneva, June-July 1988.

63. E Armitage, "The Changing Face of Intellectual Property" [1987] 7 EIPR 195 at 196.

64. Vaver, see footnote 28.

65. Vaver, see footnote 16 at 733.

66. Cornish, ibid at 99.

67. See the case of *Computer Edge Pty Ltd v Apple Computer Inc* (1984) 53 ALR 225.

68. Senate Committee discussions reveal pre-occupation with "lobby" concerns.

69. WPO Document IPIC/CE/II/2.

70. Article 7.

71. Article 2.

72. Commission Regulations (EEC) 89/104 (OJL 140 11.2.89).

73. H C Jehoram, "The European Commission pressurised into a "disharmonising" Directive on Chip Protection" [1987] 2 EIPR 35, 36.

74. Article XV.

75. UNESCO/WIPO Document CGE/PW3 I Principle PW21, para 275.

76. UNESCO/WIPO Document IPC/CE/113 para 10.

77. Armitage, ibid (see note 63) at 196.

78. P R de Almeida, "The International Protection of Integrated Circuits" (1989) Copyright World 41.

79. ibid at 44.

80. Ibid at 45.

81. E Kelly, "Aspects of the New international Economic Order" (ed Hussain) 1980, London, 250.

82. Code of Conduct for Transnational Cooperation.

83. See Kelly, Note 81 at 253.

CHAPTER TWO

THE REVISIONS TO THE BERNE AND UNIVERSAL COPYRIGHT CONVENTIONS, 1971

"From the broader terms of reference, the infrastructure of the Paris (Revisals) was: (a) international law is no longer exclusively a consolidation of the status quo but a vital factor in the evolution of the international society; (b) education, technical assistance, transfer of science and technology, and investment in human resources are composite materials for a highway to national development."[1]

I. Introduction - A Crisis in Copyright

Discussion of the effect of the Revisals to the Berne Convention and the UCC effected contemporaneously at Paris in July 1971 requires to be prefaced by a brief consideration of the period which immediately preceded their adoption. Such an outline is intended to elucidate the reasons why it was necessary for special measures to be created for the developing countries as a condition precedent for a wider discussion of what changes the Revisals signalled for the development of the international copyright system itself.

It had been internationally recognised that there was a crisis in international copyright.

"The Berne Union existed harmoniously with the UCC for some time after the UCC came into effect. However, the emergence of newly independent countries seeking to import foreign educational materials on favourable terms began to impair this accord in the late 1950s and the problem reached crisis proportions by 1967."[2]

It was a post Second World War realisation that while Berne was adroitly defending authors' interests abroad, and the UCC was beginning to raise copyright consciousness in the newly-independent states, the fact remained that development in the Third World brought with it

a requirement that less developed countries (LDCs) should have as immediate access as possible to written and audio-visual material to assist those countries in the development process. The industrialized Western states formed a powerful bloc in the Berne Union opposed to any relaxation in the dissemination of intellectual materials at anything less than developed market prices. The jurisprudential thrust of the Berne Convention was entirely geared to guarding against any lowering of the levels of protection accorded to authors. Similarly, the UCC which was initially designed to promote development by stimulating intellectual creation, essentially within the frontiers of less developed countries, contained no provision for the immediate access those countries needed to educational works of the developed nations.

There was a very real threat that unless special provisions were incorporated into both Conventions there would be a mass exodus from them by LDCs who would abandon any copyright standards they had achieved. At a meeting of African states at Brazzaville in 1963, a Conference for the revision of Berne included consideration of "provisions safeguarding ... the free use of protected works for educational and scholastic purposes."[3]

Thereafter, another group of experts chosen by the Swedish Government and officials of BIRPI recommended the text of a new article on developing countries to be added to the Berne Convention.[4] The group emphasised that "exceptional measures for the benefit of developing countries was in principle justified",[5] and considered that countries unwilling to adopt Berne principles should turn to the UCC but at the same time indicated the advantages to authors if LDCs were induced to draft their domestic copyright by legislation on the pattern of Berne. The text of this and other provisions were submitted to a Committee of Governmental Experts which met in Geneva in 1965 but while a good deal of lip-service was paid to the needs of developing countries the prevailing attitude towards the intended provisions was pronouncedly apathetic. Writing shortly after the 1965 meeting, one commentator said

"From the outset it was the ambition of the Berne Convention to become, in the fullness of time, universal. Its opening to the world is a requirement of our times ... The idea is to attract the former possessions of the colonial empires by easing the adhesion clauses. In order to slake the thirst for culture of these new independent territories, the Berne Convention, Stockholm version, would institute an optional system specially tailored for the developing countries ... Assistance to the less developed countries ... reflects the remorse of the western community at having been possessed too long and too deeply by the love of lucre. The desire of the wealthier peoples to spread a little of their plenty where poverty and even want hold sway is all to their credit ... The whole problem if to spread the calm of reason and the spontaneity of charity ... We should be wary of making inroads, on the pretext of democratizing culture, on the spiritual heritage handed down by our forefathers; at any rate, we should do so early when quite sure of what we are about and in case of absolute necessity ...[6]

And so, preparations were made for the Conference of 1967 in Stockholm. Its Programme, which recommended some minor amendments in what had become the Protocol Regarding Developing Countries was published about a year before the Conference itself but the comments of participating governments on the principles were quite sparse and what comments were made expressed concern and opposition to the Protocol. The trouble with the Stockholm Conference was that it tried to achieve too much. Apart from the Protocol, the Conference was designed to alter Articles 1 to 20 of the substantive text, to revise in a primary fashion all of the administrative provisions of all the intellectual and industrial property conventions administered by BIRPI, the administrative committee of Berne, and to set up the World Intellectual Property (WIPO), a specialised agency of the United Nations. It was the combination of these largely unrelated issues that made the conference unmanageable and diluted the level of attention that was quite properly directed by LDCs towards the debate on their access to western copyright materials. The problem was "exacerbated by the intense political atmosphere generated by the Arab-Israeli war".[7] The principal concern of the developed countries was that they refused to permit the compulsory licensing of agreements to translate western materials into ones usable in LDCs on terms favourable to the latter. Hindsight suggests that although Article 1(e) of the

protocol, dealing with uses for "teaching, study and research", was the most bitterly contested question at the Stockholm Conference, the most important issue was the extent to which a developed country would be bound under the protocol to allow the use of its works in a developing country. An effort was made early in the Conference to split the Protocol completely from the Convention but this was unanimously rejected. It was clear that a developed country choosing to accede to the substantive clauses of the Stockholm Act would have to accept the Protocol as well. The critical issue was thus: what if a developed country that was already a member of the Berne Union under the earlier texts decided not to adhere to Stockholm at all? Could it be bound involuntarily to allow the use of its works under the provisions of the Protocol, even though it has never acceded to those provisions? When it became clear that such involuntary usurption of national sovereignty would never be contemplated, LDCs' continuing impatience became extreme. Their truculence in face of developed countries' protection of the *status quo* made a total confrontation unavoidable. In fact, it was demanded by LDCs through UNESCO that the terms of Article XVII, the Safeguard Clause, be modified. The UCC was drafted in order that it would complement the Berne Union, and accordingly, Article XVII(1) was included. It states

> "This Convention shall not in any way affect the provisions of the Berne Convention for the Protection of Literary and Artistic works of membership in the Union created by that Convention."

The Appendix Declaration relating to Article XVII explains that relationships between the Berne Convention countries acceding to the Universal Convention are to be governed solely by the provisions of the Berne Convention.[8] This oblique threat was sufficient to encourage joint revision of both Conventions at Paris in 1971. The purpose of the Revisals was to bring about a system of non-exclusive licences for the compulsory translation and reproduction of works for educational purposes in LDCs. What was important in a juridical sense here was that decisions required to be made regarding the purpose of international copyright protection. The relationship between Berne and LDCs

raised complex questions: the Convention is essentially concerned with the private interests of authors and with raising the level of protection accorded to them. LDCs are at varying stages of economic development. What they want is to increase the rapidity of their development and one way of doing this is the promotion of literacy, and technical and vocational training programmes which in turn mean LDCs need ready access to educational and informational materials, which usually come from the developed countries. LDCs do not possess the foreign currency they need to buy original copies of works themselves. The Paris Revisals allowed them to take advantage of specific exceptions to both Conventions.

II. Exposition of the situation of LDCs prior to 1971 and outline of what was agreed at Paris in July 1971

The Subject-Matter of the Revisals:

The revision of the UCC was more comprehensive than that of the Berne Convention. Within the text were included the author's fundamental rights of reproduction, public performance and broadcasting, together with the concessions made to developing countries relating to restrictions on the translation and reproduction rights contained in Articles V *bis*, V *ter* and V *quater* and the suspension of the Berne Union safeguard clause in the Appendix Declaration to Article XVII. Since the fundamental rights of reproduction, public performance and broadcasting were part of the Berne Convention prior to 1971, no such comprehensive revisal was reuired and reservations in favour of LDCs were introduced into an Appendix to Berne rather than in the corpus of the main Convention. The reservations themselves permit LDCs to avail themselves of restrictions on the rights of translation and reproduction, as provided for in both Conventions via the medium of compulsory licences. There are non-exclusive and non-transferable licences issuable on the expiration of prescribed periods, and after prior consultation of copyright-owners, by the competent authority in the developing country, subject to provision for the payment of just compensation. Reproduction licences may be issued only for use in connection with

systematic instructional activities; translation licences for the purpose of teaching, scholarship or research.[9]

It is generally accepted that the revisals brought the international copyright crisis to an end. They were successful because the simultaneous Conferences set off from a position of mutual goodwill that was not in evidence prior to or at Stockholm. The linking of the UCC with Berne had a great deal to do with the eventual acceptance of the reservation "package", simply because the UCC no longer remained a potential low-level refuge for the developing countries. On the other hand, these countries were no longer placed in the position under the Berne Safeguard Clause of being prevented from acceding to the UCC if this was what they wished. The advantages to developing countries under both Conventions were now essentially the same, and there was no reason for them to move from one convention to the other.

It is, however, difficult to indicate how beneficial the Acts have been to LDCs. Very few have so far availed themselves of the special provisions but in any event undertaking such an empirical examination would probably be to disguise the real consequence of the Acts. The provisions represent a delicate compromise between different conceptions of the role of copyright. The developing countries had never argued for the abolition of copyright but they did urge that its prescriptions should be lowered in certain circumstances so as to assist their economic development in the areas of education and training. The developed countries, or rather the authors' and publishers' organisations within them argued in turn that prescription of their rights should not be used as a means of providing economic assistance to developing countries. To a great extent the adoption of the exceptions represents the acceptance by developed countries of this argument: if economic assistance is to be given, it should not be at the expense of the relatively small group of persons who create literary works. The fact that to date four countries have availed themselves of the exceptions shows that authors are willing to licence the translation and reproduction of

their works. The crisis had thus been averted but the perception of international copyright needed to be re-appraised.

Even though the Revisals are less than twenty years old, they have to be seen against an historical background which no longer applies. At the material time, the universality of the Conventions was conceived to be the most important question facing those charged with the task of revision, a process which correspondingly required the establishment of a greater degree of co-existence and harmony between the Conventions themselves. And until that moment the structure of copyright attributed it to an individual, a group, organisation, company or agency, which then had the right to exclude others from utilizing works in certain ways. After 1971, there arose the concept, embodied in the revised Conventions, that states themselves might have an interest in cultural emancipation and development. The Joint Conferences signified the first acceptance of the view that far from there being a contradiction between the needs for access to knowledge by countries with scarce resources and the moral and material interests of authors, their needs and interests were actually complementary.

> "UNESCO, on whose initiative the Universal Copyright Convention was prepared, and which claims extensive competence and far-reaching responsibilities with regard to the protection of intellectual creation, expects that your efforts will make a decisive contribution to the achievements of one of its essential aims, namely the promotion of the right to culture through the organisation of international co-operation."[10]

The process of usurption of the two Conventions to this end began in the early 1960's, although early work in this direction suffered because a bifurcation of approach had become evident. The economic development of LDCs was regarded as no more important than their cultural development, and indeed the two were perceived as separable and distinct aims. At the fourteenth session of the General Conference of UNESCO in Paris in 1966, it was noted that

"The conventions ... governing international relations in the matter of copyright should be partially revised to take account of the economic social and cultural conditions obtaining in the developing countries ..."

and that UNESCO should

"... facilitate (their) accession to the Universal Copyright Convention, so as to guarantee a minimum degree of protection to authors of works of the mind while allowing of a broad dissemination of culture."

While the aims seemed complementary, the method of achieving them was incohesive. There was no attempt to assimilate the stimulus of intellectual creation or production with methods of control of dissemination of the works created. (That process of assimilation has to some degree been achieved by a number of *ad hoc* measures adopted jointly by WIPO and UNESCO, the principal of these being the adoption of the Tunis Model Laws for Developing Countries, which will be referred to later.) As long as that situation was allowed to continue the economic and cultural aims were always to require separate treatment. By treating these two aims separately was to assume that in order to accommodate them both a derogation from traditional copyright standards was necessary and this view pervades the Records of both the Stockholm and Paris Revisal Conferences. The argument was opened further by claims that the Revisals constituted a quantum leap from Berne's principally protectionist approach to the principals of copyright. Until the 1960s the European Theory of copyright as expressed in the Berne Convention dominated international intellectual property. It consisted of the view that protection of the exclusive economic right of authors *ipso facto* would look after the abstruse qualities of cultural advancement. To encompass humanitarian purposes seemed at variance with the Berne tradition.

The foregoing argument influenced the legislative content of the Appendix to Berne and the revised UCC in the following manner.

III. The introduction of reservations and exceptions

It is often said that the rationale behind the introduction of the Paris Revisals was a political one with no other function than to find an answer to the urgent contemporary problem of the application of the Conventions in those countries whose immediate interests were not being served by the international copyright system. It was recognised implicitly that if the application of the conventions were to be called into question then *ipso facto* not only was the enforceability of copyright law in general imperilled, but worse still the essential relevance of that system which had taken so long to acquire and mature could be nullified. That those nations of the developed would have little choice but to make major concessions to the developing ones to achieve the greater good of preservation of the system was axiomatic. Further those concessions were contrary to the terms in which the Berne Convention and the UCC were couched, there being a significant move away from the protectionist value of exclusivity of authors' rights to access to the works protected under compulsory licences. The process of giving legislative effect to those concessions by inclusion in the Conventions was carried out expeditiously, one might even say hurriedly.

> "Consider the task facing this Conference: to prepare a revised text of a world-wide convention on a highly complex and technical subject; to reconcile widely divergent purposes and needs; to make the revised text as consistent as possible with concurrent revisions in the quite different Berne Convention; and to do all this in an extremely short time."[11]

Importantly in a practical sense, the Revised Conventions were speedily ratified. It is certainly the case that political expediency was at the root of such speedy introduction of the exceptions created at Paris but bland acceptance of this fact disguises the international recognition of the evolution of an expanding philosophy, the germination of a radical

jurisprudence of international copyright that has parallels in other growth areas of international law. In fact, it will be shown that the Paris Revisals reveal evidence of a structural renovation of the international copyright system, and that the provisions for the benefit of developing countries should not be regarded as a railway siding for the temporary housing of ephemeral needs, but rather as an upgrading of the main line in order to improve the system of international communications as a whole.

The whole legal tenor of the Appendix to the Revised Berne Convention and the Revised UCC reflects a recognition of copyright as a complex and peculiar branch of the law relating to private individuals via the medium of international Treaties which is part of the Public International Law and which in turn has been transformed in the turmoil of the last hundred years. The law of Copyright is so highly complex and technical because it deals with acute problems of international codification of private law subject matters at both a bilateral and multilateral level: bilateral, or regional, because most copyright dealings in the international sphere are contractual between two interests, author/publisher on the one hand and user on the other, (hence why the rule of national treatment is said to be the cornerstone of both Conventions); and multilateral because bilateral relations are best administered and regulated by international codification. Since collective "law-making" treaties emerged from the modern international society of the last century, the search for the art of fruitfully comprising the advantages of bilateral and multilateral agreements has been the central tenet of international economic law. It is essential, particularly when dealing with copyright, that there exists a spirit of tolerance for the co-existence of different systems of codification, both bilateral and multilateral for the same subject-matter.

Particular questions which are related to the foregoing considerations are the following. Firstly, is the unification of international copyright law as exemplified by Berne and the introduction of additional members of what we might call the international copyright community through the medium of the UCC being threatened by a deunification process

begun by the Paris Revisals? Secondly, are the Revisions in conflict with the rules of Public International Law? Thirdly, can the provisions of the Appendix to Berne and the Revised UCC be regarded as indicative of a cohesive codification policy on the part of WIPO and UNESCO as postulated above? It has been claimed that the Revisals evince a strong codification policy which is expansive, aiming at ratifications at all costs, but which has altered the spirit of the policy and substance of the copyright conventions:[12] the three questions postulated above thus become most critical.

Dealing with the first question of the unification or deunification of copyright law, we can make the following observations.

> "Efforts to persuade all countries to become members of the (Berne) Union have always been very emphatic. Mainly driven by the idealism of the founding fathers and inspired by a concept of the righteousness of all-out copyright protection derived from Natural Law, the journal of the Union, Le Droit d'Auteur, often sketched a sort of picture that presented union members like good people belonging to the only true Church while those staying outside the Union were somewhat regarded as the contrary."[13]

Prior to 1971, the Berne Union canvassed for membership largely on this basis. The identifying features of Berne members at this point in time included the use of the first place of publication of a work, the country of origin, as the essential connecting factor in determining protection of a work in all other contracting states, irrespective of the author's nationality, on the basis of national treatment. The minimum duration of protection in respect of published works was 50 years *post mortem auctoris*. The right of protection against unauthorised translation was the same period of time, unless members availed themselves of the reservation of Article 8, reducing the period to 10 years.[14] The country of origin was also used by the UCC as the main connecting factor, but with a period of protection reduced to 25 years *post mortem auctoris* and with a 7-year period of protection as regards translations.[15] Broadly speaking, the immediately foregoing is an indication of

the commitment of the members of either of the Conventions. What was achieved at Paris was the harmonisation of the reservations network of the two Conventions which represents a portion of unification of law. At Paris, the two groups identified above were splintered into several more, based on the same criteria of translation right and duration of protection. The first group consists of any country of the Union which may fully ratify and accede to the 1971 version of the Berne Convention together with its Appendix which entails the period of 50 years protection *post mortem auctoris* and equal protection of the translation rights in terms of Articles 7 and 8. Within this group developed countries observe the terms of the two said Articles but in terms of Article 1 of the Appendix a developing country is not required to give reciprocal protection if it has lodged notice with WIPO of its intention to make use of the reservations set out in Appendix Articles II-V, by virtue of which LDCs are entitled to lower the protection which they grant to translation rights to 3 years duration after publication. Reciprocity is therefore excluded. The second group consists of those developing countries who may, under Article II(3)(b) of the Appendix, lower the duration of the translation rights protected to 1 year upon publication in the case of translation into languages other than English, French and Spanish. Article V(1)(b) of the UCC provides similarly. The third group consists of Berne Union states who may "provisionally" apply Article 5 of the Stockholm Protocol of 1967. This instrument enables developing countries tomake reservations defined in Article 1, and to reduce thereby to between 3 and 10 years the protection of the translation rights in relation toworks first published in developed countries of the Union. The scope of application enforced bythese provisions is much wider than those of the Paris Appendix since they can be applied indefinitely wherever declarations are made by States under Article 5, prior to the entry into force of the Paris Act. (Even given the fact that the Stockholm Act and Protocol never entered into force, agreements between countries under Article 5 of the Protocol on its provisional application are deemed to survive. Article 34 of the Paris Act forecloses further aceptance of the Stockholm Act and Protocol.) The fourth group is made up of those countries both developed and developing, members of Berne, who have always maintained the traditional reservation to Article 8 which allows them to reduce to 10 years

upon first publication the protection of the translation rights as to works published in other Union countries. Developing countries that have not made such a reservation earlier or are now Berne members are still entitled to invoke them (Article V(1)(a)(i) of the Appendix) but the reservation does not seem to operate reciprocally. Other Berne members may now reduce the terms of protection of translation rights in works that are first published in these countries invoking the reservations under Article V(1)(a)(i).

The next group concerns UCC members who accept the original version's requirement of 25 years' protection after the death of the author and of 7 years' protection of translation rights. After 1971, developing countries may reduce the period of protection of translation rights to 3 years post publication by virtue of Articles V *bis-quater* of the new version of the Convention. Lastly, there remains the group of states which have ratified and acceded only to the 1952 version of the UCC.

Seen in this way, the Paris Revisals have created a disunification of law, not by accident, but by reason of deliberate policy choices. The result is a "diverse universalism" which is evidenced by the deunification illustrated by the groupings of states mentioned above and the provisions of the Paris Acts which were accepted with such alacrity in 1971 but greeted with such horror at Stockholm in 1967. The main purpose of those charged with the duty of producing a workable compromise in the preparatory work for the joint Conferences of 1971 was to attract the membership of developing countries by granting them unilateral privileges. Taking, for example, Article V *bis*.(1) of the revised UCC any developing country "may notify at the time of ratification, acceptance or accession to the Convention, or thereafter that it wishes to avail itself ... of any or all of the exceptions provided for in Articles V *ter* and V *quater*." Article 1(1) of the Appendix to the Revised Berne Convention is couched in similar terms and speaks of a developing country being able to "... avail itself of the faculty provided for in Article II or ... Article III". Contrast these with Article XX of the original UCC of 1952 which states "Reservations to this Convention shall not be permitted" and the fundamental change of emphasis may be noted.[16] The thrust

towards universalism requires not the extension of multilateralism through the geographical aggrandisement of the international copyright conventions, but the increased employment of bilateral and regional means. Modern copyright comprises uses of works which go far beyond the publication of written material. The variety of prevalent subject-matter as well as the cultural divide which separates so many states and groups of states in international regulation of that subject-matter demands some kind of combination of multilateral and bilateral agreement, of which the reservations introduced by the Paris Acts are but examples. The use of bilateralism within the operation of the multilateral Conventions should not be thought to involve a juxtaposition of two inherently different methods of revising extraterritorial agreements. Rather, the Paris Acts tend to display latently bilateral effects. An example of these bilateral effects is shown in terms of Article 32(3) of the Paris version of the Berne Convention which allows developing countries to apply the reservations of the Appendix in relations with Union countries which are not parties to the Paris Act "... provided that the latter country has accepted the application of the said provisions". Article VI(1) of the Appendix is a correlative to Article 32(3) and states that a developing country may, before the Paris Act has come into force as far as it is concerned, provisionally apply the regulations in its relations with another country of the Union which admits the application of the Appendix by that developing country to works of which the other country is the country of origin.

The complicated network of reservations permitted under the Acts reflects their basic philosophy that the main purpose of the drafters was to attract as many LDCs as possible into the membership of the Conventions, and that by granting them unilateral privileges. Now turning to the second question postulated there arose contradiction between the method adopted to attract LDCs and the substantive rules of international treaty law. Article 2(1)(d) of the Vienna Convention on the Law of Treaties of 1969 states that "reservations" means a unilateral statement, "however phrased or named", made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their

application to that State. Further, under Article 21 of that Treaty which deals with the legal effects of reservations,

> "(a) reservation established with regard to another party ... modifies the treaty provisions to which the treaty relates to the same extent for that other party in its relations with the reserving state."[17]

Unlike many other articles of the Vienna Convention, this provision, which foresees material reciprocity as the legal effect of reservations does not include the phrase "unless the treaty otherwise provides". The basic tenet of the reservations permitted by the 1971 Revisals is that material reciprocity is neither required not expected.

Dealing with the last of the three questions posed, whether WIPO and UNESCO are currently engaged in a cohesive codification policy as a result of the Paris Acts, we can make the following observations and criticisms. WIPO and UNESCO are aware that "(a) rather quantitative redevelopment of international copyright must be replaced by a qualitatively new structure".[18] As stated above, the Appendix to the Berne Convention and the new text of the UCC of 1971 tend to be viewed as an incentive to introduce to world copyright those countries which were unwilling or unable to adhere. In fact, they represent a much more subtle shift in the emphasis of protection granted by the Conventions. The exceptions introduce some serious limitations on two of the main powers granted by copyright to authors, the power of reproduction and the power of translation, but more importantly, they take from authors' rights their exclusive character, replacing them with a system of obligatory licences. In the case of a country invoking such licences, the copyright proprietor

> "becomes a mere creditor claiming for some equitable remuneration ... What conclusions are to be drawn ... concerning the characteristics of the recent evolution of the Berne Convention, especially the amendments made to it in its last revision? It seems clear that the new trend in its evolution is in the direction of a diminution of the authors' rights. One may fear even more: this diminution may

> be more than a mere limitation; it may consist of a deep change of the nature of copyright from an exclusive right to a claim for some equitable remuneration."[19]

The tendency until the present time has been to view the 1971 revisals as a temporary adjustment, caused by special circumstances not related to the mainstream of international copyright. It is the writer's submission that while the functions of copyright have not altered since 1971, nevertheless the manner in which authors' rights are perceived has changed. Later chapters will deal with how the new technology has facilitated this process but what we are dealing with presently is a discussion of the manner in which the pressure group constituted by less developed countries has contributed and continues to contribute to the metamorphosis of the international copyright system. The influence of the developing countries is a concomitant of the fact that they form numerically the largest grouping of those states members of the Conventions. They are able to influence the activities of WIPO and UNESCO in a way which is tangibly unfavourable to the protectionism which is so very much at the heart of the Berne Convention. The emergence at international level of newly independent countries and the action they pursued meant the international development of authors' rights progressed towards adaptation to their social, cultural and economic circumstances. Although developed countries feared a breakdown of the protection that nationals of their member states enjoyed, the opposite has happened, and the fact that LDCs play a major role in both UNESCO and WIPO decision making merely

> "constitutes a natural tendency and there is absolutely no reason to fear an outcome that would be fatal to the potection of authors' rights, since these countries are developing and their progress can but consolidate the protection of such rights."[20]

A feature of the rationale and core-content of the domestic copyright laws of LDCs is the balancing of the requirement of the minimum protection of authors' rights with restrictions on exercise of these rights in order that the possibilities for promotion of access to cultural materials is enhanced. The restrictions, however, are those largely permitted by Berne,

relating to quotations and borrowings from official texts and to oral works. Restrictions of the authors' exclusive right of reproduction and of public performance have been provided for in most developing counties, taking into account the cultural and educational aims pursued, the private and non-financial nature of the use made of the work, and the specific capacity of the user, such as a broadcasting organisation. The resultant encouragement of "home-grown" authors through a well-known copyright protection system will solve the educational and cultural problems of LDCs.

The exceptions heralded an era in the history of the Conventions which signified the advent of exclusive rights as instruments for

> "an international regulation of exchange of literary and artistic products and services"[21]

Since requirements for the use of copyright materials for teaching and research form the crux of the exceptions, it was necessary for states members of either or both Conventions to accept that there are situations in which there is no obligation on a user to ask the author for permission to use his works, although still be bound to pay for that use, or to limit the use that can be made of the work. In short, the general provisions relative to teaching, scholarship and research and to "mainstream" copyright law make the legal situation regarding the former quite difficult to accurately establish, and the reason for this is because the conventions had rather suddenly to come to grips with a change in the application of exclusive rights, the legal content of which had been painstakingly established over a long period in the case of Berne. The standard legal technique of applying any copyright law is through the medium of an exclusive right for the creator, or other copyright proprietor who may then decide when, where and how his works will be used. The exclusive right also protects authors' financial interests and moral rights in their works. Because it secures financial returns from the activities of authors, the exclusive right model, as the foundation of copyright, serves as an incentive to cultural development. From the exclusivity of rights is drawn the equality of rights for authors abroad. The

only restrictions to exclusive rights which are noticeable in the Conventions are those which are justified by the varying economic, cultural, social or other conditions prevailing from member state to member state. The whole content of the exceptions reveals a system of checks and counterbalances between the privacy of the exclusive right and the restrictions which may be made thereto. For example, Article 10(2) of the Paris text of Berne states

> It shall be a matter for legislation in the countries of the Union, ... to permit the utilisation, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilisation is compatible with fair practice."

Therefore, national legislation and agreements between Berne Union countries may restrict the exclusive right to the extent justified by the purpose provided such utilisation is compatible with fair practice. The Appendix to Berne and Articles *bis, ter* and *quater* of the UCC are in almost identical terms, and give to those countries which have declared that they will avail themselves of one or more faculties the possibility of limiting the exclusive right of the author further than would otherwise be allowed under the Conventions. Any person may make and use translations, based on a licence given by the competent authority of a developing state, for the purpose of teaching, scholarship or research. Also broadcasting companies have a right to obtain licences for translations and to use them for teaching and other educational purposes under specified conditions.

In 1976, UNESCO and WIPO jointly assisted in drawing up the Tunis Model Law on Copyright intended to cater for the needs of developing countries by providing a model which they could use when framing or raising domestic legislation and adapting it to their particular interest. The Model law gave WIPO and UNESCO the opportunity to fuse philosophical and methodological differences between individual members and individual groups of members in the body of a municipal enactment,

"a piece of legislation drawn with the greatest precision possible, so that the provisions of the law be certain and unambiguous, facilitating the Court's task of interpretation."[22]

One of the primary purposes of the Model Law is to bring to the attention of those LDCs considering its introduction the fact that it contains provisions which are designed to limit any derogation of the fundamental notions of freedom of contract, moral rights and the importance of preserving authors' rights,

"thus implementing the overriding desire of the Paris Conference, to promote and encourage, wherever possible, voluntary arrangements between the owner of the basic rights and the parties interested in their exploitation or use."[23]

The application of the Model Law by LDCs in conjunction with the improved access to intellectual materials is guaranteed in terms of the Convention establishing WIPO.[24] This encourages a uniformity of scope and protection in municipal legislation and a true community of interest. At the same time it seeks to improve a structure of copyright law with the diffuse set of rationales for copyright which exists throughout the world. The UNESCO Convention has a strong bias towards the human rights rationale, that social and economic development among nations is assisted by the pressure of exclusive rights for authors in relation to their work. On the other hand the core rationale of the Berne Convention is the rationale of individual rights whereby intellectual property attracts a value to be expressed in financial terms. The result in the Model Law is a fusion of rationales bound by a common structure, and the effect is a startling resemblance to most of the national copyright legislations of the last decade, whether of developed or developing country provenance. This in turn may suggest that the fact that two international copyright conventions exist side by side, with many states members of both, is an enhancement of the international copyright system rather than a detraction from it. Further, it is ventured that the duality of the present system is its very strength. Since it is realised by LDCs that the preservation of the degree of exclusivity awarded to authors'

rights is in their long-term interest, and it is also realised by developed countries that the wider dissemination of works is in the latters' interest, it is not difficult to achieve a core structure of legislation with diverse rationales. As will be described in a later chapter dealing with the new technologies the aggrandisement of the core structure of national copyright laws has been a pre-occupation of joint UNESCO-WIPO work in the face of perceived threats such as piracy and unauthorised reproduction of cultural materials since 1978. The Model Law is not a "soft option". While embodying in its Appendices provisions to enable LDCs to obtain compulsory translation and reproduction licences, it nevertheless contains much of the terminology of the Berne Convention. Section 7 on "fair use" contains a provision according to which the use of a lawfully published work by way of illustration in publications, broadcasts or any recordings for teaching will be permissible without the author's consent to the extent justified by the purpose. The same rule applies to the communication for teaching purposes of works broadcasts for use in schools, education, universities and professional training, provided that such use is compatible with fair practice and that the source and the name of the author are mentioned in the publication, the broadcast or the recording. The freedom thus accorded by Berne and the UCC to states in regulating uses of works in teaching and research is wide but the arguments surrounding the use of compulsory measures in copyright whose essence is the consensual agreement of parties of equivalent bargaining power remains.

The compulsory licences envisaged by the latest versions of Berne and the UCC are likely to become the norm for copyright material unrelated to scholarship, teaching and research. For example, in the United States Federal Copyright Act of 1976, there is provision for compulsory licences in respect of cable television transmission and the broadcast of sound recordings. Inclusion of such items is probably the tip of the iceberg. The reason for the inclusion of such means across such a wide spectrum of copyrightable works is simply a question of enforcement. The current trend to be discerned from copyright conferences is for the implementation of effective enforcement of the right to remuneration in a situation where new technical means give the rights owner no opportunity to ascribe his consent to

individual disseminations of his work. While dismissive of all the exclusive rights of author other than that of remuneration, compulsory licensing does possess a social approach and collective element whose desire is to increase the writers' and artists' share in the gross national product, and stricter controls in many of the modern copyright statutes, be they of developed or developing states; they also place a very strong emphasis on the protection of moral as well as pecuniary rights and all of these tensions explain the legal content of the Tunis Model Law. Compulsory licensing will probably have to be endured so long as it makes enforceability of law at least tenable. The fact that it entails fixing the remuneration due for the use of a work by statute, or where the statute speaks only of a reasonable remuneration, by reference to a tribunal, means that it is not commensurate with the working of a free market economy in which the prices are governed by the free play of supply and demand. Therefore, contractual arrangements should only be provided for in exceptional cases, where the fixing of the remuneration could be determined by the prices that are normally agreed upon in licence contracts. There is certainly a need for the facilitation of the access to protected material but the greater the willingness of authors and publishers to grant licences, the greater the possibility of avoiding a wholesale system of compulsory licences.

IV. The influence of copyright on cultural development of LDCs

> "The (subject) is certainly perilous both by reason of its burning topicality and the complexity of its manifold aspects ... man feels ever more the necessity to know because it has become evident in our time that the elevation of the human spirit, far from being a useless luxury enables man to expand his qualities, to realize his human potentiality and to promote human comprehension."[25]

There is an appreciation, slowly gathering momentum, that the world's wealth depends on a dialogue of cultures, and it is certainly indisputable that the progress of culture can constitute a powerful means for attaining the essential aim of human rights constituted by the maintenance of peace and international security. Article 27 of the Universal

Declaration of Human Rights is one of the few Conventional expressions of that appreciation and permits us to identify the exclusive rights in literary and artistic property which we call copyright as worthy of safeguard in the interests of humanity. This is what the Charter of the Authors' Rights adopted by CISAC (Confédération International des sociétés d'auteurs et des artistes) in 1956 lays down in its Article 1st:

> "The authors of literary, musical, artistic and scientific works play a spiritual and intellectual role in society which is to the profound and lasting benefit of humanity and a decisive factor in shaping the course of civilisation. The State, accordingly, should grant to the author the widest possible protection, not merely in consideration of his personal achievement, but also in recognition of his contribution to the common good."

As stated above until the early 1960s, the European theory of copyright as expressed in Berne dominated international intellectual property. Few countries outside Europe till then had publishing houses and copyright law was largely unknown to them. Even in the colonies of Berne founder members, where municipal copyright statutes were in force, there was little impetus to implement them, and consequently little encouragement to authors within those colonies. There did exist entities called Authors' Societies but there was no State interest in them and they were often encumbered by a terribly clumsy and obtuse administrative structure which

> "saw in the exercise of copyright by the (indigenous) population a source of revenue which could serve above all political purposes (politics: it was the obsession of that era)".[26]

Some of the new states, former colonies, by "declarations of continuity" continued to apply Berne in their relationships with Berne countries, while others acceded directly to that Convention. Following their independence, LDCs were faced with the rapid development of teaching and the increase in the number of children at school which demanded greater supplies of cultural material, cuasing new financial burdens. In view of these needs, the

tendency in the developing countries after accession to sovereignty was, logically, to set limits on all rights that impaired the development of society in the interests of the national community. Thus, literary and artistic property rights could have led in this context to complicated problems in respect of the balance to be maintained between the interests of authors and those of the national community.

> "Having become masters of their own destiny, the developing countries found themselves confronted by numerous preoccupations, among them being the requirements of cultural and social evolution. And the problem which now faced them was whether they should find at the basis of Human Rights the same concept of man, and whether the exigencies of development can be reconciled with the full application, in general of the rights which all formally affirm in their Constitution - and in particular those concerning property. In Europe, as we know, it is the nation which, in general, preceded the State, which consolidated it afterwards. In some developing countries the inverse situation has been noted. In these countries, the multiple divisions of sociological, economic and political character have hindered the formation of a true nation, which the State, constituted after independence, accepts as its duty to erect."[27]

The developing countries are therefore often compelled to grant priority only to enterprises whose aim is to further social development.

> "To this effect, for the purpose of establishing order and ensuring this development, some relegate liberty and justice to a secondary position, in particular freedom in the act of creation and justice in remunerating authors."[28]

> "But the logic of development obliges the State to expand its aims, to stretch its prerogatives, to diversify its capacities in order to enable itself to cope with the limitless needs of the National Community. For it has become evident that in the developing countries private initiative is incapable of meeting all the necessities which simultaneously present themselves, either because of an inadequacy of means or a lack of technical ability. The State is accordingly obliged to abandon the role of

> policeman, of guardian of the social peace, and to take in hand the production of material (and immaterial) goods, their circulation and distribution. Thus it becomes the big "Boss" of Commerce, Industry and the Arts. One can, therefore, understand the need for the developing countries to limit the property right, in the interest of the collectivity, the right of which it is said that "it cannot be in Africa, a continent of essentially communal structures, what it is in general, in Europe".[29]

The omnipotence of the State can, however, be dangerous for if the State becomes the supreme innovation of the idea, that is to say of God, as Hegel put it, it ceases to be a factor for civilisation and, as was said by Leopold Senghor "it degenerates into a force for derealisation".[30]

N'Diaye argues that the forces of derealisation bring about a restriction on the rights which humans are entitled to enjoy. He cites the decision of the United States Supreme Court which, at the time of the "new Deal" policies of President Roosevelt, in spite of its habitually uncompromising attitude, ended by accepting that

> "the economic and social growth claimed by the country justified, for it to be made effective, some infringements of classic freedoms."[31]

The choices facing developing countries were channelled into the following questions, namely

> "among the tremendous expenses which are necessary in order to reach the desired higher level, from buildings construction and teaches' training to installation of broadcasting systems and printing of books or production of audio-visual material, what is the proportion which would correspond to authors' royalties, and is this part of any real importance?"[32]

The second question could be addressed to the governments of the developed countries:

"Why should the effort to assist the developing countries in education, scientific or cultural matters be exclusively financed by the authors who pay indirectly by the sacrifice of their rights, and not by the whole nation, whose conscience and interests should lead to the above mentioned assistance?"[33]

As a strict matter of statistics, the use made by LDCs of the exceptions granted by the Conventions in their favour was not extensive in the decade following the Acts and a clarification of the content of the Acts was therefore undertaken jointly by WIPO and UNESCO. In November 1980, a working group ws convened by the Secretariat of UNESCO and the International Bureau of WIPO to formulate "Guidelines in the System of Translation and Reproduction Licences for Developing Countries under the Copyright Conventions". The Working Group, composed of twelve national representatives, produced the following. The Guidelines exclude from the permissible scope of compulsory licensing requests by industrial research institutes and private undertakings if they conduct reasearch for commercial purposes. Only works which are necessary to teaching, scholarship or research in a developing country are available for compulsory licensing. The most frequent requests for translation or repoduction licnces are made by qualifying nationals who, as publishers, want to market copies of works in translation, or by broadcasting organisations who want to use audio-visual materials for instruction. In order to obtain compulsory licences, these applicants must provide proof that efforts have been made to reach and to obtain the copyright owners' authorisation. The Guidelines also require that copyright proprietors are justly compensated for legitimate uses and that accurate reproductions or translations protect proprietors' moral rights as well. The Guidelines have been supplemented by the activities undertaken by the Joint International UNESCO-WIPO Service for Facilitating the Access by Developing Countries to Works Protected by Copyright, whose sole remit is greater access by LDCs to protected works. That access is given expression in international law.

"If the premise is accepted that "free participation" is only possible through free access, literal implementation of the above language arguably legitimises the unauthorised use of copyrighted works."[34]

The Preamble to the Constitution of UNESCO further supports this argument:

"the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern."

The recognition of copyright in LDCs offers long-term benefits that the piracy of works cannot.

