Copyright and Neighbouring Rights: International Legal Framework

Copyright seeks to protect the original expressions/creations of authors/creators of works of art. It is often termed the right of diversity, and the law which governs this stream of activity seeks to protect the commercial exploitation of these products. These products are largely born out of culture any country evolved as the result of day to day activities of its inhabitants. It extends protection to the expression of ideas, and not the ideas themselves. Copyright law applies to a wide variety of works, including literary, artistic, dramatic, musical cinematographic films, sound recordings, drawings, and photographs, among others. Thus, it protects books, films, computer programs and multimedia works. Copyright therefore, seeks to place the work in a tangible medium.

The inventions, innovations and developments in mechanical, electronic and digital spheres have influenced the growth of copyright law throughout the course of history and without which copyright law would have remained stagnant (Copinger&Skone James: 2010). It is interesting to know that while copyright bestows upon the authors/creators the right to preclude all others from copying their works, it also seeks to provide certain rights to all others, including the right to reproduce the work, perform or communicate the work to the public, translate the work and adapt the
work, among others. As a result, copyright is generally described as a ‘bundle of rights’, which can be assigned or licensed separately and are mutually non-exclusive in their transmission.

2.1 Brief history of Copyright law

Enacted in England in 1710, the ‘Statute of Anne’ was the first copyright law in the world. For the first time, this Act put forward the idea of the author of a work being the owner of its ‘copyright’, and laid out fixed terms of protection. This Act required copyrighted works to be deposited at specific copyright libraries, and registered at Stationers’ Hall. But notably, no automatic copyright protection was offered to unpublished works. Other countries followed this route. For instance, the Copyright Act of 1790 in the US was enacted. However, copyright legislations remained uncoordinated at the global level until the 19th century. In 1886, the Berne Convention mooted mutual recognition of copyrights between nation states, and the promotion and development of international standards for copyright protection. The Convention did away with the need to register works separately in each individual country. This treaty has now been adopted by almost all nations and provides the basis for international copyright law.

2.2 Objectives of copyright law

Copyright law endows certain exclusive rights on authors, composers, artists, designers, publishers and film producers, as well as other creative people, who risk their capital in putting their works before the public. These rights, also called economic rights, permit
these creators to enjoy the benefits of the created subject-matter for a limited period of time. Under the ambit of these exclusive rights falls the right to reproduce the work in any form, the right to make copies of the work, the right to perform the work in public, the right to make any cinematographic film or sound recording of the work, and the right to make adaptations of the work, among others. Interestingly, this can also be termed as grant of a type of monopoly for a limited period of time. In India, the Copyright Act, 1957 puts this limited period at 60 years after the death of the author. During this period, persons other than the copyright owner cannot enrich themselves at the cost of the former’s efforts.

The copyright law also provides for moral rights to the author/creator. Under its ambit fall the right of integrity and the right to claim authorship of the work. The author or creator of the work thus, has a right to prevent any injury or mutilation of his intellectual product. However, the copyright law permits the general public to make some free uses of the copyrighted material. A list of these free uses has been laid down in the Copyright Act 1957. The reason for such a provision relating to free uses is to strike a balance between the copyright owner’s interests and those of the society. Thus, the private rights of the copyright owner have been curtailed to a limited extent in the interest of society’s larger rights.

The purpose of the creation of practically all works of art is to make them available to the public. But this calls for significant investments. And these investments will not be made unless there is a
reasonable expectation of recouping them and making a reasonable profit, too. Here, the doctrine of unjustified enrichment may apply if those who make the creative contributions are not adequately compensated. The copyright system helps attract a considerable part of the investments needed to create some such works, for instance, films, which typically require heavy investments.

The copyright system is also based on the principal of natural justice. As a result, the author of a work can decide on whether or not to publish a work, and in the event he decides to, the way in which it should be done. Since he is the creator or maker of the work, he is entitled to the fruits of his efforts. Thus, the royalties he gets are the wages for his intellectual work (Stewart: 1983).

The culture of a nation depicts the creativity of its people and the works produced by its creators are its national assets. It is because of the encouragement and the rewarding of creativity that a contribution to the development of the national culture can be made.

The dissemination of the works to large numbers of people helps forge links between various classes, racial groups and age groups. This makes for social cohesion. The creator thus, renders social service and the ideas and experience of creators can be shared by a wide public within a short span of time which ultimately results in the advancement of the nation’s society (Stewart: 1983).
2.3 Nature of Copyright

There is an inherent property in the concept of copyright. But the nature of this property is incorporeal or intangible. That there is a property in the work is due to the fact that the owner has created or produced it. And since he is the owner of the property, he can dispose of it through outright sale (assignment of his right) or by licensing. Interestingly, copyright does not lend protection to mere ideas and thoughts since these exist only in a man’s brain, and are not works as defined by the copyright law. But once these ideas or works are reduced to writing or other material forms, the result becomes a work that can be lent protection.

Various experts describe copyright in different ways, for instance, it is called a bundle of exclusive rights, and even a negative right, which means that the rightful owner can prevent all others from copying his work, or doing any other acts which, according to copyright law, can only be done by owner. It is also referred to as a monopoly, albeit for a specific short period of time. But interestingly, there can be no case of infringement if two exactly same kind of work is produced independent of one another. This then therefore, gives a twist to the term ‘monopoly’. As mentioned earlier, the exclusive rights in copyrighted work are limited in time. At the expiration of this period, the work passes into the ‘public domain’. In other word, it becomes public property and can be freely used by anyone without any hindrance (Stewart: 1983).
2.4 Subject Matter of Copyright

According to the Indian Copyright Act 1957 as well as Copyright, Design and Patents Act 1988 of United Kingdom, copyright resides in original literary, musical, dramatic and artistic works, sound recordings and cinematographic works. The UK Copyright Acts of 1911 and of 1956 also required the originality of the literary, dramatic, musical and artistic work for subsistence of the copyright. However, there was no statutory requirement of originality for literary works under the Literary Copyright Act 1842. This has also reflected in *Walter v Lane*, where the House of Lords decided that under Literary Copyright Act, 1942 a reporter was entitled to copy verbatim a public speech of Lord Rosebery. Lord Halsbury LC specifically referred, as a basis for his decision, to the absence of term ‘original’ in the statute (Copinger and Skone James: 1991). Further, the Engravings Copyright Act 1766 also did not use the expression ‘original’, whereas the Sculpture Copyright Act 1814 and the Fine Arts Copyright Act 1862 referred to ‘original sculptures’ and ‘original paintings’ respectively (Copinger and Skone James: 1991).

