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Copyright Protection on the
Internet: Analysis of an
International, Regional and
Nationally Based Protection

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Dedicated to my only wealth, my Family...

Special Thanks to my Professor for his peerless supervision...

Abbreviations

The Bern Works	Bern Convention for the Protection of Artistic and Literary Works
EDD	European Database Directive
EU	The European Union
EUCD	The European Union Copyright Directive
ICCPR	International Covenant on Civil and Political Rights
IESCR	International Covenant on Economic Social and Cultural Rights
IPRs	Intellectual Property Rights
TCA	Turkish Copyrights Act
TCA	Turkish Copyrights Act
TRIPS	The Agreement on Trade Related Aspects of Intellectual Property Rights
UCC	The Universal Copyright Convention
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization
WCT	WIPO Copyright Directive
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

1 Introduction

1.1 Overview

Human intellect creates new technologies, products, services or expressions that increase the wealth of society. This wealth could be seen in different forms, sometimes such as patents and trade secrets that are constituent elements of technology, sometimes in form of music, novel etc. that are expressions of human mind in the way that he saw the world. In other words “Intellectual property is a generic term that refers to intangible objects, such as literary works, artistic productions, scientific discoveries and plans for inventions and designs, which acquire their value primarily from creative efforts”¹ and these fruit of human minds are protected by intellectual property rights (hereinafter IPRs) aiming to reward creator and promote economic, social and technological development of the nations. Traditionally intellectual property rights law deals with 4 different types of intangible property, trademarks, patents, copyrights and trade secrets. However this thesis only focuses on one kind of intellectual property that is to say copyrights.

For many years, new inventions such as printing press, phonograms, radio and television broadcasting, cable and satellite transmission, videocassette recorders, compact disc (CD) and digital versatile disc (DVD) technology has triggered the change both in form and the substance of intellectual property rights. Currently, the Internet has effect on different kinds of intellectual property rights and there is no doubt that this new technology has a great role to change the substance and form of intellectual property.

“The Internet has revolutionized the computer and communications world like nothing before. The Internet has at once a world-wide broadcasting capability, a mechanism for information dissemination, and a medium for collaboration and interaction between individuals and their computers without regard for geographic location”². It is true that the Internet revolutionized computer and communications. Moreover as a result of exploitation of the Internet “Ever adaptable, intellectual property has now migrated to the Internet and is being modified to suit the online environment in many ways. Intellectual property has gained importance in this digital

¹ Audrey R. Chapman, *Approaching Intellectual Property as a Human Right*, Copyright Bulletin, Volume 35 No.3, Unesco Publishing, p.4., <http://unesdoc.unesco.org/images/0012/001255/125505e.pdf#page=4>, Visited on 13 July 2005.

² <http://www.isoc.org/internet/history/brief.shtml>, 13/04/2005.

environment as, increasingly, business assets are reflected in intellectual as opposed to physical property”³.

This migration could be seen in almost every kind of intellectual property areas, but it can be said that the migration is very significant and obvious in the field of copyrights. For instance vast numbers of works such as literature, film, art, music and computer programs have already taken their places in the cyberspace. Digitized books and newspapers gradually become more and more popular and demand for e-books have growing. Online newspaper publishing is also becoming widespread. For instance in September 2002, for the first time, The New York Times received more visitors to *nytimes.com* (1.28 million daily), than its weekday paper circulation (1.2 million daily)⁴. In the field of fine art, indigenous craft and artifacts, numerous museums and art galleries have digitized their collections and made them available for viewing on the Internet.

From the above it is clear that the migration of intellectual rights give the Internet users a great opportunity to access any information from any place in the world but at the same token Internet has become the largest threat to copyright for copyright holders. As mentioned before, the Internet contains a lot of information including news items, novels, plays, pictures, software, etc. and has provided the best form of communication through e-mail. Copyright law protects almost all of those uses. The film and music industry, software developers, authors and publishers, in other words, the intellectual community are, searching new ways to take a presence in cyberspace where dissemination and production costs are extremely low. However, as mentioned above, although they want to make available online their creations and put into circulation their works, they are hesitant to do so since copying and distribution is very easy and most of the Internet users believe that the information on the Internet and intellectual property sourced or downloaded from the internet are free. Therefore, right holders seek not only national protection, since Internet is a borderless area, but also International and regional protection. Many countries have already adapted their legislation in order to cope with these new technological challenges. However, since Internet has no borders International and regional protection is very important.

1.2 Purpose and Methodology

The purpose of this work is to take a brief look at copyright protection of material on the Internet and protection of those materials within the International Legislation, European Legislation and finally at national level under Turkish legislation, the Turkish Copyrights Act (hereinafter TCA). This examination includes those of basic Internet activities such as sending e-mails, posting materials on the World Wide Web, Web sites as a

³ World Intellectual Property Organization, *Intellectual Property Rights on the Internet: A Survey of Issues*, http://www.wipo.int/copyright/e-commerce/en/ip_survey/ip_survey.html, p.19. , Visited on 02 June 2005.

⁴ WIPO, *Supra* Note 2, p. 20.

compilation of individual works and web sites as computer programs and databases. In the second chapter of this thesis, the author's economic rights on the Internet will be discussed under the TCA. In the sixth chapter the relationship between human rights and intellectual property rights will be addressed. The final chapter of this work will examine the Turkish copyright to ascertain whether or not it provides adequate legal protection as well as dispute resolution of copyright infringement on the Internet and the current position/problems concerning the implementation of copyright.

During the research phase, an extensive literature review including the review of not only primary documentation but also secondary bibliography has been done. In addition, the Internet sources available on-line especially data and publications of pertinent organizations such as WIPO, WTO, UNESCO, EU, and have been reviewed. Moreover, a number of interviews were concluded in order to reach an understanding about the current situation in turkey concerning copyright.

2 International Legislation

Intellectual property protection is a combination of national, regional and international law, and is predominantly grounded in treaty norms.

Copyright takes its roots from the fifteenth century with the advent of printing. Since that time many systems were adopted in different countries in order to protect the rights of authors. For instance, some countries like the United States and the United Kingdom have implemented a “copyrights system” while others such as France and Germany have adopted “the author’s right system” which is also called the continental system. There are a number of essential differences between those two systems⁵, and every country has built its own copyright protection according to its philosophical, economical, cultural and political perspectives. Therefore, today there are variations of national legislation providing for copyright protection, which is effective only in their territory. However, exclusive national protection granted by national legislation is not always sufficient to protect the creator and inventor’s rights. Especially, after the nineteenth century, it was recognized that works created in a country could easily be used in another country without the consent of the author, moreover the developments in world trade, commerce and improvements in technology, have raised the importance of protection of intellectual property at the international level.

Beginning from the nineteenth century, many bilateral agreements were concluded between companies and between private companies and states in order to protect the works created by their nationals in those countries. “However, such “bilateralism” led to undue complexity and uneven protection and it was apparent to most that a better solution was for the industrialized countries to ensure protection by way of a multilateral, international convention”⁶. In the area of copyrights, the Bern Convention for the Protection of Artistic and Literary Works (herein after the Bern Convention) could be seen as one of the first cross-border intellectual property norms. Naturally, new developments in technology especially in areas such as digital and satellite communication and particularly in Internet which engages a great amount of technology, has led international treaties - likewise domestic legislations-; to undergo several amendments. Moreover, other international norms have been established, like the WIPO Copyright Treaty (hereinafter WCT) and the Agreement on Trade-Related Aspects on Intellectual Property Rights (hereinafter TRIPS Agreement) in order to cope with the new challenges posed by the technological developments.

Consequently, this chapter provides an examination of each of these international treaties in relation to Copyrights and the Internet.

⁵ For further information, see J.A.L. Sterling, *World Copyright Law*, Second Edition, London, Sweet& Maxwell, 2003, p.16.

⁶ Guy Tritton, *Intellectual Property in Europe*, Second Edition, London, Sweet& Maxwell, 2002, p.306.

2.1 The Bern Convention for the Protection of Literary and Artistic Works

The Berne Convention is the first international copyright treaty signed in 1889, revised in 1971, and amended in 1979. Member states that are the party to the Convention consent to recognize the moral rights of integrity and attribution of creative works and the economic rights to produce, copy, distribute, and perform works of creation.

The main objective of the Bern Convention is to harmonize copyright laws of member states, to eliminate the formalities and to provide against any discriminatory activity. According to this convention, member states are under an obligation to protect the rights of authors in their literary and artistic works. Therefore, the convention only provides that authors enjoy certain rights and left the most important part to be governed by the member states, that is the obligation to ensure that those rights are available and could be enjoyed by the authors in the member countries individual legislation.

There are 3 basic principles of the protection of authored works established by the convention:

- *National Treatment Principle*: Contracting states grants nationals of other contracting states the same treatment as if they are their own nationals. The main goal for providing this principle was to protect foreign authors against discrimination. Protection provided for a qualifying work depends on contracting states national law -the place protection is sought- as long as the author is a national of a country which is a member of the Bern Convention or the work was first published in a Bern Convention contracting state. However not all authors nor of all works are under the protection of the Bern convention. In order to benefit the rights of those authors should meet certain requirements such as a) he/she is a national of one of the members of the union and b) he/she is an author who is a national of a country which is not a member of the union but that his/her work was first published in one of the countries of the union, or was simultaneously published in a country outside the union and in a country of the union⁷.
- *Automatic Protection Principle*: Contracting parties cannot set conditions of compliance such as registration in member states local copyright office or placing a notice on published copies of the work; protection must be automatic.
- *Independence of Protection Principle*: Protection under the Berne Convention is independent of protection granted in individual states.

⁷ Art. 3(1).

Besides those main principles, the Bern Convention established a general term of protection, which is the life of the author plus 50 years after his death.⁸ However, in the case of photographic works and works of applied arts, the convention provides that term of protection shall last at least until the end of 25 years from the making of the work⁹.

The subject matter of protection afforded by the Bern convention, as above mentioned, is literary and artistic works¹⁰, which means whatever might be its mode or form of its expressions, every creation in the literary, artistic and scientific area. Moreover, the convention did not limit the protection of those works but also set norms in order to protect translations, adaptations, arrangements of music and other alterations¹¹ of literary or artistic works and collections of literary and artistic works such as encyclopedias and anthologies¹², provided that they don't prejudice the copyright in the original work.

The convention also provides for “economic rights” and “moral rights”.

The main exclusive rights of the authors guaranteed by the convention are:

- *Reproduction Right*: Article 9(1) refers to “Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in *any manner or form*”. However if certain conditions are fulfilled according to article 9(2), contracting states are permitted to make some exceptions provided that a) there is a “certain special case”, b) the permitted copying is in conformity with the normal exploitation of the work and c) authors legitimate rights is not unreasonably prejudiced by the permitted reproduction. This system is called the “three step” test, which has gained importance in European and international instruments.
- *Adaptation Right*: According to Article 12, authors shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works.
- *Distribution Right*: Author's distribution rights are under protection by many national laws. However in the Bern Convention the only article, which is in relation to right of distribution, is Article 14(1). According to that article, “authors have the exclusive right of authorizing the cinematographic adaptation and reproduction of their works, and the distribution of the works thus adapted or

⁸ Art. 7(1).

⁹ Art. 7(4).

¹⁰ Art. 2(1).

¹¹ Art. 2(3).

¹² Art. 2(5).

reproduced". Thus under the convention, a film incorporating a work (e.g. underlying novel, the screen play, soundtrack music, etc.) is regarded as a cinematographic reproduction, and the author has the right to control the distribution of copies of the film to the public¹³.

- *Communication Right*: the provisions concerning communication rights are found in Article 11, bis, 11 ter and 14. However, they are not a very well organized and logically structured set of rules and they are not applied to all categories of works in all cases.

Creation- the work of art- of an author is a way to express the author's personality and it is the reflection of his/her inner world. Distortion, dismemberment, or misrepresentation of the work misrepresents an expression of the artist's personality, affects his artistic identity, personality, and honor, and thus impairs a legally protected personal interest¹⁴. Therefore, being declared to be independent from the author's economic rights, the Bern Convention also recognizes the author's moral rights which is a combination of the rights, namely the right to claim authorship of the works and to object to any distortion, mutilation, modification or other derogatory action in relation to his/her works which will be prejudicial to the author's honor or reputation¹⁵.

As mentioned above, the Bern Convention sets general provisions in order to harmonize member states domestic laws and to prevent any discrimination against Bern Convention national's in union countries. The other feature of the Bern Convention is that it focuses on minimum protection standards and allows contracting states to enter into special agreements in order to provide a greater protection than the Convention provided that those agreements are not contrary to the Convention. Therefore while providing minimum protection standard, it left open to member states, not only to legislate certain rights or subject matter but to given larger protection, but also to encourage entering into special agreements between Union countries such as the conclusion of WCT.

In conclusion, there are many criticisms¹⁶ against the Bern convention these include that it does not contain any enforcement provisions and that it does not offer possible mechanism for sanctions for the party, which does not comply with the provisions. However, I am of the opinion that, although it does not offer a mechanism for sanction or enforcement standards, the Bern Convention enjoys widespread international compliance. Moreover it is an important instrument because it is a guideline for member states to follow and its provisions

¹³ J.A.L. Sterling, *supra* note 2, p.620.

¹⁴ Paul Goldstein, *International Intellectual Property Law*, New York, Foundation Press, 2001, p.273.

¹⁵ Art. 6 *bis*(1).

¹⁶ Anthony D'Amato, *International Intellectual Property Law*, London, Kluwer Law International, 1997, p.267.

are also applicable to new technologic developments such the Internet as well.

2.2 The Universal Copyright Convention

The Universal Copyright Convention (hereinafter UCC) is an alternative convention of the Bern Convention, which was developed and administered by UNESCO. It was adopted in 1952 at Geneva, came into force in 1955 and was revised in 1971.

The main objectives for concluding a new copyright convention were to build a bridge between the Bern Union members and the Pan- American convention members (that provides a weaker protection than the Bern Convention as regards duration of copyright, the subject matter and extent of protection) and to provide an alternative convention to the Bern Convention for some countries, which opposed to some of the features of the convention (e.g. the U.S, in order for a work to be copyrighted it must contain a copyright notice and be registered at the Copyright Office; the Berne Convention, on the other hand, prohibits procedures such as registration and does not therefore require registration) but still had the desire to participate in a multilateral treaty. These states were the developing countries and the Soviet Union, the United States and most of the Latin America countries. The United States then signed the convention in 1955 and USSR followed by joining the convention in 1973.

