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Copyright in The Digital Age
from The Human Rights
Perspective

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Preface

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Abbreviations

UDHR	Universal Declaration of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
WCT	WIPO Copyright Treaty
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights

1 Introduction

1.1 Protection of Author's Rights

Who is the author? To be very technical the author is the person who invests the necessary element of creativity for the creation of the work at issue.¹

According to the spirit of the Berne Convention the author is usually a natural person.² Intellectual property law in general adheres to the principle that authors enjoy an exclusive right to certain forms of exploitation of their works. Every time that such a work – a book, a play, a song, a painting, a film – is created, its author becomes the owner of the copyright of that work he or she acquires the author's right. Basically, this means that the creator decides if and how his/her work will be used.

To become holder of this right generally requires no formalities whatsoever.³ In other words “the author's right is based upon the act of creation itself”.⁴ All that is needed is that a creative work becomes fixed in a tangible form.⁵ From that moment on, an author is granted legal protection, the nature of which is provided by copyright law.

The development and use of communications new and information technology progresses rapidly. In a number of years one may expect a convergence of computer and telecommunications technology.

These developments emphasize the importance of the enforcement of intellectual property rights in general and of copyright in particular.

Copyright ensures authors and producers the control over and participation in the proceeds of the commercial exploitation of their works. Yet how is it possible to provide effective protection for intellectual property and acquired rights if just a few mouse clicks are necessary in order to make perfect copies of works by using digital technology and to distribute them throughout the world? Authors, rights holders and politicians are called

¹ Linol Bently and Brad Sherman, Intellectual Property Law,p108, OXFORD 2001

² Collection of Documents on Intellectual Property, Compiled by WIPO Worldwide Academy,2001,p3.

³ <http://www.softwareprotection.com/copyright.html>

⁴ Ysolde Gendreau, Intention and Copyright Law,Perspectives on Intellectual Property, Volume 5, p3

⁵ <http://www.nwc.uaf.edu/users/faculty/nfgjm/webd/lesson2.copyright.html>

upon to respond to this situation. On the one hand, legislation must provide sufficient legal certainty to promote creative activities and investments in this field. On the other hand, a strengthening of copyright law in the digital context must not lead to the exclusion of users, e.g. of public libraries, from the enjoyment of works.

1.2 The Need to Protect Copyright

The authors of literary, musical, artistic and scientific works play a spiritual and intellectual role in society which provides a profound and lasting benefit to humanity and is a decisive factor in shaping the course of civilisation.⁶

One of the essential ways by which society acknowledges this crucial importance of creativity is through the protection of authors' rights. The legal protection offered by copyright law grants authors both the recognition of their work and allows them to obtain fair economic rewards for their creative activities.

Although protection by law should assure creators that their works can be disseminated without fear of unauthorised uses, widespread illegal copying of music on the Internet and continuing piracy show that legal theory and day-to-day practice don't always match.⁷ That is why authors and their representatives continuously strive to defend and promote the application of authors' rights.

1.3 Which Works are Included?

The kinds of works covered by copyright include: literary works such as novels, poems, plays, reference works, newspapers and computer programs; databases; films, musical compositions and choreography; plastic works such as paintings, drawings, photographs and sculpture; architecture; and advertisements, maps and technical drawings.⁸

⁶ <http://www.caslon.com.au/ipguide2.htm>

⁷ <http://www.geocities.com/Nashville/6149/intro.html>

⁸ http://www.gu.edu.au/text/ins/copyright/content_what_is_covered.html

“The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainment in dumb show; musical compositions with or *without words*; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.” (The Berne Convention for the Protection of Literary and Artistic Works, Article 2 (1))

1.4 What Rights does Copyright Provide?

Authors of a creative work hold the exclusive right to use or authorise others to use the work on agreed terms. This generally means that they can prohibit or authorise:

- its reproduction, like in printed publication or as a sound recording;⁹
- its public performance, as in a play or musical work;¹⁰
- recordings of it, for example, in the form of compact discs, cassettes or videotapes;¹¹
- its broadcasting, by radio, cable, satellite, or over the internet;¹²
- its adaptation, such as a novel into a screenplay;¹³
- its translation into other languages.¹⁴

⁹ Collection of Documents on Intellectual Property, Compiled by WIPO Worldwide Academy, 2001, p87

¹⁰ Idem, p88

¹¹ Idem.

¹² Idem.

¹³ Idem, p89

1.5 How Long does Copyright Last?

The international standard for protection, established by the Berne Convention, is the life of the author and fifty years after his death. However, in many countries, such as the United States and in those of the European Community, the protection is extended for the life of a work's author plus an additional seventy years. Once the term expires, the work enters the public domain where it can be freely used by anyone.

1.6 Scope of the Study

This paper will discuss the authors right in the digital age under the present international intellectual property system. In particular, analysis will focus on the (WIPO) copyright Treaty of 1996. Additionally, a historical account of how the present framework in international law developed will be given in respect to the protection of authors' economic and moral rights. The subject of intellectual property rights of authors has long been very controversial internationally. The digital age presents copyright with dual challenges. Digitization of works means that works can be copied easily at low expense and without any loss in time and quality.¹⁵ It is also clear that copying does not exclusively mean the literal copying of the entire work. Digital technology allows the copyist to make changes to the work with similar ease. Deletions and alterations are easy to make and the copy will still have the appearance of an original work. All of this means, first, that the risk of infringement becomes ever more important and it is not just the risk of infringement of the copyright owner's economic rights that is of significance. The same activities can lead to the deletion of the author's name, which may be replaced by another name, or the alterations to the work may, in extreme cases, be such that they lead to distortion or

¹⁴ Idem.

¹⁵ Marybeth Peters ,The Challenge of Copyright in the digital age, <http://Bangkok.usembassy.gov/service/docs/reports/ipr2.htm>

mutilation of the original work. Therefore, the increased risk applies also to the moral rights of the author.¹⁶

The second challenge arises from the fact that works in digital format fit well with online distribution technologies. Online networks such as the Internet, are almost by their very nature international and in many cases have made international borders irrelevant. These networks have created a global market without frontiers which has facilitated the exploitation of copyrighted work. This stands in contrast with the territorial approach that has traditionally, rightly or wrongly, been adopted in relation to copyright. Rights are granted and protected on a country-by-country basis under the guidance of the general national treatment principle and the minimum provision of the Berne Convention and TRIPS Agreement.¹⁷ This has resulted in differences between the protection offered in different countries or, at the very least, the copyright laws in the different countries are not identical. Consequently, the first question to be addressed is which specific law is applicable in a case of cross-frontier exploitation and whether its provisions are also appropriate in the digital environment, subsequently the issue of jurisdiction in cases of infringement is discussed and finally, the problems involved in executing national court judgments in foreign countries is analyzed. This paper will discuss these two aspects and answer this dual challenge. Also using the human rights approach, this paper will evaluate if economic and moral right of the authors are indeed worthy of protection and in line with Islam and human rights objectives.

Due to space and time constraints, this paper will not tackle intellectual property or human rights law at the regional level (i.e., European Union). The scope will be international.

¹⁶ Pamela Samuelson, *The Digital Dilemma: A Perspective on Intellectual Property in the Information Age*.