"The copyright Conventions provide the framework for a broad international community of literature and the arts. By withdrawing from the Conventions a country cuts itself off from this community and in effect admits that it has nothing to offer to the world from its own publishing, film making and similar industries."[35]

The recognition of copyright furthers the principles set forth in the Universal Declaration and in the Preamble of UNESCO's Constitution because it is

"the most effective way of ensuring the creation of works and their dissemination."[36]

While protection of economic and moral interests of authors is vital, these are signs of a new trend. The traditional counterblancing of the interests of authors, publishers and the public interest (the latter being assumed to be the interests of consumers) has been supplanted by the identification of new interest groups comprising, firstly, the creator's interest in protecting his skill, effort and investment; secondly, competitors' interest in freedom to market improvements and innovations; thirdly, the consumers' interest in

maintaining a competitive market in order to keep prices reasonable and the selection wide; and lastly, the public interest in access to information. The last of these, the public interest, has become a broader identification with what policy options bridge the gaps between the other three, and provide the framework within which they function. Part of the emerging structure of the "new" public interest is the interest of the technologically under-developed and developing world in access to information from the technologically-developed world. What remains is the juxtaposition of

> "the utilitarian conception of conferring legal monopolies in information as an incentive for innovating, adapting or devising (and) the economic principle which favours restrictions of such legal monopolies on the basis that efficiency and low costs flow from free competition."[37]

It is submitted that the future treatment of international copyright as it relates to developing countries will lead to its synthesisation with international patent law.[38]

Prior to making some points in conclusion, we should also note the significance of administrative changes made during the period between 1967 and 1971.

The amendments agreed at the Stockholm Protocol in 1967 contained some important provisions relative to the organisation of the international copyright system, rather than international copyright law. In particular the work of Stockholm Conference Main Committee V led to a maajor institutional change in the way in which Berne Convention is administered, the creation of the World Intellectual Property Organisation. Previously administered by the United International Bureaux for the Protection of Intellectual Property (BIRPI) the Secretariat of the Berne Union, the Berne Convention became the responsibility of WIPO. It should be noted that such a change facilitated the United States in participating fully in debates on international copyright matters conducted under Berne auspices. (WIPO administers both the Berne Convention and the Paris Convention for the Protection of Industrial Property; the United States was a member of the latter in 1967,

although not at that time a member of Berne). The World Intellectual Property Organisation was established by a Convention[39] which came into force on 26 April 1970,devoted entirely to its institution and which was devoted to the promotion of intellectual property throughout the world because membership was designed to be open to nations which were not simply members of the Berne Union. WIPO became a specialised agency in the United nations system of organisations in 1974. The origins of WIPO go back to 1883 and 1886 with the creation of respectively the Paris and Berne Unions. Both Conventions provided for the establishment of an "International Bureau", or Secretariat, which were unified in 1893. Eventually, in 1964, the first formal relations between the United Nations and BIRPI took place. After the establishment of the WIPO Convention, the relations between WIPO on the one hand and the Berne Union on the other

> "are characterised by the fact that all States members of the Assembly of the Berne Union which are members of WIPO are members of the General Assembly of WIPO and that all States members of the Executive Committee of the Berne Union which are members of WIPO are members of the WIPO Co-ordination (see WIPO Convention, Articles 7(1)(a) and 8(1)(a)"[40]

The creation of the World Intellectual Property Organisation Convention is of greater import than mere administrative efficiency. As a specialised agency of the United Nations, under Article 1 of its Agreement[41] with the United Nations, WIPO is responsible for taking appropriate action in accordance with its basic instruments, in relation to the treaties and agreements administered by it, for promoting creative activity and for facilitating the transfer of technology to the developing countries to accelerate their economic, social and cultural development.

"In planning and implementing its activities for developing countries, WIPO is guided by the relevant objectives of international co-operation for development, with particular reference to making full use of intellectual property for encouraging domestic creative activity, for facilitating the acquisition of foreign technology and of literary and artistic works of foreign origin, and for organising easier access to the scientific and technological information in millions of patent documents. All this should serve the cultural, economic and social development of developing countries."[42]

V CONCLUSIONS

It is generally recognised that the Paris Revisions brought the international copyright crisis to an end. Why were they so successful? To begin with, the Conferences set off from a position of mutual goodwill that was not in evidence prior to or at Stockholm. The linking of the UCC with the Berne Convention at Joint Conference level had a great deal to do with the eventual acceptance of a reservation package, simply because

"the UCC no longer remained a potential low-level refuge for the developing countries. On the other hand these countries were no longer placed in the position under the Berne Safeguard Clause of being prevented from acceding to the UCC if this was what they wished. The advantages to developing countries under both Conventions were now essentially the same, and there was no reason for them to move from one Convention to the other".[43]

It is difficult to indicate how beneficial the Paris Acts themselves have been to LDCs. Very few have so far availed themselves of their provisions, but as stated before such an empirical examination would probably disguise the real consequences of the Acts. The provisions do after all represent a delicate compromise between the conceptions of the role of copyright.

"The developing countries never argued for the abolition of copyright but they did urge that its prescriptions should be lowered in certain circumstances so as to assist their economic development in the areas of education and training. The developed countries, or rather the authors' and publishers' organisations in those countries, argued in turn that their rights should not be used as a means of providing economic assistance to developing countries. To a great extent, the adoption of the Appendix represents the developing countries' acceptance of this argument: if economic assistance is to be given, it should not be at the expense of the relatively small group of persons who create and provide literary and artistic works ... The fact that to date, four developing countries have involved the appendix may be an indication that authors and publishers in the developed countries have been far more willing to licence their works than was previously the case."[44]

A further indication that the developing countries are themselves more concerned with the protection of authors' rights may be seen in the high levels of protection that are to be found in many of the recently adopted laws as indicated above.

Given that the provisions of the Paris Acts represent a delicate balance between widely differing conceptions of the role of copyright, has this compromise developed or changed in substantive character since the simple problem of access to materials has been eased? Has the nature of copyright, its place in society or its social function changed because of the exceptions to both Conventions? Objectively, copyright constitutes a field of law whose purpose is to organise the relations that come into being with the creation of intellectual works and their use in society. The historical evolution of copyright illustrates that the subjective content of relations between creator and user have matured over the last two hundred years in parallel with social evolution itself. The Paris Acts sought to provide a cultural climate in which the interests of the developing countries, both as users and creators of intellectual materials, were assimilated. This could not be achieved by the introduction of licensing preferences alone but rather by instituting a concentrated programme aimed at raising the level of copyright consciousness in LDCs. The restrictive scope of the Paris Revisals meant, however, that the process of assimilation was restricted

only to quicker and cheaper access to materials needed for teaching, scholarship or research. The more subtle, developmental character of copyright required to be undertaken by the more comprehensive technique of encouraging a legislative infrastructure within individual developing countries. It is the peculiarity of the institution of copyright legislation within a particular developing country that that country's copyright relations with other members of the international community formed the impetus to create that legislation in the first place, whereas the developed countries, having long since drawn up their own municipal copyright statutes found it necessary to enter into relations with other states thereafter. In this way, the conditions for the existence of copyright in LDCs and the scope of its protection are more akin to a reaction to the level of availability of foreign intellectual materials than to the cultured, economic and social circumstances therein. The Paris Acts satisfy the immediate requirements of the populations of LDCs by introducing foreign works to them but they do not provide effective stimuli for creative activity on the part of national authors. It is therefore not enough to import the copyright concepts of developed countries but rather, in addition to actual copyright provisions, consideration has to be given to the creation of bodies for the management of authors' rights and the establishment of cultural funds for the purpose of engendering creative activity by native authors.

The collective administration of authors' rights is not simply an issue that concerns the developing countries. The advent of the new technologies has made many of the rights traditionally enjoyed by authors all over the world individually unenforceable without centralised administration. The result is that much of the discussions currently being carried out by WIPO and UNESCO jointly in discussing and implementing model provisions to deal with the new means of dissemination of works will be increasingly implemented uniformly regardless of the state of the participator's social and economic development.

One last point is worth mentioning. In the last decade of the twentieth century, the Berne Convention is now recognised as the primary international copyright instrument because it guarantees a higher level of protection to authors than does the UCC. It should be

remembered, however, that the UNESCO Convention contributed and continues to contribute to an international copyright system which is all the stronger for the duality of that system. The 1971 Revisals owe much to the thrust of UNESCO which envisaged that its work in terms of the Universal Copyright Convention should be a recognition of the fact that while developing countries are normative adherents to an international system of copyright law, they are not recipients of copyright justice because the level of copyright consciousness in those countries was so low.

FOOTNOTES
(Chapter 2)

1. E S Yambrusic, "Model Law on Copyright for Developing Countries in Africa etc" 9 (1974) International Lawyer, 387-388.

2. B Ringer, "The Role of the United States in International Copyright Past, Present and Future" (1974) 56 Georgia Law Journal 1050 at 1064.

3. (Bureaux internationaux réunis pour la protection de la propriété intellectuele) BIRPI Intellectual Property Conference of Stockholm 1967 Doc 2/1 at 67.

4. Ibid at 67-69.

5. Ibid at 68.

6 B Mentha, "Looking Ahead to International Copyright Year" (Stockholm 1967) 95B EBU Review (1966) 58, 60=61.

7. B Ringer, "The Role of the United States in International Copyright" Copyright, 1968, 215 at 223.

8. UCC Appendix Delcaration relation to Article XVII(b).

9. For a full description of the Paris Revisals, see E Ulmer, "The Revisions of the Copyright Conventions" Vol 2 (1971) IIC 345.

10. R Maheu, Director-General of UNESCO, opening address to delegates, Paris 1971, document DG/11/6.

11. Report of the General Rapporteur, "Records of the Conference for Revision of the Universal Copyright Convention, 1971" 55 at 57.

12. F Majoros, "Some Considerations on the Future of International Copyright Arising upon the Paris Acts of 1971" (1977) Diritto Comparato Convenzioni Internazional 291.

13. Ibid at 296.

14. Article 8.

15. Article V(2).

16. The exceptions to copyight protection as contained in both Conventions were termed "reservations" in the course of the *travaux préparatiores* and in the Introductory Report of the Paris Conference for Revision of the UCC Doc INLA/UCC/4.p.19.

17. Majoros, op cit at 311.

18. Von Olenhausen, "Entwicklungsten im Internationalen Urheberrecht" (1974) UFITA, vol 71, p 11.

19. G Koumantos, "The Future of the Berne Convention" (1986) Columbia-VLA Journal of Law and the Arts 255 at 229.

20. N Mezghani, "The Interplay between the Berne Convention and the Developing Countries in the Evolution of Copyright" (1986) Copyright, 184 at 187.

21. G Karnell, "Use of Copyrighted Works for Teaching as International Activities" UNESCO Copyright Bulletin Vol XX1, No 2, 1987, 8 at 10.

22. Yambrusic, ibid at 402.

23. Yambrusic, ibid at 403.

24. Stockholm 1967 AA.4(v) provides that WIPO shall offer its co-operation to states requesting legal-technical assistance in the field of intellectual property.

25. N'Dene N'Diaye, "The Infuence of Copyright on Cultural Development in the Developing Countries" (1975) RIDA 58 at 83.

26. Ibid at 87.

27. Ibid at 88.

28. Ibid at 88-89.

29. Ibid at 90.

30. Ibid at 90.

31. Ibid at 91.

32. Koumantos, op cit, at note 16, p 232.

33. V de Sanctis, "The International Copyright Conventions" (1978) 14 Copyright 254 at 261.

34. N M Tocups, "Copyright for Developing Countries" (1982) Bull Cop Soc USA 402 at 420.

35. Commonwealth Secretariat, Copyright in the Developing Countries (1984) at 14.

36. International Copyright Information Centre. "International Book Year and UNESCO's Role in the Field of Copyright" 8 (1973) UNESCO Copyright Bulletin 25.

37. Tocups, op cit, at note 28, p 421.

38. Paris Convention for the Protection of Industrial Property 1883.

39. Convention Establishing the World Intellectual Property Organisation, adopted and signed in Stockholm on 14 July 1967.

41. There are no direct relations between the UN and the Berne Union, save that representatives are invited to sessions of the Assembly of the Berne Union and of the Executive Committee of that Assembly. However, there are indirect relations, though the Director General of WIPO and the International Bureau of WIPO on the basis of arrangements in force since 17th December 1974.

42. "WIPO's Guide to the Berne Convention", WIPO publication, Geneva 1987, 7-8.

43. S Ricketson, "The Berne Convention for the protection of Literary and Artistic Works, 1886-1986", London, Kluwer p 662.

44. Ibid at 663.

CHAPTER THREE

THE ADHERENCE OF THE UNITED STATES OF AMERICA TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, 1886

The United States has been a full member of Berne since 1 March 1989. The ramifications of that country's adherence are likely to be considerable, not only by reason of the introduction of the world's most prolific creator of intellectual works, but also on account of the effect that the United States will bring to bear on the future development of international copyright. That it will affect the degree to which the international enforcement of measures designed to protect intellectual property against unlawful infringement in terms of an aggressive trade policy pursued in a single-minded and unitary manner seems unnecessary to state, but it will also influence the direction in which the theory of copyright is developed in the future. In this chapter, it is intended to discuss the following issues which might lead us to some tentative conclusions: firstly, the relationship of the United States with international copyright: secondly, the measures taken to implement adherence: and thirdly, a discussion of the compatibility of the United States copyright law with the Berne Convention.

The Relationship of the United States with International Copyright

One commentator recently opined,

> "At the present time, the possible accession to the (Berne) Convention of the USA is the issue of most pressing concern."[1]

The United States has always been conscious of the activities of the Berne Union, it having been represented in an observer capacity at all Berne Conferences since 1885, having actually ratified the Convention on 19 April 1935, and abruptly withdrawing its ratification in a matter of days thereafter when it was realized that it was unable to so ratify by reason of fundamental incompatibilities with the Convention which the relevant Congressional Committee had neglected to consider.[2] In particular, the requirements of US law of registration of copyright with a public office of that country and other protectionist measures caused a rift which was maintained to prevent adherence.[3]

> "Until the Second World War, the United States had little reason to take pride in its international copyright relations; in fact it had a great deal to be ashamed of. With few exceptions its role in international copyright was marked by intellectual short-sightedness, political isolationism and narrow economic self interest. The leadership of the United States in developing and implementing the Universal Copyright Convention in the 1950s represented a sharp and admirable change in direction; but the UCC successful in achieving its limited goals, was never contemplated as more than a temporary and partial solution to a fundamental world problem."[4]

The negative sentiments expressed against entering Berne were augmented by the device of protecting US authors by means of first or simultaneous publication of a work by a US author in a Berne Union country (the so-called "back-door" to Berne) a device permitted by Berne Convention Paris text, Article 3(4).[5] It was partly to accommodate this peculiarity of American law within world copyright that the UCC was created in 1952. Although the UCC, like Berne, forbids member states from requiring formalities as a condition precedent to copyright protection, the UCC, unlike Berne, dispenses with those formalities only upon use of a prescribed notice (according to Ringer, "the great compromise of the UCC.") (UCC Paris Text, Article III(1)). That notice resembles the model used in America and in this way the United States was allowed to continue to require the formalities that multilateral treaties are designed to avoid. Preparation for participation in the UCC assisted the

process of diverting attention away from Berne standards of protection and in fact encouraged Berne members to believe that the US would eventually adhere to Berne by moving along the "low staircase"[6] provided by the UCC. However,

> "(e)ven its proponents acknowledged that the UCC was a rather modest copyright arrangement by comparison with Berne, a compromise between the high level of automatic protection implicit in the European concept of "droit d'auteur" and the conditional protection afforded by those Western Hemisphere countries (like) the United States whose copyright is viewed as a privilege obtainable only upon compliance with certain statutory formalities."[7]

The "low staircase" theory represented a "critical shift in the theoretical basis underlying the (UCC)".[8] Prior to adoption of the UCC there had appeared only one solution to the absence of the United States from the international copyright sphere and that was to bridge the gap between Berne and the bilateralist approach the US had hitherto adopted in international copyright agreements. The bridge theory had given way to the "low staircase" UCC, a low-standard convention which would be open to all and would not constitute an end in itself but "an intermediate step on a rising staircase that would lead from the low level of copyright protection then afforded by the United States and other Western Hemisphere nations up to the highest level" - the standard par excellence of copyright protection" - guaranteed by Berne.[9]

> "With the close co-operation that developed between the Permanent Committee (of the Berne Union) and the inter-governmental Committee (of the UCC) with the holding of joint meetings this began to occur and the USA became increasingly concerned with the affairs of the Berne Union. It played a crucial role in resolving the crisis brought about by the claims of developing countries in the years 1967-1971 and, with the revision of its own copyright law in 1976, the areas of compatibility between the provisions of the Berne Convention and those of US domestic law steadily decreased."[10]

Moreover, a specific encouragement to US accession has been the circumvention of the protection of authors of that country via the provisions of the UCC. Piracy abroad has cost rights owners billions of dollars. Dozens of Berne members that had not ratified the UCC and which had no bilateral copyright relationship with the US were under no obligation to protect the copyrights of American authors. Even the broader protection permitted by the publication of the works of US authors simultaneously in the USA and Canada or another Berne Convention country still left problems of proof. American efforts to bring copyright piracy havens into the realm of government by international convention often perished on the US's own reluctance to participate in the Berne Convention. These then were the circumstances which encouraged the adherence of the United States to the Berne Convention. It is necessary now to consider what practical steps had to be taken to align United States copyright law with that of the Convention.

Obstacles to Adherence

(1) *Registration Formalities*

To accede to Berne, the USA has had to abandon compliance with copyright formalities.

> "Such a change is anything but minor, given that the formalities required under US copyright laws are extraterritorial under the US Statute, the Copyright Act of 1976."[11]

In principle, copyright laws are not extraterritorial, ie they accord no protection beyond their national boundaries. However, they sometimes require activities to be undertaken abroad to accord "intraterritorial" protection.[12] An example of the harm caused thereby is the US requirement of renewal of a pre-1978 work in the US Copyright Office 28 years following its publication. Failure to do so properly may put for example classic foreign cinema works into the US public domain. (Renewal registration is a formality allowed under the UCC (Paris text, Article III(5)). The matter of formalities was eased with the abolition in the 1976 US Copyright Act of renewal of registration of a copyright notice for securing a second term of protection and a loosening of the consequences of omission of

the copyright notice in total.[13] Given that the Berne Convention requires the US to recognise copyright protection for work authored by nationals of signatory nations without any formalities, in order to join Berne the US had to make an exception to its formal requirements for Berne claimants. It did not wish to create a two tiered system for copyrights in which American-authored works would be disadvantaged. For its part, WIPO keen to bring the United States into the Union, convened a Group of Consultants in 1978 to consider the question of compatibility between the 1976 Act and Berne. The Group concluded that "formalities", the requirement of registration with the US Copyright Office of any work sought to be protected in the United States was the "principal, if not the only obstacle to accession by that country.[14] As will be discussed later, this opinion was very superficial but nevertheless,

> "(S)ubsequently, US interest in Berne membership increased further as a consequence of that country's growing disenchantment with UNESCO. This culminated with its decision to withdraw from UNESCO at the end of 1984. Although its adherence to the UCC was not affected by that action, it nonetheless diminished US influence over the copyright policies of UNESCO and encouraged the USA to direct its attention to the Berne Convention."[15]

(2) *The Manufacturing Clause*

Another major obstacle identified with American obduracy in the face of international copyright protection was the "Manufacturing Clause".

> "This egregious legislation originated in 1891 as a device for protecting the market of US printers and book manufacturers against foreign competition, by requiring the copies of certain types of works to be manufactured in the United States as a condition of full copyright enjoyment ... a flagrant piece of special interest legislation discriminating in favour of pressure groups ..."[16]

It is worth noting that the thrust of the Clause was towards the protection of those involved in the book industry save the most intimately connected with it, the authors themselves. Its eventual demise, described infra, may be ascribed to forces which were similar to those which caused the decline of the Stationers' Companies in England between the 17th and 18th centuries. The primacy of authors' rights over those of publishers was in this way affirmed.

(3) *Moral Rights*

In international copyright we find that there are basically two schools of thought. The first is the Anglo-Saxon approach which concentrates upon the economic rights of the author in relation to his works and the other is the Continental approach which is accentuated much more upon the view that the author has certain inalienable rights in his work which are not solely addressed to the question of remuneration. Essentially, the Continental approach closely identifies the work itself with the author's own personality and grants him certain rights to ensure that the work is not distorted in a way which is prejudicial to his honour or reputation. Such rights are deeply entrenched in the copyright laws of several European members of both Berne and the UCC, most notably France and Germany, and are broadly known as moral rights. They extend to granting the author the right to publish his work, to claim paternity of it and to prevent its distortion in a way which is prejudicial to his honour or reputation. For example, in France, when television stations show feature films they are required to obtain the permission of the rights owners of the film prior to editing the film or introducing advertisements during its running time, lest the artistic effect be affected thereby. Moral rights are a core feature of the Berne Convention.[17] The United States, whose copyright tradition is essentially Anglo-Saxon still has no provision in any of its Copyright Acts for moral rights. The clash of copyright cultures represented by the issue of moral rights and their possible introduction into United States law was, prior to United States adherence to the Berne Convention, and is still now, a major area of contention between those who feel that the United States is not

implementing the law of the Convention and those who argue that there are elements of American copyright law which are "quasi-moral" or are framed in the spirit of Article 6 *bis*.[18]

Against the background of these three obstacles, the domestic legislation required to permit the accession of the United States to Berne was introduced.

Accession to the Berne Convention

The Berne Convention Implementation Act of 1988 was well supported in both Congress and Senate where it received a unanimous vote. Congress adopted a philosophy towards the Act that it termed "minimalist", amending US law only where absolutely necessary to bring the US into compliance with Berne strictures. As stated in the House of Representatives report: "Ideal solutions to issues take much congressional time, require careful examination of often conflicting interest, and generally lead to the legislative processing of a Bill designed to solve a carefully defined question. That methodology is not used for the "Berne Convention (Implementation) Act".[19]

The new law took effect on the date of US accession to Berne, 1 March 1989. With respect to causes of action arising before this date, the Act is inapplicable. Thus, with regard to works infringed before 1 March 1989, even though court action pursuant thereto is not commenced till after that date, the governing law will be the Copyright Act of 1976 as amended by the 1988 Act. A limitation of the operation of Berne is contained in Section 12 of the 1988 Act which provides that there is no copyright protection "for any work that is in the public domain in the US". Although a literal interpretation of this provision merely emphasises a commonly-held view of copyright that works in the public domain are not *ipso facto* protected by copyright, the real intention of the section is to avoid according retroactive protection by virtue of Berne adherence. Yet the Berne Convention requires newly adhering states to accord retroactive protection to works that are

still protected in their countries of origin. (Berne Convention, Paris text, Articles 18(1) and 18(4).) Indeed, the converse proposition abroad, that of resurrection of US copyright in Berne nations that do not currently recognize them, was cited by the Bill's supporters as a primary reason for US accession to the treaty. "There is thus an apparent disparity between the Berne Convention and its implementing legislation."[20] This disparity is of practical import to litigants in US courts only if they may place reliance directly upon a treaty provision, which in turn raises the interesting question as to whether the Berne Convention is self-executing under US law, a question which is addressed below.

A different question arises as to whether the United States must continue to protect works of foreign origin once their own country of origin terminates copyright protection. The Berne Convention itself provides that the term of protection for copyright is "governed by the legislation of the country where protection is claimed; however, unless the legislature of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work". (Berne Convention, Paris text, Article 7(8).) Under the Rule of the Shorter Term, most nations provide, in line with Article 7(8), that a work that has lost protection in its home country is ineligible for copyright protection, even if it falls within the specified term of the country wherein protection is sought. Nevertheless, the US remains a country whose "legislature ... otherwise provides", and no distinction is drawn for copyright duration purposes under US law between US works and foreign works.

> "Therefore, once qualified for protection, a foreign work continues to enjoy US copyright protection for the full US term, even if the copyright lapses in its country of origin."[21]

The Current Position Regarding Registration of Copyright

It is not central to the 1988 Act that the use of a copyright notice disappears. In fact,

"(r)ather than being a "simplification", the Berne Convention Implementation Act simply adds another level of complexity. As of 1 March 1989, three levels of analysis govern the placement and effect of copyright notice."[22]

Firstly, as to works first published after 1 march 1989, the new law excuses all copyright notice requirements as a condition of receiving copyright protection. Secondly, the new Act leaves intact the pre-existing notice provisions with respect to copies and phonographs publicly distributed by authority of the copyright owner before the effective date of the Act which means that with respect to any work published before 1 March 1989, the impact of omission of notice or error in a notice will be judged under the former law. For example, a novel published in 1983 without any copyright notice and never registered with the US Copyright Office entered the public domain in the US no later than 1988, and is not revised by the new Act. Similarly, a novel published in 1988 without notice and unregistered was governed, at the time of publication, by the requirement of registration and subsequent cure within 5 years. Even after 1 March 1989, registration is required and if not undertaken by 1993, the novel would enter the public domain. Thirdly, the 1976 Act preserved the notice provisions of all prior US Copyright statutes which means that in relation to the evaluation of whether copyright protection of a foreign work is acquired after 1 March 1989, all former US copyright statutes which refer to notice must be consulted. The Copyright Act of 1976 contains a prerequisite to any infringement suit that a copyright proprietor must produce a registration certificate for the affected work. The Act of 1988 partially removes and partially preserves that requirement. As to works whose country of origin is the US, the new Act continues old registration strictures, but as to Berne Convention works whose country of origin is not the US, a dispensation from this formality is granted.

"In this way although US citizens are somewhat disadvantaged by Congress' action, at least no Berne claimants can contend that the US is setting up impermissible road blocks to the protection of their copyright."[23]

Further, the Ad Hoc Working Group set up by the Department of State in 1985 to discuss the feasibility of adherence by the USA to Berne concluded that several aspects of the formalities required by US law as a precondition of copyright protection and enforcement, namely notice, registration, deposit, recondition and domestic manufacture were incompatible with Article 5(2) of the Berne Convention which prohibits any preconditions to the "enjoyment" or "exercise" of copyright. Article 5(2) provides that: "The enjoyment and the exercise of these rights shall not be subject to any formality ...". (With respect to works originating in the United States, Article 5(3) provides that protection in the country of origin is governed by domestic law, so that compatibility with the Berne Union is not required. While these may seem eminently capable of being eradicated at the stroke of a pen, they were difficult last vestiges of a narrow-minded protectionism.)

The Fate of the Manufacturing Clause

The requirement of domestic manufacture had been greatly liberalised since the Manufacturing Clause was first incorporated into the US Copyright Statute in 1891, and it was all but eliminated with respect to works of foreign origin by the legislation that implemented the UCC in 1955. Although its effect had been diluted by subsequent amendments to United States Copyright law,[24] in general, books and periodicals in English had to be printed from type set prlates made in the United States, or by a lithographic or photoengraving process wholly performed in the United States. The most recent American Copyright Act, that of 1976, while not eliminating the Manufacturing Clause completely, liberalised its requirements further, with the intention of its entire repeal on 1 July 1982.[25] Despite the intervention of pressure groups like the American printing Unions who had managed to secure an extension of the longevity of the clause, it finally disappeared on 1 July 1986. In actual fact, the disappearance of the clause from United States law "also freed US authors and publishers from an artificial and burdensome constraint".[26] However, until 1988 when the Berne Convention Implementation Act was passed, there were still circumstances in which a work of foreign origin could be subject to the

Manufacturing Clause. Firstly, a work by an American author first published in the United Kingdom would be considered a foreign work under the Berne Convention but it would still be subject to a requirement of domestic manufacture under US law. Secondly, although a contribution by a British author to a periodical consisting predominantly of contributions by American authors would be considered a foreign work under the Berne Convention if it was first published in the United Kingdom, the periodical would still be subject to a domestic manufacturing clause. Since 1976, a failure to comply with the Manufacturing Clause did not of itself result in loss of copyright protection under current US law but it did preclude any enforcement of the rights of reproduction and public distribution, as well as authorising the US Customs Service to seize any copies imported in violation of its provisions.[27]

> Accordingly, the Working Group concluded that the Manufacturing Clause impairs both the "enjoyment" and "exercise" of fundamental rights and is therefore incompatible with Berne to the extent that it applies to works of foreign origin."[28]

Its recent abolition may be seen as part of Congress's political alignment with the Berne Union. Whether that alignment has any tenable juridical basis or whether it is a matter only of practical expediency will be judged by the template of moral rights.

Moral Rights

In respect of moral rights neither the US Copyright text of 1976 nor the UCC contains an express moral rights provision. The Working Group reached the conclusion that, after reviewing federal and state protection in the United States and in other Berne member states, particularly the United Kingdom, protection of moral rights was provided for under US law in a way which was not incompatible with Berne.[29] What was not argued during the deliberation of the Group was whether United States membership of the UCC carried with it the requirement to observe moral rights.

"One of the principal points of difference between the UCC and the Berne Convention lies in the fact that the latter in its Article *6bis* expressly provides in a rather comprehensive way for moral right protection. However the former not only does not contain a comparable overall position but even intentionally excluded it twice in its history. This happened for the first time when Greece, at the Intergovernmental Copyright Conference of 1952 in Geneva, had proposed to include a reference to this and this proposal was defeated (Report of the General Rapporteur of the Intergovernmental Copyright Conference, Geneva, 1952, P 47). It happened for the second time, when a similar proposal made by Argentine at the Conference for Revision of UCC in Paris 1971 was also rejected (Report of the General Rapporteur, Paris Revision Conference, 1971, pp 57 *et seq*)."[30]

The motives behind these rejections were that the contracting countries wanted to provide an international copyright system acceptable to all countries in spite of their differing historical, legal or administrative traditions.

A number of delegations expressed themselves as favouring the principle that the moral right is one of the most fundamental of the author's rights. On the other hand, the point was made by several delegations, notably that of Italy, that the proposal would mark a radical departure from the 1952 Universal Convention, and that some States now party to the UCC including the United States of America, Kenya and others do not recognize this right under their statutory law. Reference was made to the specific goal of the Washington Recommendation which was the express recognition of certain "economic" rights or interests of the author but was clearly not intended to extend to the author's moral rights. Fears were expressed that a requirement for recognition of moral rights would be fatal to the entire programme for revising both the Universal and the Berne Convention."[31]

From such a position, the interest of the UCC in moral right protection was written off without consideration of some of the substantive law promulgated by that Convention. The UCC from its inception did contain, in Article V, in both the original and revised forms dealing with the right of translation, a number of provisions which illustrate elements of moral right protection.

"In addition to the remuneration the Convention requires that certain non-pecuniary rights of the author be respected. They are not called "moral" rights, so as to avoid this controversial designation, but the assurances in question refer to prerogatives which, in the European Copyright terminology, are nothing but moral rights."[32]

"...[T]he fundamental concept of the whole system of protection under the UCC itself, namely the obligation of each contracting state under Article 1 of the UCC "to provide for the adequate and effective protection of the rights of authors" is not without any significance also from the aspect of moral rights protection ..."[33]

(Of course, the principle of national treatment as contained in Article II of the UCC in all cases where national laws of contracting countries of the UCC provide for moral rights protection, leads to the result that it has to be accorded to foreign states nationals but this has nothing to do with the minima of the Convention itself.) Another important step for the global acceptance of the concept of moral rights was effected with the adoption of the Tunis Model Law on Copyright[34] of 1976 under the auspices of UNESCO and WIPO jointly. Section 5(1) of the Model Law provides:

"The author has the right: (i) to claim authorship of his work, in particular that his authorship be indicated in connection with any of the acts referred to in Section 4, except when the work is included incidentally or accidentally when reporting current events by means of broadcasting; (ii) to object to, and to seek relief in connection with, any distortion, mutilation or other modification of and any other derogatory action in relation to, his work, where such action would be or is prejudicial to his honour or reputation."

UNESCO's own publication, "The ABC of Copyright" (1981) states

"that copyright is part of the concept of Human Rights as formulated in the Universal Declaration of Human Rights of 1948, article 27(2) of which says, "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."[35]

The use of compulsory licensing as a technique of providing cultural works to less developed countries is itself conditional upon a number of moral rights issues, namely a correct translation of the work must be assured, the original title and the name of the author of the work must be printed on all copies of any translation, and the licence will not be granted when the author has withdrawn from circulation all copies of the work.[36] Another quotation from Bogsch from his book published in 1964 is valid today. If the United States wished to assume the mantle of moral leadership in international copyright protection it had to recognise those moral rights elements which were so familiar to countries with an extensive pedigree in copyright such as France and the Federal Republic of Germany. This in turn meant recognition of the view that copyright is an identifying feature of civilized states and that protection of moral rights is evidence of the degree of civilisation which any country had achieved.

"The general, not to say vague, language of Article I has the very distinct advantage that as the views of the civilized countries change in respect of what is adequate so will the obligations of the countries under Article I. Without modifying the language of the Convention, its material content will consequently undergo changes, and the Convention will, so to speak, automatically keep itself modern."[37]

Of this quotation, Dietz says:

"(w)hat is true for new methods of communication, multiplication, expression or realization of a work could it not be time for moral rights protection? In this context we have to realize that the concept of moral right protection has certainly found an important evolution since 1971 and, in particular,

since 1976, when the Tunis Model Law on Copyright had been adopted. Given the fact that moral rights protection in continental European countries as well as in the socialist world has been a traditional concept of copyright law, this modern evolution primarily concerns new elements of moral right protection in the common law countries as well as in the developing world."[38]

Canada, the country most often used by the United States to obtain the "back-door" to Berne, has expressly protected authors' moral rights of paternity and integrity since 1931 by a copyright provision that closely resembled Article *6bis* of Berne and there has been only limited unwillingness on the part of the Canadian judiciary to vindicate moral rights.[39] A Canadian House of Commons sub-committee produced a report in 1985 entitled "A Charter of Rights for Creators" and in 1988 the Report's conclusions that moral rights were as important as economic rights were implemented, with moral rights being assimilated to copyright in both duration and in terms of the nature of remedies. Even in Canada which following a French legal tradition, is a bastion of moral rights recognition, there is nevertheless a grudging willingness to allow those who would seek to implement their rights to actually do so by means of court action.

"These (new legislative) provisions accomplish much on paper but even if one assumes a more sympathetic jury, moral rights will not likely be any more effectively protected in the future. For the (new) Act now expressly permits moral rights to be waived either expressly or impliedly, without any statutory control over the exercise of this power ... (leaving only) ... the occasional troublemaking author, with a point to prove and the money to prove it with (to pursue his case)."[40]

The interplay between domestic legislation, statute law and the courts' role in interpretation thereof will decide how widely the United States and other countries will be willing to implement rights which are espoused by Berne. The painful experience so brought about has parallels with the problems evidenced by the development of new technology where the fundamental matters of identification of the application of copyright to owners of protected materials and to uses of these materials provides us with indications of how copyright law

is to develop for the future. The identification of property rights or moral rights, is one thing, the question of their implementation quite another. Does the United States already meet Berne regarding moral rights? Discussion bills promulgated by both the House of Representatives and the Senate[41] deliberately excluded sections dealing with moral rights. The House Sub-committee on Courts, Civil Liberties and the Administration of Justice explained that the House's bill was formulated "to raise all questions that must be asked for the fullest range of public and private interests to be aware of what Berne adherence will mean in the future". Moral rights provisions were at that point included but later removed, an amendment being added that Berne is not a self-executing treaty (an issue to which the writer will return later), an indication that reliance by United States' plaintiffs directly upon Article 6*bis* would not be contemplated by municipal courts. The Berne Convention Implementation Act of 1988 avoids the inclusion of a moral rights section which makes it difficult for the observer to glean how the United States can become the leader in international copyright that it wants to be and still maintain a position of ambiguous compliance with the language of Article 6*bis* of Berne.

> "Article 6 of the Berne Convention provides for the protection of an author's right to "claim authorship" was structured to assure that these questions are addressed on their own merits free of claims to Berne obligations and precedents."[42]

In a recent article, however, one commentator opined that the entry to Berne membership by the United States had been hasty and that the reason for such hasty action lies in the fact that, "adherence will impede the full recognition of moral rights in the US by providing confirmation that the existing paltry acceptance is equivalent to the meaningful protection embodied in Article 6*bis*".[43] Damich feels that the conclusion of the Ad Hoc Working Group to the effect that the protection of moral rights in the US is compatible with the Berne Convention is in error. He goes on to say that

"(a)lthough state law as well as federal law may be examined to determine whether moral rights are sufficiently protected in the US by citing a few cases confirmed to a few states."[44]

The present position in the United States is closely reflected in that of Great Britain, another country with a common law legal system. Although the British delegation to the Rome Conference of 1928[45] was assured that moral rights were adequately protected by remedies available in equity and common law in the United Kingdom, the extent of this protection was and is questionable.[46]

"In 1928 the concept of moral rights was still in its infancy. It is noteworthy that the UK has not signed the 1971 Paris text, and the 1977 Report of the Whitford Committee on the Law of Copyright and Designs[47] stated that signing the Paris text would involve the adoption of special provisions protection moral rights under copyright law."[48]

Article *6bis* of the Berne Convention provides that:

"Independently of the author's economic rights, and even the transfer of the said rights, the author shall have the right to object to any distortion, mutilation or other modification of, or other derogatory act in relation to, the said work, which would be prejudicial to his honour or reputation.

The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country were protection is claimed. However, those countries whose legislation at the moment of their ratification or accession to this act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

This means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed."

Article 6*bis* provides authors with four "moral rights", the right to paternity, the right of integrity, of publication and of recall. The right of paternity guarantees an author that his or her name be mentioned on every copy of the work, if he or she so chooses, or that it not be mentioned, leaving the work anonymous. It guarantees also that the author's name will not be attached to a work that is not his. The right of integrity protects an author's work from being altered in such a way that would be prejudicial to his or her reputation. The last two rights vary greatly in content between Berne members. Dr Arpad Bogsch, presently Director-General of WIPO, feels that the introduction of statutory provisions on moral rights into US legislation was not a prerequisite of acceding to Berne, stressing that several Berne members have no statutory provisions on moral rights and courts therefore rely solely on common law. He feels that any obligation under Article 6*bis* has already been fulfilled by common law and by Section 43(a) of the Lanham Act (referred to infra). The question of the self-executing nature of Berne under US law needs to be examined in this connection. Some four of the thirteen sections of the Implementation Act are designed to avoid any such implication.

> "The issue of self-execution merited much close attention not because of its intrinsic jurisprudential significance, but rather because of its intimate relationship to the controversial issue of moral rights as particularly embodied in Article 6*bis* of the Berne Convention."[49]

The United States has never explicitly recognised these. There are relevant federal statutory provisions, for example, Section 106(2) of the 1976 Act, which grants authors the exclusive right to make derivative works based on their works, and Section 101 which defines "derivative works" to include abridgements, condensations, editorial revisions or other modifications. In addition, Section 43(a) of a statute called the Lanham Act[50] prohibits false designations of origins of works, including intellectual and artistic works, and prohibits false descriptions and representations of such works. However, association of Section 43(a) of the Lanham Act with the statutory provision of moral rights within the body of existing United States law seems to ignore the fact that there are two aspects of

the right to make a work which derives from another work. The first is the economic right which is transferred, and secondly, the moral one which is retained. Given the absence of a real right of attribution in the United States, the potentiality of the Lanham Act to protect the right of integrity is significantly weakened. Taken together, the 1943 and 1976 statutes do not protect all of the moral rights specified by Berne. Two issues therefore arose. Will the United States adopt the moral rights envisaged by Article *6bis* of Berne, and secondly, will the Berne requirement that redress be governed by the "legislation" of the country where protection is claimed lead to derogation from the content of Article *6bis*? The United States answered both questions with the same response. The Act of 1988, in Section 2 thereof, declares that the Berne Convention is not self-executing, and that the United States performs its obligations thereunder solely pursuant to domestic law.

> "Congress further states, in two separate provisions of the new law, that no private right of action exists under the Berne Convention."[51]

The final report of the Ad Hoc Working Group on US Adherence to the Berne Convention[52] saw things in the following way. Berne is an "executory" treaty which does not, of itself, give rise to rights or rights of action in the US. By executory is meant that the actual implementation of the provisions of the Berne Convention is left entirely to the legislative body of the state which accedes to it. It is in this way that the state which so accedes is able to interpret individual treaty provisions in a manner which is largely arbitrary. The result is that a minimalist approach to importation of treaty terms into national law may be adopted by the acceding state. The Working Group relied on Article 36 of Berne which provides

> "(1) Any country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention.

(2) It is understood that, at the time a country becomes bound by this Convention, it will be in a position under its domestic law to give effect to the provisions of this Convention."