The significant difference between the Bern Convention and the Universal Copyright Convention derive from the “requirement for formality”. According to the Universal Copyright Convention, a work has to be marked with copyright notice in order to be protected.

After the convention’s remarkable success in terms of membership, although its applicability was always limited in Europe since it was stressed that it should not affect the provisions of the Bern Convention¹⁷, it started to loose its popularity especially in the United States, the Russian Federation and many Latin American countries who started to accede to the Bern Convention. Those countries expressed their willingness to become members of the Bern Convention and proceeded to revise their national laws to make them compatible with the provisions of the Bern Convention.

2.3 Agreement on Trade Related Aspects of Intellectual Property Rights

International conventions such as the Bern Convention and the UCC were just a beginning of the international copyright protection system. After many technological developments, dissemination of protected materials as well as by new technologies such as the Internet, intangible creations have

¹⁷ Universal Copyright Convention, Art.17.

became the most important and valuable property in the twenty-first century. It was believed in the past that creating strong intellectual property rights create possible trade barriers. However developments in international trade showed that lack of sufficient protection of intellectual property rights may undermine the benefits obtained by elimination of high tariffs¹⁸. Moreover, as mentioned above, lack of enforcement measures, dispute resolution procedures and enforcement in the old conventions and finally the developments of the new technologies concerning computer programs and databases pushed the international community to look for new solutions. Therefore, Trade Related Aspects of Intellectual Property Rights introduced as a subject into the General Agreement Trade and Tariffs (hereinafter GAAT). At the end of Uruguay Round, the TRIPS agreement was added to GAAT on April 1994. This agreement is not only a part of the GAAT agreement but also became the basis for the establishment of the World Trade Organization (hereinafter WTO). Members of the WTO are automatically bound by the TRIPS Agreement.

TRIPS Agreement covers different aspects of intellectual property law such as trademarks, patents designs and undisclosed information, geographical indications and also copyrights and related rights.

Copyright protection has an important place in the TRIPS Agreement due to the fact that developments in technology make it easier for the copyright infringements because it is less costly and difficult to detect. Therefore, all WTO members who are also the TRIPS signatories must comply with the provisions provided in the Bern Convention, which was incorporated in the TRIPS Agreement. Consequently, articles 1 to 21 and the Appendix of the Bern Convention are to be applied to copyrights issues with an exception for moral rights. In other words, the TRIPS Agreement does not contain any provisions on moral rights.

TRIPS Agreement includes the “national treatment” principle similar to the Bern Convention. Other than this principle it introduced a new principle namely the “most-favored nation” treatment that is not contained in neither the Bern Convention nor the Universal Copyright Convention. According to article 4 of the agreement with regard to the protection of intellectual property “ any advantage, favour, privilege, or immunity granted by a member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other members”. In other words, WTO members shall not conclude special agreements that give any special advantage to only a group of nationals, and if they do so, these must be given to all WTO member nationals. However, this principle has exceptions¹⁹.

These exceptions are:

- (a) Deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property;
- (b) Granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment

¹⁸ Anthony D’Amato, *supra* note 13, p.268.

¹⁹ TRIPS Agreement, Article 4(a)-(d).

accorded be a function not of national treatment but of the treatment accorded in another country;

- (c) In respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement;
- (d) Deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.

In the TRIPS Agreement, beneficiaries of protection are, to the extent that copyrights and related rights are concerned a) authors of literary and artistic works, b) performers, c) producers and phonograms and d) broadcasting organizations, although these are not defined under the agreement but are to be understood to be within the meaning of the Bern Convention. Accordingly author's economic rights (except moral rights) are protected by the TRIPS Agreement in conformity with the rights granted by the Bern Convention. Furthermore, the TRIPS Agreement also introduces three new rights that are not provided in the Bern Convention. Those rights relate to:

- *Computer Programs*: The TRIPS Agreement provides protection to computer programs within the meaning of the Bern Convention. It grants them protection as literary works as defined in article 10(1).
- *Compilations of selected or arranged material*: According to article 10(2) "whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such". However, it did not grant protection directly to the ideas or data, it protects only the arrangements of the contents.
- *Protection in relation with to rental*: There is also a qualified rental right with regard to computer programs, films and sound recordings²⁰.

The Bern Convention introduces some exceptions and limitations to author's economic rights in some special cases if they comply with the "three step test". The TRIPS Agreement also sets out limitations and exceptions to exclusive rights provided that they are not in conflict with the normal exploitation and does not prejudice the interests of right holders. However there is a very important difference between the exceptions and the limitations under the Bern Convention and the TRIPS Agreement. Under the Bern Convention only the reproduction right is subject to the "three step test" while in the TRIPS Agreement all limitations and exceptions are subject to the "three step test" and satisfaction of this test is compulsory.

In contrast, the Bern Convention was criticized because there were no enforcement measures. Articles 41-61 of the TRIPS Agreement however introduced extensive provisions concerning the enforcement of intellectual property rights. Since, enforcement in the Bern Convention was left entirely to national legislation, the inclusion of the enforcement provisions by the TRIPS Agreement could be seen as a major achievement. Before the TRIPS Agreement provisions dealing with enforcement of rights, there were

²⁰ TRIPS Agreement, Article 11.

basically only general obligations general obligations to provide for legal remedies, in certain cases, seizure of infringing goods²¹.

The TRIPS Agreement is not only important because it strengthens intellectual property rights, but more so it accepted to harmonize international business regulations and the relationship between trade and intellectual property rights. Moreover by introducing enforcement procedures, protection of intellectual property rights has become more secure in member states, which had not protected (e.g. trademarks, patents, trade secrets, copyrights etc.) before by any convention or agreement. By the provisions of this agreement any member may complain to WTO of any other member states non-compliance of the obligations and seek dispute resolution. Therefore, I am of the opinion that the TRIPS Agreement is one of the most effective instruments for the protection of intellectual property rights under the new technologies.

2.4 Wipo Copyright Treaty

Technological developments that took place in 1980s and 1990s have opened new discussions for intellectual property protection. New means of on-line dissemination and the emergence of multimedia works suggested that it is vital and urgent to find new solutions in order to cope with the digital age.

Notwithstanding the efforts of countries and the international community it is in the area of copyrights, as mentioned above technological developments are however always faster than law making. For instance it was understood that the Internet and digital media would play an important role in international commerce when the TRIPS agreement negotiations were close to the end. "In this regard, the TRIPS Agreement was a step behind developments in the global economic arena even before the 'ink had dried'".²² Not only the TRIPS Agreement but also the other international conventions were one step behind the new technological developments. It is no surprise that, in the light of new technological developments the desire to apply traditional copyrights law to new areas such as the Internet, provoked international activity and under the auspices of the World Intellectual Property Organization two global agreements were concluded: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (hereinafter WPPT). This could be seen as the most noteworthy international development in copyright over the last few years. The WIPO Copyright Treaty is an important improvement in the copyrights area because firstly it is a guideline to protect the works of authors legitimately distributed via the Internet and secondly "It's enormously significant, because the provisions on technology measures are expressed

²¹ Daniel Gervais, *The TRIPS Agreement Drafting History and Analysis*, Second Edition, London, Sweet&Maxwell, p.287.

²² Frederick Abbott, *The International Intellectual Property System*, Part One, (Kluwer Law International, The Hague, 1999), p.907.

internationally for the first time,”²³ says Richard Owens, international intellectual property rights advisor at British Music Rights.

The WIPO Copyright Treaty provides as its objectives: to protect the rights of authors effectively and uniformly, to clarify international copyright law, to update international copyright law and make it applicable to digital media, to emphasize copyright protection as an incentive for literary and artistic creation, and to recognize the balance between the rights of authors and public interest²⁴. The main and basic provisions of the WCT are in conformity with the Bern Convention and according to the WCT provisions beneficiaries of protection are “authors of literary and artistic works” and creators have exclusive right to control the exploitation of their work on the Internet. Moreover author’s moral rights are guaranteed under the WCT in order to comply with article 1-21 of the Bern Convention and the Appendix although the treaty did not set any specific provisions concerning the recognition of moral rights.

The WCT follows the same logic as the Bern Convention with regard to protection of subject matter and thus “literary and artistic works” are subject to protection. Article 2 of the WCT provides that “Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such”. This means that any material on the Internet such as text, scanned photographs, music etc. in addition to those materials, computer programs²⁵ and databases²⁶ within the meaning of Article 2 of the Bern Convention are under the protection of the WCT.

In addition to economic rights provided by the Bern Convention, there are also some other rights provided by the WCT which were not only provided by the Bern Convention alone. These are distribution right (article 6), rental right (article 7) and On-Demand availability right (article 8).

Article 6(1) provides that, “Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership”. This article has a very large importance because the author’s distribution right was recognized for the first time and it is discreet from reproduction right in an international instrument.

Other right, which are not included in the Bern convention is the rental right. In the past years commercial renting of films, recordings, and books did not threaten the authors economic rights. However after technological developments, rental rights began to prejudice the author’s rights in the market place and copyright owner started to suffer because this cause a loses from sale and rented copies which could themselves be copied. Therefore, the WCT introduced article 7(1) that states “Authors of (i)

²³Richard Owens, in Juliana Koranteng, *Industry Welcomes Copyright Treaty*, www.elin.lub.lu.se/cgi-bin/linker/ebSCO_local?5705047, p.1.

²⁴ WIPO Copyright Treaty pmb1.

²⁵ The WCT, Art. 4.

²⁶ The WCT, Art. 5.

computer programs; (ii) cinematographic works; and (iii) works embodied in phonograms, as determined in the national law of Contracting Parties, shall enjoy the exclusive right of authorizing commercial rental to the public of the originals or copies of their works”. From the wording of this article, the expression ‘copies and originals’ demonstrates that, only fixed copies or original works that are subject to circulation is under rental right protection. For instance software that is put on a Bulletin Board Service, which could be downloaded from this board, will not benefit from the protection provided by article 7(1) because this software is not a tangible copy²⁷ of the work. In paragraph 2 of article 7 there are exceptions where “paragraph 1 shall not apply (i) in the case of computer programs, where the program itself is not the essential object of the rental; and (ii) in the case of cinematographic works, unless such commercial rental has led to widespread copying of such works materially impairing the exclusive right of reproduction.

The “on-demand” availability right established by the WCT by article 8 provides that “authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them”. In this case members of the public choose access time and place individually. Therefore, when a material is placed on an Internet server, it will be possible to access the material in any place where there is a computer. Since on-demand availability is considered as an exclusive right of the author, this access right would seem to authorize the copyright holder to remove an infringing posting of a work²⁸.

In addition to those new provisions introduced by the WCT, although the treaty does not contain a definition of what constitutes infringement, there are certain provisions on obligations concerning Technologic Measures²⁹, Obligations Concerning Rights Management Information³⁰ and remedies, penalties and enforcement procedures³¹.

In conclusion, this treaty is a more developed version of both the Bern Convention and the TRIPS Agreement although some of its provisions require further clarification³² and some issues were left open³³ by the treaty, it is a noteworthy accomplishment in international legislation in particular

²⁷ Stanley Lai, *Substantive Issues of Copyright Protection in A Networked Environment in Information and Communications Technology Law Magazine*; June 1999,p.274, www.elin.lub.lu.se/cgi-bin/linker/ebSCO_local?2120904, 2005-10-24

²⁸ David L. Hayes, *Advanced Copyright Issues on the Internet*, Computer Law and Security Report, Vol. 16, no.6, p.8., 2000, <http://80-elin.lub.lu.se.ludwig.lub.lu.se/elin?func=record&query=2a8535b5b351d473fe7de5f5991d4511&lang=en&start=0&fromColl=1&orgFunc=simpleSearch>, visited on 25 October 2005.

²⁹ The WCT, Art. 11.

³⁰ The WCT, Art. 12.

³¹ The WCT, Art. 14.

³² J.A.L Sterling, *supra* note 2, p. 721.

³³ *Ibid.*

on issues concerning digital age. However, after the adoption of every new instrument, the situations become more complex in the copyright area. Therefore, as technological developments take place the need for an instrument that can regulate the same aspect introducing this new situations and which is applicable throughout the world, becomes necessary and urgent.

3 European Legislation:

Digital technologies are becoming more important in business and a potential locomotive for economic growth and trade. The U.S producers and consumers have enjoyed a ‘Digital revolution’ since 1990’s and it is not surprising that they became the largest economy in the information society. Although following developments in information society one step behind the U.S, the challenge for Europe is to clinch the digital age and become the most competitive knowledge-based economy and society is the new goal of the EU³⁴. Statistics shows that, in Europe 90% of firms and most of their employees have an Internet connection 60% of those firms have web sites and approximately 20% of the European companies sell and buy over through the Internet³⁵.

The Internet penetration in business is very high in Europe, but apart from business and trade there is no doubt that the Internet has a direct effect in everyday activities. “In today’s society, Internet access has become a fundamental right for all citizens and responsible governments have a duty to provide it”³⁶. This is one side of the medallion and the other side is the government’s duty to provide effective and adequate protection and to set aside high protection to authors and creators works. As long as laws guarantee copyright protection, the authors will be stimulated to create new works and circulate them by means of new technologies such as the Internet. In this respect, The European Community started a harmonization program in order to achieve the main objectives of Common Market, that is to say, freedom of movement of goods, persons, services and capital in all areas and also in the field of copyright and related rights.

The first step taken by the European Commission for harmonization was started in 1988 with the Green Paper entitled *Copyright and Related Rights and the Challenges of Technology* that concerned steps to be carried out to harmonize aspects of copyright and related rights laws in the EC affected by technology. In this paper, many issues were discussed and an outline provided for rules that need urgent attention. As a result of this, the Commission determined its harmonization policy in the field of copyright and related rights throughout the community. The basic concerns of the Green Paper were; a) elimination of obstacles and divergences at the national level b) setting high levels of protection in relation to copyrights in order to improve the competitiveness of its economy with regard to its global trade partners, c) protection of creative effort or investment from fraud by others who are not members of the community³⁷.

³⁴ European Commission Publications, *Europe on the Move*, 2003, <http://www.eu.int/comm/publications/booklets/move/36/en.pdf>, p.5., visited on 27 October 2005.

³⁵ *Ibid.*, p.13

³⁶ European Commission Publications, *supra* note 33, p.3.

³⁷ Guy Tritton, *supra* note 3, p.324.

In 1995 the Green paper on Copyright and Related Rights in the Information Society was documented as a second step of the Commission in order to cope with the new technological advent and electronic transmission of information and other materials. “ In these papers, the commission drew the attention to the need for an EU public sector information policy in the context of the Information society, and the problems raised by the rendering of protecting material into electronic format, rights of access to and commercial exploitation of material on internationally-linked computer databases (as in the Internet) and, in particular, the public interest issues involved in regulating availability of electronically transmitted information and protected material”³⁸.