¹⁷ J.C. Ginsburg, *Private International Law of Copyright*, 253-256

2. International Protection of Author's Right

“Author's right is the term used in English-speaking countries to characterize the legal recognition of rights to control or benefit from the communication of works of authorship. The word has a double meaning, stemming from its etymology. It denotes not only the right “to copy” but also the right to own and control “the copy,” that is, the prototypic work of authorship itself . . . Though similar in some ways, copyrights and patents are fundamentally different forms of legal protection. Copyrights protect works that owe their origin to the expressive efforts of a writer, composer, artist or other creative individual. As long as a work is original in the sense that it was created independently, it can be copyrighted even if a closely similar work is already in existence. A copyright owner has rights only against those who use his work for their own purposes without his permission.”¹⁸

“Copyright is used as a legal mechanism for the ordering of social and cultural life, or, put another way, copyright is one method for linking the world of ideas to the world of commerce. Just as many of the traditional assumptions for organizing and controlling the flows of information in society are called into question so too are the economic assumptions on which the law of copyright is founded. And these assumptions condition the patterns of our cultural and scientific life.”¹⁹

2.1 The History of Copyright Protection

¹⁸ ¹Encyclopaedia Britannica, Vol.5, London, 1975, p. 152.

¹⁹ Edward W. Ploman and L. Clark Hamilton, *Copyright: Intellectual property in the information age*, London, Boston, 1980, p. 1.

The history of copyright is closely linked to technological development. The first forms of copyright protection appeared in the 15th century after invention of the printing press which allowed for easier duplication of writings.²⁰ The first complete Copyright Act appeared in England in 1710. This was the first Act Copyright Act to grant substantive rights and effective procedures for the enforcement of copyright. This Act provided that authors had the exclusive right to print their work for 14 years after its first publication and if after the expiry of this period, the author was still alive, this period was extended for another 14 years.²¹ Amongst the first countries that followed this legal precedent were Prussia and France. During the 19th century the need for copyright protection became well established. The commercial interests of certain countries, which exported copyright material, gave rise to the need for reciprocal copyright agreements with other countries. It is in this spirit that the Berne Convention was drafted in 1886.

2.2 Berne Convention

The Berne Convention for the Protection of Literary and Artistic Works (1886) is the oldest copyright treaty.²² It aims to harmonize, to a certain extent, the copyright laws of all contracting parties by providing for minimum standards of protection for authors.²³

In order for a work to attract copyright protection it must be a creation of the mind. This means it needs to qualify as copyrightable subject matter and be original at the same time.²⁴

The notion of originality varies from country to country. It also needs to be a work that is either created by a Union country author or published in a Union country.²⁵

²⁰ John Ewing, Copyright and Authors,
http://www.firstmonday.dk/issues/issue8_10/ewing/#e1

²¹ Idem

²² The text of the treaty and a list of parties is available
at<<http://www.wipo.int/treaties/ip/bern/index.html>>

²³ J.C. Ginsburg, Private International Law of Copyright,,264-266

²⁴ Idem.

²⁵ Idem

Any protection granted to authors in any contracting state is subject to three main principles:

The principle of national treatment.²⁶

The principle of automatic protection.²⁷

The principle of independence of protection.²⁸

Authors are granted a set of exclusive economic and moral rights. Economic rights deal with the economic exploitation of the work, whilst moral rights protect the author's personal interests in the work.²⁹ The economic rights granted to authors can be divided into three main categories:

- . The right of reproduction.
- . The right of translation and adaptation.
- . The rights of public performance, broadcast and communication to the public.

Authors may also be given a *droit de suite*.

These rights are subject to limitations which are either explicitly provided for in the Berne Convention or, if they relate to the right of reproduction, are subject to the three-step test. The three step test consists of three conditions for the limitation of the right of reproduction, which may result in the use of non-voluntary licenses. These are:

1. The reproduction of a work can only be permitted in certain 'special cases'
2. It should not conflict with the 'normal exploitation' of the work
3. And it should not unreasonably prejudice the 'legitimate interests' of the author.

²⁶ Article 5(1) of the Berne Convention.

²⁷ Article 5(2) of the Berne Convention

²⁸ *Idem*.

²⁹ WIPO Intellectual Property Handbook, p 264

The Berne Convention is widely implemented and reflects the base line of international intellectual property protection. One hundred and forty-eight countries are parties to the Berne Convention.³⁰

2.3 The Universal Copyright Convention

The Universal Copyright Convention (UCC) was signed in Paris in 1952. It is an attempt to bring together countries, such as the United States, which provide a lower level of protection of authors' rights than those contained in the Berne Convention. The UCC was initiated after the Second World War by UNESCO and has approximately 98 contracting states.³¹

The UCC was revised in Paris in 1971 where the protection for authors was increased. However, the practical significance of this Convention is very limited since most of its contracting states have ratified the Berne Convention. The characteristic elements of the UCC are the following:

1. Copyright protection is made subject to the following formality: the symbol © accompanied by the name of the copyright proprietor and the year of first publication should be put at a prominent place so as to give reasonable notice of claim of copyright.³²
2. The minimum term of protection for copyright works under the UCC is 25 years after the death of the author.³³

2.4 The Agreement on Trade-Related Aspects of Intellectual Property (TRIPS)

At the international level the next step forward that strengthened international copyright protection was the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (the

³⁰ <http://www.wipo.int/treaties/en/index.html>

³¹

³² Article 3 of the Universal Copyright Convention

³³ Article 4(2) of the Universal Copyright Convention

TRIPS Agreement). This Agreement was signed in Marrakech in 1994. The TRIPS Agreement adopted the substantive provisions of the Berne , apart from Article 6(b) which concerns moral rights, and added provisions on computer programs, databases, rental rights and so on.³² The TRIPS Agreement is a trade related agreement since it was adopted as part of the Uruguay GATT round of trade negotiations and it now operates under the auspices of the World Trade Organization (WTO).

Its aim was to impose a worldwide minimum standard for the protection of intellectual property.³³ This system does not replace the existing conventions, but it works in addition to them. It obliges those countries, which do not yet protect intellectual property to introduce protection if they want to be included in the world free trading system and be a member of the WTO.³⁴

For many years the effective enforcement of copyright and related rights has been the weak link in the chain of protection that exists in many countries. The TRIPS Agreement changed this. It contains detailed provisions on enforcement and obliges all contracting states to introduce effective enforcement mechanisms, which include civil and administrative procedures, criminal measures, border measures and provisional measures. In addition there are effective dispute resolution mechanisms in the Agreement for instances where a contracting party feels that another contracting party has not faithfully implemented its obligations under the TRIPS Agreement.

All this translates into enforcement provisions and actions at the national level. Of particular importance to the right holder in this respect are the civil remedies that can be imposed. These can include damages, injunctions, delivery up orders and an account of profits

The TRIPS Agreement contains substantive provisions on enforcement and its minimum standards of protection for intellectual property works are slightly higher.

³² Carlos M. Correa, Intellectual Property Rights, the WTO and Developing Countries, The TRIPS Agreement and Options, p13

³³ Idem, p 8

³⁴ Idem, p 8

As of January 2002, 144 States had adhered to the TRIPS Agreement. The following provisions of the TRIPS Agreement relate to copyright:³⁷

Article 9: Relation to the Berne Convention

Article 10: Computer Programs and compilations of Data

Article 11: Rental Rights

Article 12: Term of Protection

Article 13: Limitations and Exceptions

Article 14: Protection of Performers, Producers of Phonograms
(Sound Recordings) and Broadcasting Organizations

Article 15: Protectable Subject Matter

Article 16: Rights Conferred

Article 17: Exceptions

Article 18: Term of Protection

Article 19: Requirement of Use

Article 20: Other Requirements

Article 21: Licensing and Assignment

2.5 WIPO Copyright Treaty (WCT)

The most important recent copyright Convention is the WIPO Copyright Treaty (WCT), adopted in Geneva on 20 December 1996, which is a re-negotiation of copyright law for application in contemporary society (albeit influenced by the lobbying of rights holders such as record labels and movie studios). Building upon the Berne Convention it reiterates the basic premise of copyright law: Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such. Article 1(1) of the WIPO Copyright Treaty provides that

‘[t]his Treaty is a special agreement within the meaning of Article 2 of the Berne Convention for the Protection of Literary and artistic Works, as regard Contracting Parties that are countries of the Union established by that Convention. This treaty shall not have any connection with treaties other

³⁷ http://www.wto.org/english/thewto_e/thewto_e.htm

than Berne Convention, nor shall it prejudice any right and obligations under any other treaties”.