The Report argues that there is inherent in this Article no statement that Berne is a self-executing treaty. Congress House states unequivocally that

"... Berne is not self-executing, that domestic law is not in any way altered except through the implementing legislation itself, and that the implementing legislation is absolutely neutral on the issue of the rights of paternity and integrity."[53]

Such would seem to be in direct contrast to the United States Constitution itself, which states as follows:

"This constitution and the laws of the United States, which shall be made in pursuance thereof and all Treaties made, or which shall be made, under the law of the United States, shall be the supreme law of the land."[54]

While this provision would seem plain enough, it remains to be seen whether reliance upon it would bear any fruitful results for a party relying on Article 6*bis* as the basis of an action for damages. The likelihood may be regarded as remote if one considers a recent United States patent case where reliance on the Paris Convention for the Protection of Industrial Property of 1883 brought forth the view of a federal court that that treaty was not self-executing.[55] The issue is further complicated by a finding of the Supreme Court in the 19th Century that certain treaties are self-executing under United States law.[56] Although no reference to the International Court of Justice has ever been made, a referral permitted by Article 33(1) of Berne, it is suggested that the question of the executory character of Berne could be settled by the utilisation of that Article, which states,

"(any) dispute between two or more countries of the Union concerning the interpretation or application of this Convention, not settled by negotiation, may by any one of the countries concerned, be brought before the International Court of Justice ..."

"... the US has joined Berne primarily for the sake of moral leadership in the world community. Yet by its minimalist approach the US is only questionably complying with some of Berne's provisions. Thus, the failure of the US to recognize retroactive protection for foreign works, seemingly against Berne's dictates and at the same time that American companies will seek retroactivity abroad, calls into question what type of leadership it is that the United States is demonstrating."[57]

Given the uncertain position in United States domestic statute law and the almost total lack of any reference to moral rights, whether so-called or subsumed under any other tenet of the common law, an appreciation of how the courts in the United States will approach implementation of a pursuer's rights may prove enlightening. One of the main fears of those who oppose the overt inclusion of the terms of Article 6*bis* into domestic US copyright law is the possible proliferation of civil actions raised by plaintiffs seeking to invoke its terms. It is currently thought in some quarters in the United States that to admit of these non-pecuniary rights would open the "flood-gates" to vexatious litigants, although Article 6*bis* of Berne does say, in delimitation of causes of action, that a distortion of a work is reprehensible only if it is prejudicial to the honour or reputation of the author. This has been regretted by some commentators who would have preferred a wording which entailed commission of an infringement whether the aggravation of prejudice could be proved or not. In fact, discussion of moral rights as a feature of international concern deserving inclusion within the Berne Convention was introduced during the 1928 Rome Revisals Conference. The Italian delegation proposed a wording that "the author may object to any alteration of the work which would be prejudicial to his moral interests."[58] The Anglo-Saxon delegations found the wording vague and objections were raised vis-a-vis the lack of harmony with current municipal laws. A compromise solution was aimed at by way of deletion from the proposed text of "moral interests" and

substitution therefor of "honour and reputation" and the revised text adopted. It is worth noting in the original Italian memorandum to the Rome Conference that infringement of moral rights should not be exaggerated to the point of protecting what would not be an interest in the legal sense, but "undue sensitivity on the part of the scientist, artist or writer".[59]

Bearing the foregoing in mind, it is intended at this juncture to discuss how American courts may be minded to deal with litigants bringing actions for infringements of their rights involving new, technological means of dissemination thereof, and to draw any conclusions therefrom for the implementation of moral rights, through the development of case law. Special mention is made here of the recent United States Court of Appeal case of *W G N Continental Broadcasting Co v United Video Inc*[60] since this case has features relative to both new technology and moral rights. Basically, the case of *W G N* deals with the application of copyrights to international telecommunications and teletext but is also notable for the Appeal Court's reasoning that a work is infringed if something is deleted from it. Can we draw the conclusion from such a finding that there is a copyright rationale for acceptance of moral rights as part of United States law? The most striking issue about the case was what the court appears to have decided as a basic right conferred by the general law of the United States. *W G N* started off as a case to test the issue as to the copyright stature of "Satellite retail carriers", companies which lease space on a satellite and use it to relay the signals of television"superstations" (a television broadcast station whose signal is distributed to cable systems by satellite). The issues for the court at this point turned on the question of copyright liability for the retransmission of television signals[61] by the new phenomena of teletext, video textual information. The television station WGN was a Chicago "superstation". United Video was a satellite retail carrier relaying WGN's signal to some 1,400 cable systems serving 4.5 million subscribers. WGN

was experimenting with the transmission of teletext in the vertical blanking intervals (VBI) of its copyrighted evening newsprogramme. The VBI is the space between one picture and the next on the tv screen. The VBI can be used to transmit various kinds of textual information, which only viewers who own a decoder machine can see either on the screen or an overlay on the next programme other viewers are watching or on a different receiving set. The work-content of such programmes is news bulletins, weather reports and the like. WGN transmitted two kinds of teletext materials, "news stories and a programme schedule"[62] as the VBI of its news programme. Concerning the news stories, the court of appeal explained:

> "The teletext channel is also to carry local news of Chicago that parallels the national news carried on the main program(me). if the main program(me) was discussing inflation nationwide, the teletext channel might provide data on inflation in Chicago; and the viewer ... who was interested in conditions in Chicago ... might decide to switch to the teletext channel."[63]

Concerning the news programme, the court opined that "(t)he teletext channel is to contain an announcement of future programmes of WGN (whereby) (t)he viewer of the nine o'clock news, a compendium not all parts of which may interest every viewer, is thus invited to switch to the teletext channel when his attention to the news flags, to see what is forthcoming on WGN."[64] However, WGN's teletext never reached cable viewers. United Video having deleted it and substituting for it another company's teletext service, WGN sued to have this practice declared an infringement of copyright.

> *"The teletext medium is now beginning to develop in earnest, and WGN was a test case in a battle for control of it, or more precisely for the control of the VBI. The battle involves communication policy as well as copyright law"*[65]

The court's decision was made on the following basis. It had recourse to the definition of "audiovisual works" in the section of the 1976 Act devoted to protected material, defined therein as "a series of related images ..." together with any accompanying sounds.[66]

> The court said that under this definition a teletext intended to be overlaid on the images of the regular program(me) in the manner of captions ... would clearly be part of the same audiovisual work as the regular program(me) ... The court concluded that the nine o'clock news and the teletext were the same copyrighted work - that the copyright on the news did cover the teletext..."[67]

WGN thus obtained an injunction against United Video from further infringements. The whole rationale of the Court's findings concerned the issue whether WGN's admitted copyright on its news programme "includes the teletext" or "covers the teletext". The issue is all the more remarkable since United Video never took the teletext in the first place. They severed it from the VBI. Deletion, in the eyes of the court, constituted infringement. "(I)f WGN's copyright of the nine o'clock news includes the teletext (then) deletion of the teletext ... was an alteration of a copyrighted work and hence an infringement under familiar principles."[68] Actually, as Barnett indicates, "(t)here are, however, no such "familiar principles".[69] There was case-law to the effect that to broadcast truncated or edited copyright material constituted a copyright infringement but not where none of that copyright material was broadcast or transmitted at all.[70] The moral rights which are closely identified with the continental view of copyright were thought by many to have no place in United States Copyright Law.[71] It may well prove to be the case that moral rights will be introduced and recognised in the general body of law of the United States but they need not be expressly founded upon. They may be recognised under different legal headings.[72] In the *Gilliam v A B C* case, for example, the court augmented its copyright ruling with an alternative holding that broadcasting a programme in "mutilated" form could be a misrepresentation of its origin and therefore constitute a breach of Section 43(a) of the Lanham Act.

Is it then the case that moral rights are part of the United States Law? The answer presently must be that they are not but they have had influence upon that country's copyright law and will continue to do so. The question of compatibility with Berne is perhaps not the proper question. It would be more correct to ask whether American copyright law is capable of embracing moral rights. Compatibility carries suggestions of uniformity of law which Berne itself recognises is not possible within those states who were members before US adherence. There is a basic lack of direction in Berne's handling of *droit moral*. The philosophy seems to have been that while moral rights are key elements of the civilized literary society, we are not quite sure how we want them to be used by those who might claim infringement. It is almost as though WIPO is uncomfortable with those elements of rights in relation to work which are other than economic. It would be unfair to criticise the United States wholesale when members such as France, where the development of moral rights has been pronounced and say, Great Britain (where it is only in latter 1988 that they became part of the municipal law[73]) seem unsure as to the proper field of application of such rights. French copyright law, until 1985[74] had traditionally protected the individual creator of intellectual property. Its main thrust was barely cognisant of creators who were corporate or collectivised. The new law of 1985, in taking into account the advent of the new technologies was criticised in some quarters for neglecting the French humanist tradition.

> "At the very least, we are now in the presence of two laws ... These two laws organise two regimes: one regime is that of the individual creator, the other is that of the mass creator, which amounts to saying that these two laws, merged into one ... promise us conflicts, doctrinal disputes and tortuous case law. The (older) law brutally dumps us into a cultural era where the creator becomes the indispensable but secondary cog in an enterprise - that of the audiovisual work - of which he is no longer in control."[75]

> "The (earlier) 1957 law was, by contrast "fiercely individualistic" and "totally permeated by individualism."[76]

Of this situation Saunders has said that the result is "anything but a synthesis of the moral and the economic".[77] British introduction of the *droit moral* as a statutorily expressed concept is striking simply by its inclusion but it is subject to waivers in favour of those employing intellectual creators, an escape clause not in keeping with the traditional view of the inalienability of non-pecuniary rights.[78] Saunders concludes interestingly,

> "These trends in French and UK legislation suggest that the domain of intellectual property law is not uniformly driven by some single general tendency towards or away from moral rights. The French shift demonstrates a displacement of moral right doctrine and its individualistic character from foundation status in French law on intellectual creation ... (T)he imperative to adhere to the moral right provisions of the Berne Convention might now never be more than a formal gesture to a dying letter, as the competitive demands of an increasingly internationalised cultural order displace the personal prerogatives of moral right."[79]

The rule in the WGN case if it is an example of the implementation of the author's exclusive non-economic rights, is paradigmatic of the unsteady definition of both what moral rights are and how they should be applied.

> "(O)ne may conclude that the rule assumed in WGN moves American law not only toward the *droit moral* but beyond it."[80]

If, in terms of Article 6*bis* of Berne, infringements may only be claimed by authors for "any distortion, mutilation, or other modification" of his work "which would be prejudicial to his honour or reputation", then that same formulation is much more limited than the *ratio* of WGN which requires only a deletion or alteration to be actionable, without the need for identification of prejudice to the author's honour, reputation or intellectual quality. What the case appears to ignore is that "(n)ot every alteration or deletion, even if material, amounts to a deformation or mutilation that makes it misleading to attribute the work to its original author".[81] It may have seemed to the Committee that it was simply a

logical extension of the application of the Lanham Act, as founded upon in the Gilliam case but in fact it marked a fundamental departure from the *ratio* of the latter. We may sum up the foregoing observations on moral rights by reference to the following.

> "In view of the clear provision under Article 6*bis* of the Berne convention, it will come as a surprise to a foreign observer who is not fully acquainted with the development of the debates during the 100th legislative session of the American Congress that the Implementation Act only addresses the question of recognising moral rights ... in a negatively defensive manner."[82]

In fact, assurances are granted *in gremio* of the Implementation Act that the mere fact of adherence to Berne will not lead in any way to the introduction of new moral rights legislation specifically designed to comply with Article 6*bis*. It is obvious that the fundamental concern of those who opposed a substantive inclusion of moral rights provision in the United States Copyright Act was whether commercial exploitation of works could be affected if "general powers of intervention and prohibition ... were conferred on creators".[83] That the Implementation Act has been so drafted is incontrovertible. Witness the terms of Section 3(b):

> "... The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State or the common law - (1) to claim authorship of the work, or (2) to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honour or reputation."

> "Given especially that the wording in Section 3(b) of the Implementation Act is clearly based on Article 6*bis* of the Berne Convention, we are left with the paradoxical situation that, although the implementation Act quite explicitly addresses moral rights, it does so only in negatively defensive terms, ie only to reject them and to "render them harmless" as it were - at least in this concrete form. From the European viewpoint, such a seemingly excessive assurance in American copyright against the Convention law's direct

> influence must almost certainly appear to testify to an over-sensitive, if not idiosyncratic, attitude towards the concept of moral rights protection ..."[84]

In summation, we may say that the current stance of the United States in relation to moral rights protection represents a grotesque illogicality since on the one hand the very passing of the Implementation Act appears to accept that the United States could adhere to the Berne Convention by recognition of the fact that its laws already complied with the import of Article 6*bis* while on the other hand there are strenuous efforts to deny the effective operation of moral rights by the inclusion of assurances to prevent the possibility of rights being asserted through direct application of the Berne Convention.

Turning to other specific areas of the US copyright laws which may require amendment to be compatible with United States law, the 1976 Act contains four permitted areas where users may obtain compulsory licences, that is assignations of rights without the consent of the owners, upon observance of specified terms and conditions. The Working Group considered that two of these compulsory licences, those for cable and mechanical licences are expressly sanctioned by Berne while a third, the licence for public broadcasting is questionably compatible and that that in respect of jukebox licences is totally incompatible. Dealing with the last two, the position is as follows. The public broadcasting licence in Section 118 of the US Copyright Act of 1976 allows public broadcasting entities to perform or display published non-dramatic musical works and pictorial, graphic and sculptural works in the course of transmissions by non-commercial educational broadcast stations, and also permits public broadcasting entitles and other non-profit organisations to produce and distribute programmes for such transmissions, entailing reproduction of the work. Licence fees are arrived at voluntarilyy by the copyright owners and public broadcasting entities, in the absence of which the Copyright Royalty Tribunal sets "reasonable" licence fees. Inasmuch as the compulsory licensing of the public performance right is concerned, the Working Group had no hesitation in concluding that Section 118 was incompatible with Article 11(2) of Berne which expressly allows compulsory licensing of the broadcasting

right provided that the author retains the right to "equitable remuneration" which in the absence of voluntary agreement "shall be fixed by the competent authority" and provided that extra-territorial use of the particular work, and moral rights are not prejudiced. The Working Group was unsure of the compatibility of the compulsory licence for the reproduction right. This might, however, be carried by the "special cover" exemption of Article 9(2) of Berne which provides that,

> "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 existence, though, of expressly sanctioned compulsory licences in other parts of the Bern Convention, eg the mechancial licence in Article 13(1), makes it difficult to infer the existence of an implied compulsory licence in Article 9(2). With regard to the "jukebox" licence in Section 116 of the US Copyright Act, a jukebox operator is allowed to perform recorded musical works in public without the consent of the owners, upon compliance with specified conditions. The royalty rate is, from time to time, fixed by the Copyright Royalty Tribunal. The working group felt that this form of licence was not compatible with Berne insofar as it relates to works of foreign origin. They felt that the public performance right in Article 11, unlike the broadcasting right in Article 11*bis*, does not expressly sanction compulsory licensing. United States law is therefore incompatible with the Convention in this respect.

The import of discussions regarding these matters of incompatibility and their relationship with United States membership of the Berne Union will, it is submitted, have a significance far beyond what that membership will mean for the United States.

"(United States membership) ... would also bring to the Berne Union and its organs a different intellectual tradition and set of attitudes. It is possible to envisage this having far more effect than has a century's membership of the Convention by the UK and Commonwealth countries. In particular, it could slow down or change the direction of development in several areas of copyright protection that have, to the present time, been of fundamental importance in the growth of the Convention... By virtue of its size and the vigour of its intellectual and legal traditions, the USA will be the most influential country to adhere to the Convention since France and Germany in 1887."[85]

It was discussed under another chapter heading[86] how the United States, while not a member of Berne, has already influenced the treatment of "works" in which it has a particular interest, ie in relation to mask works for semi-conductor chips. Ricketson envisages that the United States is all the more likely now to provide the guiding spirit to the Convention in relation to both the nature of protected works and the concept of authorship itself. That concept by which Berne has always viewed copyright as a series of rights pertaining to individuals or groups of individuals, contains no restrictions as to the kind of legal personality that may inherit these exclusive rights, either in virtue of the law of succession, or of contracts of assignation. This holds true also of the UCC. Of particular importance in this area of discussion is the tendency of the United States and some other Berne members to confer the status of "author" on persons who are not the creators of works. This problem, ie of "deemed authorship", is quite different from the situation whereby intellectual creators are employed by corporate entities to produce materials, the copyright in which rests with the latter, but the status of authorship of which still remains with the creator himself. This is the position of the United States under Section 101 and 201(b) of the 1976 Act. Ricketson declares such provisions to be totally against the ethos of the Berne Convention, and that for the following reasons.

"(1) While the term "author" is not defined in the Convention, the requirement of intellectual creation which is implicit in Article 2(1) indicates that this must be the person who is the actual creator of a work. (2) while there is nothing which

expressly requires an author to be a natural person, this seems confirmed by the requirements with respect to duration and the protection of moral rights. The fact that there is a special provision dealing with cinematographic works also supports this view. (3) The recognition of a class of deemed authors can only have the effect of diminishing the status of authorship in general: instead of being a recognition of the claims of literacy and artistic creativity to protection, it will transmit authors' rights into a form of protection for commercial or industrial investment. This will certainly have an adverse effect, in the long term, on these authors who are not in employment relationships."[87] *(Ricketson's views in reference to cinematographic works and the rights of artistic contributors to films is supported by WIPO's Guide to the Berne Convention, citing Article 14 bis(2)(b)* which states that Union members may attribute copyright in a film to "authors who have brought contributions to the making of the work ...")

The matter brings us back to the question of moral right once again since the right of paternity, the right to be identified as author, is one of the most basic of the author's exclusive, non-pecuniary rights.

THE CORRELATION OF INTELLECTUAL PROPERTY AND AMERICAN INFLUENCE ON INTERNATIONAL TRADE

"International copyright has become a trade relations issue. The existence of unauthorised copies of copyright works (eg books, films, phonograms) on the market constitutes an unfair trade barrier to the sale of legitimate copies of the works. Because of higher production costs and therefore higher prices, the legitimate articles are excluded from the market. As the sales of the so-called "copyright industries", ie these industries which could not operate profitably or at all without copyright protection, now amount to a significant percentage of the

GNP (Gross national product) of some of the major copyright industries (eg the United States, some EC countries, Japan) they are looking critically at the effectiveness of the international copyright conventions, and considering ways of bringing trade in copyright works within the ambit of the major multilateral trade treaty, the General Agreement on Tariffs and Trade (GATT)."[88]

The fact that the trend identified above should have such a strong allure, principally for states which are net exporters of cultural materials, is an indication of their dissatisfaction with the effectiveness of the protection provided by both the Berne and Universal Copyright Conventions. In turn, this perceived weakness has its roots in the fact that no effective dispute settlement machinery exists in either Convention. Any aggrieved state which feels that another state is misinterpreting a convention or not applying it at all may bring the matter before the International Court of Justice in the Hague.[89] The drawback in these provisions is that they are not self-executing, they are expensive, lengthy and apart from never having been used, are not designed for use by individual rights owners, rather only by the countries of which they are nationals. The American perspective on such a failing also recognises that the conventions themselves rely heavily upon the effectiveness of domestic legislation for the settlement of actions against the interests of foreign rights owners. The advent of American entry to Berne coincided with a current phenomenon in the perception of intellectual property as an instrument of international trade. The perception is one which is shared by the intellectual property exporting countries and which will undoubtedly be reflected in the future thrusts of both the international conventions. Its concomitant will be a growing emphasis in the work of WIPO and UNEDSCO upon effectiveness rather than uniformity of protection. The impact which international piracy of cultural materials has had upon the cultural industries is the central concern of GATT proposals for consideration of intellectual property as business assets deserving of international protection. "Piracy" is the term of art used to denote a universally recognised offence, a crime against the international community. If, as seems the likely outcome of recent GATT negotiations,[90] the inclusion of intellectual property (copyrights, patents,

trademarks, trade secrets and mask works) as subject matter protected by GATT is achieved, then not only will WIPO and UNESCO be persuaded to characterise cultural works as an instrument of trade also but GATT will be forced to recognise that the provenance of its own attitude towards the newly-included subject-matter is directly American.

> "The Omnibus Trade and Competitiveness Act of 1988 has inscribed the protection of intellectual property rights as one of the principal priorities of United States trade policy. The mandate was to negotiate improved protection world-wide. This congressional directive calling for a co-ordinated approach towards trade and intellectual property did not, however, set a new policy course; rather, it confirmed a direction that United States policy had taken for a number of years."[91]

If we seek conclusive proof that the United States' influence is so persuasive then we need only consider the nature of the background to preparation of the WIPO Treaty on the Protection of Intellectual Property in Respect of Interpreted Circuits, discussed supra (chapter 1).

On a broader view, we are considering, in discussing whether intellectual property and international trade in terms of GATT are compatible concomitants, whether the reciprocity of treatment requirements of GATT are suitable for the enforcement of intellectual property rights.

> "Countries ultimately saw the possibility that the United States Government would be willing to use the leverage inherent in access to the United States market as a means of stimulating countries to upgrade their level of protection."[92]

Such a "carrot-and-stick" approach will result in the extension of bilateralism in international trade that was such a feature of the nineteenth century. The fact that the vast majority of those states that would wish to have access to the diverse kinds of

intellectual wealth which is owned by American nationals are unable to offer the reciprocity the United States demands appears to matter little to that country. Its Trade and Tariff Act of 1984 requires the President to take into account the protection a foreign nation affords to intellectual property rights when determining (1) the nation's eligibility for the Generalised System of Preferences (GSP) program, and (2) whether the actions of the nation should be regarded as "unjustifiable" or "unreasonable" for purposes of section 301 of the Trade Act of 1974. (The GSP program provides for special tariff preferences for imports from designated developing nations.) It is not to be forgotten that this approach has led to the total, and welcome, transformation of the attitude of several states whose intellectual property legislation was basic, notably Korea and Singapore, but it is a policy which has limited potential for most countries who are not exporters to the United States. Whether the United States is allowed by GATT to pursue this policy for the future is debatable for we do not know as yet whether there will be a separate intellectual property code as part of GATT. If so, will that code be linked to WIPO and UNESCO? The kind of unilateralism which the United States is prepared to pursue may only be avoidable if it senses that there is a viable and effective international means of dispute settlement available to it for redress. Its accession to Berne is not an indication that the United States is content with the effectiveness of protection guaranteed by the Convention, rather it may see accession as a means to influencing the development of the Convention in a manner which is directed more to effectiveness rather than uniformity of protection. In so doing it may be tacitly accepting that it is not possible to accommodate the juridical theories behind so many diverse municipal copyright statutes successfully within one international convention. In fact, we may be witnessing the enforced realisation that accommodation as a means of encouraging a commonality of interest in international copyright has reached an end.

CONCLUSIONS

The implications of adherence to Berne by the United States will doubtless alter the course of the history of the Berne Convention and that of the UCC. While it may do nothing for the uniformity of protection which is the central tenet of regional copyright systems such as that envisaged by the European Community in its Green paper of June 1988,[93] the opportunities for increasing the effectiveness of that protection are considerably enhanced. It was more from the point of view of practical expediency than juridical debate on the nature of the primacy of copyright that swayed the opinion of participants in the Ad Hoc Working Group set up to discuss American adherence to Berne in 1985. Noted contributors to the evidence given in debate were such powerful pressure groups as the Motion Picture Association of America, the National Cable Television Association, the Authors' League of America, the Association of American Publishers, and the business Equipment Manufacturers' Association. Accession, then, had much to do with American trade initiatives in the field of protection of the supply of goods and services, as well as intellectual materials abroad.

> "One particular area where US participation would be vital is in the development of an intellectual property code based on the provisions of the Berne Convention which could be applied as part of the machinery of GATT."[94]

> "Given the inadequacy in both the current scope of intellectual property protection worldwide and in the outlook for reform either through bilateral negotiations or through international intellectual property bodies, the new GATT, Round provides a most logical and promising vehicle for change. As recognised by the government ministers preparing for the GATT (Uruguay) Round, international protection of intellectual property is a legitimate trade issue today."[95]

The impetus to Berne adherence was less juridical in nature than a matter of expediency. The enforcement of property rights abroad has been costing United States' Rights owners

millions of dollars per year, and it was difficult to persuade trading partners that they should award the highest standards of protection to intellectual works via the multilateral Berne Convention if the United States itself was not a member. Joining Berne would result in a stronger, multilateral agreement with some 80 Berne members rather than by trying to enforce bilateral arrangements on a nation by nation basis.

> "The (former) US policy of attaining Berne protection by simultaneous publication ignores two significant problems. Simultaneous publication is extremely costly. This leaves smaller publishers and individual authors without Berne protection. Secondly, this back-door method is not guaranteed. The Berne Convention allows its members to retaliate against the creations of non-member nations. Although Canada, a Berne member, has been the principal location for simultaneous publication, US publishers may soon find the "free ride" of protection ended, since the US and Canada have no formal agreement regarding this policy."96

Entry to Berne means that the USA now has copyright relations with states which count among their number some who have been havens for pirates of creative works. These countries are Benin, Burkina Faso, Central African Republic, Chad, Congo, Cyprus, Egypt, Gabon, Ivory Coast, Libya, Madagascar, Mali, Mauritania, Niger, Rwanda, Surinam, Thailand, Togo, Turkey, Zaire and Zimbabwe. Of these, at least four countries, Cyprus, Egypt, Turkey and Thailand are believed to be sources of substantial numbers of unauthorised copies made for both domestic sale and export. In these cases, Berne adherence should be of value to American copyright owners and their foreign distributors and licencees in bringing about prompt and effective challenges to piracy at source without the burdens, delay and uncertainty of effecting and proving simultaneous publication and the difficulties of customs detection. It will also be important to ascertain how individual Berne members will deal with older US works, including those first published (excluding those first or simultaneously published in a Union country) before 1 March 1989 (or, for countries belonging to both the Berne and Universal Copyright Conventions, before the establishment of copyright relations with the US under the Universal Convention). Under

Article 18 of Berne, copyright in American works now in the public domain in Berne states but protected in the US could be "recaptured" and protected anew.

Additional benefits of US adherence would be the severance of Berne from its European roots "and shift its centre of gravity to the common law and English speaking countries".[97] The ramifications of this will be seen in relation to the influence of American legal thought on the concept of authorship, moral right and the protection of new subject matter.

Moral rights occupies centre-stage at the moment. Standing the WGN case, moral rights have never attracted copyright protection in United States law *per se* and the 1976 Copyright Act does not recognise any distinction between moral and economic rights in the way that Article 6*bis* does. The *Gilliam* and *WGN* cases are illustrative of both the problem and the confusion. Both cases deal with the issue of transferability of a particular right, ie that of making a derivative work.

> "If the right to make derivative works includes the right of integrity, and if the right to make derivative works is transferred, what concept in US copyright law is left to comply with Article 6*bis* which states that the right of integrity subsists in the author (independently of economic rights and even after transfer of such economic rights)?"[98]

The writer argues further that the danger is "that adherence will impede the full recognition of moral rights in the US by providing confirmation that the existing paltry acceptance is equivalent to the meaningful protection embodies in Article 6*bis*."[99] The development of US case law on the point holds the key, it is submitted, to the development of the treatment of the non-pecuniary rights of the author both in the United States and throughout the Berne Union membership.

The accession of the United States might persuade other countries whether affiliated to the UCC or not to join one or other international convention. The Peoples' Republic of China

is currently considering the adoption of national legislation on copyright[100] and is considering whether it should join the UCC or Berne or both Conventions. It is suggested that the primacy of the Berne Convention over the UCC will be advanced by American adherence to the former.

> "Although US withdrawal from UNESCO was not directly attributable to any disagreement over copyright and did not technically affect US membership of the UCC, the result was that the United States lost its voice within the UCC's Secretariat. This development naturally prompted a reassessment of the US position without the UCC as a whole, and this in turn meant that the question of US adherence to Berne was raised several notches on the political agenda in Washington, DC."[101]

Trade sanctions will be the instrument of persuasion of others to accede to Berne as

> "US pressure, through trade sanctions and otherwise, is already being applied to some .... countries in order to overcome the threat of piracy. Membership of the Berne Convention might therefore be used as a means of ensuring compliance by these nations. In the same way, at the end of World War 1, the Allied Powers that were members of the Berne Union used their position of strength to require accession to the Berne Union by the various new independent states that had emerged from the dismemberment of former enemy territories."[102]

The supposed shift of the Union's centre of gravity westwards is bound to profoundly influence the next hundred years of the development of the Berne Convention in ways we may not yet fully comprehend.

FOOTNOTES
(Chapter 3)

1. S Ricketson, "The Berne Convention for the Protection of Literary and Artistic Works 1886-1986" Centre for Commercial Law Studies, Queen Mary College, Kluwer (1987) at 922.

2. H R Sandison, "The Berne Convention and the Universal Copyright Convention: The American Experience" 11 (1986) Columbia - VLA Journal of Law and the Arts, 89 at 103.

3. T Solberg, "The International Copyright Union" (1926) 36 Yale Law Journal 68.

4. B Ringer, "The Role of the United States in International Copyright - Past, Present and Future" (1968) 56 Georgetown LJ, 1050-1051.

5. Article 3(4) states that 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 publication.

6. The idea of a "low staircase" first emerged in the Committee of Experts examining the basis of the UCC, reported in (1949) 2 UNESCO Copyright Bulletin 186, 188. See Ricketson ibid, note 128 at 924.

7. Sandison, ibid at 90.

8. Sandison, ibid at 97.

9. Sandison, ibid, at 97.

10. Ricketson, ibid, at 924.

11. Sandison, ibid, at 103.

12. D Nimmer, "The Berne Convention Implementation Act of 1988 - A New Era" May (1989) Copyright World, 36-37.

13. Copyright Act 1976 USC 17, ss 97 304(a), 401 and 402.

14. Report Group of Consultants (Geneva, 5-7 June 1978, Doc BE/GC/1), reported in (1979) Copyright 95.

15. Ricketson, ibid at 925.

16. S M Stewart, see note 24, at 643.

17. Nimmer, ibid at 38.

18. Art 6*bis* "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work, and to object to any distortion, mutilation or other modification, or other derogatory action in relation to the said work, which would be prejudicial to his honour or reputation."

19. Report to the House of Representatives HR 2401, 31.

20. Nimmer, ibid at 39.

21. Sandison, ibid at 108.

22. Sandison, ibid at 108.

23. Sandison, ibid at 108.

24. S M Stewart, "International Copyright and Neighbouring Rights" 2nd edn (1989) Butterworths at 643.

25. Stewart, ibid at 644, explaining the effect of section 601 of the US Act of 1976 as a "sunset provision".

26. Stewart, ibid at 644.

27. Section 602 of the US Act.,

28. Report of the Ad Hoc Working Group 1985, (see Sandison) note 2 ibid at 105.

29. Ibid at 107

30. A Dietz, "Elements of Moral Rights Protection in the UCC" 21 (1987) UNESCO Copyright Bulletin 17.

31. Dietz, ibid at 30.

32. A Bogsch, "The Law of Copyright under the Universal Convention" Leyden and New York 1964 pp 64 et seq.

33. Dietz, ibid at 18.

34. Text and Commentary of the Tunis Model Law are contained in UNESCO Copyright Bulletin Vol X, No 2, 1976 pp 10 et seq.

35. Published by UNESCO, Geneva, 1981, p 22.

36. Stewart, ibid at 153 et seq.

37. Bogsch, ibid at 6.

38. Dietz, ibid at 22.

39. D Vaver, "Canada Stops Reforming its Copyright Law" 1989 Journal of Media Law and Practice, 6. See also Vaver, "Author's Moral Rights" (1987) 25 Osgoode Hall LJ 749.

40. Vaver, ibid at 6.

41. H P 4262 and s 1301.

42. J A Baumgarten & C A Meyer "U S Adherence to Berne, etc" May (1989) Copyright World 41 at 42.

43. E Damich, "Moral Rights in the United States and Article 6*bis* of the Berne Convention" 10 (1986) Columbia - VLA Journal of Law and the Arts 143.

44. Damich, ibid at 145.

45. Berne Convention Revision Conference, Actes de Rome, 1928, p 181.

46. H Marun, "The Author's Status in the UK and France" 20 (1971) ICLQ 675 at 677.

47. Cmnd 6732.

48. Nimmer, ibid, note 12 at 39.

49. Nimmer, ibid at 39.

50. 15 USC 1125(a) 1946.

51. Damich, ibid at 46.

52. Ibid see note 28.

53. Working Group ibid at 107. See Note 2, Sandison.

54. United States Constitution c/1.1.

55. *Mannington Mills Inc v Congoleum Corp* 595 F 2d 1987, 3rd Cir 1979.

56. *United States v Percheman* 7 Pet (32 US) 51, 1833.

57. Nimmer ibid at 40.

58 Actes of Rome 1928, p 178.

59. Actes of Rome 1928, at 181.

60. 693 F 2d 622 (7th Circuit) (1982)..

61. Section 111 of the 1976 applies. S 111(a)(3) provides an exemption for "passive carriers" that relay the broadcast signals to the cable system. The definition of "passive" occupied much of the court's time in this case.

62. See note 60 at 624 Soc of USA 31, no 4, 427 at 434.

63. See note 60 at 627.

64. See note 60 at 627.

65. S R Barnett, "From New Technology to Moral Rights etc" 31 (1984) Bull Cop Soc USA No 4, 427 at 434.

66. Section 101.

67. Barnett, ibid at 435-6.

68. Barnett, ibid at 438.

69. Barnett, ibid at 438.

70. *Gilliam v American Broadcasting Cos,* (1976) 538 F 2d 14.

71. Goldstein "Adaptation Rights and moral Rights" (1983) 14 11C43, 50-51.

72. Strauss, "The Moral Right of the Author" (1955) 8 American Jo of Corporative Law, 506, 537-538.

73. Copyright, Designs and Patents Act 1988, C 48, Section 77.

74. M Edelman, "Commentaire de la loi du 1985 etc" (1987), Actualité législative Dalloz, 1.

75. D Saunders, "Bridging the Channel? It's Copyright in France but Moral Right in the UK" November (1988) Copyright World, 21 at 22.

76. Saunders, ibid at 22.

77. Saunders, ibid at 23.

78. Saunders, ibid at 23.

79. Saunders, ibid at 25.

80. Barnett, ibid at 442.

81. Barnett, ibid at 449.

82. Ricketson, ibid at 926.

83. Ricketson, ibid at 903.

84. Damich, ibid at 66.

85. Ricketson, ibid at 926.

86. See generally, Chapter One.

87. Ibid at 926.

88. K Dam, "The Growing Importance of International Protection of Intellectual Property" 21 (1987) International Lawyer, 627 at 636.

89. Article 33(1) of Berne.

90. The Uruguay hound.....

91. J Orkin and K Viducick, "intellectual Property Initiatives in GATT" November 1989 Copyright World 147.

92. Orkin and Viducick, ibid at 151.

93. Com (88) 724.xpand.

94. Damich, ibid at 165.

95. Damich, ibid at 166.

96. Sandison, ibid at 100-101.

97. Ricketson, ibid at 927.

98. Damich, ibid at 152.

99. Damich, ibid at 166.

100. G Shoukang, "China and the Berne Convention" 11 (1986) Columbia - VLA Journal of Law and the Arts 121.

101. Ricketson, ibid at 927.

102. Ricketson, ibid at 928.

CHAPTER FOUR

THE IMPACT OF NEW TECHNOLOGY ON WORKS OF THE MIND

Copyright describes the various systems of law which protect authors and other possessors of protected rights such as performers, producers of phonograms and broadcasting organisations, in other words the rights of legal persons, both individual and corporate. It has been the opinion of many commentators on the subject that national and international law regulating these rights cannot keep pace with the challenges posed to them by technological developments in the dissemination of material which would otherwise be regarded as possessing a copyright. These developments include advances in copying techniques which have made piracy (the manufacture of duplicates of legitimately produced phonograms, without the authorisation of the original producers and their subsequent sale for commercial gain), and private copying (non-commercial copying) possible on a massive scale as well as encouraging many other new uses of works via video production, satellite transmission and cable distribution. New modes of dissemination have allowed the public easy access to copyright materials and conflicts have arisen that reflect the inadequacy of the Conventions in dealing with them. Copyright systems exist to provide exploitation rights to those engaged in literary and artistic production, to provide the widest possible dissemination of copyright material, and to harmonise the rights and obligations of producer and distributor.

The main principles upon which copyright is founded are (i) natural law, (ii) just reward for labour, (iii) stimulus to creativity, and (iv) social requirements. (i) It is a principle of natural law recognised from classical times that the author should have control over the publication of his work and be able to "object to any distortion, mutilation or other modification of ... (his work) which would be prejudicial to his honour on reputation" - Article 6*bis* of the Berne Convention. (ii) Copyright provides the economic basis for

investment by the cultural industries, basically the film and entertainment industries, in the creation, production and dissemination of works and other protected subject-matter.

(iii) Just reward is a stimulus to creativity. The promotion and reward of creativity is in the public and national interest, since the works of authors and composers contribute to the formation of the national identity, the creator might well turn to a more remunerative pursuit, and (iv) it is a social requirement in the public interest that authors and other rights owners should be encouraged to publish their works so as to permit the widest possible dissemination of works to the public at large. Since the function of copyright is thus to strike a balance between safeguarding the interests of creators and answering to the general public interest which requires the widest possible availability of copyright material, the protection of that balance must be addressed when considering the new technologies. Central to the question of attachment of copyright to new means of disseminating cultural material is whether the consumption of that material by the public involves exercise of usurption of some of the author's exclusive rights. While this is the question which is central to the issue it has nevertheless often been obscured by concern as to whether copyright is a suitable form of protection for materials which are carried by the new media. The problem of course lies in the fact that the user of an author's works is very largely indeterminate. He is more likely to be characterised by a geographical area than by individual identification. The relevance of the new technological age may therefore be made by reference to the liability of the putative user of intellectual works, not to his actual identity as an accountable individual. The unity of time and place between a work's original performance and its enjoyment by the public is removed. The consumption of intellectual works is carried out not in the presence of their performers but rather by virtue of the electronic media. There is thus a physical disruption in time and space between performance and consumption of works. One writer has said that the consequence of this is that "the concept of the "public" which is so essential to the legal construction of copyright either vanishes or fades".[1] In fact, the opposite is true.

In this chapter, the emergence of the new technologies in transmission of cultural materials to the public will be discussed. Apart from the application of traditional copyright theory to the technical details of particular inventions in the dissemination of cultural materials, the relevance of the recipient, possibly unidentifiable, public will also be discussed. In contemporary society, that public may be as wide as the ripples caused when a stone is dropped into a pool.

To date, the majority of member states of both Conventions have been slow to respond to the impetus largely created by performing rights societies in demanding that copyright owners be adequately protected from the effects of new technologies. Where legislation has been brought up to date, a tendency on the part of states to grant minimum rights to owners is beginning to develop. The courts are unwilling to find in favour of authors bringing actions which involve the new technologies. Authors are on the one hand under attack from the challenge presented by technical developments but in addition from a political tendency to assume that it is in the public interest to provide free access to cultural materials and that the interest of rights owners should take second place. Such ideas are contrary to the public interest because in the long term their implementation would result in a reduction, or even the total loss, of the source of cultural materials. The new technologies place new demands on the executive bodies of states and require specific regulation of specific distributions of original materials. It is not that international copyright legislation has been so formed that it is incapable of application to modern systems of dissemination of information but it is mostly still of 1950's vintage (although changes are currently afoot) and is not of sufficient specificity to withstand the demands placed upon it when referred to in civil actions raised by rights owners. In these actions where legal argument on technical issues is likely to lead to the subordination of the "spirit" on which international legislation relies so heavily, the rights owner has been likely to come off second best. In relation to the mid-twentieth century phenomenon of broadcasting, bland reference in current international legislation to the prohibition of "broadcasts" without sufficient remuneration for rights owners, cannot begin to answer those complex legal uses

raised by direct broadcasting satellites relaying pictures simultaneously seen by persons outside the audience envisaged by the original distributor. To date, the international conventions lay down standards below which no state may fall but lack the specificity of detail to overcome sufficient defences in law to civil actions. Greater specificity to deal with technical detail is required.