Starting from 1988 harmonization efforts are still in progress. In the field of copyrights and related rights law, several directives were adopted and in addition to those Council Directives, the Alternative Council Resolutions have importance too. The “first generation”³⁹ rights that have been adopted with council directives in line with harmonization so far are;

- Council Directive on the legal protection of Computer Programs (91/250);
- Council Directive on rental lending right and related rights (92/100);
- Council Directive on Satellite broadcasting and Cable Retransmission (93/83);
- Parliament and Council Directive on Databases (96/9);
- European Parliament and Council Directive on Artist’s Resale Right (2001/84).

Finally, the “second generation” rights that is to say the European Parliament Council Directive on Copyright in the Information Society (2001/29) was adopted on May 22, 2001, which is considered as “the true precursor of to a community copyright code”⁴⁰.

The Directive consists of important provisions such as the right of reproduction in the digital environment and temporary reproduction; the right of making available to the public particularly on the Internet; limitations and exceptions in the digital environment, technological measures for protection, and rights management information, in order to implement the WIPO Treaties.

³⁸ J.A.L Sterling, *supra* note 2, p.761.

³⁹ *ibid.*, Jörg Reinbothe, “Recent Intellectual Property Legislative Developments in the European Union: Copyright and Related Rights” 9th Annual Conference on Intellectual Property Law and Policy, Fordham University, April 19, 2001.

⁴⁰ J.A.L Sterling, *supra* note2, p.325.

3.1 European Union Copyright Directive

The Information Society or the European Union Copyright Directive (EUCD) is a major step in the development of a European copyright code, as mentioned above, when examined together with the five other directives, which achieved a certain degree of harmonization at the present time. However “ the EUCD is more far reaching and marks an important stage in the endeavor to provide solutions to problems posed by technical developments, in particular by adopting provisions to give effect to a number of provisions of the WIPO Treaties 1996”⁴¹. Therefore, the Directive covers important on-line issues and aims to deal with the copyright implications of the Internet, at the same time it pushes EC member states to adopt legislative action with respect to four rights: the reproduction right⁴², the distribution right⁴³, the communication to the public right⁴⁴ and protection against the circumvention or abuse of electronic management and protection systems⁴⁵.

This Directive is based on the same principles that were provided in the previous community directives, and unless otherwise specified it is to be without prejudice the earlier EU Directives⁴⁶. However the directive introduces some amendments to the reproduction right in article 2.

3.1.1 The Right of Reproduction

The directive establishes a broad reproduction right because “[t]he single most important copyright right implicated by the transmission and use of works on the Internet is the right of reproduction”⁴⁷. As a consequence of its importance, in order to get rid of divergences in the approach of member states laws concerning electronic and transient copying the directive extends the nature of reproduction right. According to Article 2 of the directive “Member States shall provide for the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part” of the copyrighted works. This article also covers non-visible temporary copies of a copyrighted work in the working memory of a computer and also ephemeral copies made during transmission or use of a work in an online context⁴⁸.

However, according to article 5(1) there is an exception to the reproduction right, which facilitates a special defense to online service providers and other intermediaries that innocently cache, host or transmit material that

⁴¹ *Ibid*, p.862.

⁴² The EUCD, Art.2.

⁴³ The EUCD, Art.4.

⁴⁴ The EUCD Art.3.

⁴⁵ The EUCD, Art.6-7.

⁴⁶ Recital 20.

⁴⁷ David L. Hayes, *supra* note 26, p.364.

⁴⁸ *Ibid*, p. 373.

would cause infringement with respect to reproduction right, that is to say, “Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and (c) which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2”. Design of the computers and networks render necessary the creation of incidental copies of a copyrighted work in order to perform digital processing and information transformation and these copies are not functional independently, in other words they only enable processing of information and they become extinct -unless otherwise they are not overwritten by a new data- when the computer is switched off⁴⁹.

The “three-step test” must be satisfied also for all exceptions of EUCD’s however the directive goes further than the three-step test and introduces “economic impact” fact,⁵⁰ which suggest that “when considering the application of the Bern Convention, the ‘three-step test’ in an internet-based or digital context, the court must also be conscious of the fact that technology in these fields makes for faithful reproduction and rapid dissemination, accordingly, the scope for economic harm can be greater than in the analogue context. As such, when dealing with a ‘new electronic environment’ type of case, the court might well regard this as a fourth- step in the analysis”⁵¹.

3.1.2 The Right of Communication to the Public

The EC Directive adopts a parallel approach with WCT and WPPT in respect to communication to the public. According to article 3 of the directive, with respect to copyrighted works, “Member States shall provide authors with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them”. The comments to article 3 define “communication to the public to cover ‘any’ means or process other than distribution of physical copies, this includes communication by wire or wireless means which clearly encompasses a right of transmission”⁵².

⁴⁹ Olena Dmytrenko, *Copyright & The Internet: Building National Legislative Frameworks Based on the International Copyright Law*, <http://www.internetpolicy.net/practices/20041200copyright.pdf>, visited on 2 November 2005.

⁵⁰ Recital 44.

⁵¹ Guy Tritton, *supra* note 3, p. 369.

⁵² David L. Hayes, *supra* note 26, p. 9.

All in all, for instance an act of web-posting of a copyrighted work will be considered as communication of the work to the public and from the very nature of article 2, it will grant the right of transmission and access to protected works.

3.1.3 The Right of Distribution

All national legislations and international treaties and also regional treaties like the EUCD fundamentally accept the right of distribution. This exclusive right of authors has guaranteed by the article 4 of the directive that states, “Member states shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorize or prohibit any form of distribution to the public by sale or otherwise”. As mentioned above, distribution right only covers hard copies and one may argue that transmission of a material from a server site and making of a complete copy of a work in a recipient’s computer constitutes distribution. However, the comments to article 4(1) of the EC Directive clarifies that “ the expressions ‘copies’ and ‘originals and copies’ being subject to the distribution right, refer exclusively to fixed copies that can be put into circulation as tangible objects” thus, although use of the phrase “any form” of distribution might suggest that all online transmissions of copyrighted works would fall within the distribution right of the EC Directive, comments limit the distribution right to “fixed copies” that can be put into circulation as tangible objects⁵³.

3.1.4 Copy Protection Circumvention and Interference with Rights Management Information

It is a truth that technological improvements both make life harder and easier for authors and right holders. They, make life easier from a point of view that, new technological tools offer authors and creators the opportunity to finalize their works with a perfect quality and duplicate their works in a very short time. On the other hand, this might turn out to be a disadvantage because reproduction and circulation of copyrighted materials by third people who are not the owners of the protected works was never as easy as today. Thus, technology is a double-edged sword for copyright owners, which has two sides comprising advantages and disadvantages.

However, improvements not always bring risks but also offer so- called new tools like Digital Rights Management such as access control, rights control and digital watermarks⁵⁴. Through this very innovative technologies copyright owners have tried to protect their copyrighted works, however it has not taken too much time to find simple ways to circumvent the technology. Therefore national laws introduce the anti-circumvention

⁵³ *Ibid*, p.7.

⁵⁴ Olena Dmytrenko, *supra* note 47, p.5.

provisions, which may provide to criminalize attempts to evade such copyright protection system.

The EC Directive also provided anti-circumvention protection parallel to the WCT article 11 and the WPPT article 18 in order to implement those provisions. Briefly stated, member states are under an obligation to provide adequate legal protection against circumvention of any technical measures and prohibit conduct and the manufacture of distribution of devices that enable to defeat technological copyright protection⁵⁵.

The EC Directive article 7(1) provided “electronic rights management information” that is provided by right holders in order to identify the work⁵⁶, which puts member states under the obligation to prohibit removal or alternation of electronic rights management information or the distribution, broadcast, communication or making available to the public copies of the works.

3.2 Concluding Remarks

The European Union has become more than an alliance of trade based economic community as a consequence of this close relationship of members’ harmonization. As a result in order to transpose the WIPO norms in European level copyright directive, which is its main aim, was to overcome the differences undermining the functioning of the single market was introduced in 2001. Now the union embraces its future copyright code with more strengthened norms, which are in compliance with the WIPO norms. However, although the key issues were identified in the Green Paper which were in brief: applicable law, exhaustion, the scope of economic rights, moral rights, administration of rights and technical protection; only half of these key issues were taken in the copyright directive, and the most important copyrights issues such as applicable law, administration of rights and moral rights were left unresolved⁵⁷. The directive was also criticized because as it is alleged by Prof. Bernt Hugenholtz, chairman of the Intellectual Property Task Force of the Legal Advisory Board of the European Commission that “The Directive is a badly drafted, compromise-ridden, ambiguous piece of legislation. It does not increase ‘legal certainty’, a goal repeatedly stated in the Directive’s Recitals (Recitals 4, 6, 7 and 21), but instead creates new uncertainties by using vague and in places almost unintelligible language”⁵⁸.

I am of the opinion that the weakest part of the directive is the exhaustive list of exceptions allowed under article 5, where the EU member states are

⁵⁵ EUCD, Article 6.

⁵⁶ EUCD, Article 7(2).

⁵⁷ See Bernt Hugenholtz, *Why the copyright Directive is Unimportant and Possibly Invalid*, Institute of Information Law Publications, 2000, p.501-502,

<http://www.ivir.nl/publications/hugenholtz/opinion-EIPR.html>, visited on 7 November 2005.

⁵⁸ *Ibid.*

not allowed to create other exceptions other than those. However those exceptions set out under article 5 are optional as a matter of fact this optional picking opportunity will lead the member states to change their laws as little as possible, thus it is not surprising that most of the members will keep their laws as they were before and this will hamper the harmonization efforts in a negative way. If we put aside the all-pessimistic view, we must bear in mind that the digital area is a new area, which is still in progress and potential new questions may arise; some level of harmonization has been achieved with this directive.

4 National Legislation: Turkish Copyright Legislation and Turkey's Harmonization in the Field of Copyright- Homework to be done before becoming a member of the EU

The importance of international and regional instruments is discussed in the previous parts concerning response to the copyright challenges on the cyberspace. Although they have a big importance, the main solution rests under national policy; in other words, generally solutions are left to national to be resolved by policymakers. Those treaties could be seen as triggering tools and a framework for national policymakers to use in order to find solutions to the most urgent issues.

4.1 Developments in Turkey between 1727 and 2004

The formation of intellectual property rights came into existence in Turkey later than in other European countries for the reason that the first printing house was established 272 years later than in Europe, in 1727. However, the first official "copyright" term was introduced in a regulation in 1850 called "Encumen-I Danis Nizamnamesi". Following this regulation, the first copyright act in 1910 came into force and this law stayed in force until 1951⁵⁹.

In 1951, with the enactment Intellectual and Artistic Works Act no.584 (herein after referred as TCA) the Turkish right owners succeeded in getting a real and effective protection after a long time. Addition to this development, membership to the Bern Convention in 1952, which has been the basis of international copyright and sets minimum standards for national legislation, triggered further developments in copyrights law in Turkey. Since 1951, the copyright law has been amended several times as a consequence of new developments in printing, communication and distribution technologies.

⁵⁹ Kltr ve Turizm Haber Portalı, *Fikir ve Sanat Eserleri Hukukunun Dnyada ve Trkiye'de Gelişim Sreci*, http://www.kulturturizmhaber.com/default_tr.asp?BELGENO=57895, visited on 8 November 2005.

The first amendment, which took place in 1983, did not make a considerable change in the copyright act. However, new amendments came into force in 1995, through the Customs Union which was established between the European Community and Turkey, Decision No. 1/95 and its Appendix No.8 namely “Intellectual, Industrial and Commercial Property Rights”, transformed the Turkish copyright act to a modern legislation. The provisions introduced by the amendment to copyrights act deals particularly with piracy issues because as it was mentioned in the preamble of the amendment, “... Turkey is in the first place on the pirate countries list”. Other than piracy issues, other important changes took place with respect to computer programs, where the term ‘computer program’ entered into the act and was accepted as literary and artistic works but also reproduction and distribution rights were reviewed in the light of new technologic developments; and last but not least, articles concerning private and non-commercial copying by individuals, including copying computer programs, were modified.

Technological developments continued during this time and although the act was modified only six years ago, the government went on to introduce another amendment in 2001 in order to deal with potential inadequacies. With this amendment an extensive modification has been implemented and almost all articles were reviewed and revised. In particular, the reproduction and distribution rights were reestablished in line with the international approach, also apart from the author’s economic and moral rights on radio and television broadcasting, the author’s rights on the Internet area were established. Although amendment no.4630 to TCA was a significant improvement in the matter of international harmonization, it did not turn out to be a solution to piracy issues. However, the most remarkable step taken since 1951 came into existence in 2004 with the amendments of various acts in an act dated 13 March 2004 and no.5010. The main purposes of this act are to prevent piracy and to solve the conflicts between collecting societies and the users; also this act deals with other issues and includes provisions on Internet service providers’ liability on the protection of *sui generis* database. The latest amendment (Law No.4630) to copyright law in Turkey redefines the concept of the right holder and increases the time of imprisonment and fines in case of unauthorized reproduction; in order to protect the author’s economic and moral rights. In addition to this, efforts for effective protection of copyright were strengthened with the establishment of specialized IPR courts; even though their numbers are inadequate.

One may argue that, with the 1983, 1995,2001 and lastly the 2004 amendments and the establishment of Intellectual and Industrial Property Rights Courts in 2003. These measures have taken the copyright law in Turkey into a modern era and have opened a new page with respect to the protection of authors’ rights in the digital area. Nevertheless, copyright on the Internet is still a new and progressing area not only in Turkey but also all around the world, where people usually think that all material and works displayed on the Internet is free. Therefore many infringements occur in

cyberspace whether those infringements are done intentionally or not. As indicated in the Commission of the European Communities 2004 Regular Report on Turkey's Progress Towards Accession "implementation of intellectual property rights is weak"⁶⁰. Contrary to Europe's "EUCD" and the U.S's "Digital Millennium Act", Turkey does not have its own Internet Law in respect to copyright on internet, and therefore problems concerning this issue are solved by the TCA. At first sight, the rules are exercisable, but when specific problems concerning Internet infringement occurs, this legislation would be found to be inadequate.

As a consequence, this revised act sometimes does not respond to the new technological developments. Moreover, some divergences with EUCD would possibly emerge. In order to achieve realization of copyright protection and considering Turkey's future membership in the EU, further reforms and ratification of the WIPO treaties are not only critical but also urgent.