This means that the WIPO Copyright Treaty is an update to the Berne Convention and its provisions cannot be interpreted contrary to the Berne Convention. This is also confirmed by Article 1(4) which provides that “[c]ontracting parties shall comply within Articles 1 to 21 and the Appendix of the Berne Convention”.

The WIPO Copyright Treaty has no relation with other copyright treaties, such as the TRIPS Agreement or the Universal Copyright Convention. The Copyright Treaty expressly recognizes that computer programs are covered by the Berne Convention as literary works and that copyrightable compilations of data (databases) are also covered by the Convention as such.³⁵

For the first time, the Copyright Treaty recognizes a broad right of public distribution for covered works and recognizes a right of rental for computer programs, cinematographic works, and works embodied in sound recordings.³⁶ Two other features of the Treaty are the recognition of a broad right of communication to the public, which would include the Internet, and an agreed statement that interprets the existing reproduction rights of the Berne Convention to fully apply in the digital environment.³⁷

In this context, the most significant provision is Article 11, which requires member states to provide legal protection and effective legal remedies against the circumvention of effective technological measures used by holders of copyrights or related rights to protect their material. Moreover, Article 12 requires the implementation of adequate and effective legal remedies to preserve the integrity of rights management information. Rights management information is information which identifies the work, the author of the work, the owner of any rights in the work, or information about the terms and conditions of use of the work which is attached to a

³⁵ Article 4 and 5 of the WIPO Copyright Treaty

³⁶ Article 6 and 7 of the WIPO Copyright Treaty

³⁷ See Article 8 of the WIPO Copyright Treaty and Agreed Statement Concerning Article 1(4).

copy of a work or appears in connection with the communication of a work to the public.³⁸

The purpose of this provision is to prohibit the removal and altering of certain electronic rights management information attached to a work or other subject matter and thereby facilitate licensing and prevent unauthorized copying.

Although the WIPO Treaties are the result of an international bargaining process, many provisions – including Article 11 of the Copyright Treaty – were heavily influenced by the U.S. agenda in this field. This agenda had been laid out in a “Green Paper” of July 1994.³⁹

³⁸ Article 12(2) ;Right management information is also referred to as copyright management information.

³⁹ Information Infrastructure Task Force Working Group on Intellectual Property Rights, Intellectual Property Rights and National Information Infrastructure (Preliminary Draft, July 1994)

3 The Problem : Digitization and Networking - What will new Technologies Change

Copyright is an exclusive right comparable with a property right and embracing moral rights and property rights. Hence, it constitutes a basic and human right which in most countries enjoys protection by constitutional law. Copyright protects the creators of literary works, of scientific and artistic works (text, music and pictures, but also databases and computer programs) as well as certain producers of cultural emanation (in particular performing, artists, phonogram and film producers, broadcasting companies).

3.1 Problems in Connection with Digital use of Works

Copyright laws around the world were clearly designed with analogue technology.⁴⁰ The arrival of digital technology presents these copyright laws with a set of clear challenges.⁴¹ Copyright works, whether in text, image or sound, once digitized are put in one single format. They are transformed into binary units of information consisting of 0s and 1s. This means in practice that all copyright works of a different nature can be combined easily and can also be easily modified.

It is also important to note that whilst digitization leads to a loss in quality, in practice this loss can barely be identified. Moreover once in digital form identical copies of the digital version can be made with no further loss in quality.

Ease of copying means that one is able to make copies cheaply, quickly and efficiently without any loss in quality. In addition, copying cannot be easily traced. For these reasons many people have little interest in paying for the original works or legitimate copies because the quality is exactly the same as the original copy and their infringing activities cannot be traced. In other words authors cannot enforce their economic rights easily and therefore they lose significant income. In this sense the primary purpose of copyright,

⁴⁰ Pamela Samuelson, *The Digital Dilemma: A Perspective on Intellectual Property in the Information Age*, p1

⁴¹ *Idem*.

which is to reward the author, is not met. Producers of copyright works also lose substantial income and are therefore less inclined to digitize their work or put it in an online environment.

The ease of modification to which works can be subjected also impinges on the moral rights of authors. One can easily delete or change the name of the author and/or alter and modify the content of the work. This has a dual unwelcome effect. First, it infringes the moral right of paternity and /or integrity of the author. And second, it disseminates to the public false and modified information whose quality the public is not in a position to assess. Although a problem in itself, the fact that digital exploitation of works and achievements is not limited to one single national territory, but in the majority of cases crosses borders exacerbates many of the above mentioned problems.

Consequently, the first question to be addressed to which specific law is applicable to a case of cross frontier exploitation and whether its provisions are also appropriate in the digital environment ; subsequently the issue of jurisdiction in case of infringement is discussed and finally the problem involved in executing national court judgments in foreign countries.

3.2 Point of Departure: Copyright and Protection of Creative Acts

Before moving on to the problems, it is first advisable to outline the basic principles of copyright law.

3.2.1 Economic and Moral rights

There are two aspects to copyright. The economic rights which are there to protect the financial interests of the authors in his work⁴² and moral rights whose aim is to protect the personal interests of the author in the work⁴³. Both rights are granted to the author in the form of exclusive rights. That means that the author is the only one to exercise them and can prevent third parties from doing so, unless they have his/her authorization. In other words

⁴² Collection of Documents on Intellectual Property, Compiled by WIPO Worldwide Academy,p86

⁴³ Idem,p89

a form of monopoly is granted to the author in relation to the exploitation of his/her work.

3.2.2 Exclusive Economic Rights

The Berne Convention refers to various economic rights. These give the right holder power over:

1. making a collection of speeches, addresses and or other similar works(Article 2bis(3))
2. translation (Article 8)
3. reproduction in any manner or form (Article 9(1))
4. public performance of dramatic, dramatico-musical works by any manner or means (Article 11(1))
5. communication to the public of performances (Article 11(2))
6. broadcasting and any communication to the public by any means of wireless diffusion of signs sounds or images(Article 11bis(1)(i))
7. communication to the public by wire of broadcasts and rebroadcasts (Article 11bis(i)(ii))
8. public communication of broadcasts by loudspeakers or other analogous instruments (Article 11bis(iii))
9. public recitation of literary works (Article 11ter(1)(i))
10. public communication of recitations of literary works (Article 11ter(1)(ii))
11. public recitation and public communication of translation of literary works (Article 11ter(2))
12. adaptation, arrangement and other alterations (Article 12)
13. cinematographic adaptation (Article 14(1)(i))
14. distribution of cinematographic adaptation and reproduction of works (Article 14 (1)(i))
15. public performance and communication to the public by wire of cinematographic adaptation and reproduction (Article 14(1)(ii))

These rights, constitute the minimum form of protection that has to be provided in every Union country. These economic rights can be divided into three main categories