The tremendous opportunities for investment and employment which the new technologies offer to society in general will depend on the economic viability of the cultural industries. This in turn means that the cultural policies of states as expressed through copyright legislation should ensure that an adequate framework exists for the level of investment in the cultural sector which will be required to exploit and progress the new technology. Certainly, copyright law in a state of change, an evolutionary stage inspired by the problems with which this branch of the civil law has to contend. Copyright legislation has always had to allow for the technical changes which different methods of dissemination of protected works have required. From its drafting stage in 1886 up to 1948, the Berne Convention was able to encompass inventions like mechanical sound reproduction, cinematographic works and radio and television broadcasting. But since the early 1960's with the invention of video reproduction, cable distribution and satellite broadcasting, computer storage of data and reprogaphy, problems have arisen which have not been easily absorbed within the wording of current international legislation. The UCC empowers panels of specialists convened by it to advise UNESCO and the World Intellectual Property Organisation in overseeing the working and efficiency of existing conventional legislation and to judge its ability to keep pace with technical developments. Those experts have come to the conclusion that the text of the Berne Convention contained suitable enough rules for it to be unnecessary to revise the Convention but also that those general rules were too general to provide a basis for protection by the Convention ipso facto, and their observance could only be ensured by adoption in national legislation. The same assessment was made of the Paris revision of the Universal Copyright Convention in 1971, the source of which was considered identical to that of Berne. Both Conventions rely on national

legislation implementing the spirit in which the conventions were convened and drafted but give no technical guidance to legislators on how that spirit is to be translated into concrete legal rules. With regard to the use of protected works stored by computers, experts had great difficulty in assessing how to come to terms with the problems of text input (input brings the right of reproduction into play insofar as the input text is itself a protected work.) Moreover, what can be protected in relation to the output of that text is still a matter beyond resolution. Classical copyright, based on a monopoly of the author's exclusive rights to control the exploitation of his work, has simply been outpaced by technology, and by the terms and jargon that technology uses. The fundamental questions which the problem of new technology raises are (1) Is the use of the new technology a form of exploitation? and (2) If so, how is copyright to answer these two questions that makes its future applicability uncertain. The printed work, having given way to image and sound as the usual means of cultural transmission, has left copyright on the shelf with the books. Contemporary society is a consumer society in which nearly all its members participate in the consumption of cultural materials. That cultural material has developed a world market of its own and produced multi-national enterprises manufacturing the means of dissemination and dealing direct with authors and their representatives. The amount of money involved in the market for these concerns is quite simply colossal and has induced much pirating of the material belonging to the rights owners. While no-one would dispute the illegality of piracy, the fact is that new technology makes it more and more difficult to establish a legal distinction between lawful and unlawful uses of original material. It is now technically possible to minimise reproduction processes so that individuals are capable of reproducing materials while space satellite and cable distribution networks make it possible for programs to be disseminated instantaneously anywhere. The concept of the public which is so essential to the legal question whether copyright applies or not is, as observed above, often difficult to discern. Distributors will not agree to consider themselves responsible to rights owners for so many consumers receiving the programs they broadcast.

The writer hypothised above two questions: is the use of the new technology a form of exploitation; if so, how is copyright to be exercised? Such has been the dual test applied by courts in assessing whether exclusive rights have been infringed or not. The tests seem simple enough but in relation to different technologies, throwing up exactly the same questions of infringement or non-infringement, different results are reached by application of subjective sub-tests applied in the resolution of the two questions. No-one would argue in terms of the international conventions that in a qualitative sense the exclusive right of authorising the copying of work is either more, or less, important than that of authorising the broadcast or display of work. There is no primacy of exclusive rights in either Convention but in deciding whether those rights have been infringed, the courts of member states of both apply different criteria, depending on what technology they are dealing with. The result is an unsatisfying patchwork which does not assist us in interpreting how the Conventions would prefer courts to reach their judgments and casts a gloomy reflection of the uncertainty surrounding the terms of the Conventions themselves. In order to illustrate the foregoing the writer has selected three areas of discussion where, in pure economic terms, the advent of new means of dissemination of works has had the greatest impact both on users and what one might euphemistically call "the cultural industries": computer storage and retrieval of data; satellite and cable distribution of works; and modern methods of reprography. Because of the massive amount of discussion in relation to these phenomena, it will be necessary to deal with each of them separately. Finally, it is intended to discuss the current developments in WIPO and UNESCO to deal with the identified area and to try to extract any common core of approach which may assist in the future regulation of works distributed by these means. It is hoped that by the end of this chapter, it will be proved that the two questions of applicability of copyright law will have been shown to constitute an unreliable manner of dealing with new technologies which are diffuse in terms of methodology and effect.

Computer Programs

Dealing firstly with the ramifications of computer programs, the trend in national copyright statutes has been towards inclusion of computing software as a species of literary intellectual property, most such statutes deeming it unnecessary to add specific provisions to deal with software as a separate genre of copyright work.

Recent Italian law has acknowledged the copyright protection of computer software under the existing Italian law of copyright of 1941 without the need for specific reform thereof. In the recent decision of *SIAE v Poma* (III Sez Penale, 6.2.87, No 1323), Italy's Supreme Court pre-empted the subject-matter of a number of drafts of new laws on software and software-related inventions, none of which has yet reached the discussion stage before the Italian Parliament. In the instant case, the Supreme Court was addressed by SIAE (Italy's Association of Authors and Publishers), which requested that a first instance decision denying protection be set aside. In its decision the court applied a four-pronged test, granting copyright protection to any work to which could be ascribed characteristics that (a) it is an intellectual work, (b) it is a product surviving the mere steps of creation and having individuality, utility and the capability of being used by others, (c) it has merit with a "creative value" and (d) it constitutes a new contribution in the fields of art and culture. Computer software was recognized as satisfying all four requirements.

> "In the decision itself, systems analysts and programmers were indicated as persons using a technical-conventional language thoroughly similar to the alphabet for a writer and the harmonic scale for a musician. Consequently, a creative result was recognized to exist in any new contribution to the field of computer science and data processing resulting in better programming, even to a minimum amount, with respect to the past."[2]

The question of the capability and broadness of what it is assumed that copyright can encompass is none the less relevant to whether the Berne Convention and UCC are capable of usurping software within their own terms and was the subject of intense discussion

during the first session of the Expert Group on the Legal Protection of Computer Software convention by WIPO in 1979.[3] In the context of the WIPO Model Law Provisions on the Protection of Computer Software the group considered the possible contents of a separate international treaty for the protection of computer software. During the discussions, it was stated that although neither international convention specifically protected software, an attempt should nonetheless be made to rely on them in order to avoid the need to prepare a new international treaty on the protection of computer software. Protracted debate culminated in the Model Law Provisions whose purpose was to assist countries in introducing certainty into their existing legislation in line with that of other countries. The adoption of copyright law as the medium for protecting computer programs was arrived at after consideration of how programs are constituted. The experts felt that they were

> "a work of the intellect manifested in symbolic form ... that programs are identifiable as coming from a particular author, or team of authors, even though an important characteristic of modern programs is that, for ease of checking, they should be written to pre-established standards, rather as though the author of a detective story were constrained to put the murders in chapter one and the denouement on the last page".[4]

Extending the discussion on the qualities that programs were said to possess, it was necessary to assess how the technology involved could be pigeon-holed legally to support the general theory. The term "computer software" covers not only the program used to control the computer (also called machine-readable material) but also related materials like computer program pre-stage materials and the printed documentation of the completed computer program. Section 1 of the Model Provisions contains a general definition of software as possessing any or all of the three aforementioned qualities. Since the program

> "constitutes fixed information defining the operations to be executed by the computer as well as the type of data to be processed (i)t must therefore be readable by both the human being and the computer.

> This fact is not affected by the difference between the language used to write the program and that finally used in the computer to perform data processing tasks."[5]

The stress on the requirement that the program be capable of being read by human beings was regarded by the Committee of Experts as indispensable to its character as deserving of copyright protection. This human-readability is of even wider application to the technological age of individual programs in the development of other, new, programs where program parts written in different phases have become the models for a development cycle which results in the new program; but it is essentially required to provide

> "clear text commentaries related to the program statements or instructions, ... like the headlines of the chapters in a text book. By means of this lay-out, the source language program has a text book function for the reader, who is often not the author of the program."[6]

The machine language program has to be read in order to test it and perform error-analysis tasks. In this way the program communicates not just with the machine but with the reader as is of course the case with works which normally attract copyright protection via the printed word. The argument goes to the effect that the fact that so many reproductions can be made in relation to any single computer programme, ie during the input of information into the computer system by being copied from one data carrier into the machine's storage system, during the transfer from one storage system in the system to another, during data processing, and during output on to paper or visual display unit, and the fact that reproduction and distribution of copies are so simple to effect, necessitates that protection be granted to the author of the program. How do the international copyright conventions relate to a means of dissemination of information which is far removed from traditional concepts of literary property? For Berne, the answer to the initial question whether the work itself is capable of protection depends upon the ability of Article 2 to subsume computer programs. That Article defines "literary and artistic works" as including

"all productions in the literary, scientific and artistic domain, and permits of no limitation by reason of the mode or form of their expression ... The Convention thus asserts the principle of an all-embracing protection for the benefit of all productions in the literary, scientific and artistic domain, and, in a second assertion, lays down that the mode or form of expression of a work in no way affects its protection."[7]

The broad range of types of works mentioned in Article 2 is clearly designed to be non-exclusive and is certainly not exclusive of computer programs. Additionally, there is in the article no limitation as to the purpose or use that the work protected may be put to, but it is unfortunately the case that those who would wish to copy programs would do so intending to put their content to purposes of their own. Since it is an age-old principle of copyright generally that it is the form rather than the content of a work which is protected the

"(m)ethods, procedures, principles, mathematical formulae and algorithms described or otherwise expressed in the protected work are clearly outside protection."[8]

It is the content of the program which may unfortunately be of great value to its author and to would-be infringers. The simple growth of the consumption of computer material makes it impossible to protect software by means of contract or trade secret.

"Once microcomputers entered the market by the tens of millions, the demand for exclusive protection grew together with the added exposure to the new buyer with whom no contractual or confidential relationship was meaningful: programs were not being sold in supermarkets like sausage."[9]

Some countries consider computer software as a special category of work, a new genus, while other countries assimilate it to literary works.[10] The WIPO Model Provisions on the Protection of Computer Software, Section 1, give a definition of computer program and software. Basically, the computer program is used to control the computer while software

covers related materials such as preliminary materials and documentation together with the program itself. The operations to be executed by the computer are fixed in the computer program and it comprises also the data to be processed. The nature of the program is in turn dictated by the requirement that it be machine-readable. The author, then, is limited in devising the form of his work by the ability of the hardware to "read" it. This throws up an interesting question. Does the fact that the form of the computer program is fixed in advance prevent it from being protected by author's rights because the programmer is not able to dictate conclusively the form of expression of his work?

> "The situation is not unknown in the field of copyright: works of a scientific character appear in words, numbers, figures, formulae, etc. The engineer, the inventor, may describe the "technical teaching", the invention in a writing, but the construction itself generally cannot be communicated or disclosed without a blueprint, a plan or an industrial drawing. The chemist has even less freedom; he is bound to formulae - and the mathematician to numbers. None of the restrictions, however, mean that a work having partly such a predeterminal form of expression cannot be protected by copyright. The denial of protection of a computer program cannot be justified on these grounds and the "related material", as part of the software, is in writing. As such it is covered by copyright. Readability by the human eye is not a condition of protection."[11]

The essential function of the form consists in the expression of the work in an identifiable manner.

> "The running of the computer program identifies it sufficiently; its form or mode of expression has no relevance. Even on a brief investigation of the topic we might come to the conclusion that computer software is a work because it is the result of intellectual effort which consequently must be a personal creation by its author and under the Berne Convention neither its purpose and use nor its special form exclude it from protection. Even if we would come to the conclusion that a computer program is not compatible with any of the categories of works already known, Article 2 of the Berne convention does

not exclude it from the protection of author's rights, because the list of works in this Article does not have a limitative function."[12]

Having concluded that computer software is covered by copyright, the question that remains is whether copyright protects computer software adequately and effectively. The evolution of both copyright conventions illustrates how copyright has been used to protect various categories of "works", but in widely disparate ways and to differing extents. Protection of a cinematographic work differs from protection of a book because the composition of each comprises different elements.

"A very important, perhaps the most important, use of a computer program is its copying. Electronic data processing without copying is not possible. Any kind of use of a computer program is connected with the copying of it. It is a very important aspects of the use of a computer program that the running of a program is also copying. without copying, the program cannot be run; it has to be copied either completely or in part. Loading the program into the computer also necessitates its copying."[13]

The Berne Convention covers computer software in terms of the nature of the work represented by it but also in terms of its Article 8 wherein the author enjoys the exclusive right of "making and authorising the translation" of his work.

"Not only is the translation of the computer software from one computer language to another covered by this Article but it also means that the transformation, for example, of a source code into an object code is also translation within the meaning of Article 8 of the Berne Convention. Similarly, in Article 9(1), the author may dispose of the exclusive right of authorising the reproduction of his work in any manner or form. The expression "in any manner or form" is wide and covers not only all methods of reproduction know at the time of any state member's entry to the Berne Union but rather applies to all methods of reproduction still to be invested. Moreover, the Convention does not require that the reproduction of software should be readable to the human eye. "Any sound or visual recording shall be considered as a reproduction for the purpose of this Convention." (Article 9(3)) Computer software or

> any part of it, recorded on a storage medium, for example, a magnetic tape or a magnetic disk, can be reproduced in a visual or even in an audible manner. In addition sometimes the use of computer software is impossible without the user being allowed to modify, adapt, transform, arrange or order it. In this respect, we shall not forget Article 2, paragraph 3, of the Berne Convention, which is closely linked to Article 12, which grants exclusive right to the author, to authorise adaptations, arrangements or other alterations. Translations, adaptations and arrangements are protected like original works, but without prejudice to the right in the original works. This means that the author of the original computer software may prohibit any alteration, any modification of his computer software."[14]

Berne grants more specific protection to computer software than does the UCC. Both Conventions cover a very wide range of works. The UCC also covers both human and machine readable forms of computer software.

Among Western countries the USA was the first to legislate on the protection of computer software in 1976, followed by an amendment in 1980.

> "It appears that all stages of computer software are equally protected. Restricted works are the copying and distributing of copies and the preparation of derivative works. The creation of a copy of the computer software by the lawful owner incidental to the use of the software on a computer .... is not considered an infringement."[15]

Understood in a broad sense, a computer comprises two parts: the computer or an electronic installation (hardware) and the computer program (software) or a set of instruction by means of which the hardware can carry out its task. For hardware to work, it needs to be given a set of instructions arranged in a strictly specified order, the computer program. The program, the software, comprises arithmetic or "organisation" orders which are expressed by means of special symbols, that is to say, in programming language.

In the Model Provisions on the Protection of Computer Software of 1979 the concept of software basically comprises the computer program, which is physically incorporated in tapes and discs, the accompanying material comprising the program users' handbook and the program maintenance handbook, and the programming logic handbook. From the point of view of legal protection, there are three phases through which a computer program will pass. The first covers the generation of the programming concept which constitutes the basis for the future program, drawn up in accordance with the user's needs. The second phase is that of programming preparation during which a flow chart or algorithm is used to demonstrate the programming concept. The third is the writing of the program itself as a series of instructions commanding the processing of data and representing the programming concept in a material form and the algorithm expressed in a fashion that is "intelligible" for the given hardware. It is usually submitted that the programming concept and the algorithm correspond to the notion of a literary or artistic work and the program, the set of instructions, therefore corresponds to the form of a literary or artistic work.

> "Thus, under the rules applied to copyright, a computer program in the broad sense could not enjoy full legal protection since it comprises two elements, the idea and the form. Since the idea is not legally protected, exploitation of the programming concept and of the algorithm would be free and legal protection would be afforded only to the computer program in the restricted sense of the term, that is to say the set of instructions to be fed into the hardware. This solution which has also been adopted by the Japanese Copyright Amending Law No 62 of June 14, 1985 (according to the amended Article 10, the algorithm is excluded from protection), complies in theory with the general hypotheses of copyright."[16]

The algorithms, as processes of thought and of logic, cannot be covered by copyright protection. In addition, copyright laws require originality of the work as a condition for affording protection. Many programs are not in any objective sense original. The statutory provisions dealing with computer software adopted in national legislations vary between the assimilation of programs to general copyright principles and the use of special legislation

departing from those principles. Indeed, in some states, "the need to regulate software in those countries with a considerable production of such programs has imposed recourse to legal solutions outside the framework of patent law or copyright law."[17] This is the position adopted by the WIPO Group of Experts on the Copyright Aspects of the Protection of Computer Software in 1985.[18]

> "The marketable computer program requires large expenditure and is this highly prone to being copied without authorisation. Copies of a computer program can be easily produced at any time and in any quantity by means of whatever multipurpose computer that may be available to the copier without need for expensive production facilities. The copies produced are equal in quality to the original, and can themselves serve as masters for the production of further equal - quality copies."[19]

The work of WIPO in this field dates from 1970 when it was asked by the United Nations to prepare a study on the appropriate form of legal protection, and on measures to facilitate the access of developing countries to information on software. In 1971 an Advisory Group of Governmental Experts on the Protection of Computer Programs met to advise WIPO conducted extensive research on the question of the legal production of computer software which began in 1974 and was completed in March 1985. In the first phase of the research, which lasted till 1978, WIPO worked in conjunction with an Advisory Group of Non-Governmental Experts from some 20 international organisations and in the presence of observers from various governments and intergovernmental organisations. Investigating the importance of software, the need for its protection already existing, the question of a special type of protection designed for computer programs was extensively considered. At the request of the Advisory Group, WIPO prepared a draft treaty which was to constitute an International Union for the Protection of Computer Software, similar to the Paris Union for the protection of patented works.[20] The draft treaty was in two parts, one containing substantive provisions granting a minimum protection at the national level and the other introducing an international deposit system with provision for the optional and secret deposit of the software to be protected. The

purpose of the international deposit was regarded as a substitute for national registration and deposit, and as a source of proof of the existence of a program at a certain date. During the deliberations that followed, the draft treaty failed to win sufficient support from the advisory group. It became clear that while a compulsory deposit was not desired the incentive for voluntary deposit was not considered strong enough. As a result of this first phase in its investigations WIPO published its Model Provisions on the Protection of Computer Software.[21]

> "The Model Provisions are accompanied by detailed explanatory notes, according to which the purpose of the Model Provisions is to assist countries in complementing, or introducing certainty into, their laws applicable to the protection of computer software. The notes also emphasise that the Model Provisions should not be understood as necessarily requiring adoption of a separate law on the protection of computer software, but may simply amount to classifications or extensions of existing legal rules and could be incorporated - insofar as they are not already included - in existing laws, for example, partly in the copyright law and partly in the law of trade secrets or unfair competition."[22]

The Provisions themselves include a definition of the term "computer software" which has been widely accepted at the international level, as also provisions on ownership, protection requirements and the scope of protection, acts covered by the protection, and its duration. The Provisions followed generally the copyright principles of protection of those forms of expression, and excluded the concepts, methods and algorithms on which the software was based. As a condition of protection the Provisions require originality in the sense that the software has to be the result of its creator's own intellectual effort. The protection consists in granting the proprietor the exclusive right to copy, distribute and use the software, and also the right to derive from a computer program another computer program.

> "On the other hand, the protection must not be extended to independently created software that turns out to be similar to software of a given proprietor."[23]

There are no formalities as a condition of protection. Between 1979 and 1985 WIPO and UNESCO undertook a study of the protection available under existing copyright laws and treaties of member nations.

> "At this important conference the great majority of the governmental delegations that participated actively in the deliberations rejected the introduction of a special protection system. A large number of the delegates considered copyright, in terms of the existing Conventions, applicable to computer programs.[24]

The modification or supplementation of the existing national copyright laws was then considered sufficient.

> "There is no doubt that the work of WIPO has had a strong influence on the legal development of software protection in quite a number of countries."[25]

Programming a machine to do certain tasks is not a new phenomenon. The attraction of copyright protection certainly is. In 1908, the Supreme Court of the United States found that no copyright attached to player-piano rolls which worked as directed by pierced paper drums.[26] The decision was made on the basis that the translation of the music in mechanical movements by means of the instruction contained in the pierced holes was not intended to be read by human eyes. An entirely new question arose, however, when the electronic computer age enabled a program to instruct another program to perform tasks in a machine.

> "Programs that interact with other programs permit to go beyond the mechanical univocity of the player-piano rolls: one pressing, one not. Depending on the programming content, one instruction may be translated to the electronic machine in multiple ways according to various syntaxes. This complex tapestry of instruction capable of interacting, consisted in the first man-made immaterial machine (in) history."[27]

The importance of software as a force in national economies came about with the creation of specific markets and services for available goods. The importance of copying increases apace. The growth of the consumption of computers and microcomputers from the 1970s till the present time rendered it impossible to continue to protect software on the basis of trade secret and contract because of the easy access that "pirates" have to the making of copies of programs. Patent law was rejected as the medium for protection, the creation of computer software being markedly different from the classical industrial invention to the extent that it does not result in transforming or reducing a subject-matter into another state or thing.[28] Additionally, the inventive step in a software creation is usually much lower than that required for granting a patent. On the other hand, the industrial and economic purposes of software seem to distinguish it from the literary, scientific and artistic works which are normally copyrighted. Professor Lucas refers to software as an abstract industrial creation.

> "Nevertheless it was apparent from the beginning that copyright does not fully satisfy the legitimate interests of the software developer to the extent that protection only covers actual copying."[29]

Use of the program is a larger consideration.[30] Moreover,

> "(e)xceedingly long terms of protection seem to be advisable in the case of purely intellectual works: fame and recognition are frequently slow to come, and financial reward walks in at even more restrained a pace; but artistic or literary value lasts forever. That is not so (as) regards software, as eloping technology depletes the economic utility of programs day to day, almost hour to hour (for it is utility and not intellectual value that reigns in software)."[31]

The inadequacies of copyright do not end there.

"(A) literary or artistic work-designed legislation does not provide for other legitimate needs of the community, as for instance, to have technology for which the protection is sought effectively worked in the country for the general benefit of the public."[32]

The adoption of *sui generis* protection for microchips has to be seen as part of the process whereby the advisability of a new kind of intellectual property right devised for computer software predicated a hybrid form of copyright. This was, as was averred in chapter one not apposite. Certainly, it appeared that moral rights, as one example, could not happily be married up with the public utility to which programs are to be put in society. In recognition of this, France, whose moral rights pedigree is impeccable, introduced into its copyright law of 1985 a set of provisions dealing specifically with software which incorporate a new exclusive right of "use" of programs. Moral rights were abolished, a shorter term of protection was introduced and the property was granted, in principle, to the software entrepreneur and not the creator.[33] As long as the idea embodied in the computer program was not the objective of protection, and the form of the program was, programs were thought quite suitable for assimilation to the exclusive rights protected by copyright. Such a neat resolution has not, however, remained constant, as the following account shows.

"At the time when computer systems are becoming more and more part of the various spheres of human activity and are impinging on all aspects of life in society, software is becoming increasingly important and significant in that it undoubtedly represents the most widely available form of intangible property currently offered for sale on the world market ... The forty vertiginous years that have elapsed from the pre-history of computers to the present day trace a line from first generation of computers, originating in 1946 with the Electronic Numerical Integrator and Computer (ENIAC) and continuing throughout the period of value technology, to a second generation, appearing around 1958 and featuring the revolutionary introduction of transistors and printed circuits, followed by a third generation, initiated in 1964 by the first micro-processors, and succeeded almost immediately by a fourth generation, which came into being in 1967 with the widespread use of silicon chips. At any moment - it may have happened

already - we may expect to see the emergence of a fifth generation characterised by operational systems of artificial intelligence."[34]

Mille likens the developments of legal thinking about software to the evolution of technology itself. In parallel with the four generations of computer technology evolution, he speaks of four generations of legal thinking. The first generation concerned the period when no distinction was to be made between hardware and software, when computers were mechanised, in the form of a single data-processing device, sold as a single package without the option of separate contracts, and shrouded in total secrecy.[34] The owners of computer programs at this stage were the large computer manufacturers, who had a vested interest in retaining complete control over the new invention and who were familiar with patent rights and trade secrecy.

"The inevitable result was that the first generation - which actually produced little in the way of legal ideas on the question - allowed the regulation of software to be governed by the provisions covering inventions and commercial secrecy."[35]

The second generation observed the truism that computer programs lack the "novel and inventive step" which is required for the patenting of inventions, and that they therefore lie outwith the scope of industrial property. The second phase, circa the 1960s-70s, witnessed the placing of software in municipal statutes other than those dealing with patent matters,[36] and the beginning of the first international efforts to deal with programs within public international law. In 1971, WIPO assembled a Group of Experts which produced in 1978 the Model Provisions on the Protection of Computer Software,[38] and WIPO later produced a preliminary draft international treaty on the subject in 1983.[39]

"The solution suggested by WIPO, and also advocated in certain other legal writings of the same period, involved a system combining certain elements drawn from patent law and others derived from the law of copyright. Time passed without this combined approach finding acceptance among national legislators,

and indeed it may be said that current legal thinking has rejected it altogether."[40] Mille went on, *"The third generation is made up primarily of theoretical legal opinion, secondly of legal rulings, and finally of international work and legislative reform supporting the application of traditional copyright principles to the regulation of software. Although strictly speaking this is a phenomenon of the 1980s, it has its origin in the previous generation and has a unique legislative precedent in the Phillipine reform of copyright law dating from 1972, which included software within the scope of protected works.*[41]

The depth of legal analysis had reached the point where the conclusion was reached that both the computer program and all their products resulting from the creation of software (analysis and definition of the problem, designing of the system, coding and documentation) embodied the characteristics required by legislation,legal theory and case-law for a "work" to be considered copyrightable. It was at this point that Mille identified another generation of legal thinking wherein the "work" itself, which in traditional copyright terms is considered to be original expression of an idea, is to be distinguished from its representative form, meaning the manner of technical procedure whereby expression is given to the work and to be distinguished from the copy in which work is reproduced in tangible and permanent form.

"In the case of software, the point at issue concerned those cases in which the software was reproduced with a read-only memory, (memory whose content can be read but not modified) which, - because it formed an integral and inseperable part of the equipment - merged with the latter."[42]

The conclusion was made that software is autonomous and independent of the forms in which it is expressed and the material support in which it is embodied.[43] Having come to terms with this aspect of the legal phenomenon of computers, a method of dealing with their operating systems and languages still had to be found.

"It is an accepted principle of copyright that the creator may enjoy exclusive rights over the form in which a thought is expressed but not over the idea expressed. Legal opinion therefore considers that the authors cannot claim exclusive rights when the representative form of a work constitutes the only possible form in which the idea may be expressed or is of such simplicity or banality that it cannot be regarded as the development of an idea but simply as its outward expression, without formal elaboration."[44]

The experts began to make findings that copyright protection should be extended to operating systems since they exhibited originality. Another leading topic of this generation featured the distinction between the "source code" and the "object code". The "source program" is the version of a software package expressed in high-level programming language which is intelligable to human beings. The "object program" is the machine-readable version of a software package expressed in high-level programming language which is intelligible to human beings. The "object program" is the machine-readable version derived from a compiler's work. The issue really concerned whether a "work", in order to qualify for copyright protection, had to be in a form perceptible to, or readable by, human beings.

The fourth generation dates from the latter half of the 1980s. It concerns "the design and presentation of software rather than the code in which it is written ..."[45] and allows us to opine that,

"(t)he present state of legal opinion allows us to regard the question of whether copyright is or is not applicable to software as finally settled. Discussion at the present is focused on the scope and nature of the exclusive rights accorded to the creators of software, that is to say on two very important resultant questions: Over which parts of his or her creation does the author acquire exclusive rights? How far - the question is the obverse of the previous one - is the creator of software free to draw inspiration from pre-existing creations in producing a new work?"[46]

Mille identifies the following creative elements in the making of a computer program: the idea of using a computer system to solve a given problem, ownership of which is by definition impossible; the procedure chosen to solve that problem, which involves not only suing cybernetic codes but also designing the way in which the computer system will interface with the input and output methods, calling for processes distinct from the system itself. Such a process is not eligible for copyright protection; the mode of cunningness of the system as regards the management of input and output, which will be as effective as the perceptiveness of the solution adopted by the author.

> "This, in my view, is the result of the application of state-of-the-art techniques, and it is not therefore possible for the author to restrict the use of such techniques for identical ends by third parties (provided such use stems from an independent effort and does not consist in the mere appropriation of elements from the original work)",[47] the total algorithm, ie the logical method employed to structure the program, and the various partial algorithms which go to make up the overall scheme.

> "In so far as they constitute processes that indicate to the human intelligence the concatenation of computer resources that combine to produce the result delivered to the public, they are in my view absolutely equivalent to the internal structure of the work and are, as such, to be seen as the exclusive property of the author;"[48]

Techniques for handling and storing data, designed to maximise user-friendliness, in which there are copyrightable elements include the coding of source programs and their encoded reproduction in object programs which represent forms of expression that qualify for copyright protection in the same way as any other written work the data included in he program, which can also be regarded as the author's property if the data can be said to be original in itself, the title of the program which is the author's exclusive property, and the style of the program which will never be copyrightable.

"Confirmation of the foregoing assessment is to be found in a number of interesting rulings where simultaneous appearance in various countries with different legal traditions clearly shows that we have truly moved on to a new, more basic and probing, stage of analysis in this matter. The most significant cases in this fourth generation are those in which the courts had to address the question of software that was not an identical copy of the program in respect of which copyright had been breached, but rather represented a form of "sophisticated plagiarism", involving additions and changes in quantity and quality sufficient to necessitate (as with any other instance of plagiarism involving works of other kinds) a detailed examination of the internal structure of each work to ascertain whether the one had not been illicitly derived from the other."[49]

In the United States case of *Whelan v Jaslow* (797 F2d 122 (3rd circ 1986)) the court decided that the greater part of the expenditure and difficulties involved in the creation of computer programs derive from the development of the logical structure of the program, from the correction of errors and from documentation and maintenance rather than from coding and that the way a software product "looks and feels" generally implies much more creativity and represents a higher commercial value than the code operated by the product.

"No less interesting is the conclusion of this judgement which states that copyright protection of computer programs can extend beyond the literal coding to their structure, sequences and organisation."[50]

Modern statute and case-law worldwide illustrates that the current trend in municipal statutes and case-law is towards settling questions of intellectual property relating to software in terms of copyright law. Rather than an *ad hoc* measure, the copyright protection of software has evolved in a cohesive manner either by decision of courts or by the expansion of the term "protected works" in domestic statutes. In some countries, like Japan, special sections of copyright law have been executed to include the protection of software.

"Attention should be drawn to the way in which case law and legislative reform have operated in close harmony on this issue."[51]

"There is every indication that the fourth generation of legal thinking on software will give rise to a second movement of legislative reform, focused on the penal aspect of the protection of this class of works, which the worrying problem of piracy is bringing to the fore. It is likely that the main topic of future legal studies on the protection of software will be criminal law ..."[52]

The questions surrounding the copyrightability of computer software are thus beginning to shift the emphasis from the form of the means of expression used in a program to the ideas related to it.[53] A whole new class of work, the computer-generated output, is emerging. Hitherto, computer programs have often been the product of human input via a computer. Nowadays, it is possible for the work to be produced by machine creativity via discernible forms of artificial intelligence. WIPO and UNESCO have still to come to grips with this new development. It has been argued that a computer may itself be permitted the title of "author", attracting the exclusive rights concomitant therewith![54]

Most delegations to the Joint WIPO/UNESCO 1989 Committee of Experts discussions, however, favoured the exclusion of provisions in model laws on the copyright protection of computer program. They were of the opinion that although computer programs are not mentioned in the non-exhaustive list of literacy and artistic works contained in Article 2(1)of Berne, it did not follow that they are not covered by the Convention, because the list was non-exhaustive.

"What is important is that such programs correspond to the notion of literacy and artistic works. Computer programs are writings, although certain elements of them might come under other categories mentioned in the non-exhaustive lists of works (such as drawings, etc) and thus they clearly belong to the literary and artistic domain as outlined in the Berne Convention. The great majority of computer programs contain clear creative elements and, therefore, they are original works."[55]

Besides, they argue, the 1977 WIPO Model Provisions did not outline either a *sui generis* or a copyright system. They only identified the most important provisions to be applied which were of copyright nature and the commentary to the Model Provisions explains that these provisions can also be implemented in the framework of copyright laws.

> "Just that latter solution has been accepted and has become nearly exclusive. Various WIPO meetings have identified that clear and unmistakable trend; for example, the meeting of the WIPO/UNESCO Group of Experts on the Copyright Aspects of the Protection of Computer Software held in Geneva in February - March 1985 as well as the extraordinary sessions of the Executive Committee of the Berne Union held in Paris in June 1985 and in Geneva in June 1986."[56]

Dealing now with the second example of new technology, the satellite and cable distribution of works concern another of the exclusive rights permitted by the Berne and Universal Copyright Conventions, the right of broadcasting. It has featured in the UCC only since the Paris Revisions of 1971, and was then included to assimilate to the Berne Convention. The broadcasting right was introduced into the Berne Convention at the Brussels Revision Conference in 1948, ensuring to authors wide rights to authorise "the broadcasting of their works or the communication thereof by any other means of wireless diffusion of signs, sounds or images."[57] The broadcasting right was thus added to the other exclusive right of translation, reproduction and public performance, defining the acts which relate to those other acts. Consequently, the public performance right is further regulated in Article 11. It applies to dramatic, dramatico-musical, and musical works. Article 11 protects the public performance of literary works, i.e. the public recitation right.

> "An important feature of both rights is that the general public must have actual access to the performance to make it a public one. There are two ways to enlarge the public beyond the audience actually attending the performance of their works giving rise to separate rights: (i) communication to a wider public through broadcasting in which case Article 11 *bis* applies; (ii) communication to a wider

public by cable to subscribers. This is covered by Article 11(1)(ii) as 'any communication to the public of the performance of their works'."[58]

Construction of Article 11 *bis* allows us to interpret the questions that cross-frontier television produces. Article 11 *bis*(1)(i) deals with the question of what can be considered a broadcast. Article 11 *bis*(1)(ii) is concerned with the cable retransmission right to broadcast, and Article 11 *bis*(2) deals with the limited introduction of compulsory licensing for cable systems. Article 11 *bis*(i) says

"Authors of literary and artistic works shall enjoy the exclusive right of authorising: (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images; (ii) any communication to the public by wire of the broadcast of the work, when this communication is made by an organisation other than the original one; (iii) the public communication by loudspeaker or any other analogous instrument transmitting by signs, sounds or images the broadcast of the work." "The broadcasting right is thus broken down into the various facets to cover the various ways and techniques by which it may be exploited."[59]

The wording of Article 11*bis* follows that set down in the International Telecommunications Union Convention where the essential element is "transmission intended for direct reception by the general public." In fact, in the documents of the Brussels Revision Conference of Berne it is stated

"The concept of broadcasting is known today to everyone; there is no need to define it in the Convention."[60]

The failure to define the concept presents a difficulty not yet resolved in relation to the phenomenon of satellite television. In the Brussels Act of the Berne Convention of 1948 a new Article 11 *bis* was inserted. It granted the exclusive right to the author of authorising "any communication to the public by wire or by re-broadcasting of the broadcast of the

work, when this communication is made by an organisation other than the original one." The purpose of this provision was twofold. In the first place, a right was conferred on the author of the exclusive right of authorising any communications to the public by wire (or by rebroadcasting) of the broadcast of the work. In the second place, a distinct limit was set to this right by the final words "when this communication is made by an organisation other than the original one". This simply means that the licence which the original broadcaster obtains from the author to broadcast his work also includes the right - but only for the particular broadcaster - to make use of all technical means he has at his disposal, eg cable system. Third party cable operators have to obtain permission from the author.

Similarly, an interesting development was made in the United States Copyright Act of 1976 which brings cable re-transmission back under the heading of "performance" and at variance with the recent Supreme Court decisions. Additionally, a statutory system of compulsory licences was set up for the operation of cable re-transmission of broadcasts. It was argued by cable operators in opposition to the 1976 Act that the concept of cable re-transmission as communication subject to copyright would lead to double payment. The first payment would be represented by the licence fee every owner of radio or television set has to pay and which also covers broadcasting royalties and the second payment would consist of the cable subscription fee, if out of this fee again copyright royalties were paid. The present trend of judicial thinking in relation to double payment is this:

Any cable subscriber who in fact has to pay twice also pays for two separate consents on the part of the author; his consent to the broadcast and his consent to the retransmission via the antenna installation. The subscriber also received something extra for his second payment to the cable operator; better reception, a great variety of programmes and the saving of not having to buy his own antenna but the debate concerning the meaning of Article 11 *(bis)* (ii) continues.

The employment of copyright law in relation to satellite television signified the entry of the application of this form of science into a legal environment that was never designed for it. Until very recently, international broadcasting defined either as the sale of domestic productions abroad or as unintended reception, "overspill", from one country to another. Quite apart from the economic questions of contract applicable to the rights of intellectual creators, cross-broadcasting raises a number of political and social issues. It will not be possible for the states to organise broadcasting in the way that it wishes. Indeed, Article 10 of the European Convention on Human rights, might well have foreseen the technological developments when it stated

> "Everyone has the right to freedom of expression. This right shall include to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."[61]

Indeed, the European dimension in broadcasting law is growing at a rate which legislators in Community member states are finding difficult to keep up with.[62]

> "Europe is poised to enter a new and much heralded era in telecommunications. Satellite and cable technologies are developing space and leading the Governments and broadcasting organisations of the European countries to restructure their television industries."[63]

Cross-border television was a concept introduced to consumers of intellectual materials by the advent of cable television, principally in the 1970s but satellite technology has given a complete new dimension to cable distribution systems. The present stage of development in public broadcasting will involve an extensive use of interactive cable systems in combination with the new technologies to fulfil a wide variety of communication needs in the fields of entertainment, education, information and daily living. In discussing present development a few key terms are immediately hereafter defined.

Fixed Service Satellite (FSS) - means a low-power point to point or communications satellite; television programmes are transmitted via the satellite to a ground station for rebroadcasting or distribution by cable. Receiving equipment for the signals put out by the low-power satellites is expensive and hitherto, as a rule, has been used by cable operators.

Direct Broadcasting Satellite (DBS) - means a high-power satellite via which television programmes which are intended to be received directly by the public are transmitted without the need for the intervention of a ground station and retransmission by cable distribution systems. DBS transmissions can only be received by individual members of the public who have SMATV (see below) dish aerials to receive transmissions directly from such satellites; such equipment is now becoming relatively inexpensive.

Satellite Master Antenna Television (SMATV) - means a system which used a single dish aerial capable of receiving television signals directly from a satellite rather than from a ground-based transmitter and is usually found in public houses, clubs, etc.

Cable Network - means an extensive cable system serving a large community of the general public.

Community Antenna Television (CATV) - means a cable system limited to a single aerial serving one building (typically a block of flats) or adjacent properties and having a limited number of subscribers.

Until recently it has been possible to make a clear distinction between the two types of satellite transmission but development in receiving-dish technology has made it possible for individual consumers, who were previously barred through cost, to receive tv signals emitted from the low-powered FSS frequency band. From the legal as well as from the technical point of view it is necessary to make a distinction between DBS and FSS. In relation to DBS, the satellite is considered from a legal standpoint to be an antenna or transmitter which is placed in space but is otherwise the same as a terrestrial transmitter.

This means that the broadcasting organisation which beamed the programme up to the satellite for direct broadcasting to viewers is in the same legal position as a national broadcaster of programmes such as, for example, the BBC and is therefore responsible for clearing copyright in any programme which is transmitted by DBS. The national legislation in the country where the broadcasting organisation is established is applicable to the transmission of the programme together with international convention law.[64] Broadcasting via satellite directly to the public is accepted as coming within the meaning of broadcasting under the Berne Convention and the UCC.

> "Therefore, the task of negotiation of adequate remuneration from DBS broadcasters for copyright clearances should take into account all the territories which would be covered by the satellite footprint."[65]

The legal position with regard to FSS is not so clear. Since such transmissions are not for direct reception by the public, doubts have been expressed as to whether FSS transmission comes within the meaning of broadcasting under the conventions.[66] The cable distribution element of FSS broadcasting is also treated in all national legislations as communication to the public within the meaning of both Conventions and therefore copyrightable. Unfortunately, there is no definition of "broadcasting" in either Berne or the UCC.

