SUBJECT MATTER OF COPYRIGHT & AUTHORS' RIGHT

After undertaking a survey of historical background of copyright law at the International level including a discussion on various Conventions and examining the copyright law in United Kingdom, United States of America and India in its historical retrospect in the previous chapter, it is in the fitness of things to discuss the subject matter of copyright both under the International Copyright Conventions as well as in the three countries which are under study. In addition to this, the chapter also examines the question of author’s rights. The term authors' rights is the term used to distinguish copyright from neighbouring rights, the principal distinction being that the former subsists in original works of authorship while the latter subsists in derivative works. The purpose of this chapter is to examine the principle features of legal protection for author’s rights, as embodied in the International Conventions, and as reflected in copyright systems of U.K., U.S.A. and India.

SUBJECT MATTER OF COPYRIGHT

(A) CREATION OF THE WORK:

(i) Quality:

There is a general agreement that the quality or merit of a work are matters of taste and do not enter into the question of what is a work?
Nor is there a prescribed degree of ability or amount of skill and knowledge necessary to create the work, or a measure of resources which form subject matter of this study, it will in each case be a question of degree whether the labour or skill or ingenuity or expense involved is sufficient to warrant a claim of copyright. For instance in United Kingdom, even simple compilations like a football coupon consisting of a list of forthcoming matches with spaces for punter to put a sign for win, lose or draw, were held to have a copyright. The argument that anyone can do it was met by the House of Lords saying ‘if you can do it yourself then do it yourself, but if you copy someone else’s work you must pay for it. For the same reason examination papers have been held to be ‘literary works’, as have trade lists, street directories, and time-tables.

(ii) Originality:

Unlike for a patent, where novelty is essential, there is no such requirement for copyright. However, it is generally the case that to be copyright-protected, a work must be original. The new U.K. copyright Act i.e. Copyright, Designs and Patents Act 1988 makes reference to 'original literary dramatic, musical or artistic works’. The United States Copyright Act 1976 also uses the expression 'original works of authorship’. Borrowing from Great Britain, the Indian Copyright Act 1957 refers to ‘original literary dramatic, musical or artistic works’.
But this emphasis on *originality* has to be understood in a very wide sense and does not mean *novelty*. It means no more than that the creator can truthfully say - "This is all my own work". It is possible for two different persons quite independent from one another to make the same invention. In such cases the invention first registered at the Patent Office will have the prior claim and other will not be protected. Not so in copyright. Infringement of copyright predicates the use of someone else's work. If the similarity or even identity is accidental there is no infringement. Thus, taking the examples cited above, if two people set out independently from one another to make a map or street directory using identical or very similar information and producing very similar results, each will have a copyright in his work. The net result of this is that the writer, the composer, the painter, the sculptor or anyone creating copyright material need not fear the existence of pre-existing rights which would threaten his copyright. This is the reason why the requirement of registration or deposit is not necessary in a copyright systems including U.K. and India although some countries (notably the United States) have voluntary systems, for varying reasons.

(iii) **Derivative Works:**

So far we have dealt with primary works, in the sense that the author starts from nothing and creates a work, however humble or pedestrian may be the creation. There are, however also works where
the author starts with a pre-existing work and by an additional intellectual input of his own, creates a new work. The earliest examples were translations of a literary work into another language. The translator needs the permission of the author of the pre-existing work to make the translation, but he has himself a copyright in his translation.

There is a copyright in the adaptation of a literary work such as play adapted from a novel or a film script adapted from a play. In the realm of musical works, adaptations are usually called arrangements, e.g. an orchestral work arranged for piano, or conversaly a song written with piano accompaniment orchestrated for voice orchestra. In popular music there are many arrangements of original songs made to suit a particular performer or a particular language version of the text. Each such adaptation or arrangement is a work provided there is a sufficient element of intellectual creation. The intellectual input of the adapter or arranger may be quite modest to be sufficient.

In an anthology, e.g. a collection of poetry or extracts from other literary works by different authors, the originality or the intellectual input lies in the selection and the arrangement of the pre-existing works. The creator of the collection has a copyright in the collection, though not in the pre-existing works of which it consists.

A collective work, in which copyright subsists in the individual items of the collection as well as in the collection itself, is to be
distinguished from a compilation, in which copyright subsists in a compilation of facts which are not in themselves eligible for copyright protection. For example, while an individual name and telephone number may not be copyrightable, most jurisdictions recognise that a compilation of names and telephone numbers in a telephone directory is copyrightable. However, the requirement of originality in relation to such compilations remains unsettled, particularly when they take the form of computerised databases. Some courts in the United States, for example, have held that a minimal expenditure of time, money and labour (the so-called 'sweat of the brow' theory) in compiling the data is sufficient to make the resulting compilation eligible for copyright protection; other courts have held that the compiler must show originality of selection or arrangement of data in order to be entitled to copyright protection, a requirement that may be particularly difficult to meet in the case of a comprehensive, randomly arranged, electronic database.\(^{12}\)

If the translation or the arrangement of a pre-existing work is recorded or the screen play filmed, the producer of the phonogram or the film will have a copyright in the common law countries (e.g. the U.K., U.S.A. and India) or a neighbouring right in many other countries. Thus there will exist, superimposed one upon the other, several copyrights or neighbouring rights: 'the copyright of the author of the primary work, the copyright of the translator or adapter or arranger and the copyright
of the producer of the phonogram or the film. In a song written by A, orchestrated by B, recorded by C, or a novel written by A, dramatised by B and filmed by C, A, B, and C will have copyrights or neighbouring rights in most countries.