A. Right of reproduction

This is the most basic right since it forms the basis of most forms of exploitation of a work. Reproduction is in reality the copying of a work in any manner or form. Examples include the copying of an article from a newspaper and its inclusion in a book, the storage of a song on a CD-ROM, the recording of a dramatic work as a film, the making of a three-dimensional work a two-dimensional work, the down loading of a picture from the internet, etc.⁴⁴

Whether the reproduction of work is in material form or not is irrelevant. Transient acts of reproduction, which however contain some form of permanence, such as for example, the storage of a work in the RAM memory of a computer may also qualify as reproduction for the purposes of the Berne Convention. The author's authorization, of course, renders all above permitted acts.⁴⁵

Although the Berne Convention does not refer to them, in modern system, the rights of distribution, rental and public lending of the works are also found in most copyright laws. The right of distribution grants the author the exclusive right to authorize distributions of his/her work to the public. It would make no sense to be able to prevent unauthorized reproduction of your work whilst at the same time not to be able to prevent its distribution. The right of distribution is usually subject upon a first sale or other complete transfer of rights (e.g. donation) which is made with the authorization of the author or any other right-owner (if the right in the work are already transferred). This means that the right-owner cannot prevent further disposal of the work from third parties. This exhaustion is nation-wide exhaustion⁴⁶ and for the countries of the EU, community-wide exhaustion. That means that the work at issue can freely circulate within the country or all countries

⁴⁴ Idem,87

⁴⁵ Idem.

⁴⁶ Idem.

of the EU respectively. The right-owner cannot prevent its importation into any country of the EU.

However, international exhaustion is not the norm in most countries. This means that a right-owner can prevent the importation of a copy of his work from one state to another. This also reflects the principle of territoriality of copyright according to which the owner of a copyright is able to exercise his exclusive rights on a territorial basis.

Technological advances have made the copying of work easier which has enabled its rental to the public for a fee. This new form of exploitation of works has necessitated in many national copyright laws and in the TRIPS Agreement the introduction of a new exclusive right, the rental right. This allows the right-owner to authorize the renting, borrowing or hiring of their works.

The lending right is in reality a rental right addressed to libraries or other public non-profit institutions that work on non-commercial basis.

Although this right of reproduction is an exclusive right, there are limitations to it. These limitations were put in place in order to secure that the right balance is struck between the interest of the authors and those of the public.

B. Right of Translation and Adaptation

Translation and adaptation rights can be regarded as separate rights although they involve in some form or another the reproduction of a pre-existing work.⁴⁷ Works are usually translated from one language to another. An adaptation of a work is the adjustment of a work, its rewriting or remodeling into another form in order for example to suit another medium of communication. Examples include, the adaptation of a novel into a film, the fixation of a dramatico-musical work in a film, the adaptation of a poem into a prose work and so on. The term arrangement of musical works essentially means the changing of keys or parts of the orchestration. Other alterations include parodies, caricatures and other kind of 'rewrites' where

⁴⁷ Idem,89

the work is adapted in order to suit another purpose. Broadly speaking all these alterations can be called adaptation.⁴⁸

C. Right of Public Performance, Broadcasting and Communication to the Public

1. Public Performance

Another way of communicating or disseminating works to the public is through public performance. This way of disseminating dramatic and musical works, although literary works can also be performed by way of recitation and artistic works,⁴⁹ by way of exhibition or display.

‘Performance’ means any acoustic or visual presentation of the work by any means or process. For example, sound recording, films, broadcasts or cable programs.⁵⁰

‘Public’ does not necessarily mean the public at large. It means a large number of people who do not qualify as family or close social acquaintances. Not all those people need to be present while the work is performed. It suffices that they have access to it, for example video showings in every room of a hotel. Private performances are excluded altogether.

2. Broadcasting

‘Broadcasting refers to transmissions of sound and/or images by electromagnetic waves (wireless means) for purpose of enabling reception of the sound or images, which are transmitted, by members of the general public. An example is the broadcasting of a documentary by the BBC by the emission of a terrestrial TV signal.⁵¹

⁴⁸ Idem.

⁴⁹ Article 11(1) of the Berne Convention

⁵⁰ Ansgar Firsching, The Protection of Performers from a European Perspective with regard to the “Phil Collins” Case Stockholm (1997),p.7

⁵¹ Collection of Documents on Intellectual Property, Compiled by WIPO Worldwide Academy,p88

3. Communication to the Public

Another form of communication to the public takes place when a signal is distributed by wire or cable or is rebroadcast to members of the public, which have access to equipment connected to the wire or cable system. This form of communication to the public presupposes that it is done by a party other than the original broadcasters.⁵²

The rights of public performance, broadcasting and communication to the public are exclusive rights and can only be performed by third parties once the authorization of the right-holder is obtained.

3.2.3 Limitations to the Rights

Copyright grants the author a set of exclusive rights. The severity and inflexibility of these rights is balanced on certain occasions by exceptions or limitations. Limitations aim at achieving a balance between the benefit of the author and that of the society as a whole. In other words limitations are there to serve public interest.

The Berne Convention contains three basic types of limitations. These are

1. The exclusion of certain categories of works

- Official texts of a legislative, administrative and legal nature (Article 2(4)) (discretionary)
- News of the day (Article 2(8)) (obligatory)
- Political speeches and speeches delivered in the course of legal proceedings (Article 2bis(1)) (discretionary)

2. The exclusion of particular acts of exploitation

⁵² *Idem.*

- Lectures, addresses and works of the same nature which are delivered in public may be reproduced by the press, broadcast, communicated to the public by wire and made the subject of public communication when this is justified by the purpose of information (Article 2bis(1)) (discretionary)
- The three-step test in Article 9(2) (discretionary)
- The right of quotation (Article 10)(obligatory)
- The right of utilization for teaching purposes (Article 10(2)) (discretionary)
- Exceptions made for the benefit of the press (Article 10bis) (discretionary)

3. Non-voluntary licenses

- In relation to the broadcast and communication to the public ((Article 11bis(2)) (discretionary)
- In relation to recording of musical works(Article 13) (obligatory)

The three step test consists of three conditions for the limitation of the right of reproduction, which may result in the use of non-voluntary licenses. These are:

4. The reproduction of a work can only be permitted in certain 'special cases'
5. It should not conflict with the 'normal exploitation' of the work
6. And it should not unreasonably prejudice the 'legitimate interests' of the author.

Some examples of uses that qualify under the three-step test and which are found in most national copyright laws are the following:

- private use
- judicial and administrative use
- use for educational, research and scientific purposes
- use of teaching purposes
- use by libraries and archives
- use for humanitarian purposes(e.g. handicapped or blind readers)

3.2.4 Moral Rights

Apart from economic rights authors are also entitled to moral rights. The aim of moral rights is to protect the personal rights of authors in their works. These rights exist independently of the economic rights and remain with the author even after the transfer of his/her economic rights.

Article 6bis of the Berne Convention provides for two moral rights: the right of paternity and the right of integrity.

The right of paternity is the author's right to be identified as such in relation to his work. That means that the author has the right to be identified clearly

and prominently on each copy of his/her work. It is also argued that this right extends as far as to cover the author's right to have his name removed from a work that he/she has not authored.⁵³

The right of integrity is the author's right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to his work, which would be prejudicial to his honor or reputation.⁵⁴ Examples of such instances are: situations where a literary work is paraphrased or reproduced with substantial typographical mistakes and imperfections; the rewriting of the literary or dramatic work that changes the conclusions that represent the views of its author; the rearrangement of a classical piece of music into disco; a distortion of a work while it is performed, etc. It can also be the placement of a work in a derogatory context, for example, the exhibition of a religious painting in a pornographic context.