> "However, the definition of a "broadcasting satellite service" in the Radio Regulations annexed to the International Telecommunication Convention, which includes the criteria of "signals ... intended for direct reception by the general public" is regarded by many as relevant. Even though it may be possible now, due to developments in receiving dish technology, for individuals as well as cable distribution systems to pick up signals coming from the lower-powered frequency bank of a fixed service satellite, it would seem that the transmission of signals to such a satellite should not be considered to be broadcasting unless the signals are received by a sufficient number of individuals to constitute a public.[67]

It has not been usual hitherto for national copyright laws to specifically mention satellite broadcasting but Section 6(4) of the UK Copyright, Designs and Patents Act of 1988 provides that in the case of a satellite transmission, the place from which the signals carrying the broadcast are transmitted to the satellite is the place from which the broadcast is made, while the earlier Cable and Broadcasting Act of 1984 states in Sections 13 and 37 that DBS is broadcasting within the meaning of the earlier statute of 1956 but is silent about FSS transmissions.

In relation to cable distribution and the effect upon it of the Conventions, a distinction is made between two types, known as "cable-originated" and "captured broadcast" programmes. Cable-originated programmes may be described as those produced and compiled by the cable distributions company itself, with in addition broadcast programmes picked up off air by the cable company and changed in some manner for cable distribution, whether simultaneously or not, with the original broadcast.

"Captured broadcast" programmes cover broadcast programmes originating from a broadcasting organisation picked up "off-air" and distributed by cable simultaneously with the original broadcast and in an unchanged form ("passive cable distribution"). The distinction is important in relation to the protection granted by Berne where the exclusive rights of authorisation of the owner of copyright concerning broadcasting and communication to the public give authors a right to control the cable transmission both of cable-originated programmes and captured broadcasts.

> "Cable-originated programmes made by any cable operator are subject to the exclusive rights afforded to authors by Article 11, 11 *ter*, 14 and 14 *bis*. Captured broadcast programmes are subject to the author's exclusive right of authorisation when the communication by cable is made by an organisation other than the original one, that is, other than the organisation which broadcast the work (Art 11 *(bis)*(2))."[68]

The protection afforded by this Article was upheld in the Coditel cases[69] in Belgium. In the original Coditel case before the European Court of Justice in 1980 Attorney General Warner said

> "The subscriber to Coditel, a Belgian cable tv service, when he watches a Belgian broadcast program on his set, is the recipient of the service, the service provided by cable tv Coditel in relaying it to him. The first service does not end where the second starts."[70]

The program providers pursue the cable operators to sell their wares, who in turn look for subscribers. The copyright owners pursue the cable operators or the program providers and sometimes both. In its Green Paper entitled "Television Without Frontiers"[71] published in June 1984, the Commission of the European Communities established that nearly 25 per cent of Western European homes have cable systems. Cable networks use re-transmitted foreign and national broadcasts although there has been some movement towards production of original cable material. Moreover, the development of satellite tv has increased the number of "secondary receivers" of broadcasts originating elsewhere. Cable distribution was the subject of discussion by the Executive Committee of the Berne Union and of the Intergovernmental Committee of the UCC in 1983, whose deliberations were published in the form of "Annotated Principles of Protection of Authors, Performers, Producers of Phonograms by Cable", the main conclusions of which were firstly that any distribution by cable should be considered a restricted act of communication to the public, under the law of copyright, subject to the author's exclusive right, regardless of whether it is an originated cable program or a captured broadcast (Prin 1, para 54).

> "The principles reject the notion that simultaneous and unchanged distribution by cable of broadcasts should be regarded merely as a special technical means of improving reception and not as a separate act subject to the authorisation of the author. (Prin 1, para 54) ... While advocating this high level of protection for authors, the principles suggest that a right to equitable remuneration in respect of

the use of phonograms and recorded performances in both cable-originated and captured broadcast programmes would be sufficient for phonogram producers and performers."[72]

This provision appears to accept the invocation of compulsory licensing (Prins 11 and 28).

"Any proposal for compulsory licensing affecting the right of authors must be considered in the light of Article 11 *bis* of the Berne Convention. It is a fact that paragraph (2) of that Article does allow member countries to substitute a system of compulsory licences for the authors' exclusive right but in limited terms. The documents of the 1928 Rome Conference on the revision of the Convention,[73] when the compulsory licensing provisions of Article 11*(bis)* (2) were first introduced, show that it was understood by the Conference that no country should introduce such limitations to the exclusive right of authorising any communication to the public by wire unless they had experienced insurmountable difficulties in the exercise of that right."[74]

The European Commission Green Paper,however, strongly favoured the implementation of compulsory licensing in order to ensure that rights owners should not be able to prevent simultaneous, unchanged retransmission of broadcasts across the frontiers of member states. Notwithstanding the Commission's position, rights owners organisations were not amused and the Green Paper is unlikely to be implemented in that respect.

Joint meetings of experts of WIPO and UNESCO have been discussing the legal and economic implications arising from direct broadcasting by satellite since 1985. It may be said that legal writers have agreed on the principle that it is for the original distributing organisation to secure the authorisation by the rights owners and to remunerate them for broadcasts.[75] Berne states that

"Authors of literary and artistic works shall enjoy the exclusive right of authorising: (1) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images".[76]

In the preparatory document that the International Bureau of WIPO and the Secretariat of UNESCO drew up for the committee of Governmental Experts that met in Paris in June 1986, the provisions written into Article 11 *bis* of the Berne Convention and Article IV *bis* of the UCC were examined and the following principle emitted:

> "Broadcasting through direct broadcasting satellites is broadcasting under the Berne Convention, (and) the Universal Copyright Convention ... Consequently, where audio visual works are broadcast by such satellites the owners of copyright in such works, as well as performers, phonograms producers and broadcasting organisations organisations whose rights may be concerned by the direct broadcasting by satellite should enjoy the same rights as in the case of traditional broadcasting 'by earth stations'."[77]

It seems clear that legal opinion is agreed that copyright liability lies with the originating transmitter.

> "In view of the fact that no third party becomes wedged in between the originating organisation and the public ... the originating organisation is responsible for paying the author's royalties."[78]

The alternative to placing copyright responsibility on the broadcaster in the country where his headquarters are and where signals are transmitted on the "leg-up" to the satellite itself would be to apply the copyright law or laws of those countries where the satellite "footprint" can be received. WIPO's Group of Experts considered the view that the location of the programming body was the correct point of attachment of copyright liability.

> "However, it was seen that difficulties were emerging. First on account of the possibility of there being, in the country of emission of the signal, a system of non-voluntary licences for broadcasting, whereas on the other hand the receiving country or countries might have an exclusive rights system. In practice the non-voluntary licence would then be exported to the receiving countries, and that would be at variance with the provision in Article 11 *bis* of the Berne Convention that required the effect of non-voluntary licence systems to be strictly limited to the country introducing them."[79]

The experts felt that

> "the exclusive application of the law of the country of emission could, and in many cases would, lead to the complete denial of the exclusive rights - or the rights in general - of copyright ... owners: if, in the country of emission, there was no appropriate protection of these rights or there was no protection at all, the owners of rights would be left without any protection."[80]

WIPO/UNESCO felt that the applicability of the law of the place where initial emission took place was proper and therefore had recourse to complementary criteria to integrate and impose the theory of the application of the law of the country of emission, and take due account of the entirety of the public capable of receiving the emission. It was proposed that the service zone of the broadcasting organisation be one such criteria. The territory for which the broadcast is intended is considered the service zone. The service zone and direct reception zone are identical but the service zone concept can be different if the broadcasting organisation is public or private. The service zone or area of public service is the area that media organisations require to service, according to the public function laid down in terms of national law and in which these organisations collect the licence fees out of which the copyright remuneration is paid. The service zone of private organisations is decerned by reference to, for example, the language the particular program is in. The difficulty is of defining the service zone, above all for commercial broadcasting organisations and also the englargement of the area serviced due to overspill beyond national frontiers. Given that the right of performance of which the right of broadcasting is one aspect, depends on some assessment of the true, recipient audience, how this assessment is arrived at is a contentious question. It has been suggested that the starting-point of achieving a workable definition is the definition of the "footprint" the area in which a substantial proportion of the population receives the program direct from the satellite.[81]

> "We would have to consider statements by the originating organisation vis-a-vis advertising agencies as far as numbers and nationalities of viewers are concerned, the contents of the program, the language in which it is broadcast and the number of advertising customers in different countries. All these elements taken together will then give a clear picture of the "true audience" for which the program is intended."[82]

Therefore the amount of remuneration paid to authors should be determined by the distributors' audience, not only in the country of emission but also in all the countries within the satellite's footprint. Yet such a criterion, it is submitted, still does not resolve the legal problems applicable to the subject matter. It assists with the quantification of remuneration in the same way as authors' collecting services operate but takes no account of the fact that the author would appear to lose his right to authorise and prohibit the broadcasting of his works, except when there is a non-voluntary licence in the country in which the work is being used (which in any event is strictly controlled by the operation of Article 11 *bis*(2) of Berne, which limits the effectiveness of such a licence to the country that had availed itself of it).

The question of which national copyright should be applied is one which may be answered in the following way. The general rule with regard to any kind of literary or artistic work is that protection may require to be sought according to the tenents of two or more national legislations.

> "The publisher who wishes to publish, that is, reproduce and sell, a work in two or more countries is obliged to acquire a bundle of copyright prerogatives for each country in which the work is to be used, or of the whole world."[83]

As one writer put it

"(e)ven in the latter case, world copyright, in spite of that term, is nothing other than a bundle of rights covering all countries which grant the relevant copyright protection. In the same way, broadcasting organisations often acquire bundles of broadcasting rights enabling them to sub-licence program to broadcasting organisations in foreign countries. In the latter case, though, there are several acts of broadcasting taking place in several countries even it is done simultaneously by simply "taking over" programs from other (foreign) stations. Why then, in cases where the coverage area of a DBS extends to more than one country shall we stick to the traditional view that in that case there is still only one use of a broadcasting right, with the consequence that only the copyright law of the country where the originating organisation is located is applicable?"[84]

Hitherto UNESCO and WIPO have discussed the following points: the application to direct broadcasting by satellite of the broadcasting concept as contained in the international copyright conventions; responsibility of the broadcaster towards the owners of the copyright in the works so broadcast; consideration of the territory of the satellite "footprint" in the sense that, when the communication to the public takes place by means of a direct broadcasting satellite, the communication occurs in all the countries that are covered by the "footprint"; application of the national copyright law of each of the countries covered by the satellite "footprint" in virtue of the rule of national treatment. The last two points took up much of the discussions. In the document drawn up for the purpose of the Joint UNESCO/WIPO Committee of Governmental Experts on Audiovisual works and Phonograms[85] it was said:

"Where communication to the public (transmission for public reception) is effected through a direct broadcasting satellite, the communication (transmission) process takes place both in the country where the programme-carrying signals are originated and in all the countries which are covered by the "footprint" of the satellite and to whose public the audiovisual works involved are communicated (transmitted for public reception.) Under the Berne Convention, the Universal Copyright Convention ... which provide for national treatment, the national laws of both the country where the programme-carrying signals originated and that of each country covered by the "footprint" of the satellite are

applicable. If the national laws involved do not grant the same kind or degree of protection, the highest level of protection should be applied."[86]

This approach can be argued from a number of standpoints.

"Among the arguments in support of (this) thesis ..., one should consider the fact that copyright owners are not necessarily the same in the countries covered by satellites and in the country of emission. And yet it would be unacceptable for the owner of the rights in the country of emission to be the only one to authorise direct broadcasting by satellite, whereas the owner or owners in the countries of the "footprint", who are entitled to authorise the communication of their works to the public, would be denied the possibility of exercising that entitlement. The proposed service zone or true audience criteria afford no assistance in settling questions associated with multiple ownership. What is more, they are based on the principle that it is only the law of the territory of emission that is applicable, which for one thing is contradictory and for another is not sufficient to safeguard the interests of the owners of rights in the countries of the "footprint" which rights are governed and protected according to the provisions of the laws of each country."[87]

To accept such a position would be to replace in importance the private international law tent of *lex fori* as the principle involved in deciding the jurisdiction of an action. Then, in the case of an author who applies to the court of the country of emission for the protection of his right in the "footprint" country, the court would not consider the legislation of the country in which the protection is sought but rather that of the country for whom it is sought, the use of the rule *lex loci commissi delicti*. The Group of Experts felt that the conventions contain no provision that might support the theory according to which the concept of broadcasting, in other words the communication of programs to the public by wireless means, should be confined to the initial phase of the communication, namely the emission of the program, and should not cover the entire communication process.

"The word emission does not appear in the conventions. There is nothing to indicate that communication to the public by broadcasting takes place solely in the country in which the program is communicated."[88]

The broadcast has to be directed to the public.[89]

"The logical consequence of the qualification of the act of broadcasting, which encompasses the upward and downward phases of the signal, is that to determine the existence and scope of the right of broadcasting, there are two laws to be taken into consideration: the law of the country of emission and that of the country in which the program is communicated to the public."[90]

The copyright problems connected with satellites other than DBS ones may be cited as these (viz point-to-point and distribution satellite). In accordance with the WIPO Guide to the Berne Convention, there is no special copyright concept of broadcasting other than the meaning attached by the Radio-Communications Regulations made pursuant to the International Telecommunication Convention which states

"... it is a matter of transmissions intended to be received directly by the general public."[91]

Therefore, as far as the two types of telecommunications, satellite are concerned, broadcasting takes place in the last phase where a ground station transmits programmes transported by the satellite to the general public. In the case of point-to-point satellites, which have already existed for some considerable time, copyright owners have to negotiate (at least in Europe) with only a few national broadcasting organisations in each receiving country."[92]

In the case of distribution satellites where cable systems are used to relay the programmes emitted from the satellites, the position is more complicated.

"Copyright owners are obliged to collect fees from the final distributors (that is, the cable systems) in the receiving countries and the applicable law would be that of the country where the act of the (final) transmission takes place. ... there exists "cable origination" which can also be seen as an act of broadcasting in the broader sense of the word. As a consequence, even in the use of cable systems the final distributors, the system of compulsory licences ... and especially tailored to true cases of cable-retransmission of broadcasts off air, is applicable here and would not be allowed under the law of the Berne Convention. Cable systems distributing programs are therefore fully liable under copyright law ..."[93]

With respect to DBS, there seems to be unanimity that DBS transmissions qualify as broadcasts in the technical sense of the word, the broadcast being made from the originating earth station. The satellite is regarded only as an "antenna in space" and signals from a DBS are intended for direct reception by the general public. Accordingly, the applicable law would exclusively be the national law of the originating organisation. Such a view has the following result.

"The dominant feature of copyright law continues to be the principle of territoriality, namely that the copyright protection granted in each state is limited to the territory and laws of the state. If an author enjoys protection in other states, this simply means that he has acquired a bundle of territorially limited rights of copyright for all states in which he enjoys protection."[94]

The position with DBS is thus similar to the author of a published, written work abroad, where there are multiple acts of broadcasting taking place in several countries. The question which remains then is, in cases where the coverage area of a DBS transmission extends to more than one country, is it desirable to adhere to the view that there has been only one use of a broadcasting right, with the consequence that the only applicable copyright law is that of the country where the originating organisation is located?

"Should one not recognise that in this case there is a parallel and simultaneous exercise of a bundle of co-existing broadcasting rights and that the broadcasting organisation which uses these rights in this manner via DBS should (in the same way as the publishers) be obliged to acquire the necessary bundle of permissions in order to do so?"[95]

Dietz opines that with one and the same technical act of broadcasting would be connected the exercise of a bundle of co-existing broadcasting rights of the various countries in the "coverage area" of the DBS.

"Consequently, this would also establish a legal basis for the rule that the more extensive the territory and audience reached by the DBS, the higher will be the payment demanded for the grant of the broadcasting rights."[96]

The main importance of telecommunications satellites lies in relation to the broadcasting of news and current events where immediacy is essential, as on sporting occasions. The current age of information exchange has enhanced the use of this particular technology.

Until 1985, direct broadcasting by satellite was assimilated (in terms of the Conventions) to terrestrial broadcasting which was a phenomenon known to and dealt with in the body of both Berne and UCC.

"(T)he act of broadcasting giving rise to copyright is the decision taken by the organisation responsible for programming to include protected works in programme forming part of a broadcast intended to be received by the public" (and) the use of such satellites for the transmission of programmes containing protected works is an act of broadcasting - within the meaning of copyright legislation - being identified with the decision of programming organisations to broadcast the programmes."[97]

As a consequence of this line of thinking, the ramifications of DBS for copyright were thought to be slight and accordingly, the national legislation to be applied is that of the

state to which the organisation which has taken the decision to broadcast belongs. The position changed in March 1985 with the convening of the joint WIPO/UNESCO Group of Experts on the Copyright Aspects of Direct Broadcasting by Satellite. Dr Arpad Bogsch, the Director General of WIPO opined in light of the provisions of Article 11 *bis* of the Berne Convention describing broadcasting as a means of communication to the public, the act of broadcasting takes place where the wireless diffusion takes place as a communication to the public.[98]

> "Consequently, when this communication is effected through a direct broadcasting satellite, the communication takes place in all countries covered by the "footprint" of the satellite. According to this theory, any broadcasting by DBS, when the "footprint" covers more than one country, must therefore comply with the copyright laws of each of the countries within the "footprint". Otherwise a communication to the public in one country would be governed by the national law of another country - a result that would be contrary to the Berne principle of national treatment."[99]

What then came to be known as the Bogsch theory was thereafter incorporated into the "principles" forming part of the preparatory document prepared by the Secretariats for the WIPO/UNESCO Committee of Governmental Experts on Audiovisual Works and Phonograms which met in Paris between 2nd and 6th June 1986. The report of this meeting[100] reveals a deep division of opinion among the participants in relation to Principles AW11-14 set out in the Secretariat's Memorandum, the text of which is as follows:-

> The Report of the Group makes it clear that the following propositions about DBS are widely, if not universally, accepted, videlicet:- (first) broadcasting by DBS is broadcasting for the purpose of the Berne and Universal Conventions (AW11); (second) responsibility to authors and other rights holders lies with the broadcasting organisation which originates the broadcast ("the original broadcaster") (AW12); (third) the term "originating broadcaster" means either the person or legal entity that decided what programme the emitted signals will carry or the organisation which decided to carry out

broadcasts wherever is located the ground station (used to route programme-carrying signals to the satellite and whatever the coverage area of the satellite) or the broadcaster giving the order for such broadcasting (AW12). There are general arguments for, and against, the Bogsch theory, all of which were canvassed in the Reports of meetings of both the 1985 Group of Experts and the 1986 Committee of Governmental Experts. In favour is the view that according to Article 11 *bis* of Berne, broadcasting is a means of communication to the public by wireless diffusion and therefore broadcasting takes place where the wireless diffusion takes place as a communication to the public, namely in all countries covered by the "footprint", that because Berne provides for national treatment, the national law of each country covered by the "footprint" is applicable, that by comparison with traditional broadcasting, the coverage of territories neighbouring the country of emission would, with DBS, result in a new quality of broadcasting, that application of the law only of the country where the broadcasting originates would imply that broadcasting is merely emission of signals. (Berne refutes this since the remuneration for authors could take into account only that part of the total audience that is situated in the country of origin, a result that would be manifestly inequitable. Moreover, if the laws of all the countries within the "footprint" of the satellite were not taken into account, the authors and other rights owners could not prevent the use of their works in broadcasts originating in other countries which are not party to any of the international conventions. The relationship between the concept of broadcasting to an act of communication to the public is fundamental to the foregoing arguments.

"Authors of literary and artistic works shall enjoy the exclusive right of authorising the communication of their works to the public by broadcasting."[101]

The 1948 Revision went further by stating that authors had

"the exclusive right of authorising ... the broadcasting of their works or the communication thereof to the public by any means of wireless diffusion of signs, sounds or images."[102]

"(Such proponents) point out that communication to the public means making a programme available to the public and that such communication takes place irrespective of the extent to which, if at all, it is actually received by members of the public. They add (a) that since, in the Universal Copyright Convention, as revised in 1971, the broadcasting right was introduced in Article 4 *bis* without any definition, this absence indicates that the concept was intended to remain the same as had until then been generally accepted on the basis of the Berne Convention, (b) that the definition of broadcasting in Article III(f) of the Rome (Neighbouring Rights) Convention of 1961 ("the transmission by wireless means for public reception of sounds or of images and sounds") is in full harmony with the notion of broadcasting introduced in the copyright conventions and ... their claim to assert that only the law of the broadcast-originating country should be taken into account is tantamount to saying that, after all, broadcasting consists only of the act of emission - a conclusion manifestly contrary to the spirit and letter of the international conventions."[103]

"Furthermore, to assert that, because broadcasting is communication to the public, and because that communication takes place not only in the broadcast-originating country but also in the other countries in which it is received, this means that the broadcaster is committing an act falling within the scope of the laws of those other countries, seems not only a novel but also a startling and somewhat dubious contention. After all, the broadcaster in question is carrying out his activities within an internationally agreed framework, and it is not easy to see how a legitimate activity being carried on by a broadcaster in Country A (in full compliance with the requirements of an international instrument ratified by Countries A and B), the courts in Country B are as powerless to regulate activities of the broadcaster in Country A as were the governments of the countries (other than the Soviet Union itself) which experienced radioactive fall-out in consequence of the Chernobyl nuclear reactor disaster to deal with those persons whose acts (or omissions) gave rise to that disaster."[104]

Reprography

Turning now to the last of the three examples of new means of using intellectual materials, the following arguments have arisen.

> "Private copying constitutes a serious challenge to the reproduction right. It was originally viewed as an extension to the "private use" exception which exists in most legislations and in the international conventions.
>
> But examination of the history and the extent of the private use exception shows that this form of reproduction, although practiced mainly in the privacy of the home and not for commercial purposes, is in fact not an exceptional use by an abuse of the reproduction right. The proviso of Article 9(2) of the Berne Convention, which is contained almost in unaltered form is amongst copyright legislations, states that permitted private use must "not conflict with the normal exploitation of the work" or "unreasonably prejudice the legitimate interests of the author". Really, private copying has to prejudice these interests. The difficulty for copyright law is that it is so difficult to combat. Reprographic equipment is readily available. Some countries, like West Germany have compensated for lost revenue by levying a tax on reprographic machinery, like video cassette recorders, or on audiovisual tapes. However, this practice is not universal and the pressure of consumer groups has successfully prevented the introduction of such measures in the United Kingdom where the Copyright, Designs and Patents Act of 1988 in its final form omitted the recommendation of the Whitford Committee that levies be introduced."[105]

Reprography is for students, lecturers and consumers of all kinds, a vital convenience but it is a process which was quite beyond the imagination of the authors of international copyright laws and one which only became prolific in the 1960's. However, the history of the treatment of reprography by the Berne Convention dates from the revising of the draft Convention produced as a result of the 1884 preparatory conference. Article 8 provided that each Contracting State was to permit reciprocally the publication of extracts of works or parts thereof that had first appeared in another Union country, provided that the

publication was specially made for education purposes or had a scientific character. It was also to permit the reciprocal publication of short extracts from works of different authors, or short works published in another Union country.[106] An exception to protection was extended to news of the day. The 1967 Stockholm Conference added the important recognition in Article 9 of the right of reproduction *iure conventionis* but permitted national laws to make exception to this in particular instances. It states

> "(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising the reproduction of the works in any manner or form. (2) 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 normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. (3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention."

> "Although earlier drafts of the Convention, by recognising lawful borrowings, had implicitly recognised the author's fundamental right to authorise reproduction, the new text was the first formal express recognition of that right."[107]

The right was so dealt with because firstly, it was explicit in many national legislations of the member states and failure to do so would have meant that members were free to refuse to recognise the right. Article 9(2) was the result of a British initiative, with the Rapporteur giving the following explanation:-

> "If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible, in certain special cases, to introduce a compulsory licence or to provide for use without."

The Official Report of the Stockholm Conference (1967) contains the following explanation of Article 9(2):

> "A practical example of legitimate reproduction might be photocopying for various purposes. If it consists of producing a very large number of copies it may not be permitted, as it conflicts with the normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made photocopying may be permitted without payment, particularly for individual or scientific use."

Unfortunately, neither explanation assists us with the meaning of "normal exploitation" and "unreasonable prejudice". (The 1971 Paris text of Berne maintained the same provisions in Article 9). What is noticeable about the Article is the dichotomy between its two paragraphs. The provisions of Article 9(1) are consistent with the view that the exclusive interests protected are not merely economic but also those envisaged by Article 7 *bis* which deals with the author's moral rights in his creation. Article 9(2) having been at the suggestion of the British delegation, would appear not to take account of moral rights. The Whitford Committee in the preparatory work for the UK Copyright, Designs and Patents Act of 1988 states in its Report of the Committee to Consider the Law of Copyright and Designs, Comd 6732 (1977) para 220 that the intention of Article 9(2) was this:

> "The intention of this (Article) is that there should be no compulsory licences in fields in which works are normally exploited (for example publishing a book) and, if national laws permit copying and sale without permission in other fields, they should ensure that the author is reasonably remunerated. The difference, it will be argued below, goes to the heart of the reprography problem in relation to Berne."[108]

The problem of reprography was considered by the international working group set up jointly by the Intergovernmental Copyright Committee of the UCC and by the Executive

Committee of the Berne Union. The working group felt that the regulation of reprography in detail was essentially a matter for national laws. They felt it unlikely that internationally agreed rules could be formulated except in broad generalities.

> "Each state would therefore be free within the Conventions to establish whatever system is best adapted to meet its own educational cultural, social and economic requirements. It considered that in the case of states where reprographic reproduction was widespread, it was likely that the general approach would be through the establishment of a limited number of agencies to exercise and administer the right of copyright owners to remuneration."[109]

This unitarian approach has led to the failure of Berne and the UCC to deal adequately with the technical problem that is costing rights owners a literal fortune in lost revenue. The historical approach of restricted universality as delimited by the rule of national treatment under which authors would enjoy in respect of works protected under the Conventions, the same rights in other Convention member states as those states accorded to their own nationals, in addition to the rights specifically accorded by the Convention fails to provide a uniform international approach.

> "In consequence, no approach to the problem can ignore the fact that the various states of the Union have very different views about the essential basis of authors' rights. In contrast to the view that the basis of an author's right is his natural property in his works, common law jurisdictions have tended to view these matters in purely economic terms using "economic" in the narrow sense of "monetary". This accords with the view of property rights generally as socially recognised economic rights to act, dispose of and use ... Consistently with this, economic criteria have tended to predominate in common law countries in determining whether or not a particular use is fair or unfair, which in turn is the basic criterion for determining what reprography is permissible.

> Part of the problem in this area is the failure to be clear about the fundamental difference between the starting points in the two viewpoints which can be seen in the inception of Article 9 in its present form."[111]

It has now become axiomatic that the increase in the methods by which works can be reproduced produce a corresponding decrease in the number of sales to the public and a decrease in the receipts which authors would normally share. Data banks and compact discs are only two examples whereby large numbers of individuals can have access to a limited number of recordings. The proliferation among these new forms of dissemination gives rise to the argument whether the rights of reproduction are being implemented in substantive law, and the extent to which authors can "control the destination of copies of their works legally acquired by third parties."[112]

A memorandum prepared by the Secretariat of UNESCO and the International Bureau of WIPO in connection with the Meeting of Governmental Experts in Audiovisual Works and Phonograms of 1986 states that the reproduction right afforded authors by Article 9 of the Berne Convention implies their right to control the conditions governing distribution of copies whose production the author has authorised:

> "When an author concludes a contract relative to the reproduction of his work, he can stipulate the conditions governing distribution of the copies, with respect, for example to the countries where they can be sold. He may also have the contract specify that all or part of them shall be distributed only by public rental or lending."

In addition, Articles 14(1)(i) and 14 *bis* (2)(b) of Berne recognise a distribution right for cinematographic works. Note, however, the right to control the destination of copies discussed at the Stockholm Revision Conference. The German proposal thereanent was in the following terms.

"(The FRG) favoured, in principle, the inclusion of the right of circulation in the Convention. Although the right of reproduction provided an adequate basis for legal action in the majority of cases of infringement of copyright, no protection was given when copies lawfully produced in a country outside the Union were imported into a country of the Union. It ought to be possible to take legal action on the grounds that such copies were being circulated to a country of the Union."[113]

No progress was, however, made.

"The Chairman agreed that the lack of a right of circulation constituted a gap in copyright protection and that the question was not a new one. But, in the absence of adequate preparation, the question could not be settled quickly, particularly in regard to the vital exceptions."[114]

This very problem has recently been highlighted in Community Law. In a judgment of 24 January 1989[115] the European Court of Justice discussed the implications for trade of there being differences in the duration of copyright protection in the various member states. The case concerned the right to exploit the reproduction and distribution of musical works performed by veteran UK pop star Cliff Richard. EMI Electrolo was a German company to which the UK EMI company had transferred those rights. Patricia Im-und Export sold in Germany sound recordings which had originated in Denmark and which incorporated some of the works by Cliff Richard in which EMI owned the copyright. EMI instituted copyright proceedings and Patricia argued that, since EMI's copyright had expired in Denmark, the recording in question was lawfully distributed there and could therefore expect to enjoy free movement throughout the EC. Patricia had in fact made the copies of the recordings in Germany and in fulfillment of an order placed by a Denmark company (which was not the holder of the Danish rights in the works) and the recordings had indeed been delivered to Denmark before their re-export to Germany. The German Landsgericht considered that the application of Articles 30 to 36 of the Treaty of Rome, which require the free movement in goods, put in doubt the enforcement of Germany copyright laws in such a situation and stopped the proceedings pending a reference to the European Court.

That court held that protection should be denied to any abusive exercise of copyright so as to tend to maintain or to establish artificial boundaries within the Community.

Case-law already indicated that a copyright owner could not assert his right so as to prevent the import of sound recordings which had been lawfully released in another member state by the copyright owner or with his consent. The release of recordings in this case, however, was not with the copyright owner's consent even though it was lawful. In the present state of Community Law, characterised by an absence of harmonisation of copyright rules between member states, it was for protection under national law. Any restrictions thereby created in trade through resulting national anomalies could be justified under Article 36 of the Treaty since they are linked with the very existence of those national rights as long as they were not a restriction on trade. In the instant case, EMI could rely upon its German rights even though the corresponding Danish rights had expired. This trend towards uniformity finds further expression in the Principles put forward in 1988 in joint meetings of WIPO and UNESCO which further tends to support the view that effectiveness of protection is becoming increasingly associated with the uniformity of protection which both Conventions have as a primary aim but have seldom achieved.

Having examined the problems inherent in uses of these examples of technological development, it is possible, in light of recent UNESCO/WIPO meetings to discern a pattern of dealing with them which represents the encouragement of a cohesive policy of enforcement through uniformity.

The Governing Bodies of UNESCO and WIPO provided for a new approach regarding copyright questions in the years 1986-87. WIPO and UNESCO have in the recent past tended to deal with matters of crucial importance during a biennium period. During the 1984-85 biennium the Secretariats of both Organisations concentrated on new uses (mainly cable television, private copying, rental and lending, direct broadcast satellites) affecting

the owners or other proprietors of copyright, whereas during the 1986-87 biennium specific questions discussed were grouped according to the main categories of works such as the printed word, audiovisual works, phonograms and musical works. In connection with each category, the various uses of works in those categories, including in particular the uses based on new technology and the interests of all the various kinds of owners and beneficiaries of copyright in such works were considered. Certain principles were put forward which, together with the comments advanced to accompany them, were intended to serve as a guide for governments when they were dealing with such issues. They therefore carry no binding force.[116]

Having first of all dealt with piracy of protected materials, the Secretariats then considered private copying, or reprography.

> "Widespread reproduction of audiovisual works for private purposes prejudices the legitimate interests of the owners of copyright in such works. It is an obligation of States party to the (Conventions) to mitigate such prejudice."[117]

Regrettably, however, they went on to consider the practical means by which copyright proprietors may be compensated for home taping, such as by the introduction of tape levies and the collective administration of funds so ingathered rather than enter into a discussion as to what extent reproduction may constitute a special exemption in the user's favour and therefore to what extent member states may circumscribe in their domestic legislation the parameters for "fair use" exemption. The conclusion that one might relevantly draw from such an omission is that consideration of jurisprudential questions has given way to a more pragmatic approach designed to deal with new technological means of dissemination of intellectual works in a comprehensive and authoritarian way, but one which is scarcely cognitive of the juridical history of copyright principles themselves. The Betamax case has raised a lot of common sense questions concerning the extent to which it is proper for the exclusive rights of authors to reach into the private dwellings of users to require the latter

to pay for uses of materials which is in all practical terms immeasureable. In 1984 the United States Supreme court ruled that Country's copyright law was not violated when consumers made video recordings from television programmes and companies manufacturing the video recorders were not infringing on the copyright laws either.[118]

The Defenders' argument was that the primary use of video-cassette recorders were for "time-shifting" - the practice of recording a programme to view it once at a later time - and thereafter erasing it. The Supreme Court concluded that because such recordings were not duplications, video recordings for private usage constituted "fair use" which should not be restricted. The decision appeared to ignore the fact that large numbers of blank video tapes are bought per recorder unit and that records are in fact re-run many times. Taping of material is harmful to the future marketability of, say, a cinematographic film, because it reduces the demand to re-run on television.

The secondary performance of the work was not a "performance" and did not attract copyright liability simply because the distribution was only making it easier for the viewer to view the performance which had in any event been made available to the general public by virtue of the original performance. Any subjective considerations were swept away without any debate whatsoever. The UNESCO/WIPO Committee of Experts reverted to the virtual "taxation" of users.

> "Under the present circumstances, the most appropriate way of mitigating prejudice (towards the rights owners) is the introduction of a charge on recording equipment and/or blank material supports (tapes, cassettes). The charge should be paid by the manufacturers as importers and collected by organisations responsible for the collective administration of the rights in question, and should not be used for purposes ... other than the mitigation of the prejudice mentioned in Principle AW2."[119]

> "In relation to the Direct Broadcasting by Satellite, it is confirmed that this constitutes "broadcasting" under the Berne Convention (and) the Universal copyright Convention ... Consequently, where audio

visual works are broadcast by such satellites, the owners of copyright in such works ... whose rights may be concerned should enjoy the same rights as in the case of traditional broadcasting (by earth stations)."[120]

The Secretariats supported commentators' views that the originating broadcasting organisation is responsible in copyright to the proprietors of the works concerned.[121] Thereafter the Principles AW13 and 14 deal with the royalty aspect of transmission of copyright materials in a most interesting way.

"Where communication to the public (transmission for public reception) is effected through a direct broadcasting satellite, communication (transmission) takes place both in the country where the programme-carrying signals are originated (hereinafter "country of emission") and in all the countries which are covered by the "footprint" of satellite (and to whose public the authorised works involved are communicated) (hereinafter "footprint countries")."[122]

"Under the Berne Convention (and) the Universal Copyright Convention ... which provide for national treatment, the national laws both of the country of emission and of the "footprint" countries should be applied. Alternative A: If the national laws concerned do not grant the same kind or degree of protection, the highest level of protection should be applied. Alternative B; In general, the law of the country of emission should be applied; if, however, in the country of emission the owners of copyright in audiovisual works for the ... phonogram producers and broadcasting organisations whose rights may be concerned do not enjoy protection (because there is no protection in general, or there is free use allowed in a particular use, or the term of protection has expired) and in a "footprint" country they enjoy such protection or if in the country of emission their right is limited to a mere right to remuneration (non-voluntary licensing) and in the "footprint" country they have an exclusive right of authorisation, the law of the "footprint" country should be applied."[123]

In relation to Fixed Service Satellites, the whole process of transmission of programme-carrying signals (emission, "up-leg", "down-leg", transmission from th earth station further

to the public) should be considered as one set of broadcasting composed of different places, provided that the entire process is decided at the time of emission of signals towards the satellite. In this way, FSS broadcasting is regarded as the same as traditional earth broadcasting.[124] But if the transmission is still conditional on decisions to be taken later, either by the originating broadcasting organisation or by the broadcasting organisation transmitting the programme from the earth station further to the public, that transmission of signals should not be considered broadcasting but rather a mere transmission of signals.

> "Both the broadcasting organisation originating the programme and the broadcasting organisation transmitting it from the receiving earth station further to the public are - separately and jointly - responsible towards the owners of copyright in audiovisual works and towards ... phonogram producers and broadcasting organisations whose rights may be concerned as far as the final place of broadcasting from the earth station further to the public is concerned. The originating organisation alone is responsible towards the owners of rights for the phases preceding the final place of broadcasting."[125]

In terms of the national treatment rules of Berne and the UCC the laws of both the country of emission and the countries which are the recipients of the final phase of broadcasting should be taken into account.

> "Alternative A: If the owners of rights exercise their rights towards the organisation transmitting the signals from the receiving earth station further to the public, the laws of the country of the final phase of broadcasting should be applied. If the owners of the rights choose to exercise their rights towards the organisation emitting the signals towards the satellite, and if the laws of the country of emission and the laws of the country of the final phase of broadcasting do not grant the same kind or degree of protection, the highest level of protection should be applied. Alternative B: In general, the laws of the country of the final phase of broadcasting the owners of copyright in audivisual works or the ... phonogram producers and broadcasting organisations whose rights may be concerned do not enjoy protection (because there is no protection in general, or there is free use allowed in a particular

case, or the term of protection has expired) and in the country of emission they enjoy protection, the law of the country of emission should be applied."[126]

In relation to cable transmission it was agreed that

"(a)uthors or other owners of copyright should have the exclusive right of authorising any distribution by cable of the broadcast of their works protected by copyright."[127]

"In relation to the cable distribution of programmes transmitted by Fixed Service Satellites, the final phase of the communication to the public - the distribution by cable - is to be construed as having a separate copyright relevance[128] and therefore both the broadcasting organisation transmitting the programme through a fixed service satellite and the organisation distributing the programme by cable should be considered to be jointly and severally liable to copyright proprietors. In relation to the phases preceding the phase of the cable distribution, the originating organisation should be considered to be responsible towards the said owners of rights."

Therefore, the laws of both country of emission and country of cable distribution are relevant to copyright proprietors. Principle AW38 provides the model for application of this rule;

"Alternative A: if the owners of rights exercise their rights towards the organisation distributing the signals by cable, the law of the country of cable distribution should be applied. If the owners of rights choose to exercise their rights towards the organisation which emitted the signals towards the satellite, and if the law of the country of emission and the law of the country of cable distribution do not grant the same kind or degree of protection, the highest level of protection should be applied. Alternative B: In General, if in the law of the country of cable distribution the owners of copyright in audiovisual works (or their proprietors) do not enjoy protection (because there is no protection in general, or there is free use allowed in a particular case, or the terms of protection has expired) and in

the country of emission they enjoy protection, the law of the country of emission should be applied."[129]

Doubts were expressed during the Committee meetings whether the stage of emission of signals together with the stage of effective reception in the "footprint" countries could both be said to be of copyright significance when the emission of signals stage seemed to be given some international recognition in relation to DBS broadcasting. The result of such deliberations is to the effect that Article 11 *bis*(1)(i) of Berne refutes the sole application of the emission theory. It states that

"Authors of literary and artistic works shall enjoy the exclusive right of authorising or broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images."

The second part of the provision,

"or the communication (of works) ... to the public by any other means of wireless diffusion,"

indicates that under the Berne Convention broadcasting is one kind of communication to the public by means of wireless diffusion in relation to which there are other possible ones. This view seems in keeping with the report of the Sub-Committee on Broadcasting and Mechanical instruments at the 1948 Brussels Revision Conference where broadcasting was first discussed at the international level, when it said

"The Sub-Committee unanimously considered that the exclusive right granted by the Rome Conference of authorising the communication of their works to the public by broadcasting 'should remain inviolable.'"

(This was a reference to Article 11 *bis*(1) of the 1928 Rome Act of the Convention which had stated that authors had the exclusive right of authorising the communication of their works to the public by radio-diffusion.

> "The exclusion of reception, etc means nothing other than that broadcasting is considered communication to the public in the general running of this expression, that is, in the meaning that although the works should be made available to the public (that is, the signals should reach the area where the public can be found) ... it is not a condition that the public actually receive, listen to and view the programme. It is like ... the case of a cable-originated programme: it should be transmitted to the subscribers to qualify as communication to the public, and communication to the public takes place not only where the head-end is situated, but in the whole cable network; it is not a condition, however, for the qualification of such a transmission as a communication to the public that the subscribers actually receive and view the programme."[130]

In the UCC the right of "broadcasting" was introduced by Article IV*bis* of the 1971 version but no statement was made at the time of what the term constituted and was therefore left to individual member states to interpret.

