COPYRIGHT UNDER INTERNATIONAL LAW

The International law is concerned with treaties or conventions between nations requiring their signatories to respect, in their own countries, the copyright of nationals of other signatories. There is no general principle of international law requiring such protection and, before the making of international agreements regarding the matter, a book written by "foreigner and published abroad could obtain no protection in a given country"

This chapter, therefore, examines issues relating to copyright under international law. It discusses the classical distinction of international law i.e., Public International Law and Private International Law and how these two have influenced the development of International Copyright Law. It examines the question of why copyright protection is needed for a creator of an intellectual work not only in his country but also elsewhere? Similarly, important issues relating to treatment of a foreigner under international copyright law which matters a great deal today have been put to critical examination. How different municipal laws or Private International have reacted to the question that foreigners be or be not treated at par with nationals is also examined at length.

(A) THE TWO DISCIPLINES OF INTERNATIONAL LAW:

The two disciplines of international law are (a) Public International law and (b) Private International law.

(a) Public International law ("Jus Gentium") is a system of law which
is general in its source as it is based on customary law with a superstructure of international treaties and is common in its scope as it is to be applied everywhere. It comprises those parts of the law which are international by definition, like the law of the Sea, Air law or Space law as well as International Humanitarian law ranging from the abolition of slavery as a personal status to Human Rights law. It also encompasses International Economic law which deals with the ownership and use of natural resources and the production and distribution of goods (trade agreements, such as GATT, now called WTO, International Financial Agreements, such as IMF and the World Bank). This is the part of public International law which is nearest to copyright if one views authorship as a 'national resource', which it is and carries ('supports material') of copyright works such as books, films, computer software or phonograms as 'goods', which they are.

It is, therefore, from this part of public international law that international copyright law has taken its principal tools and adopted them to its purpose. These tools are:

(a) The application of minimum standards

(b) Preferential treatment This can be

   (i) Most favoured nation treatment,

   (ii) Reciprocal treatment,

   (iii) National treatment i.e. the equality of treatment between foreigners and nationals

(i) Most favoured nation treatment is characteristic of bilateral treaties, which is how as we have seen in an earlier chapter on historical
development of copyright that international copyright started both in Europe and in the Americas. This technique was abandoned in international copyright in favour of multinational treaties of which the Berne Convention of 1886 was the first and most important. Since then 'national treatment' and 'reciprocity' are the tools used by the Conventions on International Copyright and Neighbouring Rights together with the application of minimum standards.

(ii) Private international law on the other hand is really a misleading term because it is not international law but part of national law. It is a discipline within each national legal system. There is no such thing as an 'international' in private international law. This is only that part of English, American, Indian or French law which deals with international situations (in federal states there may even be a private international law of the states of New York or of New South Wales). On the other hand there is no such thing as English or Indian public international law, that or would be a contradiction in terms. There is in fact only one public international law.

Private international is the body of rules (part of national law which deals with international situations, that is, legal situations with a foreign element (e.g. contracts of sale between persons belonging to different countries). The rules of private international law are either rules of customary international law, that is, general principles recognised by all civilised nations such as pacta sunt servanda or rules laid down by international treaties which have been ratified by the country concerned and thus have become part of its national law or rules of national law.
applied to foreigners as well as to nationals

(iii) International Copyright law is a hybrid. In this area the main source of international copyright law is international conventions which are treaties between sovereign states and as such part of public international law. The principle applied in these conventions like the principle of reciprocity or the principle of national treatment are principles of public international law but the situations to which they are applied are private international law situations.

Private international law is sometimes called 'conflict of laws' meaning the conflict between various national laws which may be applicable to one legal issue.

(B) THE VITAL QUESTIONS & CONFLICT OF LAWS:

There are three questions which are to be answered here in a case of conflict of laws:

(i) What is the legal issue?
(ii) To what category does this issue belong?
(iii) What 'connecting factor' is relevant to solve the conflict?

(i) What is the legal issue?

The question which private international law has to solve is: From which legal system do we derive the rule which will decide the legal issue before us? There may, of course, be several legal issues in one case, but each issue has to be decided separately and the answer may well be that the first issue in a case has to be decided according to one
law and the second issue according to another law

(ii) **To What Category Does the Issue Belong?**

Is the issue the validity of a will or of a marriage or is it the distribution of a person’s movable estate or a delictual liability?

A simple traffic accident may present the choice of three legal systems. An English motorist on holiday in France injures a pedestrian who is also a tourist but domiciled in Germany. If the issue is liability, that is whether the motorist or the pedestrian is to blame, it will probably be judged according to French law as the *lex loci delicti*. If the issue is whether the motorist was covered by his insurance policy which is probably an English contract, that issue will be judged by the *lex loci contractus* which is English law. If the pedestrian was killed, it would probably be for German law to decide - if he is held to have been negligent - who his heirs are and whether his estate is liable.

To choose a copyright example, if an English author makes a publishing contract to have his work published in France and the published work is then performed in a slightly altered form without permission in Germany, the issue whether the performance constitutes an infringement will probably be judged according to German law as the country where protection is claimed, that is where the infringement was committed (the *lex loci delicti* whether the delict is a crime or a civil wrong or a tort) but the validity of the transfer of the right to the French publisher will probably be judged according to French law if the contract is a French contract (the *lex loci contractus*).
(iii) **What is the Connecting Factor?**

In other words what is the feature which connects the issue with one particular legal system? In the traffic example the question would be is it the nationality of the motorist or the nationality of the victim or the country where the accident took place? In the copyright example the question would be is it the law of the country of the author or the law of the country of the publishing contract or the law of the country where the alleged infringement has taken place?

Thus, the judge or the administrator dealing with the case or the legal practitioner advising on it will have to decide first what the issue is then to which class the issue belongs and finally which is the relevant point of attachment.