However, distortion, mutilation or other interference with the work as such does not suffice. It has to be prejudicial to the author's honor and reputation. The moral rights of paternity and integrity constitute a *de minimis rule* only. That means that contracting states can exceed this protection and afford authors a wider protection. This can be done by dropping either the additional requirements of prejudice to the author's honor or reputation. They can afford wider protection by adding more moral rights, such as,

- the right of having access to the work even after it is disposed of,
- the right of divulgation of the unpublished work and
- the right of withdrawal of the work in case of change of beliefs.

Common law countries, such as the United Kingdom and the United States have followed the minimalist approach and provide for a limited moral rights protection. Civil law countries traditionally offer a very strong moral rights protection providing for an extensive right of integrity and a full list of moral rights. Contracting states are under no obligation to protect moral

⁵³ *Idem*,89

⁵⁴ *Idem*.

rights within the framework of copyright. They can protect them by other legal means such as defamation, passing, etc. Yet, these forms of protection should be in a position to grant at least the type of protection provided for in Article 6bis of the Berne Convention.

3.2.5 Term of protection for the moral rights of authors

The term of protection for moral rights is the same as the term of protection for economic rights. After the death of the author moral rights can be exercised by the persons or institutions provided for in the legislation of the country where protection is claimed. This again is a minimum term of protection which can be extended by Contracting Parties in their domestic laws.⁵⁶

3.3 Special Type of Works

The special types of works covered are:

- . Computer programs
- . Databases
- . New technology products and online distribution

3.3.1 Computer Programs

What is a Computer Program?

The World Intellectual Property Organization(WIPO) defines the term computer program as:

“a set of instructions expressed in words, codes, schemes or in any other form, which is capable, when incorporated in a machine-readable medium, of causing a ‘computer’ (an electronic or similar device having information processing capabilities) to perform or achieve a particular task or result.”⁵⁷

⁵⁶ Article 7(1) of the Berne Convention

⁵⁷ WIPO, preparatory document (BCP/CE/1/2) for the first session of the Committee of Experts on a Possible Protocol to the Berne Convention

This is a quite short definition that works in some cases and it is not sufficient in others, because of its generality.

A computer program can also be technically defined as an algorithm formulated in a programming language in combination with the related areas of data, which instruct a data processing unit. Programs regulate the data-input and data-output as well as the realization of the working instructions. For solving more complex problems programs are usually divided in several parts (subprograms, procedures, and blocks).

Depending on the programming language, the source programs, which are usually written in a machine distant or higher level language, are translated by a translation program, called an assembler, compiler or interpreter, into a machine language. Frequently used programs or parts of programs are stored as data files and administrated in program libraries.⁵⁸

This somewhat technical explanation means that a computer program consists of several parts and that different kinds of programs exist within it. Based on another definition used for licensing purposes, a computer program could be “a series of instructions in machine-readable form, prepared to achieve a certain result. It is the intelligence communicated to the computer by the human in the latter’s attempt to get the machine to do his or her bidding.”⁵⁹

In a shorter form it could be said, that a computer program is a set of instructions to be used in a computer to produce a certain result. This very broad definition should be able to cover all different types of programs. It is now a legal matter to find out how these changing appearances affect copyright, presuming that they do.

The EC Directive 91/250 does not give any definition for the term computer programs. Article 1(1) only provides that “the term ‘computer programs’ will include their preparatory design material.”

Therefore, it seems really not possible to define a computer program in one definite way but this could be also an advantage as it leaves open the

⁵⁸ The definition follows the one given by the Bibliographisches Institute&F.A. Brockhaus AG,1999

⁵⁹ Bender, David, Computer Law, Evidence and Procedure, Time Mirror Books, New York, 1986

possibility to cover a wide range of programs under the term ‘computer program’.

A word about the term ‘software’ has to be said as it is very often used as a synonym of ‘computer programs’. It seems therefore necessary to define it. In this work the term is understood as referring to computer programs, databases and documentation and as a counter part of the term ‘hardware’. The term ‘computer program’ will be used in a narrower sense.

As can be seen by now, a computer program is special because it is not like other literary work. A computer program is not a book, which is unless of the content, recognizable by it’s well known form. A novel begins and ends in a clearly perceptible way. A computer program is different. It is hard to define its borders. It can be found in various and fast changing forms because the technical development is so rapid. And like all digitized material it has gathered increasingly quantitative importance over the last few years due to the fact that it can be so easily copied and disseminated over the Internet.

A lawyer cannot work properly with the law if it is uncertain what a specific legal term means. We are looking for a definition for computer programs to determine which parts of the different programs are protected by copyright. Computer programs are not only programs such as WINDOWS, they are also used for controlling cars, washing machines, video recorders and a lot of other machines or systems surrounding us.

3.3.2 What Intellectual Property Laws Applies to Computer Programs

A computer program is a classic case of an intellectual creation which is not listed in Article 2 of the Berne Convention. Further treaties have addressed this gap, namely Article 10(1) of the TRIPS Agreement and Article 4 of the WIPO Copyright Treaty (WTC). While slightly different in wording, these two provisions both state that computer programs should be protected as literary works, and that the protection should be the same as that granted to such works under the Berne Convention. The TRIPS Agreement also clarifies that the protection applies to computer programs “whether in source

or object code”, while the WCT expresses the same in less technical form:” such protection applies to computer programs, whatever may be the mode or form of their expression.

3.4 Databases

Databases are another case of new technology works that are not expressly referred to in Article 2 of the Berne Convention. The closest that the Berne Convention comes in this respect is Article 2(5) which states that “collections of literary and artistic works such as encyclopedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations”.

However, this provision was introduced in Berne Convention when electronic compilations had not yet appeared.

An updated version of this provision is now found in Article 5 of the WIPO Copyright Treaty (WCT). In this Article databases are defined as a “[c]ompilation of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations.

Article 5 of the WCT provides, consistently with Article 2(5) of the Berne Convention, that “[t]his protection does not extend to data or the other material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation”.

In other words, a database, either in analogue or digital format, may contain both copyrightable and non-copyrightable material. In cases where a database contains copyright work the right in these works exist independently of the right of the author of the database.

3.5 New Technology Products and Online Distribution of Works

The rapid development of technology has given rise to many new forms of intellectual creations. These forms either refer to the development of an entirely new product, possessing unique or qualitatively new characteristics when compared to the conventional copyright works, or to a new method of

fixation and/or distribution. Some examples of such products are video games, multimedia products, virtual reality works and so on.

Since the works I have mentioned are considered to be intellectual creations, they come within the scope of Article 2 of the Berne Convention and should be afforded the same protection as any other literary and artistic work. Yet, certain works, such as for example, cinematographic works, computer programs or databases have been given a tailor-made regime of protection. Therefore, in order for few new technology products to be protected effectively, they either have to be fitted within one of the existing categories of copyright works, which seems to be close to their nature and characteristics or they have to be granted a new tailor-made regime of protection.

4. Problems need for reform

Since the day information became digitized, the possibilities of reproducing such material have undergone a sensational improvement. Because everything posted in Cyberspace is digitized, virtually everything can technically be exactly reproduced without any loss of quality or data. This of course, has lead not only to enhanced lawful reproduction, but also illegal copying of protected material.⁶⁰ Many difficult issues arise. Five major questions will be addressed here.

- Is material found on the Internet protected by copyright and if so how?
- What amount to copyright infringement in an Internet context?