(B) **FIXATION OF THE WORK:**

In all common law countries including the three under discussion, fixation is crucial. The work has to be fixed in writing or in some other material form to qualify for a copyright. This is not to say that a work cannot be complete while merely in the mind of the author, e.g. a composer may play his composition or a poet recite his poetry without having written anything down beforehand. The work is an intellectual creation not a material thing. However, in common law jurisdictions it does not acquire protection until it is reduced to material form. In other words, fixation is a condition precedent to the existence of copyright. The work can exist in a complete state in the mind of the author, but he has to take a further step before acquiring a copyright, he has to fix it in material form. This is not so in most Civil law jurisdictions, particularly in France and Germany. In these jurisdictions, a lecture given without a script or a musical performance of a work without a score is protected. In view of this position the Berne Convention does not take sides and provides\(^{13}\) that it is ‘a matter for legislation in the countries of the Union’ to require fixation ‘in some material form’.
This gives each country the possibility to demand fixation either generally or for one or more categories of works\textsuperscript{14}.

'Writing' is not required in International law. The Berne Convention defines a literary work as: "every production in the literary domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings......"\textsuperscript{15} It seems to follow that in all Berne Convention countries, any form of fixation other than writing will suffice to acquire a copyright. Apart from the obligation to honour the Convention, the opposite interpretation would lead to very odd results in the light of modern technology, e.g. a musical work not written down on paper but played and recorded would not be protected as a work and anyone who copied it from the recording would not be an infringer. As this situation arises regularly in recording studios with jazz and popular music, musical copyright would be seriously undermined.

In countries, not members of the Berne Convention writing could be required by the national law. The classic case was the United States, where the word 'writings' occur in the Constitution itself\textsuperscript{16}. This was perfectly logical in the 18th century but when other forms of fixation emerged such as films and records, the courts had to wrestle with the problem and eventually gave the term 'writings' of 'authors' a wide meaning in the light of modern technology declaring a recording a form
of writings which Congress could protect in pursuant to the Copyright Clause of the Constitution. Therefore, under national laws the answer which the law gives to the question: what constitutes fixation? is not of crucial importance to what is and what is not copyright material and who is the copyright owner?

The next stage in the life of the work after creation and fixation is publication.

(C) **PUBLICATION OF THE WORK**:

The definition of publication is relevant in International copyright in several respects:

(i) In the Copyright Conventions the country of publication is one of the connecting factors (e.g. in the Berne Convention\(^{17}\) and Universal Copyright Convention\(^{18}\)) if the author of the work is not a national of a contracting state. In the Rome Convention\(^{19}\) it is one of three connecting factors which can be eliminated by reservation.

(ii) If formalities are required, these may be satisfied in Universal Copyright Convention member countries by use of the UCC-prescribed notice, which must include the year of publication.

(iii) It is relevant for the computation of the term of copyright for those classes of work where the term is \(X\) years from the date of first publication.
(iv) It is relevant for the system of compulsory licenses in developing countries under the Berne and Universal Copyright Conventions 1971 in as much as the date when the issuing of a compulsory licence becomes possible is computed from the publication of the work.

Whereas in the law of libel publication as a term of art has a very narrow meaning, i.e. showing or communicating the writing containing the libel to any person other than the person defamed, in copyright the meaning is wider and closer to the general meaning of the word, i.e. making public. The definition of publication has varied considerably both from country to country and from time to time. In the history of copyright, publication meant originally the making public of copies (i.e. reproductions) of works. When films and phonograms were invented the old definitions began to present new difficulties, which were dealt with in separate ways in different countries.

There are five basic questions which are to be answered here:

(a) Does publication imply publication with the consent of the author?
(b) Does publication require a fixation in a tangible form (corpus mechanicum) and the making of copies or duplicates which are tangible objects, or does, for instance, public performance of a literary or musical work constitute publication?
(c) Are phonograms or films copies for the purpose of publication?
(d) How many copies have to be made available to the public to
amount to publication?

(e) Do these, copies have to be sold, or does hiring out copies for public performance also amount to publication?

The first question is nearly always answered in the affirmative. Unauthorised publication is not 'publication'. The only exception, albeit an important one, is publication under a compulsory license system.

The answer to the second question varies from country to country. In some countries broad definitions like 'making a work public by any means' (Netherlands) or 'the first exercise of the right to use the work shall be considered its first publication' (Italy) or 'a work has been published if it has been made accessible to the public with the consent of the copyright owner' (Germany) are obviously wide enough to include publication by public performance or recitation of a literary or musical or dramatic work, or exhibition of a picture or statue, and are intended to include such means of publication.

On the other hand, the common law jurisdictions adopt a narrower definition of publication, which requires copies (reproductions) of the work to be issued to the public. This clearly excludes publications merely by public performance or recitation of literary or musical works or the exhibition of any artistic work or the construction of a work of architecture.

The major disadvantage of recognizing public performance is the difficulty of ascertaining the date and place of a first performance of a
work, and these two factors govern not only the term of protection but often decide when a work is protected internationally. This is the main reason why the Berne Convention excludes performance from constituting publication.

In France, where publication is nowhere defined in the law, the courts have developed the concept of publication, starting from the publishing of printed copies and gradually including phonograms and films, thus assimilating modern media to the original printed copies. So that making copies available to the public by any means seems to constitute publication and so does public performance, recitation and any form of communicating works to the public directly.

In sheer logic, it is difficult to see why making available to the public phonograms containing the recording of a work should not be publication of that work, as particularly in the field of music the work reaches the public more quickly and in much longer numbers than by printed copies and the same consideration applies to films. However, under the 1956 U.K. legislation and the national laws derived from it publication of a recording of a work did not amount to publication in law. This attitude was based on the essential difference between a copy of a book and copy of a phonogram. Whereas a printed copy is a ‘neutral’ reproduction of the work, a phonogram is a reproduction of the recorded performance of the work. Thus, the performance comes
between the work and the copy whereas there is no such intervention in the printed copy of a book. Thus, recognising this difference the publication of a phonogram is regarded as publication of the recording which is a derivative work, but not of the work recorded. On the other hand, the making of a recording or a film provides the certainty of place and time which mere (unrecorded) performance lacks. However, the latest amendments in both United Kingdom as well as in India have taken care of this problem and now making a work available to the public by issue of copies or by communicating the work to the public is regarded as publication. This was in line with the United States Copyright Act 1976 which provides that 'publication is the distribution of copies or phonorecords of a work to the public' thus preserving the traditional and as we have seen above not unwarranted distinction between 'copies' and 'phonograms' but widening the concept of publication by including publication of 'phonorecords' (i.e. the recorded version) of a work.