The dilemma in all cases of conflict is between consistency (similar decisions in similar cases) and international harmony (same decision on the same issue in whatever country the issue may be tried). In an ideal world the decisions would be both consistent and harmonious. In practice this is not possible as legal systems vary widely and the rules of private international law are part of a national legal system which may be different from most legal systems. Therefore, choices have continuously to be made, usually by judges, which are neither perfect nor completely logical but the best that can be done in the circumstances. If one views consistency and harmony as a parallelogram of forces within which the solution has to be found, the strongest force among the connecting factors which will decide a case is the *lex*
This is so because private international law, being part of national law which the courts apply every day, the natural tendency of the judges will be to apply their national law, and those rules of private International law which are part of it, rather than a foreign law.

The well known international law writer, Kahn-Freund calls this the homeward trend point out that courts do not only prefer to apply their own law, but also do so more efficiently than if they have to apply foreign law. He concludes that the homeward trend should not necessarily be considered as an aberration, or as a sign of intellectual inertia. It is also an expression of the craftsman's pride in his work and of an unwillingness to jeopardise the quality of the product through the use of unfamiliar tools. One suspects that many phenomena of private international law are partly the result of the homeward trend: the rule of ordre public fraude a'la loi treating as a rule of jurisdiction what might have been treated as a rule of choice of law, insistence on the need to assert the applicability of foreign law in the pleadings, the need to prove it by calling an expert rather than just producing the written law, are all signs of the conscious or unconscious desire of the courts to avoid the application of foreign law.

(C) THE SOURCES OF PRIVATE INTERNATIONAL LAW:

(i) International Customs:

Since, as we have seen above, private international law is a set of rules which forms part of national law, it follows that, as Justice Storey, Judge of U.S. Supreme Court puts it:
Whatever force and obligation the laws of one country have in another, depend solely upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent.

However both foreign laws and customary international law can, applying the terminology of English courts have 'persuasive authority' meaning that the court adopts the reasoning of judgement without being bound by it. This is close to the position of customary law in private international law, when it fills a gap in the national law. German jurists call it *Erkenntnisquelle* (as opposed to *Rechtsquelle*) a source of reasoning as opposed to a source of law. Most ambitiously French jurists try to adduce general principles from the 'comity of nations' which constitute generally recognised rules of private international law based on 'national law'. This doctrine is often referred to as the 'universalist' or 'international' doctrine. The doctrine seeks to see adopted by the whole civilised world, identical rules on the conflict of laws and aspires to this goal by natural sentiments. It is a doctrine which, in the domain of action, seeks to get adopted, by the greatest possible number of nations, that identity of rules which may eventually lead to uniformity.

Applied to private international law generally this perhaps is no more than the elegant expression of a pious hope. It is discussed here because it is precisely the philosophy which in international copyright inspired the Berne Convention and other Copyright Conventions which
followed it. It is most gratifying that in this sphere of international law it has proved highly successful

(ii) **International Conventions**:

The sparsity of customary law and the imprecise nature of what little there was, proved a major incentive in the 19th century to regulate international situations by state treaties. Such treaties can be either inter partes-seeking to deal with conflict situations arising between contracting states - or *erga omnes* - seeking to be generally applicable. The early conventions were of the first variety, either bilateral treaties or multilateral treaties specifying that they only applied between contracting parties. There is a tendency in the 20th century towards convention *erga omnes*, seeking to codify the widest achievable international consensus in one specific field of law. One of the main influences producing both the trends towards convention *erga omnes* and towards specialisation of subjects were the Hague Conventions on private International law. Against this trend, the International Conventions in the field of Industrial property and in the field of Copyright and Neighbouring rights are notable and most successful exceptions.

(iii) **National Legislation**:

As private international law is, in fact, part of national law, particularly in those countries which rely on codification rather than development of the law by court decisions. That there has been comparatively little national legislation dealing with private international
law is due to two reasons. The first is that many aspects of the subject are controversial and many of the controversies have grown rather than diminished during the 19th and 20th centuries so that national legislations did not find the measure of agreement which would enable a statute to represent a consensus of opinion or at least a pre dominant majority opinion. The first major codification of private international law which has proved the most influential was contained in the French Civil Code of 1804. Of later national codifications the two in the major European countries, the German Law of 1900 and the Italian Law of 1942, were passed by fairly authoritarian regimes. The common law democracies did not attempt codification. The other reason is that the task of regulating international situations by national legislation is politically highly sensitive as no country wants to give away more than it receives.

The French Civil Code 1804 contains three main rules. The laws dealing with ordre public (such as police and security matters) govern all persons living in France, whether French citizens or not. This is the origin of the ordre public doctrine which has since been much enlarged. Land is governed by French law, whether owned by Frenchmen or foreigners and the rules dealing with personal status and capacity apply to all Frenchman whether living at home or abroad. On this comparatively narrow base the French courts have been able to build over a century and a half a fairly elaborate system of private international law.

In the U.K. and other common law countries including India on the other hand there has been no attempt to deal with private interna-
tional law by general legislation. Only laws dealing with particular subjects contain some private international law provisions.\textsuperscript{13}

This explains why, when the first international convention in the copyright field was created\textsuperscript{14}, French legal thinking and experience dominated the scene.

(iv) **Judicial Decisions & Juristic Works**

The courts have an important role in the development of private international law not only in the common law countries but also in countries which rely to a large extent on codification to formulate the rules of conflict of laws such as France. Similarly the writings of academic lawyers have a significant role to play.

(D) **INTERNATIONAL COPYRIGHT LAW**

In the realm of the law of movable (physical) property, the law applicable to decide ownership is, generally, the law of the country where the property is acquired. If one bought goods in country A and takes them to country B, the question whether one has become the rightful owner of goods is to be decided by the law of country A. The position is different with regard to copyright. The law applying to the physical property of the *corpus mechanicum* such as the book, the film, the record containing the work is governed by the above mentioned rules. The property in the work, however, is governed by the law of country B, if that is where the right is claimed. Thus, ‘the centre of gravity’ of the work is the country where protection is claimed.
Copyright law, like patent law, started as a privilege conferred by the prince and developed into a right conferred by a statute. Such statute law gave protection to the right owner but, like all other statute law, only within the territory of that state. However, once it was conceded that the creators of new works of many kinds should be protected, such protection becomes at best only partially effective and at worst totally ineffective if it is confined to national frontiers. The idea that copyright arises from the act of creation of the work and not from any administrative act leads naturally to the idea that once the right exists, it should be valid anywhere. There is no good reason why a creator should be entitled both to moral recognition and to the pecuniary rewards of his works only in his own country and not abroad. But even more important than the moral imperative is the Gresham's law on international currencies that *bad money drives out good money* applies to works and copyright-protected matter. If a 'work' protected by copyright in country A is not protected in countries B and C so that it can be freely reproduced in these countries, it may be imported into country A where it will then compete with copies on which copyright has been paid. As the imported copies will not have paid any copyright, they will be cheaper and will, therefore, drive the home-made product, which has paid copyright, out of the market.