⁶⁰ Deputizing the ISPs-Internet Service Provider should take responsibility for polocing copyrigh infringement in Cyberspace, by William J.Cook Intellectual Property magazine,spring 96. [http://ipmag.com/acook.htm\(970716\)](http://ipmag.com/acook.htm(970716))

- What technical devices can we use to enforce copyright on the Internet?
- What can be done to prevent digital piracy of Copyright works
- What is the role of private international law on copyright protection?

4.1 Is material found on the Internet protected by copyright and if so how?

The first thing to note is that the Internet and the use of works on it do not change copyright. Works that are protected as such do not lose this status when they appear on the Internet. And copyright applies also to Internet-related issues. We need simply apply the existing rules to the internet.

International organizations as well as states respond to this development by passing new legislation. One of the most important legislative activities, that laid the framework the The Digital Millennium Copyright Act(DMCA) and the European Community Copyright Directive,are the WIPO Copyright Treaty..

In general the WIPO Copyright treaty (WCT) concerns copyright protection on the global information infrastructure.

One of the features of the Treaty is the recognition of a broad right of communication to the public, which would include the Internet, and an Agreed Statement that interprets the existing reproduction right of the Berne Convention to fully apply in the digital environment.⁶¹

4.2 What amount to copyright infringement in an Internet context?

Copying could be defined as "reproducing the work in any material form". Such a reproduction may be made through the storage of the work in any

⁶¹ Article 8 of WIPO Copy Right Treaty (WCT) States that "Without prejudice to the provisions of Articles 11(1)[Articles 11\(1\)\(ii\), 11bis\(1\)\(i\) and \(ii\), 11ter\(1\)\(ii\), 14\(1\)\(ii\) and 14bis\(1\) of the Berne Convention](#), 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."

medium by electronic means.⁶² Transient or incidental copies are also included. Loading software or the contents of a page of a website into the memory of a computer must thus involve an act of copying. When material is downloaded, things become even clearer. Printouts and copies on the hard disk or on floppy disk are clearly copies⁶³. The typographical arrangement copyright in the site is also copied on each occasion and if a website is held to be cable program the acts named above will also involve copying through the making of a photograph of the whole or a substantial part of any image that forms part of the cable program. As with software, there may also be case of non literal copying when only the design and the structure of the website are copied.⁶⁴

4.3 How do the defense to copyright infringement apply to alleged infringement on the Internet

There are, no doubt, a whole host of reasons that motivate people to set up their own website and homepages and to make material available on them. One of these reasons must be that others users may access their material and that they feel they have something to say or to offer to these other users. The whole concept of the Internet or any other network is that a connection will be made with other people, with whom content will be shared.

From a legal point of view this must mean that whoever makes material available on the Internet consents to the fact that others will access that material. There must be some kind of implied license to do certain acts that are necessary to access that material. Such a license must be non-exclusive in nature, because it is given on equal terms to all potential accessors of the material. Copyright law finds no problem with such a non-exclusive implied license, because there is no ban on them. The license can be implied from the way in which the dealings between the parties have been set up. Here the

⁶² Justin Williamson, Online Service Provider Copyright Liability: IS THE DIGITAL MILLENNIUM COPYRIGHT ACT THE ANSWER? ,Kentucky Law Journal, Volume 88, 1999,2000,number 4, p992-993.

⁶³ Keith Kupferschmid, Lost in Cyberspace: The DIGITAL DEMISE OF THE FIRST SALE DOCTRINE, The John Marshall Journal of Computer & Information Law, Volume XVI, Summer 1998, Number 4, <http://www.jmls.edu/jcil>, p837-843

⁶⁴ Idem.

whole set-up of the Internet points towards the conclusion that implied license must exist.

The remaining problem is that it is not necessarily clear what can be done under such an implied license. The starting points seems uncontroversial. It must be a license for any Internet user to access the material on the site and to perform all acts of copying that are necessary to gain access. Any intermediary provider of services must be allowed to transmit the material and to make transient copies in as far as this is required from a technical point of view.

It is less clear whether users can ,download the accessed material onto any hard disk, CD, etc, whether they can print it and whether they can make any further use of the material. This depends on the type of material that is accessed and the type of site on which it is found. The starting point must be that the Internet. Medium does not change the basic rules of copyright. Any material that qualifies for copyright protection will be protected when it is made available on the Internet. Users are licensed to access the site on which the material is contained in the same way as they are licensed to read a book or to play a CD or a videotape. Copying or any other restricted act requires a further license.

4.4 What technical devices can we use to enforce Authors right on the Internet?

Technical devices against piracy are usually known as system of identification of the work.⁷² Their task is to embed distinguishable digital marks in the works(tattooing or marking) that are capable of identifying it. These marks also reveal the identity of the rightholders,⁷³ the use that is licensed and registration number of the work referring to general registry capable of providing more information in relation to the work.

Examples of anti-copy devices are:

⁷² Gillian Davices, Technical Devices as a Solution to Private Copying,, Copyright in the New Digital Environment, 165

⁷³ Idem, p 168

Encryption is a process that transforms a file that is originally written in a format capable of being manipulated into a ‘scrambled’ format through the use of mathematical principles.⁷⁵ The scrambled file can only be restored to an accessible and usable format through the use of an authorization that takes the form of a ‘key’ to unscramble the file.⁷⁶ An example of this is the key that is used to unlock a CD ROM containing of the work.⁷⁷

Digital signatures are mathematical algorithms that are used to ‘sign’ and ‘seal’ the work.⁷⁸ Through the use of digital signatures one will be able to identify the source of the particular work as well as verify whether the original contents of the works have been altered.⁷⁹ Digital signatures essentially work as means of authentication of the work.⁸⁰

watermarking ‘also referred to as digital fingerprinting’ Watermarking is often used in conjunction with encryption schemes and other forms of online content distribution.⁸¹ The aim of watermarking is to hide information in data in order to ‘protect the copyright of a product or to demonstrate its authenticity’.⁸² Although it does not stop the reproduction of data, it can provide an evidence trail should unauthorized dealing be suspected or detected.⁸³ Watermarking techniques have been developed for the use with still digital video and rendered text. Recent discussion of watermarking techniques

⁷⁵ www.wipo.org/copyright/en/meetings/2001/cr_rio/doc/cr_rio_01_5.doc

⁷⁶ *Idem.*

⁷⁷ *Idem.*

⁷⁸ <http://www.commerce-database.com/legal-terms/digital-signature.htm>

⁷⁹ <http://www.legal-definitions.com/digital-signature.htm>

⁸⁰ *Idem.*

⁸¹ Daniel Augot, Jean-Marc Boucqueau, Jean-François Delaigle, Caroline Fontaine, and Eddy Goray. Secure delivery of images over open networks. *Proceedings of the IEEE*, 87(7):1251–1266.

⁸² George Voyatzis and Ioannis Pitas. The use of watermarks in the protection of digital multimedia products. *Proceedings of the IEEE*, 87(7):1197–1207

⁸³ Deepa Kundur and Dimitrios Hatzinakos. Digital watermarking for telltale tamper proofing and authentication. *Proceedings of the IEEE*, 87(7):1167–1180

include.⁸⁴ The removal, alteration or other modification of watermarks is forbidden by the WCT.⁸⁵

The Serial Copyright Management System (SCMS) is an example of anti-copy device. This system was developed jointly by the international recording industry and members of the consumers electronics industry in relation to digital audio tape (DAT) recorder.⁸⁶ Its aim is to prevent a recorder from making private copies from the direct digital copies that are made from the original copyright protected material.⁸⁷ This system prevents a second digital copy being made privately from the first digital copy made from original work.⁸⁸

All these systems present ample opportunity to keep the access and use of copyright material under control.⁸⁹ They also serve as means of authentication of the work so that the public is certain that it receives genuine unaltered information.⁹⁰ All these systems of course can be used only in a digital environment.