The Committee's Report took the fairly common sense if not necessarily scientifically correct view that communication to the public means the point at which the programme is made available to the public without the necessity that it is received by that public. Such a position represents a quantum leap from the way in which exclusive rights in relation to television broadcasts appeared to be developing. Cable television, for example, has raised many problems throughout Europe and the United States, and especially in small European countries like Austria, Belgium and the Netherlands. In these smaller countries, the populations show a special interest in foreign broadcast programmes. Cable tv can provide subscribers with self-originated programmes or can pick up originally-broadcast programmes from the air and re-transmit them to subscribers. The copyright question does

not arise with self-originated programmes. This is just another method of broadcasting and these programmes are thereby subject to copyright.

> "It is only logical that cable-originated programmes and broadcast programmes should be subject to different legal provisions in terms of copyright. A cable operator taking the responsibility for the programmes he transmits is acting in the same way as a broadcaster propagating his programme-carrying dogma by cable, or by any conducting device, instead of by means of radio waves. It can be seen from this remedy alone that the position of the cable operator will not be very different, in copyright terms, from that of the broadcaster, which itself is only a particular instance of "communication to the public or public performance." Under the public law of some countries, no distinction is made between broadcast television and cable television."[131]

The transmission by cable of cable-originated programmes then comes under the "basic rights" of authors, governed by Article IV *bis* of the UCC as revised at Paris in 1971, in regard to the public performance and broadcasting of their works., In Articles 11 (dealing with the public performance and communication to the public of "dramatic, dramatico-musicial and musical works") 11 *ter* ("the public recitation of works") and 14 and 14 *bis* (cinematographic and associated audio-visual works), the Berne Convention explicitly states that the right exists irrespective of the nature of the means or process chosen to exercise the activities subject to copyright. The UCC allows member states freedom to decide whether the cable transmission of cable-originated programmes is a performance, or communication to the public or a broadcast. Berne, on the other hand, does not admit that cable transmission of cable transmission can be categorised as broadcasting since Article 11 *bis* reserves the use of the term "broadcasting" for "wireless diffusion". The problem arises with the common-place cable re-transmission of broadcast programmes. Cable operators have claimed in the case-law on this subject that they only facilitate reception of copyrighted works; that only the broadcasters can exploit these works. They, the cable operators, are only passive receivers and therefore do not need the consent of the copyright owners of re-transmitted music, films or other works. This line of reasoning has been

followed in a number of Supreme Court decisions in the United States and the Netherlands. The Supreme Court of the United States, in 168 and 1974, in the "Fortnightly" and "Teleprompter" cases[132] held that the cable- transmission of both local and distant signals did not come under the heading of "performance" and therefore not subject to copyright liability. A conceptual line was thus drawn between broadcasters who perform works and viewers who do not. The courts concluded that cable tv was analogous to the function of the normal tv antenna, a large communal antella for subscribers, replacing the individual antennae of individual viewers.

In respect of para(1) of Prin PW9 which stated that the storage of works in computer systems was reproduction there was agreement in Committee. In relation to PW9(2) which referred to the display of works stored in computer systems as a form of reproduction covered by the right of reproduction. Therefore this so-called reproduction theory was applied to the question of copyright status of display. Generally it may be said that the display of writings or graphic works on a screen differs in nature from the performance of a dramatic, dramatico-musical or musical works,the recitation of a literary work and the communication to the public or broadcasting of such a performance or recitation as well as from the performance, communication to the public or broadcast of a cinematographic work.

> "The essence of the difference is that when writings and graphic works are displayed on a screen, they are fixed for a shorter or longer time while in respect of the performance that is not the case. The fixation takes place at least for the time which is necessary for reading the text and studying or enjoying the graphic work concerned. What appears on the screen is naturally a copy of the work (or part of it), usually in page format, that is a reproduction of the work ... such a display is necessarily covered by the right of reproduction. The relationship between the storage of the work in the computer system (as a copy) and the screen display of the same work (as another copy) is similar to the relationship between a printing place and the printed copies. The preparation of the printing place does already qualify as the reproduction of the work, and of course, both that reproduction and

> the making of printed copies are covered by the right of reproduction ... When a writing or graphic work is stored in a computer system for the purpose of making it available to the public through display on screens, the two acts of reproduction can be - and actually are - also considered as the stages of the same complex use and usually the same authorisation covers both (the authorisation may also extend to another possible reproduction, namely to the hard-copy reprographic reproduction of the same work).[133]

(Concerning this approach, there were some reservations as several delegations felt that they did not consider display a reproduction of the work because the copy was not obtained in a tangible form and they rather felt that communication to the public as a public performance, also conferred by exclusive rights of the author, had taken place.) In relation to data bases, there was fairly general agreement about Principle PW16 which contained the definition of data bases and the basic principles concerning their protection.[134]

One delegation proposed that the first sentence of paragraph (3) of Principle PW16 should mention further possible acts which would result in recognising data bases as intellectual creations and, thus, the sentence should refer to data bases which, by reason of the "selection, collection, co-ordination, assembling or arrangement of their contents, etc" constitute intellectual creations.[135] Paragraph (3) has been amended accordingly.

Furthermore, another delegation proposed that, in Principle PW16, a new paragraph should be inserted to read: "When a summary of a work is stored in a computer system, such a summary should be made either by the author of the work himself or on the basis of his authorisation".[136] An observer from an international non-governmental organisation expressed concern whether it was meant by that proposal that authorisation to print a summary would be required if it had not otherwise amounted to an infringement of rights.[137] The remark made by that observer drew attention to the possible misunderstandings that might have been created by the insertion of the proposed new paragraph. The question of whether certain types of summaries (reviews, etc) can be made

only with the authorisation of the author or not is of general nature and does not only concern summaries prepared for data bases. Much depends also on the nature of the summaries, etc. Therefore, it seems more appropriate to leave this question to national copyright legislation and case law.

In respect of the related rights type protection of data bases proposed in Principles PW17 to PW20, there was no agreement at the meeting of the Committee of Governmental Experts.

One delegation expressed serious reservations concerning Principle PW17 on possible *sui generis* protection of data bases and also concerning Principles PW18 to PW20 related to that principle. It expressed the opinion that States should extend copyright protection to electronically compiled collection of data on the basis of a reasonable standard of originality and should never insist on a higher standard than for traditional compilations. The delegation was of the view that the danger inherent in *sui generis* protection was that it would fall outside the system of the international copyright conventions and the principle of national treatment, that the co-existence of copyright and *sui generis* protection could result in the dilution of copyright protection and, finally the *sui generis* protection could in itself be too broad and cover also fairly meagre collections which were not worthy of protection.[138]

Some participants shared the opinion of the above-mentioned delegations, some other participants being , however, of the view that there was a need for *sui generis* protection of catalogues and similar collections of data which existed in the Nordic countries, arguing that because it was not justified to differentiate protection according to whether a collection was made on paper manually or in a computer electronically, computerised data bases should necessarily share the status of collections protected under *sui generis* protection. It was also emphasised that there were countries where mere skill and labour were not enough for collections to qualify as works protected by copyright on the basis of the notion of originality prevailing in such countries, but where the significant investments

made by data base producers did, on the other hand, need and deserve some kind of protection.[139]

The discussions referred to above show that there are at least some countries where data bases are not protected by copyright, although they might be afforded some other kind of protection. In those countries, the need for related rights type protection cannot be excluded, the more so because there is an urgent need to offer global and legally safe protection to data base producers, otherwise they may become reluctant to invest in such an expensive and at the same time increasingly vulnerable service. Therefore, Principles PW17 to PW20 have been retained but put in brackets to express the prevailing differing opinions and the fact that those principles may only be needed in certain countries.

CONCLUSIONS

"Authors' and publishers' rights become difficult to enforce as we move away from the print culture and confront a surge of space-age apparatus that enables the broad-based dissemination and simultaneous reception by huge audience of almost unimaginable quantities of creative works. In the copyright world there is a prevailing concern that brilliant technologies will overwhelm authorship and copyright. There is danger."[140]

From the new technologies which include photocopying, cable television, satellite transmissions, and video and audiotaping, some common characteristics are emerging. There is a trend towards the increased importance of display and performance for the dissemination of "traditional" works, and widespread consumer ownership of instruments for display and performance and for copying for display, performance and use. There is continuing doubt about the applicability of copyright control bringing with it a concomitant spread of unauthorised uses. The new uses are increasingly private in nature making them correspondingly difficult to detect.

"Copyright in the past - at least in those countries with highly developed jurisprudence in intellectual property - adapted rather well to technological change. Technological innovation is not new. But its pace is now unprecedently fast and accelerating."[141]

The will to overcome the problems presented by the media and the opposition to the use of legislative means to support that will were matters well versed in the Betamax case. Stewart says of this kind of public interest debate that:

"(t)he next challenge is one which goes to the very root of copyright. It is a doctrine which is not new but which assumed much greater importance in the 1960's and 70's and will, I fear gather strength in the 1980's as the economic recession develops. It is known as "consumer politics". Applied to copyright, the doctrine means that the consumer should have the widest possible access to all copyright material at the lowest possible cost and, in many cases, free. Almost everybody in our modern society is a consumer of copyright in several respects as a reader of books, newspapers, or other printed copyright material, as a listener to music, as a viewer of television, or parent of a child at school who should have his school books cheap or free, to name only the most common uses. Thus, put in electoral terms on most copyright issues the overwhelming majority of voters are one side and a comparatively very small number of voters, who are copyright owners, are on the other side of the argument. Furthermore, only a tiny portion of this small number of copyright owners become millionaires, but it is these few who are constantly in the public eye. No politician, even if he is the opposite of a popularist, could totally ignore this when taking a position on a copyright issue. The counter-arguement, as you all know, is that without copyright, the liberty of the subject, including the liberty of speech and the freedom of expression in literature and the arts, would be in danger and ultimately some of the values of western civilisation would be at risk. But this counter-argument is not as obvious as the popularist argument of access to copyright work by the general public. Therefore, the copyright argument needs to be put again and again in differing forms and all countries. Once this is acknowledged the task of constantly arguing for the maintenance and development of copyright, which may at times appear repetitive, or even tedious, becomes a necessary, even a worthy pursuit, humanist in the best sense of the word."[142]

Ladd goes further

> "(C)opyright is an instrument of freedom, and a basic one at that. Copyright is intended to support a system, a macrocosm, in which authors and publishers compete for the attention of the public- independent of political will of the majority, the powerful and above all the government - no matter how startling, disturbing or controversial their experience, views or visions."[143]

The WIPO/UNESCO Principles set out above in relation to a new means of dissemination of works represent a firm and pronounced shift favour of the protection of the proprietors of copyright materials. In relation to works which may be said to be "performed" or "broadcast" via satellite, or cable tv or "reproduced" by means of reprographic equipment, the applicability and relevance of what has been termed, "the true audience"[144] for which broadcasts are intended has grown. The result is an objective appreciation of the actual or noational use to which a programme may be put and leaves behind copyright's previous inability to cope with the unforeseen uses of the works. The juridical justification for such an approach is perhaps questionable when viewed against the aims of traditional copyright of matching an actual use with actual recompense in terms of private law contract. Placing a levy on reprographic equipment to recompense for potential uses of material usurps the role of the private law in a system of national relations between a corpus of rights owners on the one hand and one of rights users on the other. The keynote has thus become effectiveness of protection. The proliferation of reprographic materials which may be used in the home has been a feature of the "eighties". The advent of compact disc (CD) and digital audio-tape (DAT) in combined form is the latest state-of-the-art method of overcoming authors' rights. Both are unique sound media, carrying sound frequency information in the form of a digital signal which can be "read" by lasers. The combination of CD and DAT provides home copiers of pre-recorded music with a perfect master copy medium which permits infinite duplication of perfect copies of the original.

"The uncontrolled introduction of DAT will necessarily cause an escalation of private copying because of the "cloning" nature of the copy."[145]

The import of the Principles is an admission that such burgeoning means of copying works can only be dealt with by methods which are uniform in all states parties to the Conventions, otherwise the technologies themselves will outpace legislative development. The advancement of technology as it relates to computers provoked one commentator to remark,

"There is little point in the law chasing the frontier of technology which moves at that pace. The law will be substantially involved as and when cultural/or commercial interests developed on the back of the technology need its protection."[146]

The impetus towards uniformity has a parallel in the European Community's interest in intellectual property. In March 1985, the European Council determined that a specific goal of the Community should be the creation of a common information market. In November the same year, the Commission sent the Council details of a work programme for the creation of such a market (Com(85) 658 final). The Commission aims to build a data base information industry in the European Community in order not to become dependent on the United States information industry. Copyright (including computer software) is described by the Commission as the most significant legal barrier to the free flow of information.

"Willingness on the part of potential commercial information service suppliers to provide such services across the Community will inevitably depend on their being satisfied that adequate protection for their considerable investment will be guaranteed by the intellectual property laws of member states. Both the protection afforded to the software around which any proposed service will hinge and the protection afforded to the compilation of the underlying data base will need to satisfy these commercial demands."[148]

If it constitutes a barrier to the free flow of information as the Council says, copyright is also the currency by means of which intellectual information changes hands. The Council's creation of a common information market will depend upon the strengthening of a uniform system of copyright among its members, as its own Green Paper of June 1988 makes clear, rather than dismantling of that system or discontinuation of the application of copyright itself. As an example of the pursuit of that uniformity one may consider the European Commission's Proposal which seeks to emphasise the argument put forward by many states whereby it is perceived that the assimilation of computer software to copyright law is correct, although the draft directive supports the mistaken view that copyright may protect the "idea" of a programme.

> "This has happened because the use of copyright for "literary work" as such does not enable software to be protected in the way that the computer industry would wish."[149]

The question of inclusion of computer programs as protected works under Berne has recently been voiced at the Committee of Experts on Model Provision for Legislation in the Field of Ccopyright, Geneva, 1989, where some delegations expressed doubts whether copyright protection of computer programs was an appropriate solution.

> "Against the copyright protection of computer programs, the following main arguments were formulated: computer programs are not covered by the Berne Convention: they are of a technical and utilitarian character and cannot be considered to belong to the literary and artistic domain. In general, they lack originality and are composed of mere subroutine elements. The basic provisions of copyright protection do not suit the protection of computer programs: For example, the 50-year term of protection after the author's death is socialistic: computer programs become obsolete within a much shorter period ... At the level of WIPO no meetings have dealt with this question recently. The WIPO Model Provisions on the Protection of Computer Programs adopted in 1977 should be considered to prevail and those Model Provisions outlined a *sui generis* system."[150]

New provisions for dealing with the advanced technologies may well be included in a draft Protocol to the two Conventions at a joint conference to be held some time shortly after 1991. The Director-General of WIPO stated at the commencement of the session of the Committee of Experts on Model Provisions for Legislation in the Field of Copyright that work on the draft model provisions would be useful in identifying the questions with which the studies for the establishment of a possible protocol to the Berne Convention should deal. Reading from WIPO's draft programme for 1990.91, the Director-General said

> "(t)he need for such an exercise lies in the fact that there are certain questions in respect of which professional circles have no uniform views and ... even governments which legislated or plan legislation on such questions seem to interpret their obligations under the Berne Convention differently."

The Committee's programme for discussion, it should be noted, was defined to be, in terms of the approved programme and budget of WIPO for the 1988-89 biennium, the "Setting of Norms in the Field of Intellectual Property". In respect of the objective of norm-setting, the Committee's programme contains the following statement

> "The objective is to make the protection of intellectual rights more effective throughout the world. "More effective" means that the norms (standards) of protection are raised, where necessary, to the required level and that the enforcement of the intellectual property rights will be easier and the sanctions for infringement stricter."

The Principles, following the work of the Committee of Experts on the Evaluation and Synthesis of Various Categories of Works in Geneva in mid--1988, will form part of the uniform solutions envisaged by the Model Provisions on Legislation Committee. The draft model provisions contain a dramatic revision of even the most historically entrenched articles of the Berne Convention, for example, the subject-matter of protection, rights protected, duration and ownership of rights.

What we may conclude from all of the foregoing is that the application of *sui generis* treatment of intellectual works is likely to proliferate. Whether such a development should be regarded as condusive to the better implementation of traditional copyright principles or as a derogation from them, consequently signalling the partial destruction of the copyright system, only time will tell.

FOOTNOTES
(Chapter 4)

1. A Kerever, "Is Copyright an Anachronism?" (1983) Copyright 368 at 371.

2. L Besotti, "Italy's Supreme Court Acknowledges Copyright Protection of Computer Software" (1988) Copyright World, 33.

3. WIPO Document LPCS/1/4.

4. L Perry, "The Legal Protection of Computer Software - The WIPO Model Provisions" (1979) 3 EIPR 34.

5. M Kindermann, "Computer Software and Copyright Conventions" (1981) 1 EIPR 6.

6. Kindermann, ibid at 6.

7. WIPO - "Guide to the Berne Convention" 1978 Geneva, 12-13.

8. Kindermann, ibid at 12.

9. D B Barbosa, "Software & Copyright, A Marriage of Inconvenience" Copyright 1988 195.

10. J Stern, "The Centre will not hold - Recent U S Developments in Protecting Idea Aspects of Computer Software" (1987) 9 EIPR pp 125-131.

11. G Palos, "Copyright Protection of Computer Software" (Jan 1989) Copyright World 38.

12. Palos, ibid at 38.

13. Palos, ibid at 39.

14. Palos, ibid at 39.

15. Palos, ibid at 40.

16. V Besarovic, "The Legal Protection of Computer Programs" 4 (1987) Copyright 144 at 148.

17. M Keplinger, "Authorship in the Information Age, Protection for Computer Programs under the Berne and Universal Coopyright Conventions" (1975) Copyright 119.

18. Copyright Aspects of the Protection of Computer Software, WIPO/UNESCO Report Copyright (1985) 12.

19. M Kindermann, "The International Copyright of Computer Software, History, Status and Developments" (1988) Copyright at 201.

20. WIPO Document AGCP/NGO/111/3.

21. In 1978.

22. Besarovic, ibid at 153.

23. Kindermann, ibid at 203.

24. Kindermann, ibid at 204.

25. Kindermann, ibid at 204.

26. *White-Smith Music Pub Co v Apollo Co* 209 U S 1, 1908.

27. Barbosa, ibid at 194.

28. Barbosa, ibid at 196.

29. A Lucas, "La Protection des creations industrielles abstraites" 1975.

30. Barbosa, ibid at 195-6.

31. Barbosa, ibid at 146.

32. Law No 85-660 Copyright 1985 pp 326-335.

33. A Mille, "The Development of Legal Thinking on Copyright Protection of Software" 23 (1988) Copyright UNESCO Bulletin 4, 17.

34. Mille, ibid at 18.

35. Mille, ibid at 18.

36. Eg the United Kingdom's Copyright (Computer Software) Amendment Act 1985.

37. The computer manufacturers' lobby was a major impetus in this movement.

38. WIPO Publication 814, Geneva 1978.

39. WIPO Document LPCS/II/3, Geneva 1983.

40. Mille, ibid at 18.

41. Mille, ibid at 18-19.

42. Mille, ibid at 20.

43. See the French case of *Apple v Segimex Trib* Gp Inst Paris 1983.

44. Mille, ibid at 20.

45. M Daily and H W Jones "Software Protection" Manhattan Beach Vol 5 and No 2 (1987) p 7.

46. Mille, ibid at 21.

47. Mille, ibid at 22.

48. Mille, ibid at 22.

49. Mille, ibid at 22.

50. Mille, ibid at 23.

51. Mille, ibid at 23.

52. Mille, ibid at 24.

53. Stern, ibid.

54. S Hewitt, "Copyright Claims to Computer Output in the U K" (1983) 11 EIPR 308 at 311.

55. Copyright (1989) ibid at 149.

56. Ibid at 149.

57. Article llbis (1).

58. M H Pichler, "Copyright Problems of Satellite and Cable Television in Europe" (1987) Kluwer, London, 21.

59. Pickler, ibid at 22.

60. Documents, at p 265.

61. European Convention on Human Rights, 1950, Article 10.

62. Green Paper on the Establishment of the Common Market for Broadcasting COM (84) 300 final, 14.6.84. White Paper of the Commission on the Completion of the Internal Market COM (85) 310 final, 14.6.85, para 115 onward.

63. G Davies, "Satellite and Cable Television in Europe - Developments and Prospects" (1986) 5 EIPR 139.

64. Third World Conference of Broadcasting Unions, Tokyo, 1980.

65. Davies, ibid at 142.

66. WIPO - "Guide to the Berne Convention", Article llbis 7, Report of the Brussels Diplomatic Conference on Distribution of Programme-Carrying Signals Transmitted by Satellite, 1974 para 37, Copyright 1974 267 et seq.

67. Article 84 Aps pa 2 of the Regulations, 1971 as quoted in Davies, ibid at 142.

68. Davies, ibid at 144.

69. The Coditel cases before the European Court of Justice, Cases 62/79 (1980) ECR 881 and 262/81 (1982) ECR 3381.

70. See Note 69 at 885.

71. Green Paper on the Establishment of the Common Market for Broadcasting, especially by Satellite and Cable, COM (84) 300 final, 14.6.84.

72. Davies, ibid at 144.

73. Report of the Sub-Committee for Radiophony, Documents of the Rome Conference, 1928 at 183.

74. Davies, ibid at 145.

75. C Colombet, "Propriété littéraire at artistique et droits voisins" 1986 Paris p 210.

76. Article llbis of the Berne Convention.

77. Principle AW11 (1986) Copyright 231.

78. A Szilagyi, "Questions of Broadcasting by Satellite with Special Reference to Authors' Rights" Copyright (1981) 229.

79. M Fabiani, "Copyright and Direct Broadcasting by Satellite" (1988) Copyright 17, 19.

80. Fabiana, ibid at 19.

81. W Dillenz, "Legal System Governing the Protection of Works Transmitted by Direct Broadcasting Satellites" 1986 Copyright 392.

82. Dillenz, ibid.

83. Fabiani, ibid at 21.

84. A Dietz, "Satellite Programme Transmission", Stato da Diritto Comunitante degli Scambi Internazionali, 1985
p 375.

85. 1986 Copyright p 231.

86. Principles AW13 and 14.

87. Fabiani at 22.

88. Fabiani, ibid at 23.

89. WIPO - "Guide to the Berne Convention", 1978, Geneva p 78.

90. Fabiani, ibid at 23.

91. WIPO - "Guide to the Berne Convention" ibid, 67.

92. A Dietz, "The Shortcomings and Possible Evolution of National Copyright Legislation in View of International Satellite Programme Transmission" - Television by Satellite - Legal Aspects (1987) ed S de B Bate, p 115-116.

93. Dietz, ibid at 116.

94. Dietz, ibid at 121.

95. Dietz, ibid at 121.

96. Dietz, ibid at 122.

97. A Kerever, "Droit d' uteur et Satellites spaciaux" 121 RIDA (1984) 26, 50-52.

98. 18-22 March 1985, (1985) 21 Copyright 180, 181.

99. M Freegard, "DBS: The Implications for Copyright" 13 (1988) Columbia - VLA Journal of Law and the Arts, 77 at 80-81.

100. 22 (1986) Copyright 218-250.

101. Berne Convention, Article llbis (Rome Revision 1928).

102. Article llbis (Brussels Revision 1948).

103. Freegard, ibid at 86.

104. Freegard, ibid at 88.

105. S M Stewart, "International Copyright in the 1980's (1981) 8 EIPR 231 at 232.

106. For an interesting history of Berne's treatment of reprography, see J Adams, "Reprography Re-examined" (1989) Copyright World, 31.

107. Adams, ibid at 32.

108. Adams, ibid at 33.

109. Adams, ibid at 33-34.

110. Adams, ibid at 34.

111. Adams, ibid at 34.

112. M T Desurmont, "The Author's Right to Control the Destination of Copies Reproducing His Work". (1988) Vol 12 No 4, Columbia-VLA Journal of Law and the Arts, 481 at 483.

113. Records, Geneva, 1967 p 854, para 683.

114. Ibid, p 855, para 686.1.

115. *EMI Electrola Gmblt v Patricia IM - und Export Verwaltungsgesellschaft mbh* (case 341/87).

116. Committee of Governmental Experts on the Evaluation and Synthesis of Principles on Various Categories of Works, Geneva, 27th June to 1st July 1988.

117. Principle AW2.

118. *Sony Corp v Universal City Studios Inc*, 104 Sh Ct 774 (1984).

119. Principle AW3.

120. Principle AW11.

121. Principle AW12.

122. Principle AW13.

123. Principle AW14.

124. Principle AW15.

125. Principle AW16.

126. Principle AW18.

127. Principle AW20.

128. Principle AW27, 28, 31-33 and 34(2).

129. The Cable Principles were adopted wholesale from the "annotated Principles" of Protection of Authors, Performers, Producers of Phonograms and Broadcasting Organisations in conjunction with Distribution of Programmes by Cable" adopted by the Executive Committee of Berne Union and IGG of UCC in 1983.

130. Committee Report (1988) Copyright 368 at 385.

131. A Kerever, "Transmission by Cable and Copyright", UNESCO Bulletin XIX 1985 3, p 10 at 12.

132. *Fortnightly Corp v United Artists Television Inc*, 392 US 390 (1968) *Teleprompter Corp v Columbia Broadcasting System Inc*, 415 US 394 (1974).

133. Committee of Governmental Experts on the Evaluation and Synthesis of Principles on Various Categories of Works, Copyright (1988) 445 at 468.

134. Ibid, Note, 133 at para 77.

135. Ibid, Note 133 at para 85.

136. Ibid, Note 133 at para 91.

137. Ibid, Note 133 at para 91.

138. Ibid, Note 133 at para 86.

139. Ibid, Note 133 at para 87.

140. A Ladd, "Securing the Future of Copyright" 9 (1985) Columbia-VLA Journal of Law and the Arts, 413.

141. Ladd, ibid at 414.

142. S M Stewart, "Copyright in the 1980's" 28 (1981) Bull Cop Soc USA 351, 369-70.

143. Ladd, ibid at 413.

144. W Dillenz, ibid. "The Legal System Governing the Protection of Works Transmitted by Direct Broadcasting Satellites". See Note 81.

145. G Davies, "A Techincal Solution to Private Copying: the use of Digital Audio Tape" 6 (1987) EIPR 155.

146. C Clark, "Electronic Publishing and the Law" Copyright (1988) 241 at 246.

147. For a full exposition of the objectives underlying these proposals and the current barriers to the free flow of information in the Community, see P Hughes (1986) EIPR 275.

148. Hughes, ibid 278.

149. I A Staines, "The European Commission's Proposal for a Council Directive on the Legal Protection of Computer Programs" (1989) 6 EIPR 183.

150. Copyright (1989) 146 at 149.

CHAPTER FIVE

COPYRIGHT AND THE PUBLIC INTEREST

In dealing with the subject-matter of this chapter it is intended to highlight certain issues affecting the modern author and his recipient public. There is a plethora of material written about the problems which technological advance poses for the owners of exclusive rights, much of it arguing that the rights of authors cannot be maintained because the law cannot keep pace with the challenge of technical developments in dissemination of works in this, the information age. Essentially, however, problems that technology brings involve only one issue, namely, whether or not a broadcast, reproduction, display or performance of original material is subject to copyright. It is submitted that there remain issues which are more crucial and which go to the very functions that copyright is conceived to serve and that while the functions of copyright do not change, the legal means of ensuring that these functions are performed assuredly do. An examination of national as well as international legislation reveals that different pressures are contorting the shape and form of law that regulates authors' exclusive rights. It is the purpose of this chapter to examine those tensions.

Specifically, it is intended to identify the progressive deterioration of the traditional copyright model of the author-publisher-user triangle in favour of the collective embodiment of interests which are also collectively identified, shared and paid for. The supplanting of the individual as a creator of artistic works in virtue of his employment by the cultural industries has proved to be less significant in this respect than the identification of a corpus of users. The recipient public, whose cognitive rights of access to works have required state intervention in a sphere thought formerly to deal purely with private property rights. The importance of the public interest to copyright is a phenomenon identified by the emergence of three key factors: firstly, the requirement that techniques for the enforcement of rights be, at least in part, the responsibility of the state;

secondly, the subordination of "literary and artistic works" to the protection of "information" generally; and thirdly, the collectivisation of exclusive rights, administered by authors' societies. Additionally, and as a concomitant of these pressures, the public interest in relation to the uses to which copyright laws are put will be examined as also to what extent public interest is given recognition in the International Copyright system and what measures are adopted in order to foster and safeguard that interest. In examining the diverse aspects of the public interest in the national and international senses, the principal focus of the writer's attention will be upon the three key factors enumerated above; firstly, the enforceability of measures designed to require compliance with norms of either international or municipal laws; secondly, the nature of the subject-matter of protection; and thirdly, the growing use of collectivisation of authors' rights. Before examining those factors, a summary of the origin of the term "public interest" and its historical place in copyright law will emphasise the metamorphosis which has post-dated it.

A. Historical background and the legal concept of the public interest in national laws

The history of international copyright law has a pedigree of only one hundred years but they have been years which have seen the concept of the international community develop dramatically. In 1886, when the Berne Convention was ratified, copyright was largely a matter of national concern. There followed a practice of publishing across frontiers which grew apace with international trade and was dependent upon the technology of the day. Until then there had been only limited discourse between states, works being distributed almost exclusively within the country of their authors' domicile, and the lack of international copyright protection caused little concern. The more advanced nations became concerned with the problem of protection abroad for their domestic works and consequently some bi-lateral treaties were negotiated to establish a basis for reciprocity on which eligible foreign works could enjoy the same copyright status as domestic works. Reciprocity between states worked well enough when there were in existence only a few homogeneous national copyright laws, the content of which was broadly similar. Thereafter, though, the need for international standards grew, encouraging the notion of a

common international legal framework. The Berne Convention was concluded at the initiative of a number of mainly European states who formed themselves into a Union intended to bring about a genuine society of states. The 20th Century, and in particular the period following the Second World War, gave rise to a stimulus in the production of ideas. The intellectual development of economic planning, institutions and policy, and the recognition of new, humanist values given international recognition in the Universal Copyright Convention of 1952, have led to an enormous amount of creative literature on every conceivable subject, the acceptance or rejection of which is an active process upon whose outcome the relations of nations depend. It is now the province of copyright to protect the formal expressions of that active process.

A general study of copyright history is in the writers' view essential to the consideration of the dominant philosophy behind modern municipal statutes. The origins of copyright in ancient Jewish law is a case in point. Founded upon the principles set out in the Torah and Talmudic Law, long before the printing press was invented, the theory was promulgated that incorporeal rights in property, aside from property itself, could be stolen. In Jeremiah Chapter 23, 30th verse is found the following, "Therefore behold said the Lord. I am against the prophets that steal my words everyone from his neighbour." Plagiarism is a theme expanded upon at some length in the doctrine of Mishna, a collection of thoughts made during the period that the Roman occupation "scattered the Jews to the four winds" in the century or so following 70 AD. In Talmudic Law it is found that reporters of oral principles of the Talmud through the generations have been careful to express principles of law by reference to their authors. The prohibition on adopting an original expression as one's own continued after the maker's death and the similarity between this and the time-limits for prescription of copyright protection after the author's death granted by contemporary legislation is obvious. It is also interesting to note that the correlation between uses of copyrighted works and the requirement of payment therefor which we recognise today, is missing from ancient Jewish law where misappropriation of the author's

word is a matter of moral concern alone. Only in later Talmudic Law does the principle of payment for authorised use emerge. These later pecuniary rights were

> "something which took place when those protected moral rights came face to face with daily materialistic life so that pecuniary rights came to be protected as a consequence of the defence of the moral rights of authors".[1]

From the foregoing, one can discern the functions that copyright historically aimed to perform. The main principles upon which copyright is founded are, as indicated in Chapter 4, natural law, just reward for labour, stimulus to creativity and social requirements.

Commentators on the jurisprudence of copyright traditionally indicate that its functions do not change, remaining constant notwithstanding technological advance. Traditionalists see the public interest in terms of the continuity of intellectual creativity which is brought about by effective protection of the author. The public interest was best served on this view by the existence of exclusive rights protected by civil, and in modern times criminal, remedies, but it was not recognised as an entity in itself in the triangle of creator, publisher and recipient public until recently.

The convocation of private property rights and public law, brought into focus by the growth of what might loosely be termed "consumerism", now presents as a crisis in copyright.

> "Undoubtedly copyright is in a state of crisis today, at least in the strictly etymological sense of the word, denoting change, with no overtones either optimistic or pessimistic. It is to be wondered whether the crisis is one of age or of decadence, in which case the question should be given a positive reply, or whether it is in an evolutionary crisis, indicating the transition to a new state."[2]

The elements which cause such a matter to be debated are the technical aspects of modern dissemination. The triangle of author-publisher-public, influenced by the existence of the printing press, produced the exclusive rights of the author.

> "Indeed, the activity of the printer-publisher, which called for the purchase of materials - in other words, investment, gave rise to protection by way of a privilege of exclusiveness, the nature of which originally, was purely industrial. The privilege of the printer-publisher won its patent of nobility, so to speak, and became refined through finding its legal cause in the grant of the exclusive right of the author, that grant having been negotiated "freely" between largely equal parties."[3]

The importance of the method of dissemination of a work was therefore crucial to the make-up of the various rights which became the law of copyright. It was

> "a structure based on a monopoly that was conferred on the creator and assigned by contract to the activity of such enterprises."[4]

The growth of the cultural industries has happened by reason of the development of more and more sophisticated technical media. The latter is the cause of the former, and one of its identifying features is the way in which many of these new media make recognition of the recipient public almost impossible. That copyright may be enjoyed by multinational enterprises and not by the individual creators themselves tends to shift the argument away from the maintenance of copyright as a means of protection of authors' exclusive rights. The legal justification of the protection of intellectual property becomes even less clear when it is realised that these same multinational enterprises are of two groups with fundamentally divergent interests. On the one hand there are enterprises which are closely associated with the continual production of intellectual materials as copyright holders, assignees or licensees; on the other hand there are others, particularly in the audiovisual field, which disseminate the materials produced by cable or by satellite.

"The modernisation of copyright necessitated by the emergence of new audiovisual techniques too often appears to be merely a conflict between two categories of industries. The infrastructural industries are of course bound to involve the rights of consumers as a means of bypassing copyright, and such arguments do strike a chord with some sections of the policy-making class, in that it is then merely a question of arbitrating between conflicting business interests.[5]

It is said that

"(I)nnovators need the law, but the last thing they want is to be involved with the law. Future innovation in Western countries depends heavily on our capacity to make our intellectual property far more sophisticated than it is at present. Learning how best to protect intellectual property is one aspect of this task, and it cannot begin too soon."[6]

The Place of the individual in the International Copyright Conventions:-

The preamble of the UCC declares that the Contracting States ... "(c)onvinced that a system of copyright protection appropriate to all nations ... will ensure respect for the rights of the individual ... " (and) "will facilitate a wider dissemination of works of the human mind and increase international understanding."

"It should also be recognised that the numerous restrictions in copyright mentioned in the Copyright Conventions and in national copyright legislation, actually serve to mitigate the impact copyright could have on the freedom of expression and information."[7]

Nevertheless, censorship has been used liberally by the USSR in the bilateral copyright treaties it has concluded with other socialist countries, even after its accession to the UCC in 1973.

Article 19 of the Universal Declaration of Human Rights of the United Nations mentions not only the freedom of expression and information, but also the "right to the protection of

the moral and material interests resulting from any scientific, literary or artistic production of which he is the author" (Art 27(2)). This last right has also been included in the International Covenant on Economic, Social and Cultural Rights of the United Nations of 1966 (Article 15(1)(c)), while the Berne Convention finds its justification in the twin claims of justice to authors and universal benefit to mankind. A "solemn declaration" by the member states of the Assembly of the Union on 9 September 1986 was in the following terms, viz

> "... that copyright is based on human rights and justice and that authors, as creators of beauty, entertainment and learning deserve that their rights be recognised and effectively protected both in their own country and in all other countries of the world ... that the law of copyright has enriched and will continue to enrich mankind by encouraging intellectual creativity and by serving as an incentive for the dissemination throughout the world of expressions of the arts, learning and information for the benefit of all people ... that international respect for the law of copyright opens paths across the frontiers for works of the mind, thus contributing to a better international understanding, and to the cause of peace; ... the Berne Convention ... by providing an outstanding, comprehensive and harmonised codification of the rights of authors has guaranteed for a hundred years the most effective international protection of these rights; ..."[8]

> "A developing social or political system can assure individual self-fulfilment by creation, recognition and protection of property values which remain for the benefit of the individual."[9]

As an embodiment of this principle, Article 27 of the Universal Declaration of Human Rights, adopted and proclaimed by the United Nations General Assembly in December 1948, states:

"(1) Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and share in the scientific advancements and its benefits.

(2) Everyone has the right to protection of the moral and material interests resulting from any scientific, literary or artistic production, of which he is the author."

Created under the auspices of UNESCO in reference to Article 27, the national treatment provisions of the UCC provide that each member will accord the same copyright protection granted its own citizens to nationals of other member countries, and to works first published in other member countries."[10]

In February 1973 the Soviet Union acceded to the UCC. For the Soviet Union, accession permitted greater access to world intellectual property markets for its own creative products in return for access to all types of copyrightable products for import.

"Although Soviet authorised authors and publishers have access to world markets to license their creations and copyrights, access to the Soviet market-place for other UCC members who wish to licence their properties is limited. The Chief Administration for Matters of Literary and Publishing Affairs (Glavlit) is the main censorship agency. Glavlit maintains all types of political, ideological, military and economic control over items prepared for publication and distribution. In this way the Soviet Union has been able to import information for its own commercial, agricultural and industrial development, while denying other publications access to the Soviet consumer market on ideological grounds ... The freedom of expression is hindered and even punished if it is not acceptable to the prescribed cultural, intellectual or political concepts. By adhering to certain universal values, the Soviet Union is thus able to accomplish its own unique goal within the context of the totalitarian system while frustrating the goals of shared values of human dignity and individual choice."[11]

This is in fact what has happened. The Soviet Copyright Agency (VAAP) established in 1973 immediately after accession, used UCC membership to extend domestic censorship abroad through the national treatment provisions of the Convention.[12] Its censorship methods have not always extended to the extraterritorial usurpation of domestic copyrights to thwart the publication of works by dissident authors in foreign states which are UCC members. They have frequently been less subtle. Alexander Solzhenitsyn published "The Gulag Archipelago" in 1973 in Paris in the Russian language. The VAAP had not at that time appropriated exclusive jurisdiction of all Soviet authors' works. Instead of attempting to restrain publication, the Soviet authorities inflicted its penal code on Solzhenitsyn, arrested and eventually expelled him.

The amendment of the domestic Russian legislation after 1973 still involves Western publishers in making licensing and assignation agreements "via the intermediary of a state agency, in the framework of the state monopoly of foreign trade".[13] Before 1973, Western publishers had been free to publish Russian works without any governmental authorisation but this is no longer the case, and concerns regarding this matter had induced the Dutch Government to put forward a proposal for the addition of a clause to the Final Act of the Conference on Security and Co-operation in Europe, the Helsinki Declaration of 1975, which now reads in its final form, under the heading of "Co-operation and exchanges in the field of Culture":

> "The participating States ... express their intention now to proceed to the implementation of the following: ... to promote fuller mutual access by all to the achievements - works, experiences and performing arts - in the various fields of culture of their countries, and to that end to make the best possible efforts, in accordance with their competence, more particularly - to promote wider dissemination of books and artistic works, in particular by such means as facilitating, while taking full account of the international copyright conventions to which they are party, international contacts and communications between authors and publishing houses as well as other cultural institutions, with a view to a more complete mutual access to cultural achievements."

It remains to be seen what the practical implementation of the Helsinki Text will be.