The effect is the same as if a tax was put on a home product, whereas the same product was allowed to come in from abroad tax-free. The greater the mobility of persons and goods the more serious will be
the result of this phenomenon. To cope with it (as well as protecting its citizens abroad) a state has to give a certain amount of reciprocal protection to foreigners.

(i) The Treatment of Foreigners in Copyright Law:

When faced with the question of the rights of foreigners in a country (country x) the following questions have to be answered in the following order:

(a) Can the foreigner claim protection under one of the international conventions to which country x is a party? (in countries where such conventions are self-applying e.g. U.S.

(b) If not, can he claim protection under a bilateral agreement to which a country is a party?

(c) If not, can he claim protection under the national law of country x relating to foreigners?

In this third case, national law may provide that he can claim no greater protection than that granted in his country of origin or it may apply the rule of material reciprocity.

As the great majority of countries which are of importance for copyright purposes are parties to one of the International Conventions, bilateral agreements have lost most of their importance. Thus, in most cases one will have to see whether the foreigner claiming protection is covered by one of the conventions and if not whether he is protected by the national law of the country where protection is claimed, in its provisions relating to foreigners.
The treatment of foreigners, apart from conventional protection, varies considerably and within the confines of this study, a summary of comparison between the major European countries, United States and India will suffice by way of example.

(1) In the Republic of Germany, works are protected if they are first published in Germany or are works by German Nationals or assimilated persons (stateless persons and refugees).

(2) In Italy, works are protected if they were first published in Italy or the author resides in Italy.

In both Germany as well as Italy foreign authors are protected (over and above conventional protection) subject to reciprocity.

(3) In the United Kingdom, works are protected if their maker at the time of publication is a qualified person (qualified persons are British and Irish nationals or persons domiciled or resident in the United Kingdom), or if they are first published in the United Kingdom or an associated territory.

(4) In France, foreign works are protected even if neither the author is a French national nor the work was first published in France. The only condition is that an exclusive right in the work exists in the country of origin. However, it is perhaps significant that a few years after the French Copyright Act, 1957, France passed a law to the effect that if a country which is not a member of any of the conventions to which France is a party does not grant adequate and effective protection to work first published in France, works first published in such a country are not protected in France.
(5) The United States having won independence from Britain and wanting to create their own culture became protectionist. Copyright was granted only to American citizens and residents in the United States. Even a century later when copyright was gradually granted to some foreign authors (country by country) copies of a foreign work had to be printed in the United States (under the so-called 'manufacturing clause').

(6) In India, foreign works are protected if either the author is an Indian citizen or domiciled in India or the work was first published in India. Such an order of giving protection is to be issued by the central government and will take into account the doctrine of reciprocity.

(ii) The History of International Copyright Treaties:

We have noted in the chapter on historical development that the first international treaties dealing with copyright were bilateral agreements both in Europe and in America. In both cases they were found unsatisfactory as they produced particularly in America, a mosaic of differing relationships leading away from harmony instead of towards it. They came to an end in Europe with the creation of the Berne Convention in 1886 and in America - for all practical purposes - with the creation of the Universal Copyright Convention in 1952. The Pan-American experience is illuminating in this respect. The first multinational treaty was the Montevideo Convention in 1889, thus, almost contemporary with the Berne Convention 1886. Just as the Berne
Convention was initially a mainly European Convention but open to all countries\textsuperscript{22}, so the Montevideo Convention aimed at establishing a Pan-American Copyright system but was open to all countries and ratified by many American states as well as European ones\textsuperscript{23} However, there was an essential difference The Berne Convention was based on the principal of national treatment\textsuperscript{24}, treating foreigners like nationals if they belonged to member countries, thus, accepting broadly speaking the \textit{lex fori} Under the Montevideo Convention on the other hand the rights of an author were governed by the law of the country of first publication or the law of the origin of the work which followed the work into all other countries of the Union, thus accepting the principle of the \textit{lex originis}

This meant that a court in country A when adjudicating on works originating from countries B, C and D had to apply three different foreign laws, those of countries B, C and D, whereas under the principle of national treatment the court would have applied only the law of country A its own Thus national treatment is a better principle

There followed five further inter-American Copyright Conventions not open to non-American states\textsuperscript{25} The most successful one was the Buenos Aires Convention 1910 which was ratified by 17 Latin American republics and the United States It has changed to the principle of national treatment After the second world war the members of the Pan-American Union signed a revised convention in Washington DC in 1948 which was fashioned on the principle of the Berne Convention a number of minimum rights and the principle of national treatment If copyright was obtained in one state, a statement
appearing on the work indicating the reservation of copyright confers copyright in all states without any formalities. A notice like 'copyright reserved' was sufficient. Fourteen Latin American countries ratified it but the United States could not accept the granting of copyright without any formalities which were required under its own national law and did not ratify. With the largest American market outside the convention, it could not become really effective and the Latin American republics were clearly seeking worldwide rather than merely Latin American protection, which had to include both the U.S. and Europe. They turned towards the Universal Copyright Convention created six years later in 1952 and although the Pan-American conventions are still operative, it is the Universal Copyright Convention that governs relations between the Latin American states and the United States and the Berne Convention as well as the Universal Copyright Convention governs the relations between them and the European States. Thus, all copyright and neighbouring rights Conventions are now based on the principle of national treatment.