4.5 What is the role of private international law on copyright protection?

⁸⁴ Idem

⁸⁵ Article 12 of the WCT.

⁸⁶ Gillian Davices, Technical Devices as a Solution to Private Copying., Copyright in the New Digital Environment, p171-173

⁸⁷ Idem.

⁸⁸ Idem.

⁸⁹ Idem, p181-182

⁹⁰ Idem.

One of the main characteristics of digital exploitation of works and achievements is that it is not limited to one single national territory, but in the majority of cases crosses borders.⁹¹ Yet traditional copyright law proceeds from the concept of equal validity of national copyright laws side-by-side - hence proceeding from a cumulation of national provisions in the case of cross-border exploitation.⁹²

Consequently, the first question to be addressed is which specific law is applicable to a case of cross-frontier exploitation and whether its provisions are also appropriate in the digital environment; subsequently the issue of jurisdiction in case of infringement is discussed and, finally, the problems involved in executing national court judgments in foreign countries.

4.5.1 Applicable Law

First of all, the act of reproduction is governed by the law of the country in which the reproduction takes place.⁹³ This applies to the production of CD ROMs, to the input of a work into a computer and hence to storage of a work on a server.

Apart from this, a distinction must be made between making available of a work in digital form off-line and making available on-line:

- in the case of cross-border distribution of off-line media (e.g. CD ROM), the laws of each country in which copies of the protected work are distributed are applicable.⁹⁴ Legally and economically, cross-frontier distribution of off-line media is not distinguished from distribution of traditional analogue copies of works (e.g. books, records, etc.). Here as well production and distribution rights may be assigned individually for different countries; within the EU the first putting into circulation of the products leads to so-called Community-wide exhaustion of the distribution right,

⁹¹ J.C. Ginsburg, *The Private International Law*, p235-255

⁹² Graeme B. Dinwoodie, *A new Copyright Order, Why National Courts Should Create Global Order*, *University of Pennsylvania, Law Review*, Vol, 149, No 2, p533.

⁹³ J.C. Ginsburg, *The Private International Law*, p258

⁹⁴ *Idem*

meaning that the products may circulate freely within the Community once they have been put into circulation.⁹⁵

The legal scenario is less clear as regards cross-frontier making available of protected works in digital networks. In this context disputes already exists as to which right is applicable in case of a traditional, cross-frontier communication of the work to the public by means of radio broadcasting. According to one opinion, the law of the broadcasting country should apply, whilst the laws of all receiving countries remain unimportant (theory of country of emission); according to another opinion, the entire process of a cross-frontier broadcast should satisfy the copyright law not only of the broadcasting state but also the copyright laws of all receiving countries (so-called country-of-reception theory).⁹⁶ The objective is to protect rights holders against their works being broadcast from a state without or with a very low level of protection, who would thus be deprived of the fruits of their creative efforts.⁹⁷ The country-of-reception theory means that a broadcasting company wishing to broadcast works on a cross-border basis must acquire the rights for each individual country of reception; this poses problems where the rights in the individual countries are no longer held by the author or by one and the same rights holder.

In the field of traditional television and radio broadcasting the EU introduced the principle of the country of emission. However, this was only possible on condition that a certain minimum level of protection was introduced throughout the Community, as regards the rights of authors and related rights holders involved. Moreover, certain particularities of transactions concerning film rights and music rights facilitated the decision in favour of the principle of the country of emission.⁹⁸

These reasons render it questionable whether in the near future the principle of the country of emission can be transferred to making available and transmission of protected works and subject matter in digital networks. In the end, this would require globally harmonized - and in a digital

⁹⁵ Idem, p266

⁹⁶ Idem,p322-325

⁹⁷Idem.

⁹⁸ Idem, p 399.

environment global means global - and uniformly effectively enforceable copyright protection, something that does not seem likely in the medium term, despite the conclusion of the TRIPS Agreement.

Hence, the solution will presumably lie in a system of subsidiary points of attachment, starting from the person who inputs information and proceeding progressively to other participants in the communication and their active locations.⁹⁹ Yet another problem arises in that it is almost impossible to locate works unequivocally in digital networks, owing to their ubiquity. This is the point at which any kind of legal control - even control restricted to an approach bound to the country of emission - reaches its boundaries.¹⁰⁰ Once again, technology itself can provide assistance, in as far as in future it will be possible to trace the journey of a certain protected material through the network and, where necessary, to halt the progress of certain individual works.¹⁰¹

Nevertheless, the issue of which law is applicable in case of cross-border on-line transmission merits particular attention.

4.5.2 Jurisdiction

An additional problem arises in cases of cross-frontier infringement in finding a court which accepts international jurisdiction to take on the case and, possibly, to hand down a corresponding judgement. Even where a national court has jurisdiction under the applicable national procedural law, in many cases this court will not render a judgment on the entire cross-frontier case but only on the relevant national part thereof.

Basically speaking, in the majority of countries the rule applies that the courts of the state in which the defendant is domiciled or has his place of business have jurisdiction. In case of torts, which category includes copyright infringements, the courts of those countries in which the effects of

⁹⁹ Graeme B. Dinwoodie, A new Copyright Order, Why National Courts Should Create Global Order, University of Pennsylvania, Law Review, Vol, 149, No 2, p571.

¹⁰⁰ J.C. Ginsburg, The Private International Law, p335.

¹⁰¹ *Idem*, p348

the infringement occur also have jurisdiction.¹⁰² As regards copyright infringement by reproduction this means the state in which the copies of the work were made (but only as regards the reproduction right), as well as those states in which they were distributed (as regards the relevant national distribution right). In contrast, in states in which the copies of the work were merely in transit, as a rule it is not possible to obtain a court judgment, although evidently infringing copies are involved. According to the above-mentioned principles, as regards copyright infringements by means of dissemination of works via digital networks, the courts of those states have jurisdiction in which under national substantive law the right of public communication has been infringed; hence, the uncertainty as to the law applicable to on-line dissemination discussed also affects international jurisdiction.

Where a national court accepts jurisdiction, as a rule it will only award the injured party damages for the entire infringement if it has accepted jurisdiction on the basis of the defendant's domicile, i.e. if the infringer is domiciled or has his place of business within national territory. In all other cases the national court will probably only compensate the injured party for that part of the damage incurred within the national territory of the court.

This principle applies under the majority of national procedural codes

Where the injured party cannot or does not wish to file suit at the infringer's place of domicile, then his only option is to file suit for each and every national part of the damage separately. This is particularly awkward and uneconomic where the infringement is absolutely clear and obvious and does not give rise to complicated and/or disputed legal questions in the countries involved. Corresponding considerations apply as regards injunction orders; here again the rights holder is only able to enjoin the infringer from international distribution through a court in the latter's native country, otherwise a specific injunction order is required in each country of distribution.

Consequently, it is recommended to expand the international jurisdiction of national courts to the effect that, in cases of obvious infringement, the courts

¹⁰² *Idem*, p 287

of those states in which the defendant is not domiciled and does not have a place of business, are also entitled to issue a cross-border injunction order and award compensation for the entire damage caused by an infringement that took place in several countries.