2.4.1 Original Literary Works

An original literary work is the product of the human mind which may consist of a series of verbal or numerical statements, not necessarily possessing aesthetic merit, capable of being expressed in writing, and which has been arrived at by the exercise of substantial independent skill, creative labour, or judgment. The Copyright Act 1957 provides an inclusive definition of literary work. Prior to the
Copyright (Copyright Amendment: 1994), ‘literary work’ was defined to include “tables, compilations and computer programmes, which, when fed into a computer is capable of reproducing any information”. The 1994 amendment substituted a new definition for the earlier one. The Act now includes “computer programmes, tables and compilations, including computer databases” (Copyright Act: 1957).

2.4.2 Test of Originality

A work can be termed original only if it has not been copied from another work. It was held in Macmillan v Cooper (1924) that “the product of the efforts, skill and capital of one man on some raw material cannot be appropriated by another”. And to secure the copyright for the product, certain amount of labour, skill and capital should have been expended to lend the product some characteristic which the raw material did not possess, and which thus differentiated the final-product from the raw material. However, it is not possible to define the exact amount of knowledge, labour, efforts, judgment, skill or taste that the author of a book must endow on his creation. Thus, a work may be ‘original’ if the author has applied his skill or labour, even though he has drawn on knowledge common to himself and others or has used already existing material. A mere copyist does not obtain copyright for his copy.

In RupendraKashyap v Jiwan Publishing House (1996), the court held that the word ‘original’ in Sec 13 of the Copyright Act 1957 did not imply any originality of ideas but only meant that the work under consideration should not be copied from some other work but
must have its origins from the author’s efforts, labour and skill. Thus the term ‘original’ in reference to a work means that the particular work ‘owes its origin’ to the author. Original simply means that the work has been created by the author on his own and hasn’t been copied from any other person’s work.

In Eastern Book Co v Navin J Desai, (1996) the Delhi High Court examined the requirement of ‘originality’ to claim copyright protection in a literary work. The plaintiff in this case was publisher of the CD-ROM on SCC Online-Supreme Court Case Finder and Supreme Court Cases Full Text. The plea of the Plaintiff was that the judgment not only claimed copyright in these works as compilations but also in head-notes of the cases and in the copy editing including correcting typographic errors, paragraph numbering, inclusion of commas and full stops, adding citation of cases, and footnotes, among others, which involved skill, labour and judgment necessary to constitute original literary work.

The plaintiff alleged infringement of copyright in their work by their competitors – ‘The Laws’ and ‘Grand Jurix’. According to the plaintiff, the defendants had copied the full text of the judgments and a number of head-notes from the plaintiff’s CD-ROM SCC Online. The defendants contended that there was no copyright on the full text of the judgments of courts and the modification made by the plaintiff in the form of copy editing was too trivial to claim copyright. The court held that there was no copyright in the judgments and these were in public domain once published. On the question of copyright
in the copy edited full text of the judgment, the court held that: “The changes consisting of elimination, changes of spelling, elimination or addition of quotations and corrections of corrections of typographical mistakes are trivial and hence no copyright exists therein.”

The court further held that: “Materials in which no one has a copyright is available to all. Every man can take what is useful from them, improve, add and give to the public the whole, comprising the original work and additions and improvements. I, am therefore, of the opinion that the Judgments/orders published by the plaintiffs in their reports “Supreme Court cases” is not their original literary works but has been composed of, complied and prepared from and are reproduction of judgments of the Supreme Court of India, open to all. I am also of the opinion that merely correcting certain typographical or grammatical mistakes in the raw source and by adding comas, full stops and by giving paragraph numbers to the judgment will not make their work original literary work entitled to protection under the copyright Act.

In respect of head notes, the court was of the opinion that unlike copy editing, there could be copyright protection if the plaintiff could show that there was originality and intellectual effort put into the creation of the head notes. Since the defendant undertook to ensure that the copyright in the head notes of the plaintiff would not be infringed, the court did not pass any orders as to whether the defendants had infringed the copyright of the plaintiff in their head notes.
2.4.3 **Scope of Original Literary works**

Books were the earliest works to have received copyright protection. But over the years, judicial decisions extended copyright protection to many other literary works. Under the rubric of original literary work, various other works were included as capable of getting copyright protection (Ghafur v Jwala: 1921). These included school text books, question papers set for examinations; law reports; business letters; application and other forms; research papers and dissertations; catalogues; contact forms; consignment notes; directories; football coupons; list of bills of scale; compilation of a book on household accounts and domestic arithmetic (Manohar Lal Gupta v State of Haryana: 1977) list of football fixtures; mathematical tables; railway timetables; road books; guide books; book of scientific questions and answers; rules of games; book on studs; trade statistics; compilation of a list of clients and law firms; opinion and advise to clients; telegraph codes; questionnaire for collecting statistical information; head notes of law reports; and panchang, among others. Apart from the aforesaid works, study course material, laboratory notes, research reports and course work of students also fall in the definition of copyright protection. However, syllabus merely prescribing the guidelines which are to be followed by textbook writers’ does not fall under the definition of an original work (Nag Book House v State of West Bengal: 1982).
2.5 Neighboring Rights