(iii) The Principles of International Copyright Conventions:

Seeking to apply the general principles of private international law to a multinational copyright treaty, theoretically two of the principles would appear to be suitable: the *lex loci* and the *lex fori*. The adaptation of the principle of *lex loci* (or *lex originis*) leads to the principle of country of origin of the work. This means treating a work like a person and saying that its nationality is either that of its father (the
author) at the time of its birth, which would be the time of its creation if it remains unpublished or the time of its first publication, if published. Alternatively, it would be the nationality of its birthplace, that is the country of its first publication. Like a person, the work would then, so to speak, have a passport and take its nationality with it wherever it goes. For example, if India is a convention country, the work of an Indian author, first published in India, would have in the UK or France the same rights as it has in India.

The adaptation of the principle of lex fori to copyright leads to the principle of national treatment, or as it is sometimes called, the principle of assimilation. This means that persons protected by the convention can claim in all contracting states the protection that the law of that state grants to its own nationals. Foreigners, if belonging to a convention country are "assimilated" to nationals.

The work of the same Indian author, published in India, would have in the United Kingdom the same rights as if it were created by a UK author and first published in the UK.

It will be seen that the advantage of adapting the first principle, would be that the same work will receive the same treatment in all member countries. The disadvantage is that lawyers and courts will continuously have to apply a large number of foreign laws, sometimes several laws in the same transaction or court case.

The advantage of the second principle, the lex fori, is that courts will always apply their own law. The disadvantage is that the same work will get varying levels of protection in convention countries according to
the national law of the country where the protection is claimed

(a) National Treatment (Assimilation):

In practice, the second principle, that of national treatment, has proved to be the only viable one. This is so mainly for two reasons, one psychological and the other political. The psychological reason is that courts prefer to apply their own law which they know to having to apply foreign law which they do not know, and thus, the quality of judgements will be better and the law, therefore, more certain under the principle of national treatment. The political reason is that right owners in countries of low level protection will realise that they get better treatment abroad in high level protection countries than they get at home and will bring pressure to bear on their governments to raise the level of protection at home. Thus, as the high level protection countries give a lead, the level of protection will gradually rise everywhere, thus, getting nearer to the ideal of uniform treatment but on a high level.

National treatment is also in accord with the ideal of international law that all men are equal before the law, regardless of whether they are nationals or foreigners, and in a period of history where more and more eminent authors and creators are expatriates or refugees, conventions have also assimilated these to nationals so that they enjoy the same privileges in the country of their choice. The principle of national treatment also means that both the question of whether the right exists and the question of the scope of the right are to be assured in accordance with the law of the country where the protection is claimed.
A beneficial spin-off of the principle of national treatment is that confiscating measures valid under the law of the country where the confiscation takes place have no validity in other countries. These countries have to treat the right owner as they treat their own right owners regardless of how he is treated in his own country.

For these reasons, the principle of national treatment was adopted as the basic principle of the Berne Convention in 1886 and of the copyright and neighbouring rights conventions which followed the Berne Convention.

(b) **Extensions of the Principle of National Treatment:**

(1) **Minimum Rights:**

The principle of national treatment is extended in the copyright Conventions by providing minimum rights which may be claimed in all Convention countries *jure conventionis* regardless of the national legislation. In a strictly conceptual sense, these minima are not rules relating to conflict of laws as they contain no reference to another legal system. They also do not compel a convention country to grant these conventional rights provided as minimum rights to its own nationals because the convention deals only with international situations and therefore, if nothing else is provided in the convention only compel a state to grant these rights to foreigners who are nationals of member states. However, the principle of national treatment without minimum rights, *jure conventionis* might produce a serious imbalance which states would find unacceptable. If countries A and B were members of a
convention which provides only for national treatment and has no minimum rights and country A grants performance and broadcasting rights as well as reproduction rights, whereas country B grants only a reproduction rights, the effect would be that the nationals of country B would enjoy performance and broadcasting rights in country A, but nationals of country A would not enjoy these rights in country B because the nationals of country B do not enjoy them either. This could produce a serious disequilibrium which would be unacceptable to country A.

The history of copyright and neighbouring rights conventions bears this out. The Berne Convention which was agreed at a time when the level of protection granted to authors still varied greatly from country to country started with only a minimum term and a translation right. The first task was to get as many countries as possible to accept these 'minimum rights' in their legislations which they had to do before they could ratify the convention. Having thus created a common minimum level of protection in these respects the Revision Conferences added further minimum rights. The high level protection countries gave a lead to the low level protection countries and it was hoped that the right owners of the lower protection countries, enjoying rights abroad which they did not have at home, would bring pressure to bear on their governments to introduce them. These hopes subsequently, proved amply justified.

When the Universal Copyright Convention was negotiated over 60 years later, the difference in the level of protection with regard to the
rights covered by the convention had become less marked, and thus less stringent measures to ensure against unacceptable differences in the level of protection were required. The term of 25 years post mortem auctoris and the translation right are minimum rights. Whereas Article I requiring contracting states to provide for the adequate and effective protection of the rights of copyright owners and Article X requiring contracting states to adopt such measures as are necessary to ensure the application of the convention are only general guidelines. However, this was considered enough to ensure that differences of levels of protection under the national treatment rule were not too great.

In the Rome Convention, the first neighbouring rights convention, the principle of national treatment is accompanied by minimum rights for each of the three beneficiaries: a right against unauthorised fixation for performers, a reproduction right for phonogram producers and broadcasters, a performance right in phonograms (subject to reservations) for producers and performers. If reservations are made the reciprocity rule can be applied to the states making a reservation. Thus, the principle of national treatment combined with minimum rights to assure a common denominator is moderated by the reciprocity rule to avoid injustices being caused by large divergences of levels of protection.

Minimum rights also make the gradual growth of a convention possible. The convention can start with a small number of minimum rights and add others as the years go by at revision conferences, thus providing a road towards both uniformity and higher standards of protec-
The Berne Convention, for instance, started with the translation right and added the right of public performance and the broadcasting right, the droit moral, the cinematograph right. The Universal Copyright Convention provided for the translation right only and in its revised version in 1971 added the reproduction right, the broadcasting right and the public performance right.