4.5.3 Enforcement of Rights in Foreign Countries

Where the infringer is neither domiciled nor has his place of business or property within national territory, the rights holder has no choice but to enforce a judgment obtained within national territory in a foreign country. There are proceedings for recognition of foreign judgments, but they are sometimes rather tedious and time-consuming.

Consequently, steps should be taken towards creating an international convention for the recognition of foreign judgments, applicable throughout the world.

5. Islamic Law on Author Rights :

A couple of decades back, Ulema, Islamic religious scholars, in Islamic countries were against the protection of intellectual property rights. But now, the scenario has changed. Presently, an overwhelming majority of religious scholars, who have certain influence over law making and implementation process in the Islamic countries are in favour of copyright protection. In Sunni School of thought, there are four Imams or main

religious leaders. Those are Maliki, Hanafi, Shafie and Hanbali. The Hanafi School of Thought was not in favour of copyrights. The other Imams accepted this right on the analogy that the right of usufruct is accepted. Their argument in favour of copyrights is as follows:

1. Like other properties, it is also created by some kind of labour though labour behind it is primarily the outcome of mental efforts. So it should be treated as other properties are treated.
2. Since *Mudarba*¹⁰³ is allowed in Islam, copyrights are also allowed.
3. Up to the 7th century payment for Azan¹⁰⁴ was not allowed, but afterwards it was permitted. On the same principle, copyrights can be allowed.
4. In the olden days students learned by attending meetings with teachers. Such students could teach other people only by getting permission from their teacher. This was also a form of copyrights. In the classical Islamic period, there was a full fledged profession, called, *Warraq*. A *Warraq* was a publishing house at that time, which made copies of a book upon request. Ibn Nadeem was one of the famous *Warraq*, who had prepared a catalogue of books he could copy.

There is only one main argument opposing the validity of copyrights, i.e., there is not a clear mention of copyrights in the Quran¹⁰⁵ and Sunnah¹⁰⁶ and the concept of ownership in *Shariah*¹⁰⁷ is confined to the tangible objects only.

On the other hand, majority of religious scholars accept copyrights as valid in Islam. In this regard we may forward the Fatwa¹⁰⁸ on the validity of

¹⁰³ *Mudarba* is a kind of business partnership that is a combination of capital from one party and labour or management from the other one.

¹⁰⁴ A particular voice of call made in the mosque to invite people to pay salat (prayer).

¹⁰⁵ Muslim's holy book.

¹⁰⁶ Practice of the Holy Prophet of Muslims, Muhammad.

¹⁰⁷ *Shariah* is Islamic term used for law.

¹⁰⁸ Fatwa is a religious ruling about the validity or invalidity of a matter, issued by a religious scholar, who is duly capable to issue such ruling.

copyrights in Islam, by Mufti Muhammad Taqi Usmani, who says:

“I have analyzed the arguments of both sides in my Arabic treatise “Bai-ul-Huqooq” and have preferred the second [validity of copyrights] view over the first [invalidity of copyrights], meaning thereby that a book can be registered under the Copyright Act, and the right of its publication can also be transferred to some other person for a monetary consideration... I would like to add that if the law of copyright in a country prevents its citizens from publishing a book without the permission of a copyright holder, all the citizens must abide by this legal restriction.”¹⁰⁹

Answering to a question of copying software on a hard drive that one has not purchased:

“[T]he Permanent Committee for *Iftaa'* (Islamic Rulings), chaired by Sheikh Abdul-Aziz bin Baz, has replied to this question by ruling that it is not permissible to copy software without permission granted from the original author or the copyright holder based on the following three *haadeeth*¹¹⁰ of the Prophet (peace be upon him):

- (1) “Muslims are to honor their agreements (with others)”;
- (2) “A Muslim’s wealth is forbidden for others to use without his permission;” and,
- (3) “Whoever is the first to acquire a mubaah (something lawful to acquire) is entitled to keep it”. This applies to both Muslims and non-believers (who are not engaged in an act of war with Muslims) because the right of a non-believer is respected in the same manner as a Muslim’s right. Allah knows best. (Committee Fatwa no:

¹⁰⁹ Mohammad Obaidullah, *International Journal of Islamic Financial Services* Vol. 2 No.1, ed. Available at <http://islamic-finance.net/journal/journal5/journal5> index. pdf

¹¹⁰ Sayings of the Prophet Muhammad.

18453). Also, Sheikh Muhammad bin Salih Al-'Uthaimen has ruled that whatever is customary among people should be the rule except when a user wants a copy for himself and the author or the copyright holder did not explicitly prohibit copying the software for private or public use. However, if the author or the copyright holder specifically stated that private and public copying of the software is prohibited, then it is not permissible to copy that software.”¹¹¹

In favour of copyrights, the Grand Mufti at Al Azhar in Cairo, the highest religious authority in the Sunni Islam, Sheikh Ibrahim Atta Allah, issued a fatwa, against piracy. He declared that “Piracy is the worst type of theft and is prohibited by Islam”¹¹²

5.1 CONCLUSION

From the above discussion, it is evident that in Islamic countries there are certain sections in society which would always support copyrights protection, particularly, intellectuals, and artists. They are generally annoyed and discouraged due to non-existence or in many cases, non-implementation, of copyrights, and are anxiously waiting for the protection and enforcement of such rights. On the other hand religious scholars, who have some weight in the country's social and legal development, are not explicitly in favour of copyrights. Now the scenario has been changed and an overwhelming majority has been expressed its views in favour of these rights. Islamic law also clearly favours Copyrights protection. All these factors indicate the potential strengths for future development in relation to the protection and enforcement of Copyrights in Islamic countries.

¹¹¹ *Idem.*

¹¹² A Fatwa on Piracy, Available at <http://www.law.com>

6. From The Human Rights perspective

Throughout history, intellectual property has been a varied array of production of service to humanity. The right of those who serve humanity as well as the rights of those who profit from these services both need to be efficiently protected. In the twenty-first century the basic rights that require profound application are” Human Rights”.

This chapter aims to discuss the relation between author’s rights and human rights in general . I will focus on the right to development and how it was recognized as a human right, and the legal framework required for the right to development at the national level.

6.1 Author’ rights and human rights: (general overview)

The fact that authors are humans needs no further highlighting. The Universal Declaration of Human Rights (UDHR) in essence, provides that every human being deserves to have rights. Article 2 reads “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” For all intents and purposes, the rights under the intellectual property laws shall be considered human rights. . Article 27.2 of the UDHR states:

“Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

A similar approach is adopted in the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Article 15.1 (c) recognizes the right of everyone 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*.”

At hindsight, Article 27 of the UDHR and Article 15 of the ICESCR are worded in such a manner that suggests that intellectual property rights must be interpreted in light of the international human rights obligations of the contracting states. However, the union of intellectual property to the human rights discourse gives the impression that the universal character of the latter must also be applied to intellectual property.

Ideally under conditions of democratic sovereignty, intellectual property rights should fundamentally serve the interests and needs, which the citizens identify through the language of human rights.¹¹³ Hence, the human rights approach relevantly dictates that intellectual property is not exclusively an economic tool. Both the moral and material interests of intellectual creators are taken into crucial account.

6.2 Freedom of Expression

Article 19 of the Universal Declaration of Human Rights (UDHR) guarantees everyone’s freedom of expression, and states that:

"Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

Likewise, Article 19 of the International Covenant on Civil and Political Rights (ICCPR) guarantees freedom of expression, again in terms similar to those found in the UDHR. The (first) Optional Protocol to the ICCPR, adopted at the same time, grants a right to individuals to appeal directly to the UN Human