The Berne Convention also adopts a wide definition of publication. A work is published if, with the consent of the author, it is made available to the public 'whatever may be the means of manufacture of the copies'. However, performance, recitation, broadcasting of literary, musical, cinematographic works, exhibition of works of art and construction of works of architecture, are specifically
excluded as not constituting publication.

The Universal Copyright Convention contains a definition of publication which requires 'reproduction in a tangible form' and the copies must be 'copies from which it can be read or otherwise visually perceived'. This clearly excludes phonograms and computer software distributed only in machine-readable code, but includes films, although in the latter case it poses a problem with regard to the soundtrack of a film.

The Rome Convention defines publication of a phonogram as 'the offering of copies....'. As to the question of what number of copies, the normal rule is that it must in the last resort be a matter for the courts to decide in each case. However, the general rule must be that the copies must be sufficient in number to satisfy the reasonable demands of the public. Three points arise at this juncture:

First, the quantity necessary to constitute publication will vary according to the nature of the work. If a book or a record has been a success in the country where it was first published, putting a few copies in a shop for sale in another country will probably not constitute publication there, as it would not satisfy the reasonable demand of the public. On the other hand, it was held in the United Kingdom that putting six copies of the sheet music of a song which was unknown on sale was sufficient to constitute publication.

The place of publication is where the offering of the work to the
public takes place. If a book is printed in country A and copies are shipped to country B where they are stored and then sent to country C where they are offered for sale, publication takes place in country C because that is where the public is for the first time invited to buy them.

Secondly, making available means offering them to the public. There is no need for the offer to be accepted. Thus, it makes no difference if the copies remain unsold. On the other hand, making available must mean that the copies be displayed or advertised in some form so that the public is aware of their availability, keeping copies in a basement without anyone being aware of their existence would probably not be sufficient. Some examples from national laws will illustrate the point, publication must be more than just minimal, there must be 'serious attempt to satisfy public demand, the distribution must be made in a scheduled, deliberate and comprehensive manner.

Thirdly, what is, in this context, the definition of 'the public'? It is submitted that it must mean availability to the general public and that availability to a 'closed group', however, large in numbers, is probably not publication, particularly if, as in the Universal Copyright Convention, the language used is 'general distribution to the public'. The problem is of great practical importance in countries where the state exercises censorship of literary works, so that some of them have to be circulated in a clandestine way.
The answer to the fifth question - have the copies available to be for sale or is availability for hire sufficient? - is of particular importance in the case of films where copies are not offered to the public for sale but are made available to distributors for public performance in the cinemas. The answer must be that the availability for hire is sufficient for publication, as the opposite would lead to absurd position that a film which has been seen by millions is an unpublished because the film producing company only releases a small number of copies for hire to a small number of distributions in any given country. Although this view has been expressly adopted in the official guide to the Berne Convention\textsuperscript{38}, it has been admitted that it requires a wide interpretation of the wording of the Universal Copyright Convention (‘general distribution to the public of copies of a work’). The public is never in possession of any copies of a film as it is in the case of book or a record. It means that general distribution has to be understood as a general communication of the work to the public. The Indian Amendment of 1994 has indeed taken care of this problem.\textsuperscript{39}

(D) CATEGORIES OF WORKS & SUBJECT MATTERS OF COPYRIGHT:

Some national legislations contain a definition of the works protected (United Kingdom, United States, India), others do not (Italy). Broadly speaking, there are two categories of works. The first is the one which includes the works named in the Berne Convention: ‘literary and
artistic works' which includes dramatic, musical and dramatico-musical works. The second is a category of recent types of works: cinematography films, sound recordings, broadcasts. These categories are ranked as works or subject matter of copyright in the common law jurisdictions (U.K. U.S.A., Australia, India etc.) In other jurisdictions, the second category ranks as subject matters which enjoys neighbouring rights. Even more recent subjects matters such as videograms and computer software. Videograms come within the definition of cinematograph films in nearly all countries and are, therefore, works in countries where films are works. The most significant difference between videograms and films is that the latter are mainly shown in public cinemas while the former are shown in private homes. Computer software, means programs devised to control the working of computers & is generally regarded as coming within the definition of 'literary works'.

Thus, the historical process of extending the categories of works continue as the British Copyright Council put it:

Over the years the types of works protected by copyright have been extended, as has the scope of protection afforded. Today copyright subsists in almost all works representing the product of labour and/or skill, if fixed so that they can be reproduced.40
The United States Copyright Act 1976 which lists seven categories of 'works of authorship does make it clear that these categories are illustrative and not limitative', and thereby reinforces the point that, like the categories of tort, the categories of copyrightable works are never closed.

(E) AUTHORS RIGHTS:

After discussing subject matter of copyright, now we should examine rights of authors. The major rights under copyright law include both economic rights and moral rights. While copyright is an idealistic concept, starry-eyed idealism should be discouraged. Copyright is 90% about money but that is not to say that the remaining 10% can not be as important as the 90%. The importance of the 90% was well put by Beaumarchais:

People say that it is not noble on the part of authors to plead sordid interest while claiming to aspire to glory. They are right, glory is attractive, but they forget that, to enjoy it for just one year, nature condemns us to dine three hundred and sixty five times.\(^{42}\)

The importance of the other 10% is contained in the definition of the droit moral in French law: The author shall enjoy the right to respect for his name, his authorship, and his work. The right shall be
attached to his person. It shall be perpetual, inalienable and imprescriptible. Its main objective is to safeguard the author's reputation, what Shakespeare called that immortal part of myself.

(i) Economic Rights:

The enumeration of the author's economic rights under the Conventions and in national legislations is not uniform; the terminology differs; several rights overlap; and the precise scope of each right varies from one country to another. Nevertheless, as detailed below, the following basic rights - or their equivalents - are found in one or both of the Copyright Conventions and in nearly every national copyright law including U.K., U.S.A. and India:

(a) the reproduction rights;
(b) the adaptation rights;
(c) the distribution rights;
(d) the public performance right;
(e) the broadcasting right; and
(f) the cablecasting right.