(2) **Formalities**:

In a sense freedom from formalities is also an exception of the principle of national treatment as it compels national laws to grant rights to works from convention countries without making such rights subject to formalities which may otherwise be required. This can be done either by requiring the granting of rights without any formalities like the Berne convention or by laying down a maximum of formalities which may be required to secure protection like the Universal Copyright Convention with the symbol (c) or the Rome Convention and the Phonogram convention with the symbol (p) accompanied by the name of the copyright owner and the year of first publication.

(c) **Limitations of the Principle of National Treatment**:

(i) **Reciprocity**:

The principle of national treatment can be limited, sometimes severely limited by the rule of reciprocity which in international law can be either 'material' (or 'substantial') reciprocity or 'formal' (or partial) reciprocity.
'Material reciprocity' means that country A will protect the citizens of country B in the same manner as country B protects the citizens of country A. As a general rule the Copyright Conventions are opposed to material reciprocity though there are exceptions. This is made plain in the 'Declaration Against Material Reciprocity' which is included in the Report of the 1971 Paris Revision of Berne Convention. One of the advantages of avoiding material reciprocity in Copyright Conventions is that the courts of member states do not have to interpret the laws of other member states to see whether protection is given in respect of a particular right. The rule of national treatment enables them instead to apply their own law to foreigners. A disadvantage is that it permits sometimes great disparities between the effective levels of protection so that the citizens of high level protection countries get less rights in some Convention countries than they enjoy at home, whereas the citizens of low protection countries get better protection in some Convention countries than they get at home. However, this is balanced by the advantage that wide ranging copyright relations are facilitated between countries of differing ideologies and differing stages of economic development.

'Formal reciprocity' in copyright convention means that each member state will protect the works or citizens of other member states in some manner but from such reciprocity nothing is to be implied with regard to the nature of the protection. That is, generally, determined by the rule of national treatment.

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

(ii) **Reservations:**

The rights granted by convention can also be limited by reservations, which give countries the opportunity to ratify the convention but to withhold the giving of some rights wholly or partly. Some conventions, e.g. the Phonogram Convention, permits no reservations, others, e.g. the Rome Convention, provides for several. The reservations can relate to the scope of a right or to the connecting factor, e.g. the reservation regarding the points of attachment in the Rome Convention or to a whole right, e.g. the performance right in phonograms in the same convention. The making of reservations is usually accompanied by the application of the rule of reciprocity so that the nationals of country A which has made the reservation can be deprived of the exercise of those rights in country B because the nationals of country B are not granted these rights in country A.
(E) **CHALLENGES TO THE PRINCIPLE OF NATIONAL TREATMENT**

Thus, the principle of national treatment subject to extensions and limitations has proved itself as the fundamental principle of copyright and neighbouring rights conventions for nearly a century. It, however, at present is in danger of being undermined as governments try to cope with the rapid development of technology and communications. When a new right is being granted to copyright owners, governments have the option of granting it in the course of copyright revision and as a copyright, or of granting it as a new right in a separate law outside the copyright law. If the government decides to grant the new right as a copyright, the international conventions apply and the principle of national treatment may demand that foreigners who are nationals of convention countries which have not yet granted the new right have to be given the same right, and thus, become entitled to the remuneration which flows from it. If on the other hand the government decides to create the new right outside the copyright law the conventions will not apply and foreigners will not be entitled to national treatment and, therefore, will not be entitled to participate in any remuneration for the use of the new right. Two practical examples will illustrate the position.

(i) **Public Lending Right**:

This right has been introduced in several countries under which authors of literary works receive a royalty when their books are being borrowed from a library by members of the public. In Germany this
right is granted in the copyright law\(^{44}\) and therefore, as Germany is a member of the Berne Convention and of the Universal Copyright Convention, foreigners who are nationals of Convention countries are entitled to remuneration if their books are borrowed. On the other hand the Scandinavian countries\(^ {45}\) or the United Kingdom\(^ {46}\) which also give a public lending right, have chosen to do so by separate legislation outside the copyright laws and are, therefore not bound to grant this right to foreigners, although, like Germany, they are also members of both conventions and the remuneration paid for the public lending right is, therefore, limited to national authors\(^ {47}\).

(ii) **Reprography**:

This is the production of copies of printed matter by copying machines. One way of dealing with such copies produced for commercial purposes is to subject the reproduction right in respect of such copies to a compulsory licence and give the author a right to equitable remuneration as in the Federal Republic of Germany\(^ {48}\).

On the other hand, France, introduced a tax on the sale and importation of all machines producing reprographic copies in its Finance Act of 1976. Part of the revenue of this tax is paid to the copyright owners of the material copies, but it is paid only to French Copyright owners although France is a party to both copyright conventions. The principle of national treatment does not apply as the compensation does not arise from a copyright and foreigners are, thus, not compensated.

The distinction between the two examples is that the reproduction
right is, generally, recognized in all copyright laws and is a fundamental right of both international conventions and unauthorised copying is only permissible as an exception (e.g. for private use), whereas a public lending right, far from being universally acknowledged, only exist in a few countries and does not form part of the *jus conventionis* of any of the international conventions. Thus, on grounds of natural justice and applying the principle of national treatment to a generally accepted right, the claim of foreigners who are convention nationals to compensation for reprographic use of the works is strong. In the case of the public lending right it is, so far, still weak whilst only few countries grant it.

Another distinction is that in the case of the reprographic right in the United States the royalty will be paid by the user, which is a characteristic of all copyright laws including India, whereas the compensation (it is not termed a royalty) in the case of the public lending right in Scandinavia and in the United Kingdom is paid out of a public fund. That means that it comes from taxpayer's money as opposed to copyright user's money.