2.5.1 Origin of Neighbouring Rights

Law is a cultural product. It follows that the legal development surrounding copyright and neighboring rights echoes the social and cultural advancement of the society. Undoubtedly, the history of copyright reflects the progress of technology. In the second half of the 19th century, technology created photograph and sound recording and the 20th century saw the advent of films with sound track, radio and television. The problem then arose of deciding whether, in the terminology of copyright, these new subject matters needed and deserved full copyright protection and, in the terminology of the *droit d'auteur*, whether they constituted work to be protected (Stewart:1989). Further, when it came to the making of broadcast, the broadcasting corporation is too large an enterprise to be conceived as a team of co-authors. Thus, on the international platform for phonograms and broadcasts a new solution had to be found. It is important to note that the new situation arose during a period marked with a discrepancy between the position and status of performers and that of authors.

The third and fourth quarters of the twentieth century witnessed a sudden rise in the importance of performers: they began to achieve great economic power as well as social position. The performers who have gained the greatest economic powers have done

---

3 The term *droit d’auteur* is a French word, and is generally used in relation to the copyright laws of civil law countries and in European Union law.
so through combining performance with authorship. These performers started to become authors of the work they performed. This phenomenon was increasingly felt in the case of film and music industries.

Over time, the economic and social standing of performers underwent changes. This was reflected in the changes to the legal rights and the protection accorded to them against unauthorised exploitation of their performances. The demand for stronger rights for performers grew sharper as the technical means to fix performances emerged. Once it became possible to exploit performances by means of phonogram and cinematographic film, the economic arguments in favour of authors’ rights became equally applicable to performers’ rights (Arnold:2004). As new technologies developed, the jurisdictions reacted differently to each new invention. However, an international consensus was reached to treat the new technological developments, including broadcasting, as subject-matters of intellectual property rights, and as such, it is close to or connected with neighbouring rights (Council of Europe (CDMM): 1998).

2.5.2 Scope of Neighbouring rights

Neighbouring rights are a significant aspect of copyright law. There are three kinds of rights that could be said to neighbour upon copyright protection. Since copyright or author’s rights do not protect anything other than creations of human mind, certain products that have been considered valuable enough to merit protection are
excluded from author’s right protection. The purpose of neighbouring rights is to serve the protection of such products.

Performing artists enjoy certain rights in their performances. The same holds true vis-à-vis phonogram producers’ rights and the rights of broadcasting organisations in radio and television programs (Blackener: 2004). Neighbouring rights, also called related rights, emerged out of technological changes in the context of live performances being broadcasted. These rights are conferred on persons or organisations that help make the works available to the public. Though in the narrow sense, the term ‘neighbouring rights’ covers only performers’ rights and rights of phonogram producers and broadcasting organisations, in a broad sense it covers rights similar to copyright. In the broad sense, neighbouring rights are similar to but less than full copyright. The latter sense is derived from the traditional reluctance of the civil law systems based on the concept of neigbouring rights to accord full copyright protection where the object to be protected is a derivative of a literary and musical work. This is particularly so where the author is a corporation, such as a recording company or a broadcasting corporation. In such cases rights which are neighbours to true authors’ rights are conferred (Arnold: 2004).

The concept of neighbouring rights is not rooted in the philosophy of natural law. Therefore, protection is usually more limited than that of author’s rights. While authors in principle enjoy a broad right against exploitation of their works so as to cover any
future exploitation, owners of neighbouring rights are only granted specified rights, which must be considered necessary against the background of justification of their protection.

Neighbouring rights are always rights over derivative works of the original. Therefore, they assume a pre-existing work. There are similarities between neighbouring rights and copyright. These include reference to its subsistence, infringement and remedies. The important distinction is that the initial copyright owner, in the case of neighbouring rights, is in most cases a corporate body. However, exception arises when in the case of ‘performers’ where the initial owner of other copyrights is usually a natural person. Similarly, the scope of copyright is wider than the scope of neighbouring rights. Neighbouring rights encompass only three categories of rights, viz, reproduction right, public performance right and broadcasting right.

2.5.3 The Rationale of Neighbouring Rights

Originally, the French term Droits Voisins was used to describe neighbouring rights. So, it can safely be said that neighbouring rights have their origin in Civil Law. The English and American law categoriseneighbouring rights as a form of protection under copyright. Persons or organisations making efforts to make the copyrighted works available to the public are conferred with neighbouring rights. The key point is that there is a communication by one or more persons to an audience for a particular purpose. They involve public performance of the works through: (a) Live performance by artists, (b) Performance through sound recordings, (c)
Performance through broadcasting, (d) Performance through the Internet.

The principal justification for protection of related rights is that the public performer displays certain amount of creativity in making the work enjoyable to the public. A performance or a phonogram is as much of an intellectual creation as a copyright work. They can easily satisfy any test of originality that may be required for a typical copyright protection. Technology is another major factor. Technology is used to fix the performance and commercially exploit it. In case of sound recording and broadcasting the justification seems to be the investment made in converting the works into signals and transmitting it. It is also due to the possibility of theft of signals and their simultaneous transmission causing economic loss to the broadcasting organisations.

According to R. Arnold, only copyright or a protection analogous to copyright can ensure that performers are remunerated as exploitation occurs, including payment for new or unforeseen forms of exploitation. Otherwise, performers are forced to bargain, in advance, for the right to exploit their performances at a time when the potential market, and perhaps even the technical means of exploitation, are unknown.