The economic rights of the author are in a large majority of cases assigned to an entrepreneur such as a publisher of books or music, a film producer or a record producer. The latter uses his judgement, both artistic and commercial and, in the case of the film producer or record producer, adds his entrepreneur who carries the risk of failure and reaps
the profit of success. He also pays for the marketing and advertising of
the works in its fixed form. It is the rationale of copyright that if he is
to recoup his investment and make a profit he has to be protected
against unauthorised reproduction. If he were not so protected the
‘pirate’ could almost invariably produce copies at a much lower price.
In book publishing the pirate’s price would be lower, but he still has
substantial costs. In record production the pirated product is sold at a
much lower price because the pirate only bears the cost of manufacture
and distribution and saves both copyright royalties and recording costs.
In film production the pirate’s costs are only a small fraction because of
the very high cost of making the original film.

About the absolute necessity of copyright protection there can,
therefore, be no doubt, even when contemplating only the economic
rights of the author. However, controversy is possible on two issues:
First, how long should the protection be, and secondly, should it be
absolute i.e. including a right to forbid any use of the work, or should,
in certain cases, use be permitted without the authorisation of the
author, against the payment of a fair and equitable remuneration, i.e. by
a compulsory licence? The argument for the term of protection, i.e. the
duration of the copyright, has, throughout the history of copyright, been
carried by the moral right of the author. This point is well illustrated by
the first Copyright Act in history: the Statute of Queen Anne (1709) in
the United Kingdom. The copyright term of 14 years was taken from patent law and clearly intended to allow the printer/publisher to recoup his costs. It also gave the author a further term of 14 years, making 28 years in all but only if at the end of the first 14 years the author was still alive. Thus, the Act clearly distinguished between what it deemed necessary for the publisher to recover his investment and what it deemed necessary for the benefit of the author. However, in later Statutes the two terms were amalgamated into one, which was assignable as a whole to the publisher. It was gradually lengthened beyond the life of the author until it reached 50 years post mortem auctoris in the Berne Convention in 1908. The motivation for this gradual lengthening of the term was clearly the moral right of the author which links his personality to the work and thus leads to the concept that copyright is a property right in the work which can and should be passed to the creator's heirs and successors.

(a) The Reproduction Right:

The reproduction right - the right to authorise the reproduction of a work in copies - is of course the most fundamental of all the author's economic rights and it is recognised in the Berne Convention, in the Universal Copyright Convention, and in virtually every National Copyright Law including U.K., U.S.A. & India.

It is, generally, accepted that every means by which a work of
authorship may be reproduced is embraced by the reproduction right, including traditional methods of design, engraving lithography, offset and all other process of printing, as well as more modern techniques of photocopying, mechanical and magnetic recording, and the like. What is less settled is whether certain uses of a work - such as storage and retrieval in a computer system - fall within the scope of the reproduction right. Also in doubt is the effectiveness of the reproduction right in relation to ‘home taping’ of sound recordings, films and computer programs, and ‘reprography’ of literary works.

The reproduction right, generally, includes the initial fixation of a work in any material form, e.g. the recording of a musical or dramatic performance, as well as any subsequent duplication of the initial fixation, e.g. the making of copies of a sound recording or film.

The application of the reproduction right to works of architecture presents special problems. Four potential acts of reproduction may be identified here:

1. Copying one architectural drawing in the form of another building;
2. Copying one building in the form of another building;
3. Copying a drawing or model in the form of a building;
4. Copying a building in the form of a drawing or model.

While the first activity obviously infringes the reproduction right unless authorised by the author, it is less clear whether the other three
activities infringe. However, the recent UNESCO/WIPO statement of principles recommends that all four activities described above should be counted among the author’s rights to authorise reproduction\textsuperscript{51}.

(b) **The Adaptation Right:**

The adaptation right is the right to authorise the adaptation, arrangement or other alteration of a work. Examples of adaptations include: translations from one language to another; musical arrangements of the spoken or written word; dramatisations of non-dramatic works and vice-versa; fictionalisations of non-fictional works and vice versa; motion picture versions of plays or novels and vice versa.

The adaptation right is expressly recognised in the Berne Convention\textsuperscript{52} and somewhat indirectly adumbrated in the Universal Copyright Convention\textsuperscript{53}. In addition, a translation right is separately enumerated in both Conventions\textsuperscript{54}.

Computer technology has raised a number of questions concerning the scope of the adaptation right. Principal among these is the question of whether the conversion of a computer programs from one programming language to another falls within the adaptation right? As detailed elsewhere in this study\textsuperscript{55}, those courts that have had occasion to consider this question have generally held, by analogy with foreign language translation, that unauthorised program conversion does infringe the adaptation right.
Adaptation is usually understood to involve a pre-existing work from one medium to another, e.g. from book to films or from two dimensions into three or vice versa. But it may also involve alterations to a work in the same medium, such as revising the first edition of a book to create a second edition. The exercise of this right to alteration creates special problems in relation to works of architecture in as much as the owner of a building may need to change it from time to time, the question arises as to whether such changes conflict with the exclusive right of the author (generally the architect) to authorise any alteration? The recent UNESCO/WIPO statement of principles recognises this problem and suggests the following approach to reconcile the conflicting interests of owner and architect.

The author of a work of architecture should enjoy the exclusive right of authorising alterations of that work, except where the alteration is of a kind that is of great importance to the owner of the building or other similar construction and it does not amount to a distortion, mutilation or other modification which would be prejudicial to the honour or reputation of the author of the work of architecture.36

There is obviously considerable overlap between the adaptation right and the reproduction right. For example, a three-dimensional
sculpture may be a reproduction of a two-dimensional drawing, as well as an adaptation of that drawing. This overlap occurs because the reproduction right includes the right to authorise the making not only of identical copies but also of versions that are substantially similar to the original work. Were it otherwise, an infringer could escape liability by making some merely trivial variation in the infringing work. It follows that most, possibly all, derivative works will infringe the reproduction right as well as the adaptation right unless authorised by the author of the original work.