Thus, by the simple device of calling the right to compensation something other than a copyright and introducing it by a separate piece of legislation the application of the principle of national treatment can be avoided. Particularly in cases where the compensation is paid out of a government fund which can be called taxpayer's money, the temptation to restrict it to nationals is considerable. If that device is, generally, used by governments when dealing with the new uses of copyright material arising from new technology and new means of communication,
the fundamental principle of national treatment and with it the copyright conventions based on it, could be seriously eroded in the near future.⁵⁰

(F) THE CONNECTING FACTOR:

On the national level the question whether copyright protection does exist or not is decided by asking first whether the subject matter attracts copyright protection or not. For instance 'literary and artistic works' are protected in all copyright countries (countries whose legislation grants copyrights). Other works like (cinematograph) films enjoy copyright in some countries e.g. United Kingdom, U.S.A. and India, but not in other e.g. France. If there is a copyright the second basic question to ask is whether the protection sought is covered by the scope of the right; for instance all works enjoy a reproduction right in copyright countries but not all works enjoy a performance right; for instance, phonograms enjoy a performance right in the United Kingdom but not the United States. The third basic question to ask is what term the legislation grants to the work or subject matter in question literary and artistic works in Berne Convention Countries enjoy a minimum of the life of the author and 50 years and in Universal Copyright Convention Countries a minimum of the life of the author and 25 years, whereas photographic works or works of applied art enjoy a shorter term (under the Universal Copyright Convention a minimum of ten years). On the international level a further question has to be answered: if the work is a foreign work or the author or the right owner is a foreigner, what is the criterion for deciding whether the work or the right owner is protected?
This is known as the connecting factor (point de rattachement, Ankunpfungspunkt), the factor which connects the work or the author with a particular country. It is usually defined as the country with which there is 'the closese and most real connection' when considering the possible connecting factors one has to bear in mind that copyright is an intellectual property right. It is a property right in the sense that it is a right erga omnes, thus resembling corporeal property rights, but the subject of that right is incorporeal. That means that although the work appears in the tangible (corpus mechanicum) of a book, a film, a phonogram in one place, it can be reproduced or performed in lots of other places whilst still remaining the same work. Different criteria from those applied to corporeal property rights have to be found to serve as the relevant factors connecting the work or subject matter or the author or the right owner of the work with one particular country. These factors are:

(i) Personal status connection of the author (nationality, habitual residence etc.) - referred to as 'the country to which the author (or the maker) of the work belongs'.

(ii) Geographical connection of the work - referred to as 'the country of origin'.

(iii) Geographical connection with the public - referred to as 'the country of first publication', the country where the work or subject matter of copyright was first made available to the public.

(iv) The lex fori - referred to as the 'protecting country', the country
where protection is claimed, that is where the use of the work, be it legitimate exploitation or infringement, takes place

(i) The Country to Which the Author Belongs:

In accordance with the philosophy of the *droit d'auteur* that the quintessence of copyright is the progress of the work from the mind of the author to the general public, the personal status connection of the author and the geographical connection of first publication with the public were the essential points of attachment of the first International Copyright Convention, the Berne Convention. The nature of the personal status connection was defined as nationality, but those persons who have their 'habitual residence' in the country of the Berne Union are 'assimilated' to nationals and the Universal Copyright Convention adopts the same structure using the common law concept of *domicil* instead of the civil law concept of habitual residence.

In essence habitual residence is a question of fact for the court that tries the case to be judged by the length of time during which the author has lived in a country, whereas the concept of *domicil* differs from country to country and may depend on where author ultimately intends to settle rather than where he resides, a matter sometimes more difficult to ascertain.

In the recent past where refugee and stateless authors have become more frequent than they were in the 19th century they too have been assimilated to nationals.

When the right owner is not a natural person, but a legal entity like
a corporation or company such as film producer or a phonogram producer or a broadcasting organisation the place of its Seat or Headquarters decides residence or domicil 57

In the case of the personal connecting factor the question to which country the author or maker of the work belongs may have to be answered differently at different times as he may change his nationality and even more easily his habitual residence. The relevant date may be the date of the creation of the work in which case different works of the same author may have different connecting factors. It may be his nationality or residence at the time of publication in the case of a published work, or it may be the time when protection is claimed. The Berne Convention is silent on the point. It is, thus, unless the national law provides for a solution, a matter for the courts to decide. It is likely that the courts will choose the nationality or residence at the time when protection is claimed for the purely practical reasons that it is probably the easiest to ascertain.

(ii) The Country of Origin:

At the earliest stage of drafting multinational treaties the concept of the country of origin of the work was at the centre of the scene. The underlying thought was that once a work is created or published it should have the same rights abroad as at home. The principle was tried in the Montevideo Convention 1889. It was not successful as a basic principle of a convention because it leads by definition to situations where different rights are attached to similar works, because one origi-
nates in a country granting a high level of protection & the other in a country with a low level of protection. The creators of the Berne Convention did not make this mistake and based the convention on the principle of national treatment. However, the convention contains a definition of the country of origin to the effect that for a published work the country of origin shall be the country of first publication and for an unpublished work the country 'to which the author belongs'. Although the Paris Act of 1971 still contains a more detailed definition, to still same effect, the importance of this point of attachment seems to have declined with the years and neither the Universal Copyright Convention nor the neighbouring rights conventions contain the concept of the country of origin. It must be remembered that conventions deal only with International situations and, therefore, protection of nationals in the country of origin itself is regulated by the law of that country. Thus, if a national author publishes at home no problem arises. If he publishes abroad, the country of first publication takes the place of the country of origin. For unpublished works the country of origin becomes important if a subsequent publication e.g. of a translation, take place abroad.

The main importance of the country of today is for measuring the duration of protection. The rule of the comparison of terms provides that although the term of protection is governed by the law of the country where protection is claimed, that term shall not exceed the term fixed in the country of origin of the work, unless the national law provides otherwise. When terms of protection varied widely the comparison of terms was often of crucial importance. It is less so now.
However examples are to be found in the relation between countries which give the minimum term of 50 years after the death of the author and countries which give a longer term.