South Africa, a member of the Berne Union, chooses to view Article 17 of that Convention in a way which permits it to constrict freedom of expression. What Article 17 says is

> "(T)he provisions of this Convention cannot in any way affect the right of the Government of each Country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right."[14]

It is agreed that this provision is intended to permit censorship for the preservation of public order. South Africa, however, chose to interpret it in a completely different way. It sought to obtain the compulsory licensing of some American opera works in the late 1960s in terms of compulsory licensing provisions in its domestic copyright statute of 1965, whereas the copyright proprietors of those musicals refused to licence their performance in South Africa because of their opposition to apartheid. The word "permit" in Article 17 was taken completely out of context by the South African Government in isolation, interpreting it as a "permission" overruling the prohibition of the author. That interpretation upset the whole purpose and structure of the Berne Convention, which guarantees the right of the author to withhold authorisation of publication or performance of his works, and which only allows compulsory licencing of those works in very special and narrowly defined cases.[15] What happened in the South African case of course was not the suppression, but rather the ordaining of performance of a work, an example of suppression of the right to expression. From such an example it is possible to discern a suffusion of moral rights and freedom of expression. The foregoing comments regarding copyright and information are intended to indicate to the reader that the identification of values in modern copyright law is a qualitatively dissimilar exercise from that which either the original drafters of the UCC or Berne Convention would have envisaged. Whether one considers the aims of the Conventions to be humanitarian or protectionist in nature, the

fundamental means by which these ends are reached is by regulation of the forms of protected works. The economic or other value of the contents of those works is irrelevant. How long will that remain the means of protection in light of developments at national level?

The Public Interest at the International Level:

The Enforcement of Obligations in National Laws and in the International Sphere:

The First Key Factor:

It is debatable whether we are actively seeking a sufficient level of sophistication of copyright law. It is the writer's belief that copyright legislators are predisposed to the efficiency rather than the sophistication of intellectual property law and in this respect that efficiency is to be achieved by an effective enforcement of regulations. This utilitarianism is reflected in the growth of anti-piracy measures currently being proposed at national and international levels, measures for effectively and efficiently combating counterfeiting and piracy.[16]

The economic interest of publishers is influential in bringing to the notice of governments that their legitimate copyright interests are being flaunted daily by pirates. The corresponding interest of the state in their predicament has expressed itself in the introduction of criminal sanctions in national jurisdictions. "Piracy" is not a term used by the relevant statutes to deal with the phenomenon of a statutorily-created category of criminal offence. Rather pirates may find themselves prosecuted for common law fraud or other crimes of dishonesty in connection with, say, the unlawful distribution of copyright video cassettes. This is in keeping with Article D of draft Model provisions which says:

"(1) Any act of counterfeiting or piracy shall constitute an offence. Any person who has committed such an act shall be punished:

Alternative A(i) where the said Act was committed with criminal intent by the same punishment as that provided for theft."[17]

Again, the impetus in member states towards the formulation of systematic action against piracy of works at the national and international level is evidenced by other international discussions: for example, the European Commission's Green Paper on Copyright, the Council of Europe's Colloquium on Piracy of Audiovisual works, both of 1988, and the General Agreement on Tariffs and Trade, Uruguay, 1987. (The Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations, 25 ILM 1623 (1986).

Enforcement procedures are now being viewed as requiring the punishment of infringement, actual and anticipated. The extension of "interlocutory relief" to situations of anticipatory infringement has led to the introduction in many states of the "Anton Piller" order. It is often essential to the plaintiff's case against an infringer who is believed to have infringing articles in his possession, to inspect such articles for the double purpose of preparing the plaintiff's case and restraining the defendant from making or distributing further infringing copies. If the defendant is given notice in the usual way of an application to the court for an inspection order, he is likely to dispose of the articles or of the relevant documents.[18]

In the British case of *Anton Piller K G v Manufacturing Processes (1976) Ch 55*, the plaintiff obtained an *ex parte* order for inspection, including the photocopying of all relevant documents and delivery of all relevant articles. The defendant may be in contempt of court if he refuses to permit same to be done. The effect is close to a search warrant in a civil case, and "is an example of how copyrights can be protected by making case law and without having to ask for special legislation".[19] While the draft Model

Provisions seek to import these Orders into the legislations of all member countries, there has been no discussion of the constitutional significance of their implementation, as the importance of effective enforcement has supplanted that discussion. Any criticism of the constitutionality of such an extreme power which, though requested by private individuals, depends for its implementation on the public duty of the courts, goes not to the measure itself, but rather to the way in which it was created. Anton Piller Orders find no expression in the United Kingdom's 1988 Copyright, Designs and Patents Act nor in the Committee which discussed the reform of British intellectual property law prior to the implementation of that Act.[20]

> "Copyright deals with the theft of intangible or intellectual property - a concept more difficult to grasp than ordinary theft; copyright is therefore far less deep rooted in the public consciousness of what is right and what is wrong. It is, however, on that consciousness that all laws, and particularly those with a criminal content, are based. Convincing the general public even in the great democracies that copyright infringement is theft is a long and arduous process, scarcely begun ... A crucial period in the development of international copyright has been reached - to describe it as a crisis is not alarmist."[21]

The foregoing quotation indicates the nature of one of the most pressing problems for intellectual rights owners as we near the twenty-first century. The principal feature of that problem is the loss of control over the work by the rights owner, a symptom of which is the trend towards collectivisation of royalties, and the trend for consumerist tendencies in the industrialised societies to change the author's right away from a monopolistic property right. (Mention was made in the chapter dealing with developing countries of the growing use of compulsory licences, (Chapter 2).) The effect has been that some of the author's exclusive rights are being exercised exclusively through bulk licensing by large collecting societies. (Control of exclusive rights, together with their enforcement, are two sides of the same coin.)

The new method of dissemination of copyright works made possible by technological advances predicates the use of collecting societies to secure financial compensation for uses of authors' works. Indeed, the creation of a royalty collection and distribution system which is common to a group of countries constituting a geographic region is an identifiable trend in world copyright. Witness the system of extended collective licences in effect in the Nordic Countries[22] in relation to the right to broadcast works, the right to make copies of published works by means of reprography, for educational uses or the right to make copies of radio or television broadcasts by means of sound or video recordings, insofar as the broadcasts contain published works. The copyright legislations of all of these countries statutorily permit, in identical terms, agreements between an organisation of authors to apply to works of those who are not members of that organisation and who are not otherwise legally affiliated to it so as to be found by its acts, thereby enlarging the usual scope of blanket licences which only affect works within an organisation's own repertory. Discussions during the preparatory stages of the Nordic legislation providing for extended collective licence clauses was concerned with whether the states concerned were able to implement such measures given the provisions of the Berne Convention. Insofar as Berne permits compulsory licences via Articles 11*bis* (broadcasting and other wireless communications, public communication of broadcast by wire or rebroadcast, or by loudspeakers or analogous instruments) and Article 13 (recording of musical works and any works pertaining thereto), the authors' organisations in Nordic countries have pressed for the compulsory licensing of means of reproduction beyond these permitted by Berne on the basis that they be analogous. It will only be a matter of time before they are successful in this since in the majority of member countries, "(T)he interpretation of the requirements of the Berne Convention has been less restrictive."[23]

Neither convention makes reference to penal sanctions but one of the outcomes of WIPOs study of piracy was that penal sanctions are viewed as an appropriate way of enforcing the rights protected under the Convention.[24] In 1988, WIPOs Committee of Experts on Measures Against Counterfeiting and Piracy met in Geneva. The Committee endorsed the

views of the earlier Fora in particular regard to advising national legislations on draft "principles" intended (i) to make them aware, as also the general public, of the need to combat counterfeiting and piracy, and (ii) to create material that should be useful to those who create national laws, and to those who adopt them, when they consider what provisions national laws should contain as measures for effectively combating counterfeiting and piracy.

It is worth noting that both counterfeiting, (which the Committee saw as a matter relating to industrial property) and piracy (which is a term properly applied to an illegal infringement of copyright), were treated both separately and together in terms of the same draft provisions or principles, because they were germane as to their legal nature. Note the terms of Article A(2) of the Committee's draft model provisions, which provides.

> "Manufacturing as an Act of Piracy. The manufacturing or the preparation of manufacturing of copies (i) of protected literary and artistic works, (ii) of fixations or protected performances, (iii) of protected phonograms, (iv) of protected broadcasts shall constitute an act of piracy, provided that such copies are manufactured on a commercial scale and without the authorisation of the owner of the right in the protected work, performance, phonogram or broadcast... (hereinafter referred to as "pirate copies"). A licensee may grant the authorisation, if and to the extent that he is entitled to do so pursuant to his contractual, compulsory or statutory licence, as the case may be."[25]

It is interesting that "manufacturing" should be used in preference to "reproduction" which is endemic to both Conventions. The draft model provisions go further. Article B(1)(a) states,

> "At the request of the natural person or legal entity claiming to be injured or to be threatened to be injured by an act of counterfeiting or piracy ... any court or law enforcement authority shall, if it suspects that an act of counterfeiting or piracy has been committed or is likely to be committed, order to take the measures it seems necessary in order to: (1) prevent the committing or the continuation of the committing of acts of counterfeiting or piracy, (ii) secure evidence as to the nature, quantity,

location, source and destination of the goods suspected to be counterfeit goods or of the copies suspected to be pirate copies, and/or as to the identity of the person suspected to have committed or to be likely to commit acts of counterfeiting or piracy."

The kind of anticipatory infringements mentioned in this principle have already been implemented in many states, eg the Anton Piller order in England cited above. A passage from the report of the meeting of the Committee is enlightening.

"A number of delegations underlined the essential importance of the conservatory measures provided for in article B. It was pointed out that these measures were indispensable in order to effectively suppress acts of counterfeiting and piracy."[26]

Note that suppression of the intention to infringe has supplanted punishment of the infringer. Article 13 of the draft Model provisions reads as follows:

"(1)(a) At the request of the natural person or legal entity claiming to be injured or to be threatened to be injured by an act of counterfeiting or piracy ("hereinafter referred to as "the requesting party"), any court or law enforcement agency shall, if it suspects that an act of counterfeiting or piracy has been committed or is likely to be committed, order to take the measures it deems necessary in order to: (1) prevent the committing or the continuance of the committing of acts of counterfeiting or piracy (ii) secure evidence as to the nature, quantity, location, source and destination of the goods suspected to be pirate copies, and/or as to the identity of the person suspected to have committed or to be likely to commit acts of counterfeiting or piracy."[27]

As an example of the effect that WIPOs treatment is having upon those countries where commercial piracy is internationally recognised as a problem we may take the Phillipines.

The Phillippines is a prime example of an internationally-recognised problem area for commercial piracy, and the WIPO guidelines have had a remarkable effect there. The

Phillippines have been a member of Berne (Brussels version) since 1951 and the UCC since 1955 (although its status in this latter respect is questionable since it purported to withdraw the same year). The Phillippines imported the innovations proposed by the WIPO Model Provisions by means of Presidential Decree (No 1988) which attached criminal responsibility to an infringer who was formerly only subject to civil penalties for his actions.

In terms of the Model provisions, then, the emphasis is upon pre-emptive measures, evidence of the movement away from the delictual remedies historically associated with the protection of copyrights. Note too that the composition of the classes of person who are entitled to request conservatory measures specifically include corporate entities, an inclusion which has no parallel in either of the Conventions. It was stated in discussion that all those who drew their use of works legitimately from the original owner of the intellectual property right in question, or who received the authority to represent such an owner, were intended to be included within the expression "the natural person or legal entity claiming to be injured or to be threatened to be injured".

WIPO has realistically abandoned the idea of controlling piracy by means of international agreements, and is adopting the potentially more promising course of strengthening national legislation. The use of interim restraining measures, invoking the seizure of goods, the affixing of seals to premises whose illicit works are produced or stored or from which they are distributed, and interdicts prohibiting importation or distribution will continue and grow.[28]

> "All that WIPO is doing would still seem fairly derisory if it were not backed up by the efforts, probably less diplomatic, of the institutions with specific responsibility for protecting markets from "unfair competition from abroad": the GATT, the EEC, the Customs Co-operation Council and the OECD."[29]

The Uruguay Round of GATT confirms intellectual property as an extension of the matters included within the scope of the Agreement. In September 1986, the Minister of the General Agreement on Tariffs and Trade adopted a Declaration in terms which a round of multilateral commercial negotiations was initiated, the Uruguay Round. The subject contemplated in the Declaration (Part I) included the definition of objectives and principles of the negotiations as well as the determination of the topics that would be the subject of negotiation, together with the effective strengthening of the role of GATT and of bringing about a wider coverage of world trade under enforceable multilateral rules which were to embody the result of a political compromise. This process is expected to conclude in September 1990. Among the items which ministers agreed in discussing this round was the question of the multilateral negotiations on trade-related aspects of intellectual property rights (TRIPS), to include the following topics in the Text on Trade-Related Aspects of Intellectual Property Rights, videlicet:-

(a) The applicability of the basic principles of GATT and of relevant international intellectual property agreements or conventions; (b) the provision of adequate standards and principles concerning, the availability, scope and use of trade-related intellectual property rights; (c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems; (d) the provision of effective and expeditious procedures for the multilateral prevention and settlement of disputes between governments, including the applicability of GATT procedures; (e) transitional arrangements aiming at the fullest participation in the results of the negotiations.

> "The emphasis placed upon the question of enforcement regarding trade-related aspects of intellectual property should be noted. This part of the Text makes it clear that it is not only the existence or non-existence (or adoption or non-adoption) of appropriate provisions regarding this subject which seems to have created tension among specific contracting parties but, more importantly, the actual applicability and enforcement of such provisions."[30]

With particular regard to the provision of effective and expeditious procedures for the multilateral prevention and settlement of disputes between governments, this part of the Text should be construed with Paragraph 6, where emphasis was placed on the importance of reducing tensions by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures. The particular tensions referred to include those created as a result of the implementation of unilateral procedures such as those contemplated in Section 301 of the United States Trade and Tariff Act (The Omnibus Trade and Competitiveness Act of 1988) which requires that the United States Trade Representative identifies "priority foreign countries" that deny adequate and effective protection of intellectual property rights, the purpose of this being

> "to provide for the development of an overall strategy to ensure adequate and effective protection of intellectual property rights and fair and equitable market access for United States persons that rely on protection of intellectual property rights".[31]

Under Section 301 of the US Trade and Tariff Act,

> "there is a presumption that the United States Trade Representative would take action in such cases where it has a reasonable indication that such action will be effective in changing the foreign country's practice or barrier."

The retaliatory measures seen here reflect the approach adopted by the United States in relation to the protection of semiconductor chips in relevant legislation of 1984. The Text reflects the influence of the United States as evidenced by the item related to the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights which uses language similar to that of Section 301 of the 1988 Act. The issue whether WIPO or GATT should have exclusive jurisdiction over intellectual property matters has been resolved by adopting a provision to the effect that

negotiations shall be conducive to a mutually supportive relationship between GATT and WIPO as well as other relevant international organisations.

Enforcement Techniques at the National Level

No system of law is complete without provision for implementation of enforcement techniques, and it is peculiarly true of intellectual property law that enforcement of rights has remained subordinated to the establishment of those rights. As far as international copyright is concerned, the Conventions leave that protection to individual states; they contain no enforcement procedures themselves, certainly as far as disputes involving individuals or their assigns are concerned. As previously discussed in terms of dealing with the new technologies, however, uniformity of measures of protection employed nationally is a trend which the Conventions will increasingly encourage.

The most important practical means by which copyright owners can maintain control of their rights is by a radical improvement of enforcement procedures. This is why major efforts have been made recently by WIPO and UNESCO in raising the level of consciousness of states as it relates to the criminal aspects of piracy. The results of meetings of WIPO and UNESCO on the subject matter of counterfeiting and piracy have (as noted above) progressed from declarations of principle and intent to the adoption of Model Provisions for National Laws.

The first international recognition of the problem came when WIPO convened a Worldwide Forum on Piracy in 1981, and then again in 1983, as stated above, at which resolutions were passed recognising that the enormous growth of piracy of sound and audiovisual recordings and of films endangers national creativity and prejudices the interests of industry and the economy and employment in countries which it plagues. All states were encouraged to develop through their own legislation stringent measures for dealing with piracy. It has now been agreed internationally that the sale of an illicit copy of a work prejudices the interest of authors and composers, performing artists and producers and a

"discouragement of national creation" argument has developed. The low price of pirated products facilitates their sale, and their availability fulfils domestic demand easily; this in turn leads to limited demand for new domestic products and the encouragement for domestic artists to produce is commensurately reduced. Pirated products are usually of a quality inferior to that of the original, and they therefore prejudice the reputation of the producers.

In the field of counterfeiting, the International Bureau of WIPO has twice convened a committee of experts in industrial property law (under the title "Committee of Experts on the Protection Against Counterfeiting"), in 1986 and 1987,. Both committees expressed advice on draft model provisions (in the case of counterfeiting), or on draft "principles" (in the case of piracy), and both intended to achieve the following aims: (i) to make legislators, governments and the general public aware of the need to combat counterfeiting and piracy, and (ii) to create material that should be useful to those who prepare national laws, and to those who adopt them, when they consider what provisions national laws should contain.[32]

The intervention of the criminal law

The foregoing study of the rights and obligations which have arisen in the field of industrial and intellectual property recently indicates a movement away from civil remedies for the infringement of such rights.

One might be excused for believing that the protection of the proprietary rights of an author should be founded exclusively on civil law and that, accordingly, penal remedies imposed for the infringement of his exclusive rights are out of context. However, public policy now dictates the necessity of providing criminal remedies for copyright infringements. Authors, often being individuals, do not have the resources of a corporate entity and therefore require the support of state intervention in the shape of criminal sanctions to redress the balance. This view tends to obscure the fact that most authors'

rights are subsumed by the companies which compete in the cultural or entertainment industries.

The history of copyright protection shows that the civil sanctions of interdict and damages are insufficient to provide adequate redress to a copyright owner whose rights have been infringed. It has hitherto been a fault of international copyright laws that the rights conferred by them are so nebulous in the manner of their expression that it was necessary for public policy to arrange for the inclusion of criminal law sanctions, sanctions which the governing bodies themselves now recommend. To put the foregoing observation in context, however, it is necessary to indicate that one characteristic of the international law of intellectual property generally is that it relies heavily for its implementation on national machinery, with little international accountability even in the case of formulating and enacting treaty provisions. It does not create a new machinery to deal with infringements.

The United States Copyright Act provides that an offence is committed by a person who

> "at a time when copyright subsists in a work, makes for hire or sale, sells or lets for hire or by way of trade offer or exposes for sale or hire or by way of trade exhibits in public, or imports into the US, otherwise than for his private and domestic use any article which he knows to be an infringing copy of the work."

An offence is also committed where a person

> "for purposes of trade or for other purposes but to such an extent as to effect prejudicially the owner of the copyright, distributes articles which he knows to be infringing copies of the work".

Further, it is an offence for any person who

"at a time when copyright subsists in a work to make or have in his possession, a plate knowing that it is to be used for making infringing copies of the work".

Section 21(1), (2) and (3).

The basic offence concerns the commercial use, attempted commercial use and importation of copies where these copies infringe the copyright in another person's work. The sub-section (2) which concerns the distribution of infringing copies specifically includes the phrase "to such an extent as to affect prejudicially the owner of the copyright", since distribution in itself might not necessarily prejudice the owner.

By far the most important element in assessing guilt in all of the above sections is the requirement of knowledge on the part of the alleged infringer. Thus an accused cannot be convicted unless knowledge of copyright infringement on his part is proved by the prosecution. The British laws of evidence place the obligation upon the prosecution to prove the case and not to shift the burden of proof to the defence. On the other hand, the burden of proof is shifted in civil actions under Section 20(7) of the Copyright, Designs and Patents Act 1988 which provides that where a record embodying a recording has been issued to the public and such record bears a label comprising a statement to the effect that the person thereon made that record and/or the record in question was first published in the year specified thereon, the label shall constitute sufficient evidence of the facts so stated except where the contrary is proved. A reluctance to shift the burden of proof in criminal cases, even to a limited degree, is readily discernible under the Act.

The Whitford Committee Report on Copyright and Designs Law (Cmnd 6732 (1977)) addressed itself to the deterrent effect that criminal sanctions have, and considered the fact that penalties were low, even when guilty knowledge could be inferred. Specifically, the Committee considered the burden of proof, the substantive evidence required to establish such proof, and the penalties themselves. The Committee made three major recommendations. Firstly, it suggested a movement in the burden of proof. "We have

been told by a number of interested organisations, particularly those concerned with copyright in music, records and films, that because of the difficulties of proving "guilty knowledge" the criminal provisions are of little use and little used in this country." Paragraph 708 of the Report "Possession in the course of trade" was put forward as forming the basis of future offence-creating legislation.

Secondly, it suggested that the burden of proof should be moved to the defence so that there would no longer be any requirement for the prosecution to establish guilty knowledge. The accused would therefore only be entitled to an acquittal "if he is able to establish that he was not aware and had no reasonable grounds for suspecting that the acts complained of were acts done in relation to infringing copies". Paragraph 711.

Thirdly, the Committee requested an increase in the scale of penalties. The recommendations were intended to achieve a redress in the imbalance of conflicting interests and with an eye on public policy to give better protection to the cultural industries.

In 1981, the British Government's Green Paper entitled "Reform of the Law Relating to Copyright, Designers and Performers Protection - A Consultative Document" (Cmnd 8302) was released which expressed serious doubts about moving the burden of guilt to the accused. The overriding public interest was conceived to be the requirement that the prosecution must prove guilt. To do otherwise, the Paper reasoned, was to give birth to an absolute form of offence which public policy did not call for.

The first major revision of the Copyright legislation of the USA had taken place in its Copyright Act of 1976. The hearings which preceded it contained no real argument as to the requirement of penal sanctions in a copyright statute because piracy was such an evident problem. It was felt that the economic loss to publishers combined with flagrant

disregard for the property rights created by copyright justified the imposition of criminal penalties.

The focus of Scottish criminal law has very much been the act of audio-visual piracy. Clearly it was political lobby pressures that led to the Copyright (Amendment) Act 1983 and the increase of maximum penalties under the criminal provisions (Section 21 of the 1956 Act). Compare though, Section 1(2) of the 1983 Act which provides that any person who contravenes Section 12(1) or (2) of the 1956 Act, (where the copyright material infringed is not a cinematograph film (which expression includes video cassettes or sound recordings) is liable on summary conviction to a fine not exceeding £25,000 for each infringing article or to imprisonment for a term not exceeding two months. Section 1(3) inserts a new subsection 7(a) in Section 21 of the 1956 Act and provides that any persons found guilty of a contravention of sections 21(1)(b) or (c) or (4a) (Subsection (4a) was inserted by the Copyright Act 1956 (Amendment) Act 1982), relating to infringing copies of sound recordings or films and video cassettes are liable to a fine not exceeding £1,000 or two months imprisonment, or both. Section 21(b) of the 1983 Act provides that any person found guilty of a contravention of Sections 21(1)(a) or (d) or (2) of the 1956 Act relating to infringing copies of sound recordings, films or video cassettes is liable to a fine not exceeding £1,000 or if tried on indictment to a fine or imprisonment not exceeding two years or both. The Amendment Act was regarded as vital by the entertainment industries purely to combat video piracy and prior to its inclusion in the Statute Book, consideration was given to prosecuting these cases not under the Copyright Act but rather under the Trades Descriptions Act 1968 simply because the penalties were greater. Prosecuting authorities were thus able to proceed under the 1956 Act, the correlation drawn directly between intellectual property and the author deprived of it, instead of under the Trades Descriptions Act where prosecuting authorities were striking indirectly, arguing that the public was not getting the quality of article they had purchased. The conceptual difference is quite obvious since on the one hand, a prosecution under the 1968 Act saw the offence in terms of a fraud that had been perpetrated upon a public which was not

receiving the quality of purchase it had contracted for, while prosecution under the 1956 Act envisaged the punishment of an offender who had stolen the property of the creator. Both statutory offences are aimed at offences of dishonesty, but each has conceived the public interest in a different manner.

Section 2 of the 1983 Act went on to give police in England, Wales and Northern Ireland the right to obtain a warrant to search premises for infringing copies of sound recordings or films, a measure similar to those given to the relevant authorities in terms of the Misuse of Drugs Act 1971. In Scotland, it was always competent to make application to the Sheriff at common law for a warrant to search premises for items connection with alleged contraventions of the Copyright Act. But a new Section 21(b) was in 1982 added which provides that in granting such a warrant the court can authorise any person named in the crave to accompany police officers executing the warrant. This allows technical experts to accompany the police offers when premises are searched to identify specialist copying equipment. Estimates vary as to the scale of video piracy but in the debate on the first reading of the 1982 Copyright Act 1956 (Amendment) Bill, the Under Secretary of State for Trade said that 74% of video films on the British market were illicit. It is a pirate's market because of costly advertising by the entertainments industries and lengthy delays between the time of release of cinematographic products to cinemas and release on legitimate video cassettes. The pirate, without these heavy costs, profits, at the expense of the legitimate owner.

Illicit copying falls into two main types. It can be carried out by an individual as an "at home job" taking a copy of a legitimate cassette, and using two video cassette recorders, the end result generally being a very patchwork affair intended for low-volume sales, or alternatively copying can be done by a wholesaling pirate on a mass-production basis. This is very often what has been seen in the Far East where the market for consumption of such goods is well-nigh insatiable. The analogy with illegal factories is a comparison drawn by many local Procurator Fiscals.

"A 'cell' structure seems to operate, with individual dealers only knowing their own suppliers - and indeed not often knowing his identity ... Where the distributors were caught their customers were identified but their own source remained protected." (In-house talk by a Procurator Fiscal 1983.)[33]

Recognition that piracy of copyright is an international problem is made in the provision (now prevalent in most national copyright statutes) which is now Section 13(1) of the 1956 Act that copyright subsists in the maker of a film where, as a "qualified person", he is a British Subject, (further defined) or a person, (including a corporate person) who or which is domiciled in a country to which Section 13 applies. In fact, the countries to which Section 13 applies are now specified in the Copyright (International Conventions) Order 1979 (SI 1979 No 1715) and include most, if not all, countries which produce films which will be seen in video shops.

Section 196(CA(1)) et seq of West Germany's Copyright Act 1965 states that illicit exploitations of copyrighted works by reproduction, distribution or public communication are punishable. These provisions correspond to the penal provisions in former German Copyright Acts of the 19th Century, but the frequency of use of the penal provisions at that time was far greater than the early and mid-20th Century and it was even debated that the penal provisions of the 1965 Act should be abolished.

It was perceived, however, over the last ten or so years that massive criminal acts like book, music and sound recording piracy and piracy of videos and films organised on a world wide basis were capable of flaunting the legal cover provided by civil proceedings for damages, interdict, etc.

It is now possible to speak of the renaissance of penal law as an instrument of copyright protection in artistic works, at least as far as literature, musical and cinematographical works are concerned, and by an irony, it is very often the rapid contemporary methods of international communication that alerts an author or producer to the infringement of his

work by a pirate who sells on the very market that those means of communication encourage, and permit him to bring a complaint.

The Second Key Factor: The Subject-Matter of Protection

Copyright and Information

In a previous chapter (Chapter 4), dealing with modern technology, the writer dealt with new means of dissemination of intellectual materials as a source of stress on the law of copyright, offering the argument that authors' exclusive rights cannot be maintained because copyright laws cannot keep pace with the development of technology itself in this, the Information Age. However, tendentious as discussion of the implications of technology for copyright is, the multiplying means of reproduction or performance which the media can produce in the future present essentially only one issue: whether or not a particular reproduction, broadcast, performance or display of original material is subject to copyright or not. There are, however, other sources of stress which are even more crucial to the subsistence of copyright in contemporary society and which go to the very functions that copyright is conceived to serve. Of grave concern is the possibility that copyright could become irrelevant in real terms. As far as that fear relates to new technology, it is necessary to make a clear formulation of national laws in broad terms to encompass all possible uses of a given work. Statutes should not therefore be drawn by reference to any particular technology.

> "It is imperative to frame laws which declare in broad terms the various rights of which copyright is composed - reproduction, distribution, display and performance - as to comprehend later unanticipated uses and to make this purpose an explicit objective of such laws."[34]

However, technology itself is more than a mere consequence of the creation of tools to effect the purpose of dissemination of intellectual property. It represents a new ideology of development fuelled by unlimited public desire for consumption of information and tends to assimilate the new machinery of reproduction, distribution, display and

performance to the works so reproduced, distributed, displayed or performed. The relationship, then, of technology and information has become a strong one, the best example of which is the relationship of computer hardware to its software. One is of course quite useless without the other. The quality of the relationship has had two major consequences, one for contemporary society and one for copyright. With regard to the former, since technology is the servant of the society that created it, then it becomes associated with the freedoms that society demands. The private use of intellectual work in the home and the unrestricted manner in which that use may be carried out are testament to this view. In relation to the latter point, copyright has now to contend with a fundamentally radical proposition, namely that what is copyrightable is not only the form or representation of the work but also the ideas or creative elements of that work. The concept of the inventive step is, of course, the province of the law of patents and what we are witnessing, as the developing law of the protection of computer software shows us, is the gradual metamorphosis of the juridical barriers, erected largely in the 19th century, to categorise intellectual property. Given that the free flow of information is a positive value in our society, a radical change in how we view copyright and the rules under which it operates, are necessary concomitants.

> "The encounter with technology reveals philosophical differences in and among societies, many of which have important consequences for authors' rights. The gravity of copyright-technology problems is exacerbated by the extent to which - just at the time copying technology is becoming greatly dispersed - ideological objections to payments to authors ... are being voiced even more loudly."[35]

The fact that creative works, which constitute one category of this phenomenon of "information" are so essential to education, public culture and the enjoyment of life means that they must be treated as possessing a social purpose not inherent in other forms of property. If this is true, then it is not possible to regard intellectual property in literary

and artistic works in the same way as a kind of tangible commodity like oil or tin or wheat. Unfortunately author's rights have become associated with that kind of overtone, largely by reason of the heavy financial investment of the cultural industries. Intellectual property law treats information as if it were a commodity, capable of transfer and assignation and subject to the economic laws of supply and demand.

By supplanting artistic works in favour of information as the main focus of copyright protection, the nature of the protected item has become transformed qualitatively, eschewing some of its incorporeal aspects, and adopting more of those associated with commodities.

> "If a commodity is freely available for all individuals to enjoy from an economic perspective, there is no need for a legal form to allocate it to particular persons or institutions. But if a resource is not sufficiently plentiful it may be possible to establish a causal connection between the absence of property rights and the realisation of social or environmental damage. Indeed, property rights have been defined as the behavioral relations among men that arise from the existence of and which pertain to their use. It is the connection of property rights to the use of resources which perhaps justifies their introduction as a fundamental tenet of an intrinsically libertarian society."

> "In some respects, of course, the analogy holds true. Like many of the ordinary goods of commerce, information has to be assembled from raw materials - in this case, primary data. "Bloggs", "6" and "25" are data: the assembly "Mr Bloggs who lives at No 25 has 6 convictions for dishonesty" is information ..."[36]

Skilled labour, as well as capital, have to be applied both in "extracting" and "refining" the raw data in the first place, and in assembling them into information, so there is an economic cost in the "production" process. But it is no accident that intellectual property laws first needed to be devised when the use of moveable type started to reduce the cost of distribution, for the analogy eventually breaks down because, not being a material

commodity, there is no finite limit to the multiplication of information once it has been assembled.[37] Since reproduction of intellectual works can be carried out by means of the new information technology in photoreplication machines, in electro-magnetic tape and compact discs, the states of these materials rather than the materials themselves ensure an infinite ability to reproduce at a minute cost. In this respect, information differs fundamentally from ordinary commodities "which lend themselves to regulation by juristic laws founded on the assumption that the laws of physics will govern their conservation, and the laws of economics their production, consumption and exchange".[38] Information technology has negatived the applicability of proprietary rights, wherein the exclusive right to enjoy and the exclusive power to divert are principle identifying features. Information cannot be stolen. It can be appropriated to use by another by copying it but the owner is thereby not deprived either of the material form upon which the information was recorded, or of the information so recorded. This reasoning illustrates why the governing bodies of the Conventions are scrambling desperately to adapt new principles to deal with information technology. It explains why sui generis treatment of computer programs and semiconductor chips has gained such international acceptance. The traditional property paradigm has proved obsolescent. It is not only the immediacy of the distribution of information that requires us to institute new laws in the information era, but also the relationships between possessors of information are altered radically.

> "Laws may be needed where a desired social end is otherwise put at risk - though not all laws succeed in promoting the social ends they are intended to serve. In the present case, the desired social ends are to maximise the flow of "good" information, and to minimise the flow of "bad" information. We would like doctors to have ready access to the results of the best medical research for the benefit of their patients, engineers to choose the best materials in order to build better, cheaper and safer bridges, lawyers to be able to cite all the best cases - and people generally to be better educated, and to benefit from literature, the arts and the sciences. At the same time, we would prefer people not to be falsely defamed, our national enemies not to know the dispositions of our armed forces, confidences not to be broken ... and the individual's privacy not to be gratuitously infringed. The dramatic fall

in the cost of diffusing information - regardless of whether it is good or bad - affects both these social ends."[39]

All this is not to suggest that the concept of property is a static one; rather it has been a variable concept functioning as a discrete response to discrete problems. The role of courts worldwide in relation to the unauthorised disclosure of information illustrates the fact. The majority of American courts have tended in recent years to find whether the defendant was in breach of an implied or express fiduciary, consensual obligation. Commonwealth courts have tended to favour the establishment of whether there existed between plaintiff and defendant an equitable obligation of good faith. The protection of confidential information is typically procured by the correlative use of statutory copyright monopolies and judicial sanction, as shall be described in the following section.

"Information may become a "currency" of the age. The know-how element already forms a significant portion of the consideration in many commercial transactions ... There are likely to be profound changes at many levels of formal legal ordering. Access to information will become an issue of critical legal relevance, replacing a concern with industrial organisation and hence with subjects such as labour law and relations, competition policy and the ordering of financial markets. The growing awareness of this issue is manifested in the increasing pressure for both freedom of information and privacy enactments in those western countries which do not already have them."[40]

As a consequence of this, a difficult matter of principle arises as to whether property rights should be ascribed to the acquisition and use of information. Thus the appropriateness of the International Conventions, whose bases still lie in traditional proprietary notions, may be called into question.

"(T)he history of legal responses to new information and knowledge suggest two critical challenges. The first relates to the ability of the professional and the commercial community to devise new social arrangements that will ensure both the creation and the effective and profitable utilisation of new

information and technology. The second challenges a liberal society to protect its basic political and human values from universal applications or withdrawals of that new knowledge. The real question is whether the institution of "property" is an appropriate vehicle for addressing these challenges."[41]

The growth of the importance of information in relation to intellectual property is the most startling development in this field of law this century, a development which, it is submitted, has fundamentally altered the way in which copyright falls to be conceptualised as a property right. The value of any property right depends upon the cost of protection it.

"All forms of this type of property relate to information which is often costly to produce, but always cheap to reproduce. Consequently, investment in information production can never be a rational act unless there is some mechanism whereby the investor can "appropriate" the results."[42]

This is a point which was appreciated by George Bernard Shaw.

"A publisher who has all the works of Shakespeare freely at his disposal will pay me for leave to print my plays, leaving Shakespeare untouched, because I can give him a monopoly and thus enable him to charge a monopoly price whilst Shakespeare can give him nothing; so that in publishing Shakespeare he can get only an ordinary competitive profit on the cost of production unless he adds a copyright preface or commentary or set of illustrations; and for these he requires the protection of the Copyright Acts as much as the authors and artists do. Tolstoy, not understanding this, repudiated his copyrights and announced that anybody who pleased could publish his works, with the result that after a few experiments, nobody would publish them until his wife took the matter in hand and practically reaffirmed his rights ..."[43]

In such a climate, the effectiveness of protection and the uniformity of that protection available worldwide have taken centre stage. Intellectual property rights place the burden of their protection upon the owner. Infringement of a copyright has always been viewed as a civil wrong, a delictual action, with very little pre-emptive or preventive character.

Why should the individual have to protect his own intellectual property when copyrights are monopolies granted by the state, at least in part, for a public purpose? Infringement is an attempt to frustrate the declared intention of the state, especially in its economic policy.

> "It can therefore be argued that the state owes it to itself as well as to the owner of the rights to protect them actively."[44]

Some argue that technology has achieved nothing.

> "Instead of fostering perfection in the arts and the creation of masterpieces, the communications revolution has already changed a number of traditional forms of expression and is destroying our standards, our ability, and our desire to judge our own culture. I remember someone predicting a few years ago that, if the present trends continue, by the end of the century we will have a great many more birds than we have now, but that they will almost all be either pigeons or starlings. I have the same feeling about the effect of technology on copyright ..."[45]

Individual authors have been replaced by the cultural industries, employing a battery of creators. In order to preserve their own independence as authors, creators are forced into collective bargaining and representation by societies for the collective administration of rights. The one-to-one relationship between reader and writer, the traditional copyright scenario, has all but disappeared.

> "(If) Governments continue to accept the validity of the traditional functions of copyright and related rights legislation, their first priority must be to meet the challenge made by new technology to those functions. In doing so, the state will inevitably be forming legislation as an instrument of cultural policy, which itself will determine how the state decides to strike the balance between the interests of rights owners on the one hand and of users of copyright material and the general public on the other."[46]

The proper proportions of that balance have become all the more difficult to discern in the midst of the information technology society. Examples of that technology like the photocopier and tape cassette recorder predominate. The public's appetite for the consumption of information is infinite, and not being a material commodity, there is no finite limit to the multiplication of information once it has been assembled. The cost of reproduction by modern means is almost infinitesimal.

> "So perhaps it is not too surprising to find that our intellectual property laws are starting to break down in more than one place."[47]

The intangibility of intellectual property removes from it the legal epithet of "property".

> "For 200 years and more, what we have called intellectual property has been no more than a convenient fiction, a useful model for fashioning certain laws to regulate certain information flows, but no more. And it is that model which is now breaking down, because it does not truly reflect the reality it seeks to describe."[48]

What we have to decide is the nature of the thing we seek to protect in prescribing which rights of authors are to be protected. On the one hand we have an historical legacy of the protection of art and the humanities which was regarded as necessary for the fostering of all that is good for society, while on the other, we are currently living in a world which increasingly recognises the value of information. Information in itself is not regarded as traditional copyright material but when applied to other information kept in another form or medium, it become, like the missing piece of a jigsaw, valuable to the acquirer. This is particularly true of the data stored in banks, scarcely recognisable in terms of artistic quality but indispensable and therefore valuable to users, and so we come to protect that value in the same way as we would protect a play by Pinter, or an orchestration by Ogden.

This information - art dichotomy - is deserving of some detailed consideration because it reveals a rather grotesque extension of an ages-old debate in relation to the classical justification of copyright. That traditional argument featured two different tensions: How far is the public to fund the production of artistic works; What is art to achieve for the public good? Discussion of these questions has always been carried out through two opposing methods of study, one economic, almost empirical, examination and one subjective. The economic approach takes as its premise that a community should have the character and quality of art that it wishes to buy at the price necessary to secure it. The subjective approach, by contrast, rejects this in favour of support for what is good for people to have, which requires that art and culture must reach a certain degree of sophistication, richness and excellence in order for human nature to flourish, requiring the state to provide this standard of excellence if the people will not or cannot provide it for themselves.[49]

There is a particular kind of information which modern copyright statutes have been developed to protect. Those laws are not designed to protect the form of expression of this information but rather the information itself. This in turn means that the quality of that information is the valuable aspect of it. Situations arise where society expects a duty of confidentiality to arise, either between identified individuals or other legal persons, or between these persons and the state. In these cases, the traditional framework of copyright becomes stretched and changed in a way which was never intended. Balancing the interest of the public in allowing intellectual creators a monopoly over their works to protect those creators financially and to enhance creativity generally in society, there remains apart from these aims a public interest in the free use of ideas and the information contained in intellectual works, in whichever tangible form these works are expressed.

> "The preconditions which must be satisfied in order to attract copyright protection may be regarded as a tangible expression of the dividing line between those competing policy interests."[50]

It is a fundamental principle of copyright law that it is not the ideas involved in a work which are protected but rather the form of expression of those ideas which is granted protection. Reference to case-law illustrates the point. In 1980, a book called Documents on Australian Defence and Foreign Policy 1968-75 was published and serialized in two leading Australian newspapers, in particular dealing with those aspects of the book which described secret massacres in East Timor by Indonesians and by the American military presence in this area. An injunction brought by the Australian Government sought to restrain sales of the book on the basis of public interest, Crown copyright allegedly having been breached.[52] The injunction was only partially successful since, while extracts of the book were not permitted to be used, the gist could be related by the press provided the book's own words were not used.