It is important to recognise that adaptation may be protected by copyright law quite independently of the original works from which they are derived. Thus, as the Berne Convention recognises, two copyrights may subsist in a foreign language translation: one in the translation itself, and another in the underlying work. The Berne Convention also makes clear that copyright in an adaptation is without prejudice to copyright in the original work. It follows that a translation may not be copied without the consent of both the translator and the author of the translated work.

Sometimes it may be difficult to determine whether a derivative work is entitled to its own copyright or not: a slavish copy of the original work obviously does not qualify for independent protection; as the United States court have aptly put, something more than a ‘merely
trivial variation is required. How much more is a question of fact to be decided on a case-by-case basis.

(c) The Distribution Right:

(1) The Basic Right:

The right of distribution is the right to authorise the distribution to the public of copies of a work. 'Distribution' for these purposes includes sale, lease, rental, lending or any other transfer of ownership or possession of copies of the work.

Except in relation to cinematographic rights under the Berne Convention, the distribution right is not expressly recognised by Berne or the Universal Copyright Convention. Nevertheless, as the WIPO guide explains:

In practice it (the distribution right) flows from the right of reproduction. The author, when he has made a contract about the reproduction of his work, can lay down conditions governing the distribution of copies, e.g. as to number (although in practice it is usually the publisher who decides on the size of the edition) and as to the countries in which these copies may be sold.

However, the distribution right is expressly mentioned in both U.K. and U.S.A. In India, it is included in the reproduction right. But
the 1994 Amendment has now, expressly provided for it by inserting it in Section 14.

(2) **First sale or Exhaustion:**

Traditionally, the distribution right has been viewed as extending only to the initial circulation of copies of a work; after the first sale of a particular copy, the distribution right was said to be ‘exhausted’ in relation to that copy, and subsequent purchasers were free to resell or otherwise dispose of it. This is the so called ‘first sale’ or ‘exhaustion’ doctrine which is explicitly recognised in the U.S.

(3) **Rentals:**

In response to the rapid growth of a commercial rental market in sound recording, video cassettes and computer software, a number of countries have created a limited exception to the first sale or exhaustion doctrine by introducing a rental right in certain categories of work.65

The development of a rental market in records and films has been the subject of study at the International level by a group of experts convened jointly in 1984 by UNESCO and WIPO and a rental right in videograms and phonograms was recommended in the recent UNESCO/WIPO statement of principles.64 In favour of such a right, it was argued that: ‘Rental and Public lending’ undermine the normal exploitation of the works concerned and is prejudicial to the legitimate interests of the owners of copyright.65 It was also noted that rental or public lending
'may facilitate private copying', although it was argued that private copying and rental should be the subject of separate rights and separate provisions in national laws.66

The question of non-commercial rental, better known as the 'public lending right', is also a matter for debate. In the United States, the rental right is limited to commercial rentals. By contrast, in the United Kingdom, the 1988 Copyright legislation creates a rental right in the rental of sound recordings, films and computer programs by public libraries, regardless of whether a rental fee is charged, and this new right is in addition to the existing public lending right in books.

Another question for debate is whether the rental right should be subject to the obligation of national treatment, so that foreign authors are entitled to enjoy the same protection in relation to rentals as the nationals of the country in which protection is sought. In as much as the rental right is not expressly recognised under the Berne or the Universal Copyright Convention, it might be argued that the principle of national treatment does not apply in the absence of a bilateral agreement between the countries concerned. However, the Committee of government experts jointly convened by UNESCO and WIPO to consider the statement of principles on audio-visual works and phonograms agreed that the principle of national treatment should apply in the case of rental rights.67
(d) **The Public Performance Right:**

The public performance right, the right to authorise the performance of a work in public, is recognised both by the Berne Convention and the Universal Copyright Convention and by most national laws including U.K., U.S.A. and India.

(1) **The Works Covered:**

For obvious reasons, the public performance right extends only to those works that are capable of being performed, namely literary, dramatic, dramatico-musical, musical and choreographic works, and pantomimes. Dramatico musical works are works created for the stage with musical accompaniment, such as operas, operettas, musicals etc. In respect of literary works, the right to authorise public performance is covered by the Berne Convention in a separate but comparable provision known as the 'public recitation right'. In U.K., U.S.A. and India, this public recitation right is subsumed under the general public performance right.

(2) **The Nature of 'Performance':**

The public performance right embraces not only traditional 'live' performances by actors, singers or musicians on the spot, but also recorded performances. Thus, the owner of copyright in a musical work has the right to authorise its public performance both by a live orchestra and also by means of a sound recording or film or video cassettes. In
addition, where national law grants a separate public performance right in sound recording or film, the owner of copyright in that work also enjoys the right to authorise its public performance. The U.S. law, for instance, grants a public performance right in films but not in sound recording. Under such circumstances, therefore, the public performance of a sound recording or film may require two consents, one from the owner of copyright in the sound recording or film and another from the owner of copyright in the underlying work. The Indian law also after the 1994 Amendment, now recognises specifically the rights of performers.

While the Berne Convention contains a separate but comparable provision for the public performance of films and their underlying works, most national laws deal with film performances under the general public performance right. In some countries such as U.S.A. broadcasting and cablecasting are also covered by the public performance right. Other countries such as U.K. and India etc, as well as Berne Convention and Universal Copyright Convention recognise a separate right to authorise a broadcast or cablecast of a work.

(3) The Meaning of ‘Public’:

It is axiomatic that the right to authorise the public performance of a work applies only to performances. However, the copyright Conventions do not define what is meant by the term ‘public’ and it is a matter for each member country to draw the dividing line between
public performances for which the copyright owner’s consent is required and private performances for which consent is not necessary. While some countries such as U.K. and India have left this decision to their courts, a growing number in recent years (France & Germany being most important) have enacted statutory definition either by defining what is to be considered a ‘public’ performance or by listing examples of performances that are not to be considered ‘private’. Irrespective of whether the meaning of public performance is defined by Statute or by the Courts, the following trends and issues may be identified.