So, what is the justification for neighbouring rights? The answer is moral right theory. In fact, the moral case is stronger in the case of performers than in the case of authors since the performance is so intimately connected with performers own personality. Therefore,
he has the right to decide the terms and conditions of exploitation of his performance. As in the case of copyright, the protection would provide the performers an economic incentive to perform by ensuring that they are properly rewarded for their performances as set out in the Rental Directive: “Whereas the investments required particularly for the production of phonograms and films are rather high and risky; the possibility for recouping that investment can only be effectively guaranteed through adequate legal protection of the rights holders concerned” (ElsVanheusden: 2007).

Though Morgan holds an opposite opinion, he does agrees to the fact that there will be a marginal increase in the quantity and quality of production if rights are conferred because then they will be able to support themselves and be less reliant on obtaining non-productive sources of employment (Morgan:2002). The protection against unauthorised exploitation helps both the performers and the industries that provide employment to the performers. In the current digital era of rampant internet piracy and file sharing, producers and artists have a common interest in combating piracy which deprives both of them of income (Morgan: 2002). The range of protection of neighbouring right involves enjoyment of the rights only with the permission of the owner of the works and that the right is limited to the extent to which permission is granted. In terms of nature of protection, one may question the right to prohibit activities resulting in economic loss, or if it is an exclusive property right. The difference between the two can be crucial because the first suggests that
everyone can, by providing adequate compensation, enjoy the right, while the second creates exclusivity.

2.6 International Legal Framework

In international law, the first move towards neighbouring rights was made in 1928 by the Rome Revision Conference of the Berne Convention when the Conference, at the end of the event expressed a *voeu* (wish) that its members mull the possibility of measures intended to safeguard the rights of performers. It was envisaged that one convention for performers and producers of phonograms and another for broadcasting organisations should be annexed to the revised Berne Convention (WIPO:2004).

Meanwhile, in 1936 Austria and in 1941 Italy granted neighbouring rights to performers and record producers. The Brussels Revision Conference of 1948 also took a similar view. Almost all states felt that rights of phonogram producers, broadcasting organisations and performers were connected and an equitable balance between them could only be achieved through a single instrument. This consensus led to the signing of the Rome Convention 1961, followed by the Phonogram Convention 1971. The latter endowed upon phonogram producers further rights which could be implemented by national legislation granting copyright/neighbouring right. Later, the Satellite Convention 1974 took broadcasting rights into the realm of international public law.
Table 1: Multilateral agreements on copyrights and related rights

<table>
<thead>
<tr>
<th>Sl.No</th>
<th>Treaty/Convention</th>
<th>Year</th>
<th>Member Nations</th>
<th>Administering Body</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Berne Convention</td>
<td>1886</td>
<td>168</td>
<td>WIPO</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1979</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Universal Copyright Convention (UCC)</td>
<td>1952</td>
<td>163</td>
<td>UNESCO</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1971</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Rome Convention</td>
<td>1961</td>
<td>92</td>
<td>WIPO, UNESCO</td>
</tr>
<tr>
<td>4</td>
<td>Geneva Phonogram Convention</td>
<td>1971</td>
<td>78</td>
<td>WIPO, ILO, UNESCO</td>
</tr>
<tr>
<td>5</td>
<td>The Satellite Convention (Brussels)</td>
<td>1974</td>
<td>37</td>
<td>WIPO</td>
</tr>
<tr>
<td>6</td>
<td>The TRIPs Agreement</td>
<td>1994</td>
<td>154</td>
<td>WTO</td>
</tr>
<tr>
<td>7</td>
<td>WIPO Copyright Treaty</td>
<td>1996</td>
<td>93</td>
<td>WIPO</td>
</tr>
<tr>
<td>8</td>
<td>WIPO Performances &amp; Phonograms Treaty</td>
<td>1996</td>
<td>94</td>
<td>WIPO</td>
</tr>
<tr>
<td>9</td>
<td>Beijing Treaty on Audio Visual Performance² (BTAP)</td>
<td>2012</td>
<td>67</td>
<td>WIPO</td>
</tr>
</tbody>
</table>

2.6.1 Berne Convention

The Berne Union exists to protect the rights of authors in their “literary and artistic works”, an expression which is illustrated by a long catalogue of examples, and then a set of further explications and limitations (Nilmmer and Geller: 2008). The aesthetic creations traditionally associated with copyright are the subject matter of the

² Not Yet in Force
Copyright and Neighbouring Rights: International Legal Framework

Convention. It covers works of literature, drama, music and art besides cinematographic films and analogous audio-visual works. These rights arise by virtue of the authorship of the works. Although the convention has not made any statement that the author must be a human being rather than a legal person, or that the work must attain any defined level of originality, both these characteristics are commonly assumed to underlie the text (Ricketson and Ginburg: 2005).

The Berne Convention’s first requirement in this regard is that each member State must follow the principle of national treatment, itself a product of the idea of territoriality (Ricketson: 1986). This is achieved through the concept of the ‘country of origin’ of the work. Where possible this is the country of first publication, rather than that of any author’s nationality or habitual residence. Thus, the approach is to avoid confusion, particularly where there is more than one author. Where the country of origin is a Berne State, other members must accord to the work the same treatment as they offer their own nationals. At this point, the Convention assumes that there will be differences in the scope of rights from one member to another. And copyright remains the field in which jealousies over inequality of treatment most readily ignite. The Convention, therefore, acknowledges a number of dispensations from national treatment (Arts. 5(1), 5(3)), which include the well-known ‘principle of the shorter term’ (Robert Brauneis: 2013).

Because of legal differences, and tendencies towards mutual suspicion, the Berne Convention has gone further than any other
intellectual property treaty to impose minimum standards on its members. The Convention’s requirements do not cover the whole gamut of activities. They consist partly of mandatory requirements and partly of limits upon the potential scope of legislative measures in member States. This exceptional movement towards standardisation of law has decisively influenced the market made up mainly of importer, rather than exporter, countries. But, during much of its existence, a strong dispute settlement enforcement mechanism has been non-existent. In this light, the recent shift in favour of such a mechanism, supported by the terms of the TRIPS Agreement, is seen as a welcome more.