4.2 Harmonization Efforts

Full membership to the European Union is one of the main aspirations of the Turkish Republic for 40 years, and Turkey officially begun to conduct membership talks with the EU after a long expectation, on 4 October 2005. In order to become a member state of the EU, candidate countries including Turkey, must fulfill certain political and economic criteria in addition to this, *acquis communautaire* of the EU. This *acquis* consist of several different issues including Intellectual Property Rights. The *acquis* on intellectual property rights specifies harmonized rules for the legal protection of copyright and related rights. Specific provisions apply to the protection of databases, computer programs, semiconductor topographies, satellite broadcasting and cable retransmission⁶¹.

Turkish legislation has already been revised several times, as mentioned above, in order to bring Turkish legislation into consonance with the EU directives. However, as mentioned in the commission's report, "both industrial property and intellectual property rights legislation need to be further aligned in order to comply with the EC directives and international requirements and to ensure effective implementation"⁶². In 2005, there was no progress made in legislative alignment with the provisions concerning

⁶⁰ Commission of the European Communities, *2004 Regular Report on Turkey's Progress Towards Accession*, Commission of the European Communities 2004 Regular Report on Turkey's Progress Towards Accession, http://www.deltur.cec.eu.int/PublishDocs/en/2004_rr.pdf#search='Commission%20of%20the%20European%20Communities%202004%20Regular%20Report%20on%20Turkey%E2%80%99s%20Progress%20Towards%20Accession', p.65, visited on 11 November 2005.

⁶¹ European Commission, *Turkey 2005 Progress Report*, Brussels, 9 November 2005, http://www.mfa.gov.tr/NR/rdonlyres/280F0021-B312-4871-8F0E-9D3A71684437/0/2005_progress.PDF, visited on 11 November 2005.

⁶² *Ibid*, p.90.

copyright and related rights. However, in implementation issues, a regulation on the certification of undertakings making duplication and sale of the material on which copyright works are fixed came into force on April 2005.

Overall, with regard to copyright and related rights, although further revision is needed for full alignment with the acquis and international requirements, it seems that Turkey has essentially aligned its legislation. However, co operation and co-ordination must be strengthened among all stakeholders such as the Directorate General of Cinema and Copyright, which is a body responsible for defining policy areas in the field of copyright and related rights, reviewing related legislation, taking necessary measures; the judiciary, the police and collecting societies.

4.3 Domestic Legislation: Applying Copyright to the Internet

4.3.1 What is Internet

“The Internet is often described as a network of networks, physically, the Internet is a collection of packet computer networks, glued together by a set of software protocols called TCP/ IP (transmission control protocol/ Internet Protocol). These protocols allow the networks and the computers attached to them to communicate and using a common address system to find other computers attached to the Internet”⁶³. Briefly, the Internet functions as follows, “the viewer’s computer transmits a request to server computer holding the website which is being browsed to forward a copy of some particular material that it is storing, this material is broken into packets, each with an address and sent across the Internet, it is then passed from one computer on the Internet to another, all of which could be said to make a copy, until all the packets are received at the browser’s computer”⁶⁴.

Many people think that the Internet is a new innovation, however, the Internet is a project, which was created in 1960’s by the U.S government and used between government and academic institutions in order to facilitate access to files and sending e-mails. Today, this global network of the Internet allows 964,289,701⁶⁵ users to send email, to search information, to view web sites, to download files such as mp3 and images, to chat with people live online, to post messages on newsgroups and forums, to play multiplayer games online, watch movies and TV programs, chat and view on web cams.

⁶³ Graham J H Smith, *Internet Law and Regulation*, Third Edition, London, Sweet& Maxwell, 2002, p.1.

⁶⁴ Simon Stokes, *Digital Copyright: Law and Practice*, Second Edition, Oxford- Portland, Hart Publishing, 2005, p.10.

⁶⁵ Internet World Stats, *The Internet usage statistics*, <http://www.internetworldstats.com/stats.htm>, Visited on 13 November 2005.

The main parties of the Internet are Internet Service Provider (ISP), which is a company or an academic institution like a university that provides the Internet connection to the Internet users and content providers that are the most important party on the Internet varying from companies to individuals.

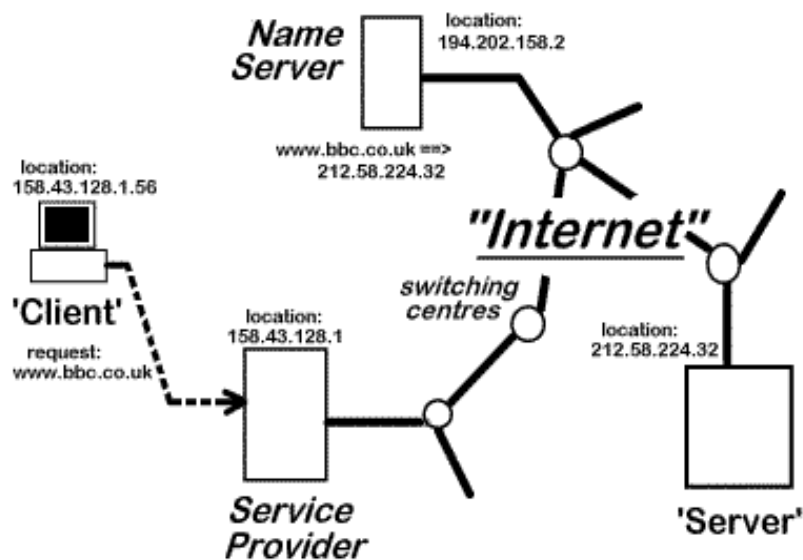


Figure 1: Actors of the Internet⁶⁶

4.3.2 Materials Subject to Copyright Protection on the Internet

Internet, which is a collection of networks, facilitates different kinds of application. The most well known facilitations are the World Wide Web, Usenet newsgroups, e-mails, bulletin boards and file downloading. The Internet consists of web pages, which are a combination of original works such as texts, images, audio, and movie files that are the heart of the copyright system. Therefore these materials displayed on the Internet are subject to copyright protection in much the same way that books, photographs and videos are. As a consequence, everyone should be aware of not only his or her rights as creators showed but also their obligations as users.

4.3.2.1 E-Mails

As a general rule literary works -although not being exhaustive- can be listed as, whether published or unpublished; novels, short stories, poems,

⁶⁶ UK Internet Rights, *Introduction to the Internet*, http://www.internetrights.org.uk/index.shtml?AA_SL_Session=8fa795873994ed10dd54938b98227a99&x=562, visited on 13 November 2005.

dramatic works and any other writings, irrespective of their content (fiction or non-fiction) length, purpose (amusement, advertisement, propaganda, etc.), form (handwritten, typed, printed; book pamphlet, single sheet, newspaper, magazine).

Electronic mail is one of the first applications used on the Internet, which is the most widespread and popular application of the Internet today. Since it is very easy to copy and forward e-mails, copyright infringements occur frequently. Electronic mail is a system that is sent from one computer via telephone lines where this message is stored until the receiver goes online and checks his or her mail. Usually this message is in text form, typed in any language or even using symbols and sometimes includes the 'emotions' that help to express mood by little pictures. Moreover by attaching files to regular texts it is also possible to send pictures, audio or video. Therefore electronic mails can be considered as literary works as much as a letter is, as a consequence of having the same characteristics. E-mail messages are automatically copyrighted by their authors, even though it does not contain a copyright notice. As a result, using those mails without the consent of author or the recipient brings civil and/or criminal liability.

TCA article 1 defines the intellectual property works and works of art as "... a work of art is every kind of intellectual products and products of art that carry the characteristics of its owner and which are accepted as works of science and literature, music, fine art works and cinema according to the provisions below". Although the act did not mention whether an e-mail is an original literary work but the content and the elements of e-mail is the same as that of a letter and it is a creation of its author that carries its owner's characteristics. Therefore e-mails fall under the scope article 1 as a literary work in the same way as a letter. As a consequence e-mails will benefit the protection granted by article 1 and will be protected under article 27, for the life of the author plus 70 years from the calendar year of its author's death. Moreover, if we consider e-mails as quasi-letters it is possible for them to benefit from another protection warranted by Article 85, which prohibits the use of letters, remembrance and writings similar to these without the permission of, not only the authors but also the second person, in other words, the person to whom it is addressed.

4.3.2.2 Forums

Another Internet application is the Internet forum, which provides discussion platforms. Internet forums are divided into different types such as conversation threads, which are a collection of written conversations posted by different individuals and allow anyone to start a new discussion or to reply to an existing thread, in other words, posting public messages. In addition to conversation threads, bulletin boards are a separate system,

which include online games and file sharing, which often constitutes copyright infringement by itself.

Conversation threads are public discussion forums where different individuals can post messages rather than sending an e-mail to another person. Anyone who has joined that thread may read the message on a particular topic and may reply to it directly to the sender or directly to the forum. Therefore conversation threads are a compilation of e-mails, which are subject to copyright protection. However, the protected material is not individual e-mails, but the whole collection of posted e-mails or messages. Although those e-mails are not original in other words they are copy of others' mails but still they are a creation of a moderator who puts his skills and effort to compose this thread.

According to TCA article 2/1 "Works of art expressed by speech or writing in any way and computer programs expressed in any way and preparatory drafts of these provided that they shall bring the result of the program in the next process" are considered as literary works. Therefore compilation of e-mails, in other words conversation threads, fall into the scope of literary works and as a consequence these works shall be protected under copyright. In addition to that, if a computer program is written for the purpose allowing individuals to post their messages, this program shall be eligible by itself to be protected under article 2. If we consider that conversation threads are original literary works, they will be protected for the lifetime of the author plus 70 years from the end of the calendar year in which the author dies⁶⁷. However, conversation threads that are unmoderated, in other words, threads created without human interaction would not be protected by copyright.

4.3.2.3 Web Sites

"The World Wide Web is a system of joining documents to each other across the Internet by hypertext links"⁶⁸. Websites consist of different works such as texts, graphics, links, music and sounds each of which may be protected separately. With the use of Internet and software devices it is very easy to use and copy a text, graphic and sound without the permission of author or creator. On the other hand it is hard to detect copyright infringements. Use of some of those materials or use of the web page in another web page without the copyright holder's consent constitutes copyright infringement. Therefore they are the most legally complex works on the Internet.

⁶⁷ TCA 1951, Article 27.

⁶⁸ Graham J H Smith, *supra note 60*, p.3.

4.3.2.3.1 Copyright Protection of Web Sites as a Combination of Different Elements:

As mentioned above, there are constituent elements, which constitute web sites.

Those are:

- Texts:

There is no doubt that texts used on web pages which the author has exercised the requisite labor, skill or effort are literary works. Therefore, they shall be protected by copyright. These texts could be in any form such as novels, poems etc.

According to TCA, those texts will fall under the scope of article 2 as literary works. Therefore they will be protected for the life of the author plus 70 years from the end of the calendar year in which its author dies⁶⁹.

- Pictures, Images and Photographs:

In the course of making homepages, web designers use background pictures, design, photographs and logos. The designer may create this work by himself or this logo, photo or picture may already exist in the commissioner's paper work⁷⁰. Obviously, those materials are entitled to be protected under the copyright law in both tangible world but also in cyberspace. According to TCA article 4/1 "Oil paint and water paint tableaus, every kind of paintings, designs, pastels, engravings, works of art drawn or determined by mine, stone, wood or other materials, calligraphy, serigraphy", inter alia, photos are also under protection by article 4/5. Therefore, those fine works of art that have esthetic qualification will be protected for the lifetime of the author plus 70 years from the first day of the year following the year of the death of the creator of the work⁷¹.

- Music and Sounds:

In recent years, music fans have discovered easy access to and free music and free download following the rapid technological improvements. Therefore digital music distribution through the Internet has increased and become not only a new economic area but also a new area of infringement. This distribution includes trading, sharing and downloading and each one is subject to copyright. As a consequence of that widespread USE

⁶⁹ TCA 1951, Article 27.

⁷⁰ Clive Gringras, *The Laws of the Internet*, Second Edition, London, Lexis Nexis Butterworths, 2003, p.239

⁷¹ TCA 1951, Article 27

“piracy” has become one of the leading problems on the Internet. There is no doubt that musical works are under the protection of copyright law provided that they are original in the copyright sense.

In the light of Mp3 technology, converting musical works into digitalized form has become very easy. “MP3 music files are CD quality compressed recordings that occupy approximately one tenth to one twelfth less file space than the equivalent CD format WAV/AIFF file, which is achieved by filtering out all noise that is not detectable to the human ear”⁷². Therefore without any loss in quality, original musical works are converted in digital form and take their places on web sites. According to some commentators⁷³ conversion of CDs into a digital format constitutes a derivative work and gives rise to an original work. It is true that authors may use or copy a pre existing work and still get copyright protection as long as the resulting work is different from the pre existing work provided that some quality and character is added to the new creation⁷⁴. It is difficult to determine whether a work is new, in other words, original or derivative. However, there are four situations where a work will be considered as non-original; “a) the labor fails to bring about a change in the resulting work, b) the change in the resulting work is a result of a ‘mechanical’ or ‘automatic’ process, c) the change in the resulting work is non-material or d) the labor is of the wrong kind”⁷⁵. There is no doubt that after process of digitization; the produced product is different from the pre existing work. However, I am of the opinion that the new product has no element of taste or selection, judgment or ingenuity⁷⁶, although TCA did not refer to the term ‘ingenuity’ it could be assumed from the examples written in article 6 that some sort of ingenuity is to be sought. Therefore conversion to Mp3 should not be considered as derivative work.

After completion of digitations, the original work of the author is uploaded by the content provider and becomes ready for use. Technically the term “uploading is to send data from a local computer to some remote computer, such as a website”⁷⁷ which obviously constitutes copying. According to article 3 of the Turkish Copyright Act “Musical works of art are compositions with and without lyrics”. Therefore musical works are under the protection of the copyright act. Use or communication of work

⁷² http://www.mp3-mac.com/Pages/What_is_MP3.html, visited on 20 November 2005.

⁷³ Mehmet Topaloğlu, *İnternet’te Fikri Haklar Sorunları*, www.turkhukuksitesi.com, visited on 21 November 2005.

⁷⁴ Lionel Bently, *Intellectual Property Law*, Oxford, Oxford University Press, 2001, p.86.

⁷⁵ *ibid*, p.87.

⁷⁶ *ibid*, p.88.