First is the almost universal recognition that performances within a purely domestic circle are not performances ‘in public’. A second and related point, exemplified in the U.S.A., is that the domestic circle is usually defined as including both a ‘family’ and its ‘social acquaintances’.

Thus, in most countries, a performance at a typical wedding reception would not be considered a ‘public’ performance, regardless of the fact that it may be attended by a large number of unrelated family friends conversely, a performance which takes place before an audience that is connected neither by family relationship nor by social acquaintance would not be considered a private performance, even though it is attended by very few people.

Where national law treats the normal circle of a family and its social acquaintances as a private gathering, the question arises as to
whether a group of people connected only by social acquaintance rather than by family relationship is also treated as a private gathering. A related question is whether a social acquaintance may be inferred where a group shares facilities for work (e.g. in a factory), accommodation (e.g. in a residential training establishment) or for recreation (e.g. in a holiday camp). The emerging view is that mere social acquaintance in the absence of family relationship should not be enough to constitute a domestic and, therefore, a private circle, and that social acquaintance should not be inferred simply from the fact that people share facilities for work, accommodation or recreation.

Another issue is whether a place where people are incarcerated against their will (e.g. a prison/or do not reside by choice e.g. a hospital) may be said to be 'public places'. Certainly such institutions are not 'open to the public' in the usual sense of that phrase. Nevertheless, since the inmates or residents are not usually connected by family or social acquaintance, it follows that they are not members of a 'domestic' circle and that performances in such institutions should be treated as 'public performances'. A similar analysis applies, a fortiori, to other institutions (such as hotels) in which people reside at their own free will.

(e) **The Broadcasting Right**

The broadcasting right, the right to authorise the transmission of a work by any means of wireless diffusion, is found both in the Berne
Convention and in the Universal Copyright Convention. Under some national laws (U.S.), the broadcasting right is subsumed under the public performance right, while under other national laws (U.K. & India), it is separately stated. Irrespective of whether the broadcasting right is recognised as a separate right or as a part of the public performance right, its basic features are well established.

(1) **The meaning of ‘Broadcasting’**:

In the first place, it may be noted that the broadcasting right applies both to sounds and visual images, i.e. to radio and television. Second, like the public performance right, there must be some communication to the public in order to invoke the broadcasting right. This doesn’t mean that the broadcast signals must actually be received by the public, only that they are ‘intended to be received directly by the general public’. Thus telephone communications are not ‘broadcasts’ for copyright purposes. By the same token, it is immaterial whether the broadcast signals are received by members of the public at the same place or at the separate places (e.g. in their houses) or at the same time or at different times (e.g. when a broadcast is transmitted for delayed viewing in different continental time zones), and this point is expressly recognised in the U.S. Copyright Statute. The question of whether various kinds of satellite transmission constitute broadcasting raises difficult problems of law and fact which are discussed elsewhere in this study.
(2) **The Scope of the Right:**

The broadcasting right encompasses not only the primary right to authorise the initial broadcast of a work but also a number of secondary rights. As stated in the Berne Convention and recognised in most national law including U.K., U.S.A. and India, these secondary rights include:

First, the right to rebroadcast the original broadcast ('rebroadcasting').

Secondly, the right to retransmit the original broadcast by cable ('cable transmission')

Thirdly, the right to communicate the original broadcast by means of a loudspeaker, T.V., screen, or otherwise in cafes, restaurants, bars, hotels and other public places.

Since all of these secondary uses involve an additional audience not within the contemplation of the parties when authority to broadcast was originally given, they require consent from the owner of copyright in any work included in the original broadcast, subject only to the compulsory licensing provisions described below.

(3) **Compulsory Licensing:**

The Berne Convention permits compulsory licensing of the broadcasting right under certain conditions and in most countries blanket licensing has evolved either by agreement between author's collecting societies and broadcasters or (in the absence of agreement)
by statutory or administrative decision. Whether blanket licensing is appropriate or not depends upon the nature of the work. In the case of musical works used by radio stations, where individual licensing is difficult or impossible because of the great number of works used by the broadcaster, blanket licensing may be a justifiable solution. But, as has been pointed out by the Committee of government experts convened by WIPO and UNESCO\(^8\), no such justification exists in relation to dramatic or choreographic works (nor, it may be added, in relation to literary or audio-visual works), and individual licensing in such cases is to be preferred.

(ii) **MORAL RIGHTS**

Moral rights 'stem from the fact that the work is a reflection of the personality of the creator, just as much as the economic rights reflect the author's need to keep body and soul together'.\(^8\)\(^9\) The moral right is usually referred to by its French name because it originated in French law, from where it found its way into whole Continental European and Latin American laws and into the Berne Convention.\(^9\)\(^0\) Common law jurisdictions, such as the United States, often give similar protection to the author but base it on other parts of the law, such as the law of defamation, of unfair competition or of contract. But in the United Kingdom and India moral rights have now been expressly adopted.\(^9\)\(^1\) There are three basic moral rights.
(a) *Droit de divulgation* (the right of publication) is the right to decide whether the work is to be made public.

(b) *Droit de paternité* (the right of paternity) is the right to claim authorship of published works.

(c) *Droit de respect de l’oeuvre* (the right of integrity) is the right of the author to safeguard his reputation by preserving the integrity of the work.