However, the Convention requires its members to prescribe certain legal guarantees. Since its Berlin revision, it has outlawed any form of registration as a precondition of legal right. Also, it calls for a minimum term of the author’s life and 50 years thereafter. It gives recognition to the moral rights of the author. Its chief objective is the scope of economic rights. Except in two rather exceptional cases, these are characterised as exclusive rights and not mere rights to remuneration (Art.7(1)).

Further, the right to authorise reproduction of a protected work is subject to a strictly limited qualification: ‘in certain special cases’ members may allow such copying if it “does not come in conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author” (Ritter Ron: 2002). By implication, this limitation applies equally to the
Copyright and Neighbouring Rights: International Legal Framework 48

Convention’s guarantee of rights to translate and to adapt works. The members may use this power by permitting a particular use of a work to be undertaken freely or subject to payment of equitable remuneration (Ricketson: 1986). The Convention contains a number of more specific exceptions. Exploitation through new technologies has brought extensions to the Convention. Thus, in addition to a general right of public performance and communication, there must be protection for the broadcasting of a work, its wire and wireless transmission and public communication; and also of works when they are adapted into films, so as to cover both reproduction of the result and also its public performance and communication (Art.9).

The convention attempts to legally regulate collecting societies. It recognises works of joint authorship for the period of duration. However, it says nothing about the nature of such works except in the case of films. Also, the convention is quiet on initial entitlement to the ownership of copyright and certain other aspects of property rights. The only aspect of remedies covered relates to the seizure of infringing copies. It does not touch upon the now significant issue of the transmission of works held in digitised form.

2.6.2 The Universal Copyright Convention

The Universal Copyright Convention in 1951 was the important international copyright convention to be adopted after Berne Convention, though it provided a lower level of protection in terms of scope and subject matter. The UCC was concluded under the aegis of UNESCO with the aim of establishing international standards
of copyright protection among countries that had not yet acceded to the Berne Convention, such as the United States and several Latin American countries. In addition to serving as a “bridge convention” to the Berne Convention, the establishment of the UCC was a recognition of the need to grant developing countries flexibility in acceding to international norms that would provide for higher standards of copyright protection than they considered appropriate for their current level of development (Ruth Okediji: 2006).

2.6.3 Rome Convention

On 18 August, 1964, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961) came into force. It provided protection to performances of performers, phonogram producers and broadcasts of broadcasting organisations. This first multilateral convention covering selected neighbouring rights, contained specific provision to the effect that:

1. Performers are protected against some actions they have not consented to

2. Producers of phonograms enjoy the right to authorise or prohibit the direct or indirect reproduction of their phonograms.

3. Broadcasting organisations enjoy the right to authorise or prohibit certain acts, namely, the rebroadcasting of their broadcasts; the fixation of their broadcasts; the reproduction of
such fixations; the communication to the public of their
television broadcasts if such communication is made in places
accessible to the public against payment of an entrance fee.

The Convention defines the term ‘performers’ to mean actors,
singers, musicians, dancers, and other persons who act, sing, deliver,
declaim, play in, or otherwise perform literary or artistic works. The
performers’ protection covers the broadcasting and communications
made to the public of their live performance; the fixation of their live
performance; the reproduction of such a fixation if the original
fixation was made without their consent or if the reproduction was
made for purposes other than those for which they gave their consent
(Art.11).

In cases where broadcasting was consented to by the
performers, the domestic law of the contracting state would regulate
the protection against rebroadcasting, fixation for broadcasting
purposes and reproduction of such fixation. The contracting states
would be at liberty to extend such protection to artists who do not
perform literary or artistic creations.

The Convention dwelled upon phonogram, its definition and the
protection lent to it under law. It defined “phonogram” as an exclusively
aural fixation of sounds of a performance or of other sounds and a
“producer of phonograms” as a person or legal entity, who first fixes the
sounds of a performance or other sounds. Each contracting state is
obliged to grant national treatment to producers of phonograms if any
of the following conditions are met: (a) nationality criterion: the
producer of the phonogram is a national of another contracting state, (b) fixation criterion: the first fixation of the sound was made in another contracting state, (c) publication criterion: the phonogram was first published in another contracting state (Art. 11(9) C).

However, contracting States are free not to apply this rule or to limit its application when a phonogram published for commercial purposes gives rise to secondary uses; a single equitable remuneration must be paid by the user to the performers, or to the producers of phonograms. Members of the Convention have to grant national treatment to broadcasting organisations if either of the following two conditions are met (a) the headquarters of the broadcasting organisation is situated in another contracting State; or (b) the broadcast was transmitted from a transmitter situated in another contracting State (Art.10bis).

Broadcasting is defined as the transmission through wireless means for public reception of sounds or of images and sounds (Art.3 (f)).

Protection

The term of protection is 20 years beginning from the end of the year in which:

(a) the fixation was made for phonograms and performances incorporated therein;

(b) the performance took place; and
(c) the broadcast took place.

The Convention is open to States which are party to the Berne Convention. The Convention indirectly gained new influence as a model for subsequent international treaties, in particular the TRIPS Agreement.

2.6.4 Geneva Phonogram Convention

Neighbouring rights did not find favour with countries which has an authors’ rights system. With its coverage of the groups of right owners, the Rome Convention did not appeal to a large number of countries that did not grant protection to performers and broadcasting organisations. Various countries that had a copyright system were ready to protect phonograms domestically as well as internationally, despite their reluctance to introduce protection for performers and broadcasting organisations.