⁷⁷ <http://en.wikipedia.org/wiki/Upload>, visited on 22 November 2005.

to the public of those works without license of the copyright holder on Internet is a copyright infringement. Original musical works used on a web site will be protected for the lifetime of the author plus 70 years from the first day of the year following the year of the death of the owner of the work⁷⁸.

Besides musical works on Internet, it is quite common to hear sounds and recordings on the web site. Web designers record sounds in digital format and put it on the web site. “ A sound recording means either a recording of sounds from which the sounds may be reproduced, or a recording of the whole or any part of a literary, dramatic or musical work from which sounds reproducing the work or part may be produced”⁷⁹. In line with Article 22 of TCA “reproduction or recording of a work from an original work, by any medium which is known today or a medium that will be developed in the future, provides voice and image transfer and reproduction of the work is considered copying”. All kinds of voice and music recording and application of plans, projects and sketches of the architectural works are also considered as copying and this definition does not only cover today’s known reproduction methods and technology but also future technology. Therefore, by this article digital recordings on a computer is also protected. However, as opposed to musical works, there is no special period of protection mentioned. In this respect sounds will be protected under article 3.

- Graphics:

“ A graphic usually refers to a computer image or picture, or an info graphic such as a chart”⁸⁰. Many companies hire web designers to create their websites. Usually content and graphics are the commissioner’s paper literature and the web designers job is to put the content, graphics, logos, texts etc., on to the web site. When applying texts and written content to web sites, web designers are not faced with any problems; however conversion of logos and graphics sometimes causes problems. Converting paper based graphics into a digital environment differs from conversion of music works to Mp3 format where digitizing of music works by Mp3 is no more than a compression of the original work. Colors of designs in paper form are different from the same converted design on web site. Therefore the designer puts his judgment and labor while converting graphic, although he is not the creator of the graphic. As a consequence, this judgment and labor will be a subject of a new copyright on the

⁷⁸TCA 1951, Article 27.

⁷⁹ Clive Gringras, *Supra Note 66*, p.240.

⁸⁰ <http://en.wikipedia.org/wiki/graphic>, visited on 26/05/2005.

digital version of the graphic but not a copyright on underlying material⁸¹.

The Turkish Court held in one of its decisions where the plaintiff was the copyright owner of the book entitled Turkish Odyssey and the web site having the same name. He put a copyright notice both in his book and on the Internet site stating that “No part of the information and materials in this web site may be reproduced or transmitted in any form or by any means, electronic or mechanical, including copying, recording and storing in any information storage and retrieval system without written permission from Serif Yenen”⁸². In this case, the defendant used in his magazine the plaintiff’s copyright protected tourist map of Turkey, which was not only in his book but was also posted on his web site. The defendant alleged that the map was not an original work. Moreover, he claimed that the Internet was composed of millions of pages, which gave the possibility of copying any information online without the consent of the owner. He added that the material used in his magazine was different from the one used on the website because the resolutions of the maps were different. After consulting court experts the court concluded that maps were considered as literary and scientific works under article 2 of Turkish Copyright Act and ruled that there was a copyright violation of the authors not only economic rights but also moral rights. This judgment is a leading case in Turkey since there are not yet many cases in Turkish courts concerning copyrights on the Internet⁸³.

According to TCA, article 4/6 graphics are considered as artistic works. Therefore, original artistic works are protected -in this part graphics- the protection period continues within the lifetime or 70 years following to the death of the owner of the work⁸⁴.

4.3.2.3.2 Copyright Protection of Web Sites as Computer Programs:

As mentioned above, web sites are a combination of different works, which are under the protection of copyright law. Although the works are protected individually, the web site by itself is a literary work that is protected by copyright due to the fact that it constitutes a computer program because it consists of actual words, symbols and numerals of HTML (Hypertext

⁸¹ Clive Gringras, *supra note 66*, p.239

⁸² <http://www.turkishodyssey.com/maps/maps.htm>, visited on 13 December 2005.

⁸³ Ankara 5. Asliye Mahkemesi, 1998/892 E. And 2000/141 K.

⁸⁴ TCA 1951, Article 27.

Markup Language) codes⁸⁵. The term of protection of the computer program is not defined in the international intellectual property conventions and also was not defined in the EC Computer Program Directive. However, it could be defined as; “a set of instructions that can be interpreted by a computer into a set of functions”⁸⁶. Therefore, web sites are computer programs and because of this reason they are copyrightable.

According to TCA article 2, “computer programs expressed by any means and the preparatory design material of the above mentioned that could result with a program at the next phase” are considered as literary works. However, an amendment to article 2 did not protect ideas and principles as literary works. According to this amendment, “ideas and principles that are the basis of any element of a computer program, covering interface, are not considered as literary works”. Therefore, copyright will not only protect the whole computer program but also sub-programs that compose the complete program but not protect the ideas and principles that are the basis of any element of computer program. All in all by copyright, the program will be protected at two stages, first one is protection of the source code and second, the collection of all small programs that compile the whole program. Since computer programs are considered as literary works, according to TCA, these original literary works will be protected for the lifetime of its author plus 70 years after its author’s death⁸⁷.

4.3.2.3.3 Copyright Protection of Web Sites as Databases

Database right is another issue, which is related to copyright. After many discussions the European Parliament adopted the “European Database Directive” on March 11, 1996 in order to harmonize database protection in the EU. According to this directive, database is defined as “a collection of works, data or other independent materials arranged in a systematic or methodical way and capable of being individually accessed by electronic or other means”⁸⁸. With this definition not only non-computer databases but also on-line databases are included. Also from this definition, a database may cover sounds, images other than texts and digitals. Therefore some web sites could be considered, as on-line databases and database right exist if a qualified person has created it, for the purpose of the directive in order to maintain and access to data easily, provided that they are systematic or methodical.

As mentioned above; content of a web site could be protected by copyright. However, if the choice of material or arrangement of the content is based on creativity, this database will be capable of being protected as a whole under

⁸⁵ Irina A. Stamatoudi, *Copyright in the New Digital Environment*, Volume 8, London, Sweet Maxwell, 2000, p. 85. for the opposite view see Mustafa Topaloğlu, *supra note*, p.145

⁸⁶ Clive Gringras, *op.cit.*, p.242.

⁸⁷ TCA 1951, Article 27.

⁸⁸ EU Database Directive 96/9. Article 1.

copyrights. According to article 6/11 of TCA “Databases that have been created by selection and arrangement of the materials and data for a specific purpose in a systematic method” is considered as “work”. Therefore it will be protected under article 27 for the lifetime of its author plus 70 years from its author’s death. Contrary to EU database directive, whether on-line databases are included to this definition is not clear from the act.

4.4 Economic Rights of the Author and Infringement in the Context of the Internet Under Turkish Legislation

Under the TCA, rights accorded to authors are divided in to two groups as “moral” and “economic rights”. In this section, leaving aside the protection of the author’s moral rights and related rights, “economic rights” of the author which are a bundle of exclusive rights will be discussed.

The economic rights of the author under TCA are the following:

- The right of processing⁸⁹,
- The right of copying⁹⁰,
- The right of distribution⁹¹,
- The right of representation⁹²,
- The right of broadcasting by radio⁹³.

In accordance with those articles, when a protected work in tangible form is digitized and made available on cyberspace, in other words made available online over the internet without its author’s or right holder’s consent or re-used without an agreement or license from the right holder an infringement of that right occurs.

4.4.1 The Right of Processing

The right of processing of a work is granted as a specific right under the Turkish Copyright Act. According to article 21 this right gives the author the exclusive right to control the transformation of a work into another type of work such as transformation of a novel into a film script. In this case, a derivative work is a work, based upon a pre-existing work but which constitute an economically independent new creation/work capable of being put into use⁹⁴. Since it is an exclusive right of the author, any act such as

⁸⁹ Turkish Copyright Act, Art. 21.

⁹⁰ Ibid, Art .22.

⁹¹ Art. 23.

⁹² Turkish Copyright Act, Art. 24.

⁹³ Art. 25.

⁹⁴ Yavuz Kaplan, *İnternet Ortamında Fikri Haklara Uygulanacak Hukuk*, First Edition, Ankara, Seçkin, 2004, p.111.

transforming a work into another type of work without the consent of author will infringe the author's processing rights. As discussed above, the biggest problem and discussion about processing rights is whether transformation of regular CD to Mp3 format constitutes processing and therefore will be an infringement of the author's economic rights under article 21. Although there are different views supporting the contention that it is a sort of processing, I am of the opinion that this does not constitute processing but constitutes an act of reproduction.

Another issue concerning the Internet, which might arguably constitute a creation of derivative work, is framing. "Framing technology allows a website to display the content of a third party web site without actually delivering the user to the third-party's site. The framed content is displayed within the framing site, which may continue to display its branding and navigation to the user"⁹⁵. However, "in refusing to dismiss a complaint that framing constituted copyright infringement, Judge Audrey Collins noted that the existing precedent does not conclusively decide the issue of whether the use of a frame constitutes creation of a derivative work"⁹⁶. Since whether framing is a derivative work or not is a close question, it would be a solution to solve cases that involve framing under trademark context.

4.4.2 The Right of Copying

"The Internet has been built on principles that challenge the concept of 'intellectual property'"⁹⁷. Undoubtedly, Internet based activities challenge traditional intellectual property concepts because the first and the most important aim of copyright are to control reproduction, and copying of works without the author's or right holder's consent. However for the very nature of the Internet, it is very easy and sometimes necessary to copy and transmit information multiple times until the user views it. In order to illustrate the number of copying activities during internet transmission of a work, for instance, downloading or viewing of a picture from a website "in the course of such transmission, no less than seven interim copies of a picture may be made: the modem at the receiving and transmitting computers will buffer each byte of data, as will the router, the receiving computer itself (in RAM), the web browser, the video decompression chip, and the video display board, these copies are in addition to the one that may be stored on the recipient computer's hard disc"⁹⁸. This example clearly illustrates that copying is unavoidable and the Internet works by copying.

⁹⁵ Jonathan D. Hart, *Web Law A Field Guide to Internet Publishing*, 2004 Edition, Colorado, Bradford Publishing Company, p.104.

⁹⁶ Maureen A. O'Rourke, *Legal Issues on the Internet: Hyper linking and Framing*, <http://www.dlib.org/dlib/april98/04orourke.html>, visited on 12 December 2005. See *Futuredontics Inc. v. Applied Anagramic Inc.* (No. CV-97-6691 ABC (MANx, C.D. Calif.)).

⁹⁷ <http://www.apc.org/english/rights/ip/index.shtml>, visited on 29 November 2005.

⁹⁸ David L. Hayes, *supra note* 26, p.364.

There has to be two necessary acts of copying in order to make available copyrighted works available on-line over the Internet. First of all the work which could be any kind of artistic or literary work such as texts, pictures, sounds, music etc. has to be digitized. This process could be defined as “ a technical process consisting in the translation of the analog signal of which it is constituted into digital or binary mode which will represent data in a two value (0 or 1) symbol the unit of which is bit”⁹⁹. The second requirement for on-line availability is storing the digitized work which take the form of 1 and 0’s into the memory of a computer connected to the network.

The right of copying is defined in the TCA under the article 22 as follows; “The owner of the work shall exclusively have the right of copying the processing or the original of a work as a whole or any substantial part. Making a second copy of the original work, recording a work on any kind of equipment used for transferring a sign, sound and vision of a work that is known or that will be developed in the future, any kind of audio and music records or applications of sketches of plans and projects related with architectural works shall be considered as copies... The right of copying includes loading, visualization and operating, sending and storing activities of a program, within the conditions of a temporary copying of a computer program”. In line with this article, to infringe copyright the offender has to make a copy of at least substantial part of the copyrighted work in any form including with an equipment which would be developed in the future without the permission of the copyright owner in other words without a license. From the wording of this article digitization of a work and uploading this material to on-line world constitutes an act of copying. Moreover, not only permanent copies but also temporary copying deemed to be reproduction is a breach of copyright provided that the conditions of application of lawful reproduction¹⁰⁰ are not fulfilled.

If every copying activity is considered as infringement, for example temporary copying, which is a result of ordinary technical activity necessary for functioning of the Internet will fall under the copyright holder’s exclusive right, then it will be impossible to use the Internet at all. Therefore, although not being a party to EUCD, Turkey has to adopt its approach, which takes place in article 5/1 and permits temporary copying, that is an essential part of a technological process, without the authorization of the rightholder. Moreover, like every other legislation in the world, under article 38 there are exceptions listed which legitimize reproduction and obviates the breach of copyright. According to this article, “[c] opying all of the intellectual works and works of art for using them personally without

⁹⁹Jérôme Passa, “*Perspectives on Intellectual Property*”, Volume 5, London, Sweet&Maxwell, 1999, p.31.

¹⁰⁰ TCA, Art.31-37 described as general benefits: Regulations and jurisprudence, Speeches, Freedom of presentation, Works selected and collected for education and instruction, Freedom of Quotation, Newspaper content, Interview, Art. 38 described as Personal uses.

aiming to publish and profit shall be possible. However, this copying, without a rightful reason, shall not harm the legal benefits of the owner of the right or shall not be contrary to benefiting from the work normally". In conclusion, in case of posting a copyrighted material on a web site that belongs to someone else without his/her consent and encouraging Internet viewing by giving permission to download will be an infringement of copyright. Furthermore, downloading any copyrighted material from the legitimate copyright owner's web site without consent or downloading his/her copyrighted material which was uploaded by someone else, provided that there is no exception, will be regarded as copying and will fall under TCA's infringement provisions. However, apart from downloading, there are some other copying activities on the Internet such as browsing, caching, linking and framing which will be examined separately.

4.4.2.1 Specific Copyright- Related Acts and Some Examples of Copying On the Internet

- **Browsing:** The most usual and the single activity on the Internet carried out by the users are browsing the web pages provided by content providers. This activity differs from the traditional media for the reason that, in order to browse material on the Internet copying is one requirement because a copy of the work made on the RAM directly; inter alia, distribution, transmission and access to the work. Therefore such browsing may infringe multiple rights of the copyright holder. As mentioned above, even temporary copying is the exclusive right of the copyright holder under Turkish Copyright Act. Therefore, by browsing a website on the Internet a copy of the protected material is made on the computers random access memory (RAM), this will constitute an infringement. However the copyright holder who has placed material on the Internet has the intent and desire that his/her material should be browsed. Therefore, browsing of those material could be deemed to be either implied license or limitations¹⁰¹.