(a) **Right of Publication**

Although prominent in French law, this is only one of the three moral rights which is not part of the moral right in the Berne Convention. It consists of two rights the right of the author to decide whether and when his work is to be published. If his creditors want to publish a manuscript to satisfy their claims, the writer can stop them. If a composer wants to hear the first performance of an orchestral work before publishing the score, he can prevent publication of it. The other right is the right to withdraw the work after publication if the author wishes to do so. This is certainly the most audacious manifestation of the *droit moral* in the French law. In common law jurisdictions the case for withdrawal will have to be a very strong one to succeed, e.g. a philosopher or scientist who has changed his theory in the light of further work or new discoveries may succeed in having the rest of an edition withdrawn and corrections made in the next edition.
(b) **Right of paternity**

The right of paternity consists of three rights:

First, the right to demand that the author's name appears in an appropriate place on all copies of the work and to claim authorship of it at all times;

Secondly, Conversely, the right to prevent all others from claiming authorship of the work;

Thirdly, the right to prevent the use of his name by someone else in connection with that other person's work.

(c) **Right of Integrity**

This contains the right of the author to authorise or prohibit any modification of his work. This part of the right is mostly used positively by licensing the modification, e.g. turning a novel into a film or a play into a work for television, but can also be used negatively, e.g. by preventing an unauthorised broadcast version or dramatisation of a novel.

It contains the author's right to prevent 'distortion' of his work. All adaptation (e.g., novel into play, play into film) demand a great deal of adaptation. Where the borderline between adaptation and distortion lies will be a question for the courts to decide in the circumstances of the case. Generally, the courts in civil law countries will apply a subjective test: does the author honestly believe that the action of the
adapter would be prejudicial to the honour or reputation of the author? The courts in Common law countries usually apply an objective test: would a reasonable, right thinking, member of the public think that the alteration is prejudicial to the honour and reputation of the author?

It is the essence of moral rights that, in the words of the Berne Convention, they are 'independent of the author’s economic rights. It is unclear whether this means that the moral rights are inalienable whatever the author agrees to in a contract in which he transfers his economic rights, he can still exercise his droit moral afterwards. If, for instance, the contract says that the adapter can turn the novel into a play in the form that appears appropriate to him, the author of novel can still object when he reads the play. The alternative interpretation is that if the author simply transfers the economic rights, he is not held to have transferred his droit moral unless the contract is in writing and says so specifically. It is suggested that the latter interpretation is to be preferred, if moral rights are alienable under the law of the country where protection is claimed. Clauses to the effect that the adapter can modify the work as he wishes, or even that he need not mention the name of the author will be valid, if it is clear that the author at the time of making the contract was aware of the clause and agreed to it for valuable consideration.

It is of the essence of the droit moral that it lasts during the life
of the author. Whether the right can be exercised by the heirs after the
death of the author and for how long depends on the law of the country
where protection is claimed. The 1971 Paris Revision of Berne
Convention provides that the *droit moral* shall last at least until the
expiry of the economic rights. Thus, this is a minimum of 50 years after
the death of the author. However, a reservation is also permitted to limit
it only for the life of the author. In France, the *droit moral* is perpetual.

Thus, it can be said by way of conclusion that the law on the
subject - matter of copyright is fairly settled and at least two models in
this regard are available i.e of giving a list of copyrighted works and the
one which does not give any such list. Similarly on the question of
economic rights of authors, the law in the three countries under study
is almost identical. The recent recognition in these common law countries
of the civil law concept of moral rights of authors is indeed a happy
beginning.
1. See, infra, Chapter on "Neighbouring Rights", Chapter IX.
2. Ladbroke (Football) Ltd. V. William Hill (Football) Ltd. (1964) ALL ER 465.
4. Purefoy V Sykes Boxall (1955) 72 RPC 89, CA
5. Kelly V. Morris (1866) LR 1 Eq 697
6. Blacklock V. Pearson (1915) 2 Ch 376
8. U.S. Copyright Act, 1976, Section 102(a).
9. Indian Copyright Act, 1957, Section 13(a).
10. See., Whitford Committee Report, P. 10
11. Under United States law, this distinction is made explicit in the Statute itself. See US Copyright Act 1976, Section 101 (definitions of 'compilation' and 'collective work'). Also see, Section 2(0) of Indian Copyright Act 1957 as amended in 1994 which lays down 'compilations' as a literary work.
12. Section 103 of the U.S. Copyright Act 1976 makes it clear that copyright protection extends to the two types of works employing pre-existing material or data: 'Compilations' and 'derivative works'. The former has been defined as a work formed by the collection and assembling of pre-existing material or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship, and the latter as a 'work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatisation, fictionalisation, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted'. The definition adds: A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".
14. For instance, for choreographic works and pantomimes.
15. Berne Convention, Article 2(4).
17. Berne Convention, Article 3(1)(b).
18. Universal Copyright Convention, Article II/1.
19. Rome Convention, Article 5.1(c).
20. The concept of compulsory licensing comes from patent law where it is used to prevent the patentee from being the sole producer, forcing him to face direct competition from others, subject only to the payment of a reasonable royalty. In copyright law the effect of a non-voluntary licence is that the absolute right of the copyright owner is reduced to a right to equitable remuneration. This right to equitable remuneration distinguishes compulsory licences from free uses of the work.
22. Italian Copyright Law 1941, Article 12.
23. German Copyright Law 1965, Article 6/5.
24. E.g. U.K. Copyright, Designs & Patents Act 1988; Section 175; U.S. Copyright Act 1976, S 101; Indian Copyright Act 1957, Section 3.
27. Listed in Article 27, French Copyright Law 1957.
27. In many cases of popular music no 'sheet music' (printed copies) is published but only the recordings.
29. U.K. Copyright Act 1956, Section 49 (1) (a).
30. E.g. India, Australia and, until 1976, the U.S.
31. Indian Copyright Act 1957, Section 3 inserted by 1994 Amendment which replaced the outdated earlier definition of publication. Also see U.K. Copyright, Design & Patent Act 1988, Section 175.
32. Berne Convention (1971), Article 3(3).
33. Universal Copyright Convention (1971), Article VI.
34. Rome Convention, Article 3(d).
35. Francis Day V. Feldman (1914) 2 Ch 728, Ca.
36. This is justified by the nature of the work as an intellectual creation, with the result that whether to publish or not must depend on the decision of the right owner and can not depend on the taste of the public at any particular time.