In 1971, an additional treaty, called the Convention for the Protection of Producers of Phonograms against unauthorised Duplication of their Phonograms (1971), was adopted to deal with the rising incidences of piracy of recorded music. This lent protection against unauthorised duplication of sound recordings, and against unauthorised import and distribution of such copies. Article 2 of this Convention provides an obligation of each contracting state to protect a producer of phonograms who is a national of another contracting state against the making of duplicates without the consent of the producer and against the importation of such duplicates, for the
purpose of distribution to the public. Article 2, thus explains the scope of the Convention – (i) whom does the contracting parties must protect, and (ii) against what events. Article 1(a) defines “phonogram” as any exclusively aural fixation of sounds of a performance or of other sounds; (the sound tracks of films or video cassettes does not fall within the ambit of this definition). “Producer of phonograms” means the person who, or the legal entity which, first fixes the sounds of a performance or other sounds. Protection may be provided under copyright law, *sui generis* (related rights) law, unfair competition law or penal law. The period of such protection should be at least 20 years from the first fixation or the first publication of the phonogram.

If, as a condition of protecting the producers of phonograms, a contracting state, under its domestic law, requires compliance with formalities, these shall be considered as fulfilled, provided that all authorised duplicates of the phonogram are distributed to the public or their containers bear a notice with the symbol (P), accompanied by the year and date of the first publication, placed in such manner as to their containers do not identify the producer, his successor in title or the exclusive licensee (by carrying his name, trademark or other appropriate designation). The notice shall also include the name of the producer, his successor in title or the exclusive licensee.

**2.6.5 The Satellite Convention (Brussels)**

The Satellite convention done at Brussels on May, 21 1974 relating to the distribution of programme-carrying signals
transmitted by Satellite. There was no global system to prevent distributors from distributing programme-carrying signals transmitted by satellite which were not intended for those distributors. And as the use of satellites for distribution of programme-carrying signals was rapidly growing, both in volume and geographical coverage, this loophole held the potential of misuse. Hence, the convention provides for the obligation of each contracting state to take adequate measures to prevent the unauthorized distribution on or from its territory of any programme-carrying signal transmitted by satellites.

The Convention defines ‘Signal’ as an electronically-generated carrier capable of transmitting programmes (Article: 1); where a ‘programme’ means a body of live or recorded material consisting of images, sounds or both embodied in signals emitted for the purpose of ultimate distribution; and ‘satellite’ is any device in extraterrestrial space capable of transmitting signals (Article: 1). Any distribution is deemed to be unauthorised if it has not been authorised by the organisation - typically a broadcasting organisation - which decides on the programme’s content. The obligation exists in respect of organisations that are nationals of a contracting State. This convention is not applicable where the signals emitted by or on behalf of the originating organisation are intended for direct reception from the satellite by the general public. The Convention is open to any state that is a member of the United Nations (UN).
WIPO’s Standing Committee on Copyright and Related Rights, responsible for broadcasting negotiations, is in the process of drafting a new treaty addressing the following issues (Kumar Das: 2013):

1. What should be protected as the rights of broadcasting organisations?
2. Feasibility of opting for a technology-neutral protection.
3. The issue of webcasting.
4. How should broadcast signals be protected?
5. Need for introducing anti-circumvention measures
6. Creation of new rights, including protection from foreign piracy
7. What are limitations and exceptions that needs to be put in place?
8. How long should the protection last?

2.6.6 Trade-Related Aspects of Intellectual Property Rights (TRIPs)

One of the important obligations of World Trade Organization (WTO) members is to protect intellectual property under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) administrated in 1994. TRIPs agreement contains the protection provided under the Rome Convention against unauthorised copying of sound recordings, and provides a specific right to authorise or prohibit commercial rental of these works.
Article 14 section 1 deals with Protection of Performers, Producers of Phonograms and Broadcasting organisations. In respect of a fixation of their performance on a phonogram, performers can prevent the following acts when undertaken without their authorisation: Fixation in sound records without authorization, Reproduction of such sound records, Broadcasting by wireless means, and Communication to the public of live performances. Producers of phonograms are given the right to authorise or prohibit the direct or indirect reproduction of their phonograms (Terence P. Stewart: 1999).

According to the agreement, broadcasting organisations are given the right to prohibit the following acts when undertaken without their authorisation: fixation, reproduction of fixations, rebroadcasting by wireless means of broadcasts, and communication to the public of television broadcasts of the same. Where Member-States do not grant such rights to broadcasting organisations, they have to provide owners of copyright in the subject matter of broadcasts with the possibility of preventing these acts, subject to the provisions of the Berne Convention (1971). This gives the freedom to confer these rights directly to the broadcasting organisations or the authors.

The provisions of Article 11 in respect of computer programs shall apply mutatis mutandis, to producers of phonograms and any other right holders in phonograms as determined in a Member country’s law. For instance, if on 15 April, 1994, a Member country

---

5 It is a Medieval Latin phrase meaning "the necessary changes having been made" or "once the necessary changes have been made".
had in force a system of equitable remuneration of right holders for the rental of phonograms, it may maintain such system provided the commercial rental of phonograms does not materially impair the exclusive rights of reproduction of the right holders. Under TRIPS, protection to performers and producers of phonograms shall last at least until the end of a period of 50 years computed from the end of the calendar year in which the fixation was made or the performance took place. For broadcasting organizations, the term of protection is at least 20 years from the end of the calendar year in which the broadcast took place. Finally, to the extent permitted by the Rome Convention, any Member may provide for conditions, limitations, exceptions and reservations to the right.