- **Caching:** A cache is a computer (generally a server), which holds copies of information (e.g., the most popular pages on the world wide web), so that users do not have to return the original server¹⁰². The main idea of caching information on the cache is to speed up the users' speed and obviating the need of going back to original sources while they are browsing the web sites. However technically a cache is divided into to two types as **local caching** which occurs on the user's computer's hard disk or RAM, or sometimes both on the hard disk and RAM. When the user wants to go back and visit a pervious site the information viewed before is recalled from the cache. The second type of cache is **proxy caching** which occurs on the server's computer. At this level the server stores a copy of material obtained from the original source sent on request of the previous users. In case of request by other users, the information stored earlier is sent rather than by fetching the information again.

As it could be seen from the explanations, caching activity is completely based on copying which is a potential infringement of right of copyright in addition it could give rise to other types of infringement of rights such as public distribution.

¹⁰¹ David L. Hayes, *Supra Note26*, p.147.

¹⁰² Simon Stokes, *Digital Copyright Law and Practice*, Second Edition, Oregon, 2005, p.9.

Since caching is a necessity for the functioning of the Internet and dissemination of information quickly, it is to be assumed that the “copyright owner who has placed information on the Internet and desires such information to reach end users as expeditiously as possible would have no incentive to assert his copyright rights against caching”¹⁰³ and would have given acquiesce to caching¹⁰⁴. In addition to acquiesce the copyright owner may post a notice that his material cannot be cached or can be cached provided that the notice is refreshed at defined time intervals.

Under article 22 of the Turkish Copyright Act, there is no doubt that caching is deemed as copying. Moreover, caching which occurs on the ISP’s server cannot be considered as personal use exception¹⁰⁵, therefore in order to make lawful cache, original web sites and the original content posted on the web sites, the ISP must obtain authorization from the copyright owner. However since legal analysis is very complex and there are many legal uncertainties concerning cache, I am of the opinion that technological means¹⁰⁶ might be an alternative and absolute solution to this problem for the copyright owners.

• **Linking and Framing:** Hypertext links constitute the hearth of the Internet. “A hyperlink, or simply a link, is a reference in a hypertext document to another document or other resource. As such it would be similar to a citation in literature or in other words “hyperlink is the cybernetic version of the footnote”¹⁰⁷. However, combined with a data network and suitable access protocol, it can be used to fetch the resource referenced. This can then be saved, viewed or displayed as part of the referencing document”¹⁰⁸. Therefore links can be considered as reference and using a link in one’s web site is not copying for the reason that no copying of the targeted page takes place until the user click on the link. When the user clicks the targeted page, the users browser establishes a direct connection and the document fetched at the targeted page as if the user directly typed the address¹⁰⁹.

Generally a single link to a website does not constitute copyright infringement. However, copyright infringement comes into existence in cases where ‘deep-linking’ is made. Deep linking is another type of Internet linking where the targeted site is a subsidiary page rather than a home page. In this case, visitors are enabled to bypass certain site features including copyright notices, terms and conditions and advertising where it economically threatens the targeted site for the reason that the targeted site is dependent on the advertisements and linking to the subsidiary pages will reduce advertising revenues of the targeted site. However, in cases such as

¹⁰³ David L. Hayes, *Supra Note 26*, p.149.

¹⁰⁴ Yavuz Kaplan, *Supra Note 89*, p.120.

¹⁰⁵ Turkish Copyright Act, art. 38.

¹⁰⁶ David L. Hayes, *Supra Note 26*, p.149.

¹⁰⁷ Unesco, *Intergovernmental Conference on Cultural Policies for Development*, Sweden, 30 March-2 April 1998, <http://unesdoc.unesco.org/images/0011/001116/111631eo.pdf>, visited on 20 December 2005.

¹⁰⁸ <http://en.wikipedia.org/wiki/Hyperlink>, 8 May 2005.

¹⁰⁹ Graham J H Smith, *Supra Note 60*, p.33.

*PCM, v. Karten.com*¹¹⁰, major Dutch publishers filed a case against the web site called Karten.com that offers headlines from well known newspapers by providing deep links which cause loss in advertisement income as a result of bypassing the homepages of publishers'. However the court denied the injunction and ruled that the links in fact directed more people to the plaintiffs' site therefore this increase the number of visitors and the traffic of the web site. Moreover the plaintiff could easily put advertisements on the pages where deep links are directed. Similar to this judgment, in *Verlagsgruppe Handelsblatt GmbH v. Paperboy*, the German court ruled that deep linking did not violate copyright law and the court went further and characterize a deep linking as a short cut for accessing a page without typing the full URL¹¹¹.

As mentioned above, according to article 2 of the TCA, a text on a web page is considered as a literary work and as a consequence it is protected by copyright. In order to talk about copyright infringement of a work, the whole or a substantial part of the work must be copied. Therefore one line of text or link, which is not more than a reference to another web site or document, cannot be considered as 'whole or substantial' part of copyrighted work and putting links on web sites cannot be considered as reproduction under article 22. Given the fact that the *raison d'etre* of the Web is linking, therefore using links on websites does not fall into the scope of copyright infringement. However when deep linking activity is taken under consideration, the situation becomes a little more complicated. It could however be concluded that even if deep linking does not violate copyright, there is always a possibility to claim that using deep links for commercial purposes constitutes unfair competition under the article 41/2 of the Turkish Code of Obligations.

Another issue which is also related and where legal difficulty arises is **framing**. In this case a content taken from another online source is used, which may be copyright protected, and the user sees the original website content framed by a different website, with a different URL, and possibly with different logos and advertising. This practice may constitute copyright infringement in some jurisdictions, because a copy of the material is made on the user's computer memory. In Germany, for example, framing is considered an infringement of the transformation right provided by Articles 62.1 and 39 of the German Copyright Act. In the case of *Roche Lexicon*, a Hamburg court decided that the RAM copies created in the process of framing constituted a reproduction of the work, which must be authorized by the right holder.

¹¹⁰ Jonathan D. Hart, *Supra Note 90*, p.103.

¹¹¹ Jonathan D. Hart, *Supra Note 101*, p.104.

4.4.3 The Right of Distribution

The owner of the copyright has a right to issue tangible copies of the work for commercial circulation¹¹².

Traditionally, the distribution right is a separate and distinct right from the reproduction right where the author has the right to control dissemination of physical copies of the work. When speaking about distribution of a 'copy' of the work in a tangible world, it is usually enough to determine whether there is a physical copy available or not. However applying the distribution right to cyberspace, determination of distribution of a work causes some difficulties since there are no concrete copies subject to distribution. The copies are nothing but packets transformed into intangible forms. However, some scholars argue as, "with respect to Internet transmission, if a complete copy of work ends up on the recipient's computer, it may be easy to conclude that a 'copy' has been distributed"¹¹³. The point has not yet been the subject of international agreement¹¹⁴.

The Internet has a different characteristic namely 'on-demand' transmission which does not look much like the distribute copies to the public but could be seen as a form of 'circulation'. Article 20/1 of the Turkish Copyright Act suggests that in its first line, "The right of benefiting from a non-publicized work in any way or methods shall exclusively belong to the owner of the work". Therefore, digitized works will be under protection and the authors shall claim their exclusive rights on the Internet.

Finally, the right of distribution is under protection and an exclusive right of the author indicated in article 23 of the Turkish Copyright Act and provides as follows, "[t]he right of distributing the copies of a work obtained by copying from its original or its processing, hiring them out, offering them for sale or making them commercial subjects in any way and the right of benefiting from them in this way shall exclusively belong to the owner of the work. The right of prohibiting the importation of the copies, which were made without the permission of the owner of the work, shall exclusively belong to the owner of the work". Therefore, in my opinion, distribution right of works or hiring them out through Internet is a right of the author although there is not a physical copy of the work. However, when the technical features of the Internet are taken into account the full work ends in the recipient's computer and the distribution is completed. Moreover, the

¹¹² Lionel Bently, *Intellectual Property Law*, Oxford University Press, New York, 2002, p.130.

¹¹³ David L. Hayes, *Supra Note 26*, p.5.

¹¹⁴ It is worth mentioning that, Swedish Courts clarified the legal position concerning "public distribution" and in one of its judgment it ruled that file sharing on the Internet is public distribution, which is regulated by Swedish Copyright Law. See, The Local-Sweden's News in English, *16,000 Kronor fine for file Sharing*, 25 October 2005, <http://www.thelocal.se/article.php?ID=2361&date=20051025>, visited on 15 November 2005.

recipient would convert this distributed work into a tangible form by using other tools.

4.4.4 The Right of Presentation

The other component of the author's exclusive rights over literary or artistic works is the presentation right. Article 24 defined this right as follows; "The right of benefiting from a work, by signing, playing, performing or displaying its copies and processing directly or with the equipment used for sign, sound and picture transfer which can be deemed as presentations shall exclusively belong to the owner of the work. The right of transmitting a work with technical equipment from its occurrence place on another place for its presentation to the public shall exclusively belong to the owner of the work".

Presentation right applies to literary, musical, dramatic, choreographic works, pantomimes and other audiovisual works such as reading a scientific or literary work to the public, playing a musical work, performing a theatrical work to the public etc. In addition, the definition of performance also includes delivery of lectures, addresses, speeches and sermons. Therefore in order to talk about the right of presentation there has to be a direct transmission of the *performance* of the work not merely the work itself. As mentioned above, for instance, indirect transmission of a digitized musical work to the hard disc causes infringement of the right of distribution. Moreover, the reproduction right but not the public performance right for the reason that the work is not being performed at the recipient's end¹¹⁵.

In order to infringe this right, the performance must be carried out in 'public'. However it is difficult to determine the boundaries of public in cyberspace. According to the advocates who stick for total freedom on the Internet, transmission of a work resulting in the display of pictures and sounds by means of the user's computer shall not be considered as representation because at any rate, once online, the work not intended to meet the public in the sense of traditional understanding of 'public' because each person sitting in front of a computer, does not access online works at the same nor in the same place¹¹⁶. Traditionally the audience has to be gathered in a place such as a theater, a club or a place of work etc. in order to be considered as public after the new technological innovations, it is no longer clear that a gathering in a place is a necessary condition for public performance¹¹⁷.

Obviously, the last sentence of the article encompasses online activity since it talks about transmission of the work. Therefore transmission of a performance through the Internet is the exclusive right of the author and transmissions without the consent of the author will constitute an infringement of this right. Since the transmission is very important in this

¹¹⁵ David L. Hayes, *Supra Note 26*, p.3.

¹¹⁶ Jérôme Passa, *Supra Note 96*, p. 56-57.

¹¹⁷ Hector MacQueen, *Law and the Internet*, Second Edition, Oxford, Hart Publishing, 2000, p.198.

case, it's necessary to examine the situation in the light of the right of communication to the public, which is defined separately under article 25 of TCA.

4.4.5 Right of Communication to the Public

The right of communication to the public is defined under article 25/1 of the TCA as follows, "Communication to the public of an original or copies of a work of any kind such as radio-television, satellite and cable broadcast or with similar equipments including digital transmission used for transferring signs, sounds or/and images and re-broadcasting it to the public these works by receiving those from another organization other than the original one is the exclusive right of the author". At first sight, this article may give an impression that it gives authors an exclusive right of communication to the public in traditional way such as broadcasting. However it includes digital transmission as well. After the amendments dated 21.02.2001 and law no. 4630, this article became parallel to EU directives and WIPO treaties where the right of making available to the public is recognized. According to article 25/2 of the act, "The author has exclusive right to authorize or to forbid putting for sale, distribution or presentation of an original or copy of his work to the public, by wire or wireless means, and making available of his work to real persons in such a way that they may access these works from a place and a time individually chosen by them".

The most important criteria while applying this article is the notion of 'public'. As mentioned above, sometimes it may be confusing to determine 'public' on cyberspace. However, as noted by M. Sirinelli, "a number of isolated points, each person at home in front of their computers, makes a public"¹¹⁸. Claiming that persons situated in private places do not constitute the public is not a valid argument, since, although digital transmission differs from traditional broadcasting because digital user chose the time and place to receive it, there are millions of people accessing the Internet from different places who constitute the public. Although the meaning of public is not defined clearly in the act, it must be interpreted widely for the sake of author and copyrights holders.

In the final analysis, uploading a protected material that could be accessed to a potential public constitutes an act of communication of that work. Conduct of such an act without the permission of the author or rightholder shall constitute breach of copyright.

4.5 Concluding Remarks

As mentioned in the previous sections, it is not legal to copy, adapt, translate, perform, or broadcast a protected work or recording, or put it on the Internet. Such an act constitutes copyright breach since authors have

¹¹⁸Jerom Passa, *Supra Note 111* , p.58.

exclusive rights to their creations unless a specific exception exists in the copyright law of the country, or unless the user has permission from all of the relevant owners of rights. One may argue that a legitimate purchaser of the copyrighted work has the right to copy it. This argument is acceptable as long as this copying activity is being restricted to limited numbers and for non-commercial purposes, which are so called copyright exceptions. However, these exceptions do not apply in cases of making available or transmitting copyright material over the Internet. As could be seen, uploading a copyrighted material to the computer does not constitute copyright breach solely under fair use articles in most countries and also in Turkey. Yet, making available it to other users by sharing it through peer to peer software constitutes not only infringement of the right to copy but also the right to distribute and the right to make available to the public. Because when end users' content becomes accessible to many others, it would not be possible to talk about personal use since it becomes in fact community use. Therefore, by sharing files one may constitute multiple copyright infringements¹¹⁹.

To date, although different forms of materials such as computer programs, pc games etc. face copyright issues and activities such as deep linking and framing constitute copyright infringement, the greatest attention has been focused on the impact of P2P systems on music and motion picture distribution on the Internet. Moreover this new era of piracy on the Internet poses potentially even greater problems than the proliferation of CD piracy and protection of digital content - of copyrighted music and movies - has never been more important. Today, where people persistently make music and movies available on the internet with unauthorized peer-to-peer 'file sharing', they are involved in copyright theft, peer to peer system users become target of content owners, system operators are face liability issues and that exposes them to the risk of legal action by the copyright holders. For the time being the vast majority of all peer-to-peer file-sharing is unauthorized, since it is not licensed by copyright holders, and is therefore illegal.