(iii) **The Country of First Publication**:

First publication is an important connecting factor. If a writer writes a book in China, (a state not a member of any international convention), it is unprotected anywhere else while it is unpublished. If he publishes it in China it is still unprotected anywhere else. If however he publishes it first in the U.K. or India it becomes protected by the Berne Convention or if he publishes it first in the United States it becomes protected by the Universal Copyright Convention. If the only publication within a convention country is an English translation published in the U.K., or in the United States, that translation becomes protected as a separate work, but the original in Chinese still remains unprotected. The result is that anyone can make another English translation (or indeed a French, German or Hindi one) and publish it in any convention country without the author’s permission. The concept of simultaneous publication is of vital importance as a connecting factor because it may considerably enlarge the protection of the work if the work is published in a non-convention country and would otherwise be unprotected. If it is ‘simultaneously’ published in a convention country this secures its protection. The Berne Convention allows an interval of 30 days between the first and second publication to qualify the second one as a simultaneous publication. So does the Rome convention for the
publication of phonograms. Simultaneous publication is particularly important in cases of works published in the same language (a translation is a new work) in several countries or in the case of musical works or phonograms.

(iv) The Protecting Country:

This is shorthand for the country where protection is claimed. As in practice an action is usually brought in the country where the infringement is committed, this usually means the lex fori. However, there are exceptions where the infringement is committed in a country other than the one where protection is claimed. It is another question not settled by the convention whether in cases of infringements abroad legal protection based on foreign copyright can be claimed. In the past, it has usually been accepted that the principle of territoriality applies and that legal protection before national courts can only be claimed in cases of infringements committed within the country concerned. However, as Ulmer points out, according to the general rules of private international law, it seems consistent to expand the rule which may be derived from the conventions into a complete rule of conflict of laws whereby protection of intellectual property rights, irrespective of the country in which the action is brought, is to be governed by the law of the country in whose territory the act of infringement took place (the lex loci delicti).

The answer depends on the view taken by the national courts. In the UK, the general rule is that a wrongful act committed abroad is
actionable. In England it would be actionable as a tort if had it been committed in England and is also actionable in the foreign country where it was committed. As in copyright cases the legal position is similar whether these are Berne Convention Countries or Universal Copyright Convention Countries, it is arguable that an action can be maintained if the infringement has taken place in that country.

In the United States the courts seem to take the view that it is a matter for their discretion and have refused to accept jurisdiction, giving as the reason that it would involve a judgement on the validity of a foreign right which would be more appropriately made by the courts of that foreign country.

However, the EEC (European Economic Community) Convention on Jurisdiction and the Enforcement of Judgement in Civil and Commercial Matters (22 September, 1968) provides in Article 5(3) that in actions for delict and quasi delict persons may be sued in any contracting state in the court competent for the place where the damage or injury has occurred. It would appear, therefore, that in the EEC an action for infringement of copyright can be brought both in the country where the defendant is domiciled and in the country where the infringement has occurred.

(G) **THE SYSTEM OF CREATING RIGHTS UNDER INTERNATIONAL COPYRIGHT CONVENTIONS:**

Thus, it is clear that there are three systems of dealing with international situations in a Convention:

(i) The situation is dealt with in the convention by granting a right **jure**
conventionis and there are no exceptions, for instance, the translation right in the Berne Convention\textsuperscript{72}

(ii) The situation is dealt with in the convention, but it is open to national legislation to introduce restrictions and fix modes of application for instance, the broadcasting right in the Berne Convention (Paris Revision 1971)\textsuperscript{73} Compulsory licence schemes are permitted although their scope is confined to the country permitting them

(iii) The situation is defined in the convention but it is left to national legislation whether it grants a right or not for example the droit de suite in the Berne Convention (1971)\textsuperscript{74} The right is optional in the sense that a member country need not introduce it (the United Kingdom for instance, has not yet introduced it) If a country does introduce it for its nationals it can make the application to nationals of other convention countries dependent on reciprocity (which is exceptional in the Berne Convention)

The choice between these systems permits a gradual approach which allows a political judgement to be exercised at every stage during the life of a Convention A new right can be introduced in group (iii) giving member states the choice whether they wish to grant the new right or wish to wait If a country wishes to introduce the new right but makes it subject to a compulsory licence it can do so in group (ii) Once a right is established and generally accepted it can then be moved up to group (i).
THE SYSTEM OF APPLYING INTERNATIONAL COPYRIGHT CONVENTIONS TO NATIONAL LAW:

The application of an International Convention by a country is the method by which the convention which is International law becomes part of the national law of the country.

At the Diplomatic Conference which establishes the convention, countries which are represented by an accredited plenipotentiary usually sign the convention. However, such signature has no legal consequences, although it may carry with it a moral obligation to ratify at a later stage.

If a country was not represented at the Diplomatic Conference or if its representative did not sign the convention it can later 'accede' to it. The effect of accession is the same as ratification.

How the international law contained in the convention is translated into the national law of a state depends on the Constitutional law of that state.

(i) In some countries international conventions are self applying. No further legal or administrative act is necessary. The provisions of the convention become part of the national law and override previous legislation. The convention is 'self-executing'. This is the case for instance in France, Germany, Italy and Latin American countries. It leads to interpretation of the text of the convention itself by the national courts.

(b) Some countries, on the other hand, do not regard agreements between
sovereign states as part of the law of the land. Conventions are not binding on their citizens until ratified by the legislature. This is the case for instances in the Nordic countries, United Kingdom, USA, and India. In these countries national legislation is needed to make the provisions of a convention binding on its nationals. This may be done by making the whole convention part of the national law thereby falling for interpretation by the national courts. It may also be done by drafting national law so as to comply with the convention. In that case, it will be for the national courts to decide whether to take the convention text into account when interpreting the national law.