Although the Berne Convention has been amended regularly over the 103 years of its history, it is still in a juridical sense an agreement among its members for the respect and enforcement of private and proprietary rights of domestic authors in all other member states. The acceptance of the principle of reciprocal respect for authors' rights in 1886 established the notion of intellectual property as "property" in the same way as heritable or moveable property, and in contrast with the typical common law perception that the author's right is merely a polite description of a commercial monopoly. Courts have always granted protection to the tangible property-owning litigant but treat comparatively lightly the claims of intellectual property owners. The position of the intellectual property owner is such that his rights may be infringed if another person's "fair dealing" with his copyright work has to be tolerated, even if that "fair dealing" results in a lost sale.[52] From this it can be seen that the protection accorded to intellectual property by UK law is substantially more qualified than that given to three-dimensional solids. The reason why municipal laws should differentiate between the degrees of protection given to physical and intellectual property might be seen as being largely historical, in that items of heritable and moveable property were first protected at a time when legal concepts were unsophisticated, or alternatively that physical existence of the former transcended the physical absence of

intellectual property. Additionally, there is an obvious difference between the conduct which exploits solid property and that which exploits intellectual property: the former is generally exclusive whereas the latter is not. So intellectual property law is far more concerned with the conduct of others than with the issue of who is entitled to have any physical object reside with him. It is the author's thesis that the relatively weak protection offered to intellectual property under municipal statutes, and sanctioned by the Berne Convention, is to be accounted for in the perception of intellectual property law as "behavioural rather than possessory"[53] in its import. For this reason, it will be suggested the protection of the "public interest" has been invoked so as to permit incursions on the enforcement of copyright if, behaviourally speaking, they are seen as providing a public benefit which outweighs the author's interest in enforcement of his private, possessory, rights. Taking the 1971 text of the Berne Convention as representing the best and most advanced thoughts of the Union members, there is considerable evidence that the public interest has been well catered for. For example, the Berne Convention states among many related provisions

> "It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts."[54] (Article 2(4))

> The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information. (Article 2(8))

> (1) It shall be a matter for legislation in the countries of the union to exclude, wholly or in part, from the protection provided by the preceding Article political speeches and speeches delivered in the course of legal proceedings.
> (Article 2bis (1))

(2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which lectures, addresses and other works of the same nature which are delivered in public may be reproduced by the press, broadcast communicated to the public by wire and made the subject of public communication as envisaged by Article 11bis(1) of this Convention, when such use is justified by the informatory purpose. (Article 2bis(2))

(3) Nevertheless, the author shall enjoy the exclusive right of making a collection of his works mentioned in the preceding paragraphs.

(Article 2bis(3))

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works (that is, works protected under the Convention) 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.

(Article 9(2))

(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

(Article 10)

(1) It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases

in which reproduction, broadcasting or such communication thereof is not expressly reserved ...

(Article 10bis(1)) (2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.
(Article 10bis(2))

(2) it shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights exercised in the preceding paragraph (that is, the exclusive right of an author of a literary or artistic work to authorise the broadcast or cable transmission of his work) may be exercised, but these conditions shall ... not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.
(Article 11bis(2))

The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right. (Article 17)

These provisions, when taken together, lead one to conclude that the private and proprietary rights of the author of a copyright may be threatened in substantial manner. Thus, a Member State can do as it wants with regard to the protection it gives to its

official legal and judicial texts, to its state papers and to political or judicial speeches. The Convention does not protect news or mere items of press information, and leaves it to each Member State to choose whether publicly disseminated works should be treated as "news" for some purposes even though they may be protected for other, non-news, purposes.

A commercial yardstick measures the legitimacy of certain types of unauthorised reproductions of a work. A yardstick of functional fairness measures the legitimacy of certain other types of unauthorised reproduction of a work. A Member State can do whatever it wants with any copyright work as long as it finds it necessary to do so. This situation leads one to conclude that the demand of "news" and of the affairs of state may legitimately encroach upon the protection offered to copyright owners under the Berne Convention; and certain acts, when committed individually, constitute a commercially insignificant invasion of copyright and are discounted by the Union. One is thus obliged to conclude that the Convention does not explicitly permit the defence, raised not by the state but by the individual, that his use of another's copyright is justified by the public interest, by the greater good of society which is not necessarily identifiable with the state. A defence of "public interest" is well known in the jurisprudence of many municipal statutes. Its position in breach of confidence law is long established, even though the extent of its applicability is unclear. Has the development of the "public interest" doctrine no place in Berne?

The case of *Attorney-General UK v Heinemann, Australia and Wright*[55] is also in point in this connection. In an action alleging breach of confidence, breach of contract and breach of fiduciary duties, the United Kingdom Attorney-General sought an injunction in the Supreme Court of New South Wales to restrain the publication of Spycatcher, the autobiography of the former British Intelligence agent, Peter Wright. The action was unsuccessful both at first instance and on appeal to the New South Wales Court of Appeal. The British Government's case had rested on three alternative bases. First, that as an

employee of the Crown, Wright owed the usual obligation of confidence, fidelity and good faith. Secondly, in the absence of any demonstrated contractual relationship between Wright and the Crown, an intelligence officer owed the Crown an equitable duty not to disclose any confidential information disclosed to or produced by him in the course of his duties. Thirdly, Wright owed a fiduciary duty which had a content similar to the equitable duty which precluded him from profiting from the misuse of unauthorised disclosure of confidential information.

In support of these arguments, the British Government relied on Wright's concession that he had signed the Official Secrets Act at commencement and termination of his appointment, making it an offence to divulge confidential information without authorisation. Anticipating the defence that the disclosures by Wright were in the public interest, the plaintiff, through its witness, Sir Robert Armstrong, a Cabinet Secretary, asserted that his Government was gravely concerned at the harm which would be done to national security and the efficiency of its secret service if former employees were permitted to publish an autobiography of his professional activities. The defendants argued that Wright's relationship with the Crown as an intelligence agent was based on statute rather than contract. In the absence of a contract there could be no contractual obligation of confidentiality. If this argument was successful, the defendants submitted that the British Government was forced to rely on the equitable obligation of confidentiality but that the plaintiff could not avail itself of this option since the information contained in the book was quite old, and being known to most of the Warsaw Pact countries was not in any sense confidential. As the book dealt with allegations of unlawful conduct by MI5 operatives, it was in the public interest that Wright's allegations be fully aired.

In reaching its judgment, the court had regard to the nature of the relationship between the disclosure and the recipient of information, the quality of the information itself and the nature of the breach. It held that the nature of Wright's relationship with the Crown was statutory rather than contractual, deriving from MI5's role as part of the defence forces of

the United Kingdom. The Court felt that despite the undoubtedly confidential nature of the information to which Wright would be privy, the obligation he was under not to divulge it remained only so long as the information in question retained its confidential character and had not crossed into the public domain. Because the contents of the book were of some veneration, it was held that they were indeed in the public domain (other books published years beforehand contained much the same information). The court also applied Lord Denning's observation in *Fraser v Evans*[56] that the concept of iniquity was "merely an instance of just cause or excuse for breaching confidence. There are some things which may be required to be disclosed in the public interest, in which event no confidence can be prayed in aid to keep them secret". In a later application by the British Government to the Austrlian High Court to obtain a temporary injunction pending the full appeal hearing, the presiding judge took the following view based on his appraisal of the importance of the policy considerations which had animated the injunction application. Deane J ruled

> "It is an ideal of our society that freedom of speech and disclosure of information be not unnecessarily or unreasonably curtailed. The public interest of this country also requires that the legal system and the courts command general respect. It appears to me that a court should be slow indeed to make an interlocutory order aimed at preventing publication or distribution of a book which is freely available in other countries and which can readily and lawfully be brought into this country by any person returning from overseas."[57]

The Spycatcher follow-ups in the United Kingdom were featured in the House of Lords cases of *Attorney-General v The Observer Ltd* and *Attorney-General v The Times Newspapers Ltd*[58] wherein not the book itself but rather the serialisation of it in two newspapers was the subject of injunctions by the British Government. The exclusive right of the author in authorising the reproduction of parts of his book in the Observer and Times newspapers and his right to control the dissemination of his copyright material was denied Peter Wright by the House of Lords. The consensus of the court was to the effect

that the author did not have an enforceable copyright interest in Spycatcher in the United Kingdom. Lord Keith said that British courts would not

> "enforce a claim ... to the copyright in a work the publication of which (was) ... brought about contrary to the public interest."

Lord Jauncey went further

> "The publication of Spycatcher was against the public interest and was in breach of the duty of confidence which Peter Wright owed to the Crown. His action reeked of turpitude. It is in these circumstances inconceivable that a United Kingdom Court would afford to him or his publishers any protection in relation to any copyright which either of them may possess in the book."[59]

There is no single definition, or indentifiable legal concept, of "public interest" in UK Law. The term exists in public law (where the Attorney-General acts in its interests) and in private law where the courts decide what the public interest permits and what it does not. It is often used as a defence to infringement of an intellectual property right and it was first recognised in the UK in modern times in the case of *Initial Services Ltd v Putterill*.[60] The plaintiff was a laundry company and the defendant an employee who had disclosed confidential information indicating that the plaintiff was acting in breach of competition and taxation laws. The Court of Appeal considered that the public interest in the discovery of unlawful and criminal activities justified the doing of the otherwise unlawful act on the part of the employee, the public interest outweighing the employer's private interest in keeping his wrong-doing out of the public interest. According to Denning, MR

> "The exception (to the principle that confidences be kept) should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation provided always - and this is essential - that the disclosure is justified in the public interest."

It is essential to note in this regard that the "public interest" is only a manifestation of the notion that there may be issues which have greater import in their particular social and political concepts than the necessity to protect the economic rights of the author of a copyright. In *Initial Services* those issues relate to fiscal matters in which government had direct interest. In a later case of *Hubbard v Vasper*[61] the plaintiff was a founder member of the Church of Scientology and had written books and articles on its philosophy, dianetics. The defendant, a former Scientologist, intended to expose the Church's methods, and intended to include in his book a number of passages from that of the plaintiff. The Court of Appeal refused to grant the plaintiff an injunction to prevent an alleged copyright infringement. It seems that the case was decided less on the vagaries of copyright law than an appreciation of public interest in relation to the dangers presented to those who were enticed to join the Church of Scientology. This is given voice in terms of "fair dealing" as stated by Section 6(3) of the UK Act of 1956 and "fair use" in the United States Copyright Act of 1976. Articles 10 and 10bis of the Berne Convention give some support to the view that "fair dealing" for the public's own good is only permitted where the work in question has been published, unless what is being published would be regarded as news-fact. Berne therefore does not expressly permit an individual to rely on the public interest defence to copyright infringement.

> "So, to summarise: (1) the Berne Convention has not expressly permitted an individual to rely on the greater benefit of the public as a defence to copyright infringement; (2) the UK law of breach of confidence does permit such a defence; and (3) UK copyright law will take the public interest into account in refusing an injunction even where the fact of copying is admitted and may do so in the trial of the full action if the copying relates to a 'serious misdeed'".[62]

Phillips then goes on to cite the case of *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* (1975) 2 QB 613 in which the plaintiff manufactured drugs which contained harmful side effects which eventually led to the famous "Thalidomide" series of damages actions. Before decision on the delictual actions, a court order for recovery of

documents possessed by the plaintiffs was made and the documents delivered to an adviser acting for the families of those injured by the drugs. He in turn sold the contents of the recovered documents to the defendant newspaper proprietors, which intended to publish the documents. The plaintiff sought an injunction to restrain the threatened infringement, pleading both breach of confidence and infringement, and it was granted on the basis of the plaintiff's ownership of the copyright in the documents. The "public interest" argument received only a brief airing in this case but it was subordinated to the decision based on copyright.

The foregoing examples identify what Phillips calls "the drift of case law doctrine from breach of confidence to copyright infringement", a drift which, in British Law at least, is mirrored by the link between copyright and public interest as expressed in the Competition Act of 1980 which permits the review of "anti-competitive practice". By "anti-competitive practice" is meant "... a course of conduct which, of itself or taken together with a course of conduct pursued by persons associated with him, has or is intended to have or is likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods in the United Kingdom or in any part of it or the supply or securing of services in the United Kingdom or any part of it." (Section 2(1)) If an act is designated an "anti-competitive practice" it can be investigated by the Monopolies and Mergers Commission which will report on whether it is against the public interest. In the *Ford Spare Parts* case (Ford Motor Company Ltd, Cmnd 9437 1985), the insistence of a major car manufacturer of its artistic copyright monopoly in drawings of mass-manufactured spare parts for its cars was held to be against the public interest because it inhibited market competition for spare parts.

> "The interesting feature to note, with regard to the "public interest" in curtailing the Ford monopoly in its spare parts, was that the Commission held that there was a public interest in the establishment of competitors in the market for the exploitation of a copyright-protected product. It was not suggested that the owner of copyright could do as he pleased with his market but, instead, that the

customers' interest in getting a mass-produced product as a consequence of competition between the copyright owners and a licensee outweighed the owners' exclusive rights, and that there was a public interest in its doing so."[63]

The breach of duty of confidence aspects of cases like Spycatcher tend to illustrate the importance of information in modern day applications of laws of restraint on the freedom of individuals to disseminate information. The recent Scottish case of the *Lord Advocate v The Scotsman publications Ltd*[64] deals with familiar subject-matter. The Lord Advocate, the holder of the highest public office in Scotland with responsibility for the administration of Scottish Justice, brought a petition seeking interdict of "The Scotsman" newspaper from publishing any of the content of a book called "Inside intelligence", written by a former member of the British Intelligence Services, Anthony Cavendish. The Court held that where national security was not prejudiced, public policy could not be relied upon to support an interdict suppressing publication. The case involved discussion of the situation where there is a duty of confidence owed to the Crown or the public and the public interest in preserving confidence has to be weighed against the public interest in the freedom of information, in other words the Spycatcher scenario.

In discussing the powers of the state in relation to the disclosure of information, we can usefully consider some other similar aspects which one might consider to derive their validity from claims of morality, and thus to constitute the public interest in laws which protect literary and artistic property.

"Copyright guarantees the author a share in the marketing of his works, and as such is a means of securing the independence of authors from patronage, and possibly influence, by individuals or the state. In this sense, copyright is one of the oldest means of securing freedom of expression and information."[65]

Collectivisation of Rights: The Third Key Factor

The third key factor upon which it is suggested the importance of the public interest in copyright now rests is the collectivisation of authors' rights. The late twentieth century has witnessed a profound shift in the manner in which owners of intellectual works divest themselves of their rights, or are compensated for use of their materials. The reason is a pragmatic one: the effective enforcement of rights in a particular kind of work by a band of authors whose work is similar is a better guarantee of non-infringement in a society which is technologically equipped to take advantage of the particular work. The future of the international copyright system may rest with the extent to which the phenomena of compulsory licensing and collecting societies are utilised.

> "... (I)s it possible for the author's exclusive right ... to survive in a world of microchips, satellites, cable networks, photocopies, home tapers, corner-ship routes and other miracles of the modern age?"[66]

In many ways, the adoption of collective administration techniques is seen as preferable to the reduction of the extent of exclusive rights by means of the implementation of compulsory licences and "equitable remuneration". The author should always be better served by an exclusive right collectively administered than by an individual entitlement to equitable remuneration under a compulsory licence. The exclusivity of the rights administered are thus left untouched.

> "(I)f ... the author is placed under the obligation to have his rights administered by a collective administrative organisation, that need not be considered a threat to their exclusivity ... unless the author is denied his right to refuse a particular use of his work. In any event, he will not be able ... to impose his own conditions on levels of remuneration, etc unless the collective administrative organisation chooses to accept them for general application."[67]

The use of compulsory licensing is permitted, but strictly limited by operation of both the UCC and Berne. The 1971 Revisals to both Conventions granted the use of compulsory licensing techniques to less developed countries who sought access primarily to educational materials. While they were hardly used, the provisions remain extant but at the same time, many less developed countries have adopted systems of collectivisation of rights as a means of encouraging national cultural creation.

The collective administration of authors' rights is not a phenomenon restricted to the recognized exported countries of copyrights. They proliferate amongst less developed countries as well, particularly those of Africa. Shortly following independence, the African countries acceded to one or either, or both of the International Conventions. Some of these countries, the former colonies, had extensive authors' societies, such as the Society of Authors, Composers and Music Publishers (SACEM) in the French-speaking countries of Africa. The International Forum on the Collective Administration of Copyright and Neighbouring Rights organised by WIPO in Geneva in 1986 debated the historical considerations and political and socio-economic factors which justified the inception of collective agencies. WIPO established a Permanent Program for Development Co-operation Related to Copyright and Neighbouring Rights, under the auspices of a Permanent Committee. The Tunis Model Law on Copyright of 1976 encourages the setting-up of national societies of authors. However, the reasoning behind the introduction of societies of authors in LDCs is different from that in developed countries where authors can identify as a corpus, a pressure-group, for the defence of their interests,

> "[w]ithin the context of industrialised societies of the liberal type. These factors shaped both the philosophy and principles of the collective administration of authors' rights in the developed countries. The authors' societies are governed by the principles of private law. They therefore constitute professional associations or economic associations ... The societies of authors in the developing countries of Africa, on the other hand, were born of government initiatives undertaken out of a concern to

protect and encourage the creators of works of the mind within the context of the development and promotion of a national cultural policy."[68]

That cultural policy includes the raising of the level of copyright consciousness, even in developed countries. The problem is the same in all states, whether developed or not. In the article cited immediately above, the author describes it in relation to Cameroon.

"One of the basic difficulties which arises when protecting authors and administering their rights in our African countries is the notion of copyright itself, its understanding and the basis for the remuneration that is claimed from the user of an author's work. Indeed, how does one explain to the operator of a nightclub or the owner of a department store that he must pay for the music produced by means of a record which belongs to him and which is played on his own record player."[69]

The role and practice of collective licensing bodies was studied in depth at the WIPO/UNESCO international Forum on the Collective Administration of Copyrights and Neighbouring Rights, held in May 1986 in Geneva.

The collective administration of rights is the method most likely to be introduced on a worldwide scale to combat the effects of piracy of protected works. The WIPO/UNESCO Committee of Governmental Experts on Audiovisual Works and Phonograms, following the work of the Forum in 1986, approved the following principles (AW5-7):

"The collective administration organisations - after the deduction of the administrative costs actually incurred and strictly necessary - shall distribute the amounts collected to the individual owners of copyright according to the presumed frequency of the reproduction of their works for private purposes, for example, in proportion to the frequency of the various forms of public use, (such as broadcasting, sales and rental of video cassettes,etc)"

> The amounts collected by the collective administration organisation must not be used for purposes (for example, for general, cultural, social purposes) other than what is defined in Principle AW5.
>
> Foreign owners of copyright in audiovisual works shall enjoy exactly the same rights as national ones. The collective administration organisation should distribute the amounts collected to foreigners on the same basis as to nationals."

To employ such means is in itself a recognition that enforcement is seen by WIPO and UNESCO as a critical factor in the survival of a meaningful copyright system. According to Ricketson,

> "(t)he rationale of collective administration is to be found in economies of scale: it is too difficult for an individual author to enforce his rights against all potential users and this is far more efficiently achieved by a collecting society which stands in his shoes with respect to the granting of authorisations and the collection of fees."[70]

Collective administration can be carried out in many ways but will essentially involve the author making a grant of the relevant right to the society, which then undertakes to license the work to users, and to collect fees and distribute them back to the author.

> "Depending on the nature of the work, the licensing can be done by means of a blanket voluntary licence where the user requires the right to use the whole of the repertoire controlled by the society. Collective administration can also be used in the case of a compulsory licence or a levy on equipment and recording material."[71]

The advantages of such systems are obvious but are they compatible with the Conventions? Since the exclusive rights of an author are his to assign, the act of assignation to the collecting society itself poses no problems. But the legal difficulty which arises is how can one then speak of the exclusive rights of authors when their exclusive rights are admitted

collectively? The development of technology and the vast increase in potential users makes collective action good sense. Rights which may be subject to mass utilisation may practically speaking only be capable of protection through a collection agency, and the exclusive rights will become to be closely identified with a simple right of remuneration. The author may thus be deprived of an essential exclusive right, that of refusing permission to an undesired user.

A further problem will arise if, what started as an attempt to enforce author's remuneration rights against unauthorised users, is then reinstated into a compulsory scheme for protecting those rights. Such measures could not be applied by Berne and the UCC, since both Conventions do not permit material formalities to be completed by protected authors in relation to the exercise of any right which they protect.[72] The rights accorded by the Conventions are granted unconditionally. Any requirement that those rights should be collectively administered would be an impediment to their exclusive exercise. (Exceptions are contained in Article 11bis(2) and 13(1) of Berne which allow Berne members to impose compulsory licences in relation to broadcasting and recording of musical works respectively.)

The International Forum on the Collective Administration of Copyrights and Neighbouring Rights, held in May 1986 The Forum reflected the growing importance of centralized administration in the field of intellectual property generally. It is now a worldwide phenomenon and although the precise nature, representation and practices of collective licensing bodies very from country to country, collective administration of copyright by licensing bodies is standard practice in all industrialised countries including socialist ones, as well as the vast majority of developing countries with copyright legislation. The establishment of the first collective licensing body predates the adoption of the Berne Convention. SACEM (Society of Authors, Composers and Music Publishers), the French Society representing authors and composers, was established in France in 1852 to administer public performance rights. After the adoption of the Berne Convention which recognised

the public performance right as a principal feature of the protection to be afforded to all authors from the Berne Union countries, it became apparent to authors in many other countries that, in practice, it was impossible to safeguard such a right on an individual basis. The need for collective licensing bodies was soon felt in every country in Europe, which led to the proliferation of such organisations. Any category of rights owner can exercise rights collectively and the practice of collection reflects this in the United Kingdom. For example, the following collecting agencies exist: the Performing Rights Society Ltd, for public performance, broadcasting and cable distribution rights of composers, authors and music publishers; the Mechanical Copyright Society Ltd, for recording rights of composers, authors and music publishers; The Design and Artists Copyright Society Ltd for copyrights generally; the Authors' Lending and Copyright Society Ltd, for off-air recording rights, photocopying and public lending rights of authors; the Copyright Licensing Agency Ltd, for the photocopying rights of authors and publishers; the Publishers' Licensing Society, for the photocopying rights of publishers; the Phonographic Performance Ltd, for public performance, broadcasting and cable distribution rights of producers of phonographs; and Video Performance Ltd, for public performance, broadcasting and cable distribution rights of producers of music videos. The fact that these collective agencies are so widespread is a strong indication that they are generally recognised as being the best means of, on the one hand, protecting the rights' owners interests, while facilitating the ease of access of copyright-protected works to the consumer on the other.

Technical innovation has sustained the impetus of the growth of these organisations. Given the emergence of secondary mass usage by means of reprography, private copying of sound and audiovisual recordings, satellite broadcasting, cable distribution, rental of phonograms and videograms, and computer storage of protected works, the need for collective licensing brokers has become itensified. The multiple administrative burdens of monitoring, licensing, collecting and distributing fees are too onerous for operations on an individual basis.

"These burdens would divert (authors') attention from their primary work of composing, writing, editing, producing, broadcasting, promoting etc which would inevitably lead to a dearth in creativity to the ultimate detriment of the public at large."[73]

There is an obvious potential conflict between the public interest and the monopolistic nature of collective administration bodies. Discussions surrounding the need for collective licensing bodies were voiced recently in proceedings before the Monopolies and Mergers' Commission in Great Britain. (The Commissioner's role is to investigate complaints of potential abuse on the part of monopolistic organisations.) During 1988 it was to consider the activities of the collective licensing body, Phonogram Performance Ltd. It was suggested to the Commission that the collective exercise of rights itself acts against the public interest, in that it allegedly removes competition, leads to prices higher than would prevail under normal competition, results in undesirable control by the collective licensing body over the way in which its members conduct their businesses and forces the user to buy a blanket licence for the whole of the society's repertoire, whatever his needs. The Commission's findings support the view, however, that the efficient administration of copyright is in the interest of the public, and in particular that the collective licensing of sound recordings is permissible, provided that such protection does not overrun into monopoly.

"This conclusion was reached on the ground that the convenience offered by collective licensing bodies to both the owners and the users of copyright is unlikely to be matched by any other means. Moreover, it took the view that smaller record companies and individual copyright owners would be at a serious disadvantage, in a totally free market, in negotiating and subsequently enforcing their rights."[74]

The public interest aspect of the collective administration of copyright derives from the public interest of the copyright system itself. Justice O'Connor, in a majority decision of the Supreme Court of the United States of America, recognised copyright as being

"the engine force of expression. By establishing a marketable right to the use of one's expression, copyright supplies the incentive to create and disseminate ideas."[75]

The view of the Whitford Committee was that

"the exclusive rights which are granted by national copyright, protect, trademark and design laws are granted because it is in the public interest to grant them."[76]

Collective administration of copyright serves a dual purpose, firstly to enable rights owners to enforce and administer their copyright effectively and to provide a service to users by facilitating access to copyright works and making it possible for users to comply with their obligations under the law to obtain licences for the use of copyright works. It has also been suggested the public interest will not be served properly unless there is collective administration.

"In many a field of use the exclusive right would be a legal fatality if there were no collective administration to implement it to a sensible degree and in a sensible manner, itself governed by more or less appropriate national legislation... The exclusive rights of authors tend more and more to lose their economic value, or become less valuable, if they are not collectively administered, with the varying degree of effect that this has on their exclusiveness."[77]

Indeed, the view was expressed at the International Forum on the Collective Administration of Copyrights and Neighbouring Rights that

"... the collective administration of authors' rights and of neighbouring rights renders great services, if it is not, in certain circumstances, outright indispensable - To both the right holders and the users, ... the establishment of collective administration systems should be encouraged wherever individual licensing is not practicable ..."

The foregoing observations tend to support the view that the owner of creative works is steadily losing his right to direct how his works are to be used by the recipient public. Collective administration of rights is a practice likely to assume great importance for the future development of international copyright. It is a practice particularly well entrenched in the Nordic countries whose experiences with the system have sounded an alarm bell for international copyright.

Problems with the Nordic system are that it seeks to institute two different levels of protection with respect to important uses of works, since the scope of their statutes generally provide for the application of extended collective licences to the reprography of works other than those by Nordic citizens or domiciliaries and to works first published in these countries or simultaneously published there. There are requirements that non-member authors have a right to claim compensation individually and a right to veto the use of his works. Such are not available to domestic authors. Instituting two different levels of protection with respect to important uses of works, one for foreign works and another, potentially lower one, for national works tends to the breach of the international copyright system, and a provision giving an individual (whether a member or non-member of the scheme) the right to veto the use of his work is a test of the worth of such licensing.

> "To refrain from giving an individual veto power would expose a non-member author to what might perhaps be worse than a compulsory licence. If the non-member disagrees with the compensation negotiated by the organisation of authors, this would still govern the determination of his own share ... Veto power <u>should</u> be required by law in order to satisfy the Berne Convention, if indeed the requirements of this Convention can be satisfied at all by an extended collective licensing clause relating to a specific use of the work."[78]

While Berne admits to the use of such clauses in order to solve the problems of broadcasters in reaching all holders of rights in the content of their programmes, they have attracted interest as a model for wider application.

One might ask of such systems whether authors in particular, and society in general really receive the benefits of collectivism? Collectivisation might deprive the author of just remuneration for his particular work. More importantly, it may stultify creativity.

> "But it is perhaps no less disturbing a thought that the collective allocation of income payments - mainly according to need - can in the long run undermine the stimulating function of copyright. A successful creative author ... may in the long run cease to feel the urge to contribute towards the maintenance of less successful colleagues."[79]

Once again, though, such subjective consideration is not conducive to empirical examination and the pragmatism of enforcement of rights demands the implementation of a collective approach. It is argued that without the unity amongst authors that collective administration systems represent, these would be a manifest weakness that would encourage the defeat of authors in the face of modern technology at the hands of the cultural industries.[80]

CONCLUSIONS

The three key factors mentioned in the foregoing discourse deal with different subject matters; the enforcement of obligations, the subject-matter of protection and the unification of private individuals into a corpus. The common denominator of the subject matter is the value of the thing which is protected. This is barely now recognisable as "literary and artistic property", but rather as information.

> "All written legal and economic systems have been grounded on the explicit recognition of property rights but the concept of property has by no means been a static one. Property is today best understood in terms of relational equities: property rights are the sanctioned behavioural relations among men that arise from the existence of goods and pertain to their use ... contractual agreements

not merely to exchange goods but to exchange bundles of property rights to do things with these goods."[81]

"It has already been recognised in the area of patent and copyright law that informational and innovational activity are useful to the innovator and creator and, in the long term, to the public. Further, disclosure and efficient usage of this stock of information should be encouraged. This policy is grounded partly in societal concerns: there is a very real danger that an information underclass will be created because of the over-zealous use of restrictive property theories ... it is a measure of the present failure of western legal systems that industrial innovators are increasingly avoiding the very systems set up to promote disclosure. Consensual agreements and trade-secret protection are now the paradigmatic way of dealing with information, research and development output."[82]

The response of the courts to the protective demands of industry has been an acceleration of the development of the law relating to breaches of confidence and trade secrets, as was described above in relation to state-appropriated information.

The joint interest of WIPO/UNESCO is in the guided development of national legislations with particular emphasis upon the criminalisation of what were formerly considered to be civil wrongs. The preventive character of such a treatment is no doubt helpful but it also creates in the public's mind a greater awareness of intellectual property. The raising of the profile of works of the mind in society's consciousness will have beneficial effects. The result is the cognitive stance which governments are now taking with regard to the role played by the state in supervising how intellectual property is to be governed for the future. What is not in doubt is that the freedom of creators and users of works to deal with works in a private and contractual way will be regulated increasingly in a manner which permits "information" to be used for the benefit of society as a whole, whatever benefit is, subjectively speaking, to be achieved.

FOOTNOTES
(Chapter 5)

1. "The Origins of Copyright Law in Ancient Jewish Law", V Hazan, Bulletin of the Copyright Society of the USA 18 (1970)1.
2. A Kerever, "Is Copyright an Anachronism?" Copyright (1983) 368.
3. Kerever, ibid at 370.
4. Kerever, ibid at 370.
5. Kerever, ibid at 373.
6. W Kingston, "Who Should Protect Intellectual Property" [1985] 3 EIPR 75 at 77.
7. H C Jehoram, "Freedom of Expression in Copyright Law" [1984] 1 EIPR 3.
8. Declaration of Geneva on the 100th Anniversary of the Berne Convention.
9. B Colfin, "Freedom of Expression and the Exploitation of Creative Works: The Struggle for Expression by Dissident Authors", 5 (1987) EIPR 18.
10. See generally, Chapter 1, on the national treatment provisions of both Conventions.
11. Colfin, ibid at 21.
12. M Levin, "Soviet International Copyright: Dream or Nightmare?" (1983) 31 Bull Cop Soc USA 127.
13. Jehoram, ibid at 3.
14. WIPO, "Guide to the Berne Convention", 1978 (Geneva) at 99 and Records of the Intellectual Property Conference of Stockholm (1967), Geneva, 1971 Vol. II 806, 911 and 1174-5.
15. Jehoram, ibid at 4.
16. WIPO Committee of Experts on Measures Against Counterfeiting and Piracy, Geneva 25-28 April 1988.
17. Draft Model Provisions promulgated by the Committee of Experts.
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CHAPTER SIX

CONCLUDING REMARKS

The evolution of laws is generally a slow process, and not a radical one. The history of the Berne Convention and the Universal Copyright Convention illustrated a fairly static notion of the purpose of copyright even if there was no totally shared assumption as to its content. This was certainly the position until the late 1950s, when it was comfortably assumed that copyright protection attached to any original literary or artistic work in a fixed form and not much beyond. What of course altered the whole face of intellectual property was the advent of the new technologies in devising new means of disseminating cultural materials, a process which gathered pace in the 1970s and is now quite breathtaking. For the writer these developments had four consequences.

Firstly, the nature of the subject-matter protectable under the Conventions and the scope of the rights attaching to that subject-matter was called into question. In this regard the conclusions of the first and fourth chapters hereof were to the effect that there is a growing consensus among the membership of both Conventions that the principle of national treatment, the cornerstone of the conventions, may be superseded by the application of reciprocity in respect of some technological inventions which are to be attributed quasi-copyright *sui generis* treatment.

It was examined how the terms of the Conventions do not permit an expansive interpretation. The categories of works covered were never intended to be read limitatively, (nevertheless those which state practice tends to endow with "copyrightable characteristics" are not always convention copyright material). It was state practice which persuaded WIPO and UNESCO that computer software should attract copyright protection. Similarly, it was state practice that led to international recognition of the copyright status of data bases. It was seen that even those works which are included in municipal

copyright statutes are not necessarily susceptible of international protection. As long as the function of the Conventions is perceived as being reactive, then uncertainty will beset the cross-frontier exchange of intellectual materials. More problematically, the powerful lobby of the cultural and electronics industries is able to exploit the inaction of the international community and give expression to protectionist tendencies. The Governing Bodies of WIPO and UNESCO must encourage a text which is proactive in the sense that it anticipates new classes of work. It is not satisfactory that economically strong countries can influence the direction of international trade in any given class of intellectual work in the way that the United States has in respect of semiconductor chips. The increasing frequency of reciprocity of treatment between exporting and importing states is not conducive to the creation of a copyright convention that is truly universal. Reciprocity and *sui generis* treatment of intellectual property are concomitants and the quality of individual debate upon their use has been insufficient to recognise the dangers inherent in them. They are simply not conducive to the common interest of states in the protection and effectiveness of protection which a truly universal system of international law should seek to achieve. Nevertheless, there is a faint yet tangible appreciation among states parties to both Conventions that there is a primacy of Convention law over domestic legislation which has often been ignored in the past. This encouraging sign is, it is suggested, a direct result of the convening of joint WIPO/UNESCO meetings on a regular basis dealing with every conceivable area of copyright activity. The trend is encouraging but the process is incomplete.

Secondly, the ascertainment of those persons, apart from rights owners, who are entitled to utilise copyrights and on what terms has undergone considerable change. In this connection, the contents of Chapter Two dealing with Less Developed Countries further illustrated the universality of interest that lies at the heart of both Conventions which is to great extent dependent upon satisfaction of the needs of net importers of works. The work of WIPO and UNESCO in relation to LDCs has sought to encourage a climate of

shared cultural interest between developed and developing states and to help to establish the cultural industries in the latter.

The Paris Revisal brought about a subtle shift in the way in which the protection of intellectual works had been drifting. For two Conventions to exist side by side, largely covering the same subject-matter but with a fundamental philosophical divergence, it was certain that there would come a time at which membership would be largely common to both but disparities and divergences of opinion between groups of members would become obvious and imperil their operations. Essentially, the recognition on the part of WIPO and UNESCO that such a situation had occurred precipitated the joint convening of the Revision Conference in 1971. Although the term "crisis" has frequently been applied to the state of copyright relations between exporting and importing countries in the 1960s, although there is no shortage of evidence from the Records of the Stockholm Conference in 1967 that there were considerable areas of acrimonious debate between LDCs and the developed countries and although the Revision Conferences produced little by way of substantive assistance to the former it is the writer's belief that the Revisions bear a conceptual significance which is not discernible from the textual changes to the Conventions alone. They succeeded in establishing a mutual recognition of interest between members which has not been lost sight of since. No international discussion of intellectual property since 1971 has proceeded solely by reference to the interests of exporting countries alone: they are always tempered by the interests of LDCs. The current GATT talks on Trade Related Aspects of Intellectual Property show this to be so. For their part, LDCs are participating through the Governing Bodies of the Convention in a continuous programme designed to increase their levels of copyright consciousness. The introduction of the Tunir Model Law in 1976 was a milestone in that process and we can identify in the recent copyright statutes introduced in the great majority of LDCs a discernible importation of the standards imposed in developed countries. Neither of the Conventions will ever, it is submitted, be truly universal in application but one may say of

the Revisals that they ensured the future development of copyright would include an appreciation of a global community of interest.

Thirdly, in order to bring materials which are transnational in character under transnational control, the means of enforcing measures against infringement have to be improved. In Chapters Three and Five the writer noted the adherence of the United State of America to the Berne Convention and discussed the possible introduction into the GATT of an Intellectual Property Code. It is the writer's opinion that the two events are not entirely unrelated but rather indicate a concerted move towards state-backed support of private rights.

From an historical background of dealing with the enforcement of private contractual assignments abroad, the Conventions have grown to encompass the consideration of interests far outside those associated with the interrelation of the parties to a private law contract. There has been a recognition by the Governing Bodies in the last twenty-five years that the mere administration of transnational relations between private or corporate personalities achieved no more than diffuse bundles of rights enjoyed on bilateral bases with no broader application of principle. The perception of a burgeoning role for public international law within a sphere dominated by the interest of private legal personalities represented a qualitative progression for the Conventions, in which the three kay factors of uniformity of enforcement of obligations, the effectiveness of that enforcement, and the collectivisation of individual rights were the essential components.

That the major personality in the international trade of intellectual commodities, the United States of America, has been persuaded to accede to the Berne Convention is a success of immeasurable proportions for that Convention. The fact of adherence is at once a recognition by that country that its own intellectual property interest abroad must be subordinated to the common good as also a realisation by WIPO and UNESCO that much of the stimulus for the introduction of much-needed enforcement standards worldwide stems

from the reluctance of net exporters of intellectual materials to expose their products to piracy. It was noted that the future direction which the development of international copyright law takes is endangered by the degree to which the United States of America is manipulative in steering the Conventions away from the traditional "cornerstone", the rule of national treatment, to *ad hoc* protectionism via reciprocity. The writer identified an alarming trend in this respect and it remains to be seen how powerful an influence the United States will be should it decide to extend reciprocal treatment and new classes of works in the future. Any comprehensive derogation from national treatment has, in the writer's view, no place in treaties which are actively striving to achieve relative parity between the strengths of the cultural industries in member states. Utilisation of the reciprocity principle is a disincentive to member states who are net importers of intellectual property in their relationships with the conventions. In short, while it is pleasing to see the most powerful nation in the world at last part of a venerable copyright heritage, it is a source of some concern the extent to which the adherence of the United States of America will dominate the thinking of WIPO by the end of the century.

Lastly, and leading from the foregoing observations the future direction of the Conventions is being influenced by issues of international trade and protection. It was noted in the body of the thesis that there exist no conventional provisions to allow a national of any member state to air grievances concerning his treatment by a foreign national other than by reference to the law of the foreign national's state. There is no institutional basis for arbitration of claims. However, the work program of the governing bodies of WIPO in the 1990-91 Biennium of work to be undertaken includes the convening of committees of governmental experts to examine whether the preparation of a protocol to the Berne Convention should begin, and if so with what content, with a view to submitting for adoption the draft of such a protocol to a diplomatic conference after 1991. The purpose of the protocol would be mainly to clarify the norms or standards applicable in the main body of the Convention. Discernment of shortcomings in the institutional aspects of the Berne Convention has also prompted the convening of a committee of governmental experts

to examine whether the preparation of a new treaty on the settlement of disputes between states in the field of intellectual property should be commenced, and if so with what content, with a view to submitting for adoption the draft of such a treaty to a diplomatic conference. The same biennium is also likely to witness the birth of model laws on intellectual property protection in respect of integrated circuit counterfeiting and piracy, as indicated in the body of the thesis, as well as the preparation of a study of the possibilities of establishing a mechanism to provide services for the resolution of disputes between private parties over intellectual property rights. For the first time, a "WIPO Intellectual Property Arbitration Centre" would be open to private individuals, not governments, on a totally voluntary basis. In final conclusion, it appears that those factors identified in the preceding five chapters will bring about a new era in international copyright. It will be obvious to the reader that the degree of co-operation between WIPO and UNESCO has reached such a pitch that the operation of both are largely interchangeable. It is unlikely that either will ever become superfluous or that there will be some textual fusion, since both have separate philosophical pedigrees. As was pointed out previously, the duality of the current international copyright system is its very strength. No doubt the Berne Convention will be the dominant partner but the writer feels that the UNESCO Convention whose birth closely followed the inception of the Charter of the United Nations provides a useful system of checks and balances in the overall scheme of operations.

The writer hopes that from the selection of subject-matters in this thesis the reader can discern the diverse impetus for change in the international copyright system and ventures to suggest that this nascent decade may witness the most significant period of change in methodology that the conventions have experienced in their long and illustrious past.

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