The most visible debate regarding peer to peer is the famous Napster case. In this case copyright holders alleged that Napster provided the technical assistance to the end users to share music files, which is an infringement of copyright. However in its defense Napster alleged that it did not violate any copyright right since it had not been involved in any copying or distribution activity. Moreover, the type of sharing in which its users engaged was private. However in its decision Napster was held accountable for the misuse of copyrighted material and it was found that repeated and exploitative copying of copyrighted works, even if the copies were not

¹¹⁹ The Swedish government has proposed tougher copyright laws especially for downloading material from the Internet in 2005. This law will make downloading, and distributing music and films on the Internet without the copyright owner's permission. See, The Local- Sweden's News in English, *Sweden Introduce Tougher Download Laws*, 17 March 2005, <http://www.thelocal.se/article.php?ID=1122&date=20050317>, visited on 22 February 2006.

offered for sale, may constitute commercial use. As pointed out above, end users of peer-to-peer systems could be held accountable for copyright infringement. “In the Napster case, copyright owners elected to pursue their legal claim against Napster, not to the individual Napster users. That decision was tactical one; however, copyright owners continue to have ability to sue individual P2P users for infringement”¹²⁰. However over 2,100 new legal cases against individuals show that the copyright holders change their tactics and start suing files against directly to the end users¹²¹.

The recording industries fight against illegal Internet file sharing not only in US but also in Europe, South America and Asia. The number of cases launched or brought in recent months to uploaders outside US has reached to 3800¹²² and many other cases and court rulings are on their way since the campaign against unauthorized P2P networks such as Kazaa, Gnutella, eDonkey, DirectConnect, BitTorrent, WinMX an SoulSeekis. Especially after several court decisions all around the world, uploading of music files on unlicensed P2P services has fallen over the last year. “The total number of infringing music files on the internet in January 2005 was slightly down on one year ago at 870 million tracks, and this is despite a huge increase in the use of broadband internationally”¹²³.

Like many other countries in the world digital piracy remains a very significant problem in Turkey, however the fight against digital piracy has started. This action is carried out by Neighboring Rights of Phonogram Producers Organization (MU-YAP), which is a non-profit organization also representing Turkish Phonogram producers. Efforts for fighting against digital piracy is one of its priority as a consequence, in order to fight piracy, the organization send cease-and-desist letters to web site owners via their Internet service providers (ISPs), concerning the outcomes of distributing Mp3s on the Internet and asked 84 web site owners and ISPs to stop their illegal file distribution. 22 out of 84 remove an Mp3 from their sites. However legal action launched against 58 others and illegal content providers were removed after a several court rulings.

In summary, the fight against illegal content on the Internet is almost in every country. As discussed above, one activity (i.e.: file sharing infringes the right of copying, distribution right and the right of communication to the

¹²⁰ Jeffery H. Matsuura, *Managing Intellectual Assets in the Digital Age*, 2003, London, Artech House, p.11.

¹²¹ IFPI, *Digital Music Report*, <http://www.ifpi.org/site-content/press/20050119.html>, visited on 18 December 2005. For more on these actions in Sweden see, The Local-Sweden’s News in English, *200 File-sharers Reported to the Police*, 4 June 2005, <http://www.thelocal.se/article.php?ID=1554&date=20050604>, visited on 18 December 2005.

¹²² *Ibid.*, <http://www.ifpi.org/site-content/press/20051115.html>, visited on 12 December 2005.

¹²³ *Ibid.*, <http://www.ifpi.org/site-content/press/20050119.html>, visited on 10 December 2005.

public) may fall in the scope of more than one copyright infringement clause since the digital area shows some differences than the tangible world. However, article 25 provides strong protection to copyright holders in case of multiple infringements. Although author's economical rights are protected under TCA, consumer awareness of the illegality of unauthorized file sharing and making available, copying and distribution of copyright protected content remains very high.

5 Relations Between Human Rights and Intellectual Property Rights

It has always been a question mark in our minds whether intellectual property rights and human rights are related to each other some how and if they so, to what extend. This is an understandable concern since the two areas seem to serve different purposes and as a matter of fact two subjects developed in virtual isolation from each other¹²⁴. In other words, from the international human rights instruments legal expressions, human rights are an inalienable and universal claim, which exist independently of recognition or implementation and belong to individuals and communities and serve the protection of human well- being. In contrast, intellectual property rights are rights, which are granted by the governments for a limited period of time and could be withdrawn, licensed or assigned to someone else, that is trade related rights usually find a presence under economic and cultural rights.

Moreover, one may argue that human rights emerged in order to abolish specific threats to fundamental rights, whereas IPRs emerged on a functional basis that is to respond to economic needs of different kinds of industries and countries. Nevertheless, I believe that although the human rights community rarely discusses human creativity and fruits of one's labor under human rights provisions, this is not because IPRs are irreconcilable with fundamental human rights but because IPRs represent the economic side of labor, and it is true that, both from a historical and functional angle, economic, social and cultural rights are usually listed and appear nearly as a remnant category, for instance as reflected in article 27 of the Universal Declaration of Human Rights and Article 15 of the International Covenant on Economic Social and Cultural Rights. This lack of importance placed on cultural and economic rights, delayed the international community from deal with the two areas, which are in close relationship with each other in fact. However, two developments prevented especially the international community from concentrating on the importance of intellectual property rights as human rights. The first development is the expansion of the areas covered by intellectual property regimes such as copyright protection in the digital domain and the second is the emergence of universal rules on intellectual property protection in the global trading system¹²⁵. Furthermore, intellectual property and human rights issues are relevant in a range of

¹²⁴ Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence*, Public Law & Legal Theory Research Paper Series, Social Science Research Network Electronic Paper Collection at: <http://ssrn.com/abstract=459120>, visited on 28 December 2005.

¹²⁵ Statement by the Committee on Economic, Social and Cultural Rights, *Human Rights and Intellectual Property*, Twenty-seventh session, Geneva, 12-30 November 2001.

issues such as freedom of expression, public health, education and literacy, privacy, agriculture, technology transfer, and the rights of indigenous peoples in fact.

There are two different conceptual approaches to the human rights-intellectual property angle. According to the first approach, there is a conflict between two concepts and strong intellectual property protection undermines a broad spectrum of human rights especially in the areas of economic, social and cultural rights¹²⁶ and it always gives priority to human rights. The second approach sees human rights and intellectual property law essentially compatible and deals with both of them with the same fundamental equilibrium. As a result of this equilibrium it is argued that there has to be a balance between author/inventors rights and public access to the fruits of creators. Therefore, according to this approach “intellectual property rights are akin to human rights and tension in this area may be nothing more than a clash of rights that require balancing”¹²⁷. This balancing process is a matter of development and modification of international, regional and domestic IPR regulations¹²⁸.

Although, it is still unclear how far IPRs protection expands as a matter of human rights, if we put philosophical discussions aside; it is possible to say that IP protection has been recognized as a basic human right in several different human rights instruments. The main sources that legitimize the IPRs as human rights are the Universal Declaration of Human Rights (UDHR) and the Covenant on Economic, Social and Cultural Rights (ESCR). According to UDHR Article 27(2), “ Everyone has the right to protect moral and material interests resulting from any scientific, literary or artistic production of which he is the author”. From the wording of this article if we consider that IPRs are human rights, it could be argued that scientific, literary and artistic production provides its author not only a moral interest, but also material interests and the protection of these interests is independent of legislation. However, from a practical point of view, a claim that is based just on human rights would not amount to a strong protection for the creators since most of the protection is based on the registration and filing system, in the case of patents and trademarks. On the other hand, this claim would be legitimate for copyright since its existence does not require any registration. No matter what kind of intellectual property it is; whether subject to a registration or filing system, states are

¹²⁶ *Ibid.*

¹²⁷ E. S Nwauche, *Human Rights- Relevant Considerations in Respect of IP and Competition Law*, Script-ed, Volume 2 , Issue 4, December 2005.

¹²⁸ See, e.g., Intellectual Property and Human Rights: Report of the Secretary-General, ESCOR, Sub-Commission on the Promotion and Protection of Human Rights, 52nd Sess., Provisional Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2001/12 (2001) at 8 (submission by WTO asserting that existing international agreements permit states sufficient room to balance intellectual property and human rights standards, but noting that “[h]uman rights can be used – and have been and are currently being used – to argue in favour of balancing the system either upwards or downwards by means of adjusting the existing [intellectual property] rights or by creating new rights”)

under an obligation to provide an appropriate IPRs system and to pass legislation and build administrative machinery for the protection of IPRs.

The other source for the IPRs is article 15(1) of CESCR which recognizes a right to intellectual property with an identical wording to UDHR, which gives everyone the right a) to take part in cultural life; b) To enjoy the benefits of scientific progress and its applications, c) to benefit from the protection of the moral and material interests resulting from any scientific literary or artistic production of which he is the author. The article is made up of two components; where a private reward is given to the creator in 1(c) and public benefit component in 1(b). Therefore a right to intellectual property has two components that could be regarded as two separate rights¹²⁹ that is to say protection for creators, innovators for the fruits of their intellectual endeavors, in addition the public right to benefit from the scientific and cultural progress that intellectual property products can stimulate.

Beside the UDHR and CESCR, some regional instruments such as Article 1 of the Protocol to the European Convention on Human Rights, Article 21 of the American Convention on Human Rights and Article 14 of the African Charter on Human Rights and Peoples' Rights contain provisions relating to the protection of property rights. Therefore, right to intellectual property are under protection by different human rights instruments in contrast "no references to human rights appear in the major intellectual property treaties such as the Paris and Berne Conventions, or in the more recently adopted TRIPs Agreement"¹³⁰. Nevertheless, it is possible to see the reflection of human rights in intellectual property instruments. For instance, one of the dominant principles in every human rights instrument is the non-discrimination clause, which is also found in international intellectual property instruments, "national treatment", anchored in the notion of non-discrimination¹³¹. The inclusion of this clause could be found in the Berne Convention for the Protection of Literary and Artistic Works¹³² which ensures protection of copyright law in foreign States: a measure which promotes recognition of non-discrimination and furthers the globalization of IPRs.

The belated attention and neglecting behavior of treaty bodies, experts and commentators has changed in the past years. Intellectual property, which remained a normative backwater in the human rights pantheon,¹³³ left its place in the human rights communities and various UN agencies actions to explore the implications of intellectual property protections for the

¹²⁹ See the Draft General Comment No. 18 of the Committee on Economic Social and Cultural Rights on article 15(1)c.

¹³⁰ Laurence R. Helfer, *Supra Note 123*, p. 3.

¹³¹ Brain Burdekin, *Panel Discussion on Intellectual Property and Human Rights*, Geneva, 9 November 1998, <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/opening-unhcr.html>, visited on 11 January 2006.

¹³² The Bern Convention, Art. 3(1).

¹³³ Laurence R. Helfer, *Supra Note 123*, p.4.

realization of human rights. The World Intellectual Property Organization and the Office of the UN High Commissioner for Human Rights involved in the efforts and held a seminar on Intellectual Property and Human Rights in addition the UN Sub-Commission for the Promotion and Protection of Human Rights, adopted resolutions on this subject at its sessions in both 2000 and 2001. In this resolution of the Sub-Commission and the Statement on Intellectual Property and Human Rights adopted by the Committee, which aimed to encourage the integration of human rights into the development and interpretation of intellectual property regimes concluded that current intellectual property developments do not take into account the protection of fundamental human rights. Moreover, intellectual property protections can inhibit the realization of fundamental human rights, particularly the rights included in the Covenant¹³⁴.

In sum, as briefly discussed above, several human rights instruments have recognized the right to intellectual property. A human rights approach locates the protection and development of human dignity and the common good in the center, therefore a balance between economic interests of the authors and inventors and the interests of the society. If it is more important to improve human welfare than maximizing economic benefits, one may argue that copyrights are prevent seeking, receiving and imparting information and ideas of all kind as prescribed in article 19 of the International Covenant on Civil and Political Rights (hereinafter ICCPR). As discussed in the previous parts of this thesis, technological developments in the cyberspace give an opportunity to the Internet users to reach information quickly and disregard frontiers. At this point, I am of the opinion that, the freedom of expression is both author's right and Internet users right where copyright exceptions and limitations are a balancing tool between the author's rights and those of the public. In conclusion states are under an obligation to protect not only authors' rights but also the public good while establishing intellectual property rules, bearing in mind the human rights, in order to promote innovation and development of culture by any means. Therefore there is close relationship between human rights and intellectual property rights, in other words they are complementary of each other.

¹³⁴ ,*Report on Science and Human Rights*, www.shr.aaas.org/report/xxii/ip.htm, visited on 10 December 2005

6 Proposal and Conclusion

The aim of this work was to assess the current copyright protection in the digital environment specifically focusing on the Internet by analyzing different kinds of protection mechanisms, that is to say from an international, regional and national perspectives. The reason for choosing Turkish legislation was, first I am a national of the Turkish Republic and second my personal deliberation that TCA did not provide an adequate protection in the context of digital environment. However, after an extended research I realized that as stated in the commission's progress report, Turkey has essentially aligned its legislation to EUCD¹³⁵. It is true that Turkey has revised and adapted many of its legislation not only in intellectual property but also in every field. However, I am of the opinion that some revisions of the current copyright law are unavoidable since copyright will exist as an instrument of cultural and economic control in the cyberspace. In this final section I would like to make some proposals not only related to legislation but also its implementation and more importantly promotion of the public's awareness concerning copyright on the Internet.

First of all, it is not necessary to develop a completely new model of categorizing property in the digital context -although it could be another solution but since technology is still in progress of development, this categorization would face the danger of being out of date easily- but it is important to abolish legal uncertainties and inadequacies of the current TCA in order to provide more effective way of protection. Therefore revision of some articles of the law would be enough at this stage. While revising the law, the language of the law should become simpler, in other words, since adaptations were taken from European legislation the language lost its essence and it is difficult to understand the core of some articles even though it is read by a lawyer. Therefore it must be simplified and become understandable by an ordinary average person. When we come to the proposals regarding revision of specific articles, in article 22 concerning reproduction right, although the European approach is followed¹³⁶ the technical acts of temporary reproduction should be clarified and not fall under the exclusive reproduction right. In addition it is recommended to add the term of "intangible" to article 25, dealing with the right of communication to the public. Furthermore, in my opinion the meaning of the term "public" laid down in several different parts of the law should be revised and clarified. Although it is the task of case law to determine when an individual person or a number of persons belong to the public in an individual case, it is important to clarify what is meant by the public in the context of digital environment which shows differences regarding the traditional understanding of that term. Other than article 38 of the act which

¹³⁵ Commission of the European Communities, 2005 Regular Report on Turkey's Progress Towards Accession, Brussels 2005, www.eu.int.

¹³⁶ See, section 4.4.2 the right of reproduction.

allows personal copying should be revised and should clarify digital reproduction that gives a person the to make a single digital copy of a work for private use, personal scientific use and inclusion of a work in digital archives for private and personal scientific use provided that is not aimed of publishing or for profit.