TRIPS and Copyright

According to the provisions on copyright enshrined in TRIPS, all members must comply with the substantive Articles (1-21) of the Berne Convention other than the provision on moral rights (Correa: 1994). At crucial points, these obligations affecting the work of authors, as defined in the Berne Convention are extended or made more explicit. Here, three general and two special cases deserve note:

(1) General: For the first time in an international instrument, the basis of dichotomy of this branch of the law appears: ‘copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such’. This vital touchstone for balancing exclusivity against free access thus becomes part of international understanding. For all
its difficulty of application, it must accordingly remain within our own law. TRIPs makes general, the Berne principle restricting the extent of exceptions in national legislation to the reproduction rights. As to the term, there is a new minimum of 50 years from the making of a work, where term is not measured by reference to a natural person’s life.

(2) Special computer programs are required to be protected as literary works “under the Berne Convention”; and so are some compilations of data. A rental right is introduced for computer programs, and tentatively for films.

By contrast, in the sphere of neighboring rights there is no equivalent incorporation of the Rome Convention or the Phonograms Convention (though Members are allowed to adopt the Rome Convention’s conditions, limitations, exceptions and reservations). Instead, the TRIPS agreement has its own code of obligations relating to performers, sound recording procedures and broadcasting organisations:

(1) Performers: they must be provided with an exclusive right covering fixation, reproduction, wireless broadcasting and public communication of actual performance (as distinct from their recording). It must last for 50 years from the performance (Art.14).

(2) Sound recording producers: they must have an exclusive right in the direct or indirect reproduction of their phonograms, and
likewise (subject to certain limitations) to the rental copies. It must last for 50 years from the fixation (Art.14).

(3) Broadcasts: either broadcasting organisations themselves must have an exclusive right over fixation, reproduction and re-broadcasting of their (wireless) broadcasts, and right of public communication in the case of television broadcasts: or else equivalent rights must be given to copyright owners of material broadcast. The minimum term is 20 years from the broadcast (Art.14).

While these provisions have a considerable impact on many of the developing countries, for the developed countries the effects are less acute. A quarter century ago, a discriminating view of copyright’s proper function could at least command some audience. Today it stands challenged by the unremitting lobbying of the copyright industries and authors’ associations, whether they rank as collecting societies or labour unions. At every forum, they dwell on the possibilities of uncontrolled and perfect copying and look to broaden and intensify the grasp of copyright: by adding new subject matter, extending the range of infringing acts, imposing liability on general distributors, such as telecommunication chains, removing or limiting traditional exception and insisting on draconian measures to support electronic management systems. Such legal changes would buttress, for instance, the community’s commitment to a strong copyright regime.
The movement to enhance the position of copyright owners draws basic support from Chicago-inspired theories of property rights (Center for Economic Personalism: 2005). This approach ranks copyright indiscriminately with other commodities and claim that its value will be most efficiently realised if it is placed in the hands of a single right-holder, either by initial allocation, or by ready, legally secure, bargaining over an exclusive right, rather than a mere right to remuneration or compensation. However much the right is the consequence of creative expression, what matters is that it should be exploited by the person most prepared to assume the investment risks of so doing. This, so it is argued, is the first object lesson of copyright’s history and it leads away from the liberal view that the right is only justified to the extent that it encourages authorship and its initial marketing. Rather the law should give continued protection so that a work will be made available whenever an entrepreneur is prepared to re-issue a work. Free bargaining legally enforced, is an essential element in this process and, the argument goes, it should not be constrained, except where absolutely necessary, by rules preventing a right-holder from taking more than the copyright law allows him.

The drive behind such thinking can be taken far. Rights whether formally classified as economic or moral, should not be allowed to proliferate, so as in particular, to exacerbate the transaction costs involved in procuring complex products, such as films, databases, multimedia works and broadcasts. The law should therefore be ready to police copyright ab initio, not in the hands of the
creator but in those of the risk investor – certainly where the two are related by employment, and even where the work is otherwise ‘made for hire’. Ultimately, such thinking may sustain the case that copyright should be perpetual, like property intangible and the case that the author should no longer be treated as the bearer of rights, only as their progenitor (Turkecich: 1990).

In practice though, such extreme propositions are unlikely to hold sway. Copyright has emerged as an amalgam of differing passions and there is some international accord about its acceptable scope and effects. The functioning systems draws from, but is not determined by, economic arguments from either extremes. Two other value systems contribute to the outcome. First, the ideal values which have been placed upon the contribution of all arts to human culture, notably in Europe, have been an essential part of the rhetoric for copyright from the French Revolution onwards. In the last half-century, this has led to demands that authorship, far from being downgraded, should attract enhanced protection in law. So, it is that moral rights have often been given guaranteed form in order that the author may be sure of being named and may object if its contents are deleteriously altered. So, in various countries, authors have been protected against the full force of "free contracting"; in certain circumstances they are assured of equitable remuneration or fair compensation or protection against unconscionable bargaining (Samueksib: 2001).
Secondly, copyright's role in underpinning the democratic process is presented as a distinct and vital function (Samueksib: 2001). Democracy can operate only upon a premise of free and open debate, and it is a basic element of the history which we have examined that modern copyright emerges only with the passing of a censorship run by bookseller power-brokers in league with the church and the State. By outlawing pirate copying in the marketplace, copyright fosters the presentation of arguments on social, political, religious and economic policy in highly significant ways. This perception provides its own force. It is likely to strengthen the view that copyright should last only for a limited period, since so far as possible the borrowing and exchange of ideas is itself crucial to a free society. Equally, a social contribution can properly be demanded from copyright owners. In return for the valuable support which the State offers by conferring the rights, right-owners can be expected to contribute in limited ways to social policies on maintaining the stock of knowledge, fostering the processes of research and education, allowing the transmission of news and the expression of criticism and review. Hence, the various exceptions for ‘fair dealing’ which our law currently admits, in addition to the general principle that infringement requires substantial taking from a work.

Over the last decade, the amazing potential of the Internet as a source of online services for education, information, entertainment, business and government has dawned around the world and its character has changed rapidly. Parts of it are already being used to supply the stuff of the traditional copyright industries; and more is to
come. The publishing, record and film industries face, at least, a partial revolution in the methods of delivery and they are each searching actively for secure techniques by which material can be obtained from authorised sites only on payment of a fee equivalent to the purchase or hiring of a hard copy of material. At the same time, they fear the appearance of pirate sites and the downloading and distribution of illicit copies, which on the worst prognostications, could amount to a complete undermining of their commercial position. However, the possibilities within the new technology for monitoring the use of material are also considerable, and many do not take such a pessimistic view of the future (Crawford and Gorman: 1994).

2.6.7 WIPO Copyright Treaty (WCT)

The World Intellectual Property Organization (WIPO) Copyright Treaty 1996, adds various general provisions to the range of the Berne Convention. The Treaty deals with online digital services. It lays down the right that works within the Convention be communicated to the public (through wire or wireless means), including through “making these available to the public in such a way that they may access these works from a place and at a time individually chosen by them” (Art.8). Since it was not previously clear in many copyright laws that communication to the public could take place in such a piecemeal fashion, the clarification makes sense.

However, the attempt to secure the right of electronic reproduction of extreme particularity became a far more controversial
issue. Internet placement and transmission involves constant storage, some of them only transient, others more or less permanent. Rights owners hoped for a decision that would embrace them all, thus in principle making all providers of services liable for their roles in distribution. The campaign failed and no reproduction rights were included in this treaty by way of supplement to the Berne Convention Article 9.

2.6.8 WIPO Performances and Phonograms Treaty (WPPT)

The WIPO Performances and Phonograms Treaty (WPPT) 1996, specifically recognises exclusive rights of aural performers, including moral rights with reference to the Right of fixation of unfixed performances, Broadcasting & communication of unfixed performances, Reproduction, Distribution, Rental, and Making available to the public. The Treaty, in general, deals with IPR of two types of beneficiaries: (i) performers, and (ii) producers of phonograms.

As for performers, according to the Treaty performers get four types of economic rights in their performances fixed in phonograms (not in audiovisual fixations, such as motion pictures). These are the right to: (i) reproduction, (ii) distribution, (iii) rental, and (iv) making them available. Each of these is an exclusive right, subject to certain limitations and exceptions (Art.7-10).

According to the Treaty, performers get three rights vis-à-vis their unfixed (live) performances. These are the right to: (i) broadcasting, (ii) communicate to the public, and (iii) fixation(Art.15).
They also get moral rights: that is, the right to claim to be identified as the performer and the right to object to any distortion, mutilation or other modification that would be prejudicial to the performer’s reputation.

As far as producers of phonograms are concerned the Treaty grants them the right to: (i) reproduction, (ii) distribution, (iii) rental, and (iv) making available (Art.7-10). Each of these is an exclusive right, subject to certain limitations.

In the case if both performers and phonogram producers, the Treaty lays down that subject to certain exceptions and limitations, each contracting party shall, accord to nationals of other contracting parties, the treatment it accords to its own nationals or national treatment. According to the provisions of the Treaty, performers and producers of phonograms can enjoy the right to a single equitable remuneration for direct/indirect use of the phonograms, which are in basically published for commercial purposes, broadcasting or communication to the public. However, any contracting party may restrict or - provided that it makes a reservation to the Treaty - deny this right. In the case and to the extent of a reservation by a contracting party, the other contracting parties are permitted to deny, vis-à-vis the reserving contracting party, the national treatment (Art.4).

2.6.9 Beijing Treaty on Audiovisual Performances (BTAP)

Hence, Beijing Treaty on Audiovisual Performances (BTAP) tries to develop and maintain the protection of the rights of
performers in their audiovisual performances in a manner as effective and uniform as possible. This treaty was adopted by the Diplomatic Conference on the Protection of Audiovisual Performances in Beijing, on June 24, 2012. However, it has not yet entered into force. As the preamble of the treaty states, has been adopted by recognising the need to:

(a) the need to roll out new global rules aimed at sorting out issues thrown up with economic, cultural, social and technological developments;

(b) the impact of the development and convergence of information and communication technologies (ICT) on the production and use of audiovisual performances, and

(b) the need to maintain a balance between performers’ rights in their audiovisual performances and public interest.

Under BTAP, contracting parties are obliged to provide the same protection granted under this law to performers who are nationals of or have habitual residence in other contracting countries. The principle of ‘national treatment’ is incorporated under BTAP. Article 5 creates moral rights, independent of economic rights and at least until the expiry of the economic rights, for performers with regard to their live performances or in audiovisual fixations. It includes the right:
(a) To claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance; and

(b) To object to any distortion mutilation or other modification of his performances that would be prejudicial to his reputation, taking due account of the nature of audiovisual fixations.

The performers have the exclusive economic right of authorising, as regards their unfixed performances; (i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and (ii) the fixation of their unfixed performances. In respect of their performances fixed in audiovisual fixations, in any manner or form, the performers are entitled to: Right of reproduction, Right of distribution, Right of rental, Right of making available fixed performances, and the Right of broadcasting and communication to the public. However, in the absence of any contract to the contrary, once a performer consents to fixation of his performance in an audiovisual fixation, the exclusive rights of authorisation would be transferred to the producer of such audiovisual fixation (Art. 7-11).

Performers are provided protection at least until the end of a period of 50 years computed from the end of the year in which the performance was fixed (Article 14). BTAP requires the contracting parties to provide adequate legal protection and effective legal remedies against circumvention of technological measures used by performers with regard to the exercise of their rights under this
Treaty and which restrict acts, in respect of their performances, which are not authorised by the performers concerned or permitted by law. Also, the contracting parties are obliged to provide adequate and effective legal measures concerning rights management information. This treaty is open to all WIPO members, mirrors the principle of automatic protection; that is, no formalities are required to acquire the rights under the treaty.