37. Indian Copyright Act, 1956 in its Section 3 lays down that publication in case of a literary, dramatic, musical or artistic work, means, the issue of copies of the (work either in whole or in part, to the public in manner sufficient to satisfy the reasonable requirements of the public having regard to the nature of the work. Also see U.K. Copyright Act 1956, Section 49(2) (b).

39. Supra note 31.
40. Quoted in the WHITFORD COMMITTEE REPORT, Supra note 10, para 28.
41. U.S. Copyright Act 1976, Section 101.
42. Quoted in STEWART, S.M., INTERNATIONAL COPYRIGHT NEIGHBOURING Rights, p. .
43. French Copyright Law 1957, Article 6 (‘impresscriptible is used in the WIPO translation and means ‘not subject to prescription’)

44. Milton’s Paradise Lost was sold outright for £5 and it took the publishers seven years to sell the first edition of a few hundred copies.

45. The term of 28 years was taken across the Atlantic at the end of the 18th century and in the form of 28 years plus 28 years on renewal, formed the term of United States Copyright law until 1976 when it was replaced by 50 years after the death of the author under the influence of the Berne Convention. The 50 years after the death of the author term has been in operation in India since 1957.

46. There is still a remnant of the division in the ‘reversion provisions’ in some common law countries: the U.K. Copyright Act 1911, Section 5(2), repealed in 1956, however still applies to pre-1952 works (schedule 7, para (3) and schedule 8, para (b) of the Copyright Act 1956 and Schedule I, para 27 of the Copyright,
Design & Patent Act 1988); U.S. Copyright Act 1976, Section 304 (6) for works created before 1978, where the rights in a work, although assigned to a publisher revert to the author or his heirs for the last years of the term of copyright.

47. *Post mortem auctoris*: after the death of the author.


49. See infra Chapter on "Computer Software", Chapter VI.

50. See infra Chapter on "Literary, Dramatic & Musical works", Chapter V.

51. See UNESCO/WIPO/CGE/WA/3 at para 21.

52. Berne Convention, Article 12.

53. Article IV bis of the UCC provides that the economic rights "extend to works protected under this Convention either in their original form or in any form recognisable derived from the original.

54. Berne Convention, Article 8; UCC, Article V.

55. See infra Chapter on "Computer Software", Chapter VI.

56. UNESCO/WIPO/CGE/WA/3 at para 30 (Principle WA4)

57. Berne Convention, Article 12.


59. See UNESCO/WIPO/CGE/AWP/3 at para 62.

60. U.K. Copyright, Design & Patents Act, 1988, Section 18; U.S. Copyright Act 1976, Section 106(3).

61. Indian Copyright Act 1956, Section 14.

62. U.S. Copyright Act 1976, Section 106 (3); Also see House Rep. No 94 - 1476, P. 62.

63. Until 1989, the U.K. Copyright Act did not give a copyright owner a rental right. The 1988 Act introduced a rental right for sound recordings, films and computer programs, see U.K. Copyright, Designs & Patents Act 1988, Section 18. The Indian
Copyright Amendment Act 1994 has also made a similar provision, See Section 14.

64. UNESCO/WIPO/CCE/AWP/3 at para 60.
65. Ibid., at para 58.
66. Ibid., at para 68. See ibid at para 158, arguing that the same considerations should apply *mutatis mutandis* to phonogram. Notwithstanding these warning, the suspicion remains that the legislations in certain countries - notably the United Kingdom and the United States - have introduced a rental right only as a sop to rights owners for their failure to enact a home taping levy.

67. See UNESCO/WIPO/CCE/AWP/4 at para 49 (videogram) para 76 (phonogram).
68. Berne Convention, Article II.
69. Universal Copyright Convention, Article IV bis.
70. WIPO Guide to Berne Para 2.6(d).
71. Berne Convention, Article 11 *ter*.
72. U.K. Copyright, Designs & Patents Act 1988, Section 19; U.S. Copyright Act 1976, Section 106 (4); Indian Copyright Act 1957, Section 14(iii).
73. Berne Convention, Article 14 (i) (ii).
74. The Indian Copyright Amendment Act, 1994 provides for a separate public performance right in films. Section 14(d).
75. See, infra Chapter. See infra Chapter on "Neighbouring Rights", Chapter IX
76. U.S. Copyright Act 1976, Section 101 (definition of 'publicity).
77. In the U.K., for example, performances in a factory during working hours have been held to be 'public' performances F. Turner Ltd. V. Performing Rights Society Ltd. (1943) Ch 167.
78. Berne Convention, Article II *bis*.
79. Universal Copyright Convention, Article IV *bis*.
81. Berne Convention, Article 11 *bis* (i) (ii).
82. See WIPO Guide to Berne, para II *bis* 6. See also U.K. Copyright, Design and Patents Act, 1988, Section 6 (1); Indian Copyright Amendment Act 1994, Section 2 (ff).
83. See WIPO Guide to Berne, Ibid.
84. U.S. Copyright Act 1976, Section 101 (definition of 'publicity').
85. See, infra Chapter. See infra Chapter on "Neighbouring Rights", Chapter IX
86. Berne Convention, Article II bis (i) (i).
87. Ibid, Article II bis (2).
88. See UNESCO/WIPO/CGE/DCM/3 at paras 56 - 58.
90. Berne Convention, Articles bis. The Universal Copyright Convention contains rudiments of moral rights in Article V (e) and (f).
91. U.K. Copyright, Designs & Patents Act 1988, Sections 77, 80, 84, and 85; Indian copyright Act 1957, Section 57.
92. French Copyright Act 1957, article 32.
93. The Whitford Committee in the U.K. and the Government Green Paper 1981 recommended the extension of the moral right to the full period of economic rights (paras 51-51, Whitford Committee Report; ch 18, para 8, Green Paper) and this approach is followed in Section 86 of the U.K. Copyright, Designs and Patents Act in relation to all the moral rights except against false attribution, which lasts only for 20 years after the person’s death; the 1994 Indian Amendment to Section 57 has also provided for the extension of moral rights till the expiry of copyright period.