In respect to the above, ratification of WIPO Copyright Treaty by Turkey is essential, without undue delay, in order to provide copyright protection in the digital context.

Secondly, in order to implement the law efficiently, co-operation and co-ordination must be strengthened among all stakeholders such as the Directorate General of Cinema and Copyrights which is a body responsible for defining policy areas in the field of copyright and related rights, reviewing related legislation, taking necessary measures, the judiciary, the police and collecting societies. Moreover, under the supervision of collecting societies, the Directorate General and/or police, a department of specialists should be established to be responsible for monitoring not only intellectual property infringements but also other kinds of crimes committed on the Internet. Furthermore vocational training of judges, police officers and lawyers is necessary for them to follow the latest developments concerning copyrights and IPRs.

Thirdly, public awareness should be increased by giving advertisements on televisions and radio or by putting posters which is a very favorite way of providing corporation these days, stating that “copying or buying pirated materials is nothing but the same thing as stealing a car or a purse”. However there are not any advertisements concerning piracy on the Internet. Therefore informative cautions could be put on the popular web sites. In addition, since computer education has become widespread in Turkey, intellectual property education could be given starting from primary school.

In conclusion, the Turkish Copyright Law, as compared to other countries legislations provides a high level of protection for digital materials. However, lack of jurisprudence, which could be used as a guideline for legal studies could be seen as evidence that people think that material on the Internet, is free of charge. Moreover people do not know their rights concerning copyright. Therefore, public awareness will always remain the key issue and the most important theme while protecting the fruits of the mind in the digital environment.

7 Bibliography

- Alfredo Ilardi, *Origin and Development of the International Protection of Intellectual Property*, Oxford,
- Anthony D'Amato, *International Intellectual Property Law*, London, Kluwer Law International, 1997.
- Anthony Murphy, Queen Anne and Anarchists, can Copyright survive in the Digital Age?, Oxford IP Research Center Seminar, 26 February 2002.
- Audrey R. Chapman, *Approaching Intellectual Property as a Human Right*, Copyright Bulletin, Volume 35 No.3, Unesco Publishing, p.4, <http://unesdoc.unesco.org/images/0012/001255/125505e.pdf#page=4>, Visited on 13 July 2005. <http://www.isoc.org/internet/history/brief.shtml>, 13/04/2005.
- Bernt Hugenholtz, *Why the copyright Directive is Unimportant and Possibly Invalid*, Institute of Information Law Publications, 2000, <http://www.ivir.nl/publications/hughenholtz/opinion-EIPR.html>, visited on 7 November 2005.
- Brain Burdekin, *Panel Discussion on Intellectual Property and Human Rights*, Geneva, 9 November 1998, <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/opening-unhcr.html>, visited on 11 January 2006.
- Clive Gringras, *The Laws of the Internet*, Second Edition, London, Lexis Nexis Butterworths, 2003.
- Commission of the European Communities, *2004 Regular Report on Turkey's Progress Towards Accession*, Commission of the European Communities 2004 Regular Report on Turkey's Progress Towards Accession, http://www.deltur.cec.eu.int/!PublishDocs/en/2004_rr.pdf#search='Commission%20of%20the%20European%20Communities%202004%20Regular%20Report%20on%20Turkey%E2%80%99s%20Progress%20Towards%20Accession', visited on 11 November 2005.
- Daniel Gervais, *The TRIPS Agreement Drafting History and Analysis*, Second Edition, London, Sweet&Maxwell.
- David L. Hayes, *Advanced Copyright Issues on the Internet*, Computer Law and Security Report, Vol. 16, no.6, p.8., 2000, <http://80-elin.lub.lu.se.ludwig.lub.lu.se/elin?func=record&query=2a8535b5b351d473fe7de5f5991d4511&lang=en&start=0&fromColl=1&orgFunc=simpleSearch>, visited on 25 October 2005.
- David Vaver, *Recent Copyright Developments in Europe, Notes for a session at the International Conference on the Commodification of Information*, Haifa University
- David Vaver, *The Future of Intellectual Property Law: Japanese and European Perspective Compared*, WP 09/99, OIPRC Electronic Journal of

Intellectual Property Rights,
<http://users.ox.ac.uk/~mast0140/EJWP0999.html>.

- Draft General Comment No. 18 of the Committee on Economic Social and Cultural Rights on article 15(1)c.
- E. S Nwauche, *Human Rights- Relevant Considerations in Respect of IP and Competition Law*, Script-ed, Volume 2 , Issue 4, December 2005.
- Elliot Simcoe and Patrick Reimer, *A busy year: getting to grips with copyright in the internet age*, Copyright World, 2005
- European Commission Publications, *Europe on the Move, 2003*, <http://www.eu.int/comm/publications/booklets/move/36/en.pdf>, p.5., visited on 27 October 2005..
- European Commission, *Turkey 2005 Progress Report*, Brussels, 9 November 2005, http://www.mfa.gov.tr/NR/rdonlyres/280F0021-B312-4871-8F0E-9D3A71684437/0/2005_progress.PDF, visited on 11 November 2005.
- Fiona Macmillan, *Copyrights Co modification of Creativity*, University of London.
- Frederick Abbott, *The International Intellectual Property System*, Part One, (Kluwer Law International, The Hague, 1999).
- Golam Robbani, *Trade-related aspects of intellectual property rights and least developed countries*, *The Journal of World Intellectual Property*, 2005(8):4.
- Graham J H Smith, *Internet Law and Regulation*, Third Edition, London, Sweet& Maxwell, 2002.
- Guy Tritton, *Intellectual Property in Europe*, Second Edition, London, Sweet& Maxwell, 2002.
- Hans Morten Haugen, *Intellectual property: rights or privileges?* *The Journal of World Intellectual Property*, 2005(8):4.
- Hector L. MacQueen, *Intellectual Property in a Peripheral Jurisdiction*
- Hector MacQueen, *Law and the Internet*, Second Edition, Oxford, Hart Publishing, 2000, p.198.
- <http://en.wikipedia.org/wiki/graphic>, visited on 26 May 2005.
- <http://en.wikipedia.org/wiki/Hyperlink>, 8 May 2005.
- <http://en.wikipedia.org/wiki/Upload>, visited on 22 November 2005.
- <http://www.apc.org/english/rights/ip/index.shtml>, visited on 29 November 2005.
- What is Mp3, http://www.mp3-mac.com/Pages/What_is_MP3.html, visited on 20 November 2005.
- <http://www.turkishodyssey.com/maps/maps.htm>, visited on 13 December 2005.
- IFPI, *Digital Music Report*, <http://www.ifpi.org/site-content/press/20050119.html>, visited on 18 December 2005.
- Intellectual Property and Human Rights: Report of the Secretary-General, ESCOR, Sub-Commission on the Promotion and Protection of Human Rights, 52nd Sess., Provisional Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2001/12 (2001) at 8.

- Internet World Stats, *The Internet usage statistics*, <http://www.internetworldstats.com/stats.htm>, Visited on 13 November 2005.
- Irina A. Stamatoudi, *Copyright in the New Digital Environment*, Volume 8, London, Sweet&Maxwell, 2000.
- J.A.L. Sterling, *World Copyright Law*, Second Edition, London, Sweet&Maxwell, 2003
- Jane Strachan, *The Internet of tomorrow: the new-old communications tool of control*, European Intellectual Property Review.
- Jeffery H. Matsuura, *Managing Intellectual Assets in the Digital Age*, 2003, London.
- Jérôme Passa, "*Perspectives on Intellectual Property*", Volume 5, London, Sweet&Maxwell, 1999
- Jonathan D. Hart, *Web Law A Field Guide to Internet Publishing*, 2004 Edition, Colorado, Bradford Publishing Company.
- Jonathan D. Hart, *Web law: a field guide to Internet publishing*, Denver, Colo. : Bradford Pub. Co., 2004
- Kathy Bowrey, *Law & Internet cultures*, Cambridge University Press, 2005
- Kültür ve Turizm Haber Portalı, *Fikir ve Sanat Eserleri Hukukunun Dünyada ve Türkiye 'de Gelişim Süreci*, http://www.kulturturizmhaber.com/default_tr.asp?BELGENO=57895, visited on 8 November 2005.
- Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence*, Public Law& Legal Theory Research Paper Series, Social Science Research Network Electronic Paper Collection at: <http://ssrn.com/abstract=459120>, visited on 28 December 2005.
- Lawrence Lessig, *The future of ideas the fate of the commons in a connected world*, New York: Random House, 2001.
- Lionel Bently, *Intellectual Property Law*, Oxford University Press, New York, 2002.
- Lionel Bently, *Intellectual Property Law*, Oxford, Oxford University Press, 2001.
- Maureen A. O'Rourke, *Legal Issues on the Internet: Hyper linking and Framing*, <http://www.dlib.org/dlib/april98/04orourke.html>, visited on 12 December 2005. See *Futuredontics Inc. v. Applied Anagramic Inc.* (No. CV-97-6691 ABC (MANx, C.D. Calif.)).
- Mehmet Topaloğlu, *Internet'te Fikri Haklar Sorunları*, www.turkhukuksitesi.com, visited on 21 November 2005.
- Olena Dmytrenko, *Copyright&The Internet: Building National Legislative Frameworks Based on the International Copyright Law*, <http://www.internetpolicy.net/practices/20041200copyright.pdf>, visited on 2 November 2005.
- Paul Goldstein, *International copyright principles, law, and practice*, New York Oxford University Press, 2001.
- Paul Goldstein, *International Intellectual Property Law*, New York, Foundation Press, 2001

- *Report on Science and Human Rights*, www.shr.aaas.org/report/xxii/ip.htm.
- Reto M. Hilty, *Copyright in the Internal Market*, *International Review of Industrial Property and Copyright Law*. 2005(35): 7.
- Richard Owens, in Juliana Koranteng, *Industry Welcomes Copyright Treaty*, www.elin.lub.lu.se/cgi-bin/linker/ebSCO_local?5705047.
- Robert Burrell, *Copyright exceptions: the digital impact*, Cambridge University Press, 2005.
- Robert P. Merges, Peter S. Menell, Mark A. Lemley, *Intellectual property in the new technological age*, New York : Aspen, cop. 2005
- Ruth Towse, *Assesing, the Economic Effects of Copyright and Its Reform*, *Reader in Cultural Industries*, Erasmus University,
- Sherri Mabry Gordon, *Downloading copyrighted stuff from the Internet: stealing or fair use?*, Enslow Publishers, cop. 2005.
- Simon Stokes, *Digital Copyright Law and Practice*, Second Edition, Oregon, 2005
- Simon Stokes, *Digital Copyright: Law and Practice*, Second Edition, Oxford- Portland, Hart Publishing, 2005.
- Stanley Lai, *Substantive Issues of Copyright Protection in A Networked Environment in Information & Communications Technology Law Magazine*; June 1999, p.274, www.elin.lub.lu.se/cgi-bin/linker/ebSCO_local?2120904, visited on 24 August 2005.
- Statement by the Committee on Economic, Social and Cultural Rights, *Human Rights and Intellectual Property*, Twenty-seventh session, Geneva, 12-30 November 2001.
- UK Internet Rights, *Introduction to the Internet*, http://www.internetrights.org.uk/index.shtml?AA_SL_Session=8fa795873994ed10dd54938b98227a99&x=562, visited on 13 November 2005.
- UNESCO, *Intergovernmental Conference on Cultural Policies for Development*, Sweden, 30 March-2 April 1998, <http://unesdoc.unesco.org/images/0011/001116/111631eo.pdf>, visited on 20 December 2005.
- Valentine Korah, *Intellectual Property Rights and the EC Competition Rules*, Hart, 2006.
- Vaver, D. "Internationalizing Copyright Law: Implementing the WIPO Treaties", WP 01/99, OIPRC Electronic Journal of Intellectual Property Rights, <http://www.oiprc.ox.ac.uk/EJWP0199.html>.
- Wendy J. Gordon, *Authors, Publishers, And Public Goods: Trading Gold for Dross*, *Loyola of Los Angeles Law Review*, Vol. 36:159,
- William W. Fisher, *Promises to keep: technology, law, and the future of entertainment*, Stanford University Press, 2004.
- World Intellectual Property Organization, *Intellectual Property Rights on the Internet: A Survey of Issues*, http://www.wipo.int/copyright/ecommerce/en/ip_survey/ip_survey.html, p.19. , Visited on 02 June 2005.
- Yaman Akdeniz, Clive Walker and David Wall, *The internet, law and society*, Harlow : Longman, 2000.

- Yavuz Kaplan, *İnternet Ortamında Fikri Haklara Uygulanacak Hukuk*, First Edition, Ankara, Seçkin, 2004
- Vaver, D. "Intellectual Property: Where's the World Going?", S 01/99, OIPRC Seminar Papers, <http://www.oiprc.ox.ac.uk/Seminar0199.html>
- James Boyle, *A Manifesto on WIPO and the Future of Intellectual Property*, www.debatpublic.net/Members/paigrain/commons/manifesto-boyle-WIPO.pdf.
- Terri Branstetter Cohen, *Anti-Circumvention: Has Technology's Child Turned Against Its Mother*, http://www.highbeam.com/library/doc0.asp?DOCID=1G1:106097247&refid=ip_almanac_hf, visited on 13 October 2005.
- Paul Ganley, *Digital Copyright and the New Creative Dynamics*, International Journal of Law and Information Technology, Vol. 12, No.3.
- Ramazan Acun, *İnternet ve Telif Hakları, Bilgi Dünyası*, Cilt:1 Sayı:1, 5-26 ss., 2000.
- David Green, *Copyright: Dead or Alive in a Digital Age, National Initiative for a Networked Cultural Heritage*, Vol:13, No:1, 1997.
- Yavuz Kaplan, *İnternet Ortamındaki Telif Haklarına Uygulanacak Hukuk*, Türkiye Bilişim şurası, <http://www.Bilisimsurasi.org.tr/dosyalar/95.doc>
- T.C Başbakanlık Devlet Planlama Teşkilatı Müsteşarlığı, *Fikri ve Sınai Haklar Özel İhtisas Komisyonu Raporu*, Ocak 1995, <http://ekutup.dpt.gov.tr>
- Deniz Ilgaz, *Turkey Aims at Full Harmonization with the EU Acquis Communautaire in Intellectual Property as a Requirement of Membership*, <http://home.um.edu.mt/edrc/publications/documents/contents.pdf#search='turkey's%20adoption%20of%20the%20acquis%20communautaire%20ilgaz>. Visited on 15 October 2005.