Thus, as is revealed from the above discussion, it can safely be said that international copyright law has done a commendable job in strengthening the copyright protection world over. Infact, it is one of those areas where international law has influenced developments at the Municipal laws. Moreover, unless effective protection is afforded to foreign authors, in the fast changing modern world which has come so close as to reflect a global village particularly after the recent advent of Internet, copyright law would become meaningless. It is indeed satisfying to note that the International law dealing with copyright problems has now achieved a certain amount of uniform standards of copyright protection for the creators of intellectual property.
1 FREUND, KAHN, GENERAL PRINCIPLES OF INTERNATIONAL LAW (1980), p 321
2 Adapting a term used by Arthur Nusabaum in PRINCIPLES OF PRIVATE INTERNATIONAL LAW P 37
3 STOREY, JOSEPH, COMMENTARIES ON THE CONFLICT OF LAWS (2nd ed, 1941) p. 30.
4 The term is applied by the English courts usually referring to decisions of the courts of other common law jurisdictions
5 Supra note 1 p 20
6 This definition of 'comity' was used in the United Kingdom by Deplock L J in Garthwaite V Garthwaite (1964) p 336 at 389
7 Levy Ullman, extensively quoted a KAHN - FREUND, Supra note 1, p 21
8 The Franco - Swiss Treaty of 1869 on Civil Jurisdiction and the Enforcement of Civil Judgements is one of the earliest and outstanding examples
10 The Paris Convention for the protection of Industrial Property, 1883, several times revised, lastly at Stockholm 1967, and the Madrid Agreement For the Repression of False or Deceptive Indications of source on Goods 1891, several times revised, lastly at Stockholm, 1967
11 Supra note 1 p 20
12 There are only few private International law provisions to be found in other parts of the Civil Code, e.g. Article 170 on marriages and Article 999 dealing with wills
13 The Legitimacy Act 1916, Foreign Judgements (Reciprocal Enforcement) Act 1933, the Recognition of Divorces and Judicial Separation Act 1971, the Wills Act 1963 in the United Kingdom
14 The Berne Convention 1886.
15 Similar rules apply in Denmark and Netherlands
16 Law of 8 July 1964
Article I of the Universal Copyright Convention

This is an example of even the most liberal country in the world in copyright matters saying 'enough is enough' and applying the rule of material reciprocity. Yet true to its tradition 'moral rights' are protected even in such cases.

With various modifications this clause survived until the Copyright Act 1976

Indian Copyright Act 1957, Section 40-43

See chapter on "historical development", supra chapter II

The three non-European countries of the ten signatories of the original Berne Convention were Haiti, Liberia and Tunisia.

The European countries included the most important markets, France, Germany and the U.K.

Berne Convention, Article 5(1)


It was first proclaimed by the 'Societe des gens de lettres' at their Conference in Paris 1878, which was the forerunner of the Berne Convention, see ROTHLISBERGER, THE BERNE CONVENTION (1961) p 6

STEWART, STEPHEN, INTERNATIONAL COPYRIGHT & NEIGHBOURING RIGHTS, second ed, 1989 (London, Butterworth) at p 39

Universal Copyright Convention, Article VI

Ibid, Article V

Rome Convention 1961

Berne Convention, Article 5(2)

Universal Copyright Convention, Article III

Rome Convention, Article II

Phonogram Convention, Article III

Material reciprocity has been described as 'tit for tat'

The droit de suite in the Berne Convention (Article 14 bis) or the 'Comparison of terms in the Berne Convention (Article 7/8)

38 Ulmer, "Copyright Problems in Relations between East and West', ILIC 32, (1944) 44
39 Ibid
40 Berne Convention, Article 7
41 STEWART, STEPHEN, Supra note 27, p 42
42 Rome Convention, Article 51
43 Ibid, Article 161 (a)
44 Copyright Law 1965 as amended 1972
45 See e.g., Law on Public Libraries, 27 May 1969 (amended 26 June 1975), Article 19 in Denmark
46 Public Lending Right Act, 1980
47 One of the strange consequences of this method is that the translator of a book if he is a national has a right to remuneration but the author of the same book, if he is a foreigner, has not
48 Germany Copyright Law, Article 54(2)
49 A case where 'a rose by other name' does not 'smell just as sweet'
50 STEWART, STEPHEN, Supra note 27, at p 43
51 Berne Convention, Article 3(2)
52 Ibid, Article 5(4)
53 Ibid, Article 3(1)
54 Ibid, Article 3(2)
55 For a recent analysis of the concept of domicile in the United Kingdom, see Re Ful'd's Estate (1968) p 675 quoted in STEWART, STEPHEN, Supra note 27 at p 45
56 Berne Convention, Article 3(2)
57 Article 4(1) of the Berne Convention makes one of its rare concessions to the notion that a corporate body can have copyright by recognising the headquarters of a maker of a cinematograph work as his residence for the purposes of the Convention
58 Berne Convention, Article 2(3)
59 Paris Revision of Berne Convention
60 Berne Convention, Article 5(4)
61 Ibid, Article 7(8), Also see Universal Copyright Convention, Article IV
62 For definitions of 'publication', see Berne Convention, Article 3(3), Universal Copyright Convention, Article VI

63 It the work is valuable it may, therefore, be wise to publish a limited edition of the origin in the U K or U S first to establish the connecting factor and sense protection by the conventions. See CORNISH, W R, INTELLECTUAL PROPERTY (1980) p 340 note 25

64 Berne Convention, Article 3(4)

65 Rome Convention, Article 3(d)

66 Under the Rome Convention the criterion of first publication can be excluded as a point of attachment (article 5/1), the result is that the sole point of attachment are the nationality of the producer or the fixation of the recording. If a country excludes the criterion of publication, as some Nordic countries do, it is for this reason to exclude simultaneous publication protecting a phonogram which is made in a non-convention country by a producer who is a national of a non-convention country

67 ULMER, INTELLECTUAL PROPERTY RIGHTS AND THE CONFLICT OF LAWS (1978) p 10


69 CORNISH, W R, Supra note 63, p 69

70 Orsman V Stanway Corp 163 USPQ (NDIII) 1969, Vanity Fair Mills Inc V Eutin & Co 109 USPQ 446 (2nd Cmc) 1956, Package Instrument Corp Inc V Beckaman Instruments Inc (NDIII) 1972

71 Ratified by the six original member states of the EEC

72 Only possible exceptions are contained in the protocol, and apply only to developing countries

73 Article II bis

74 Article 14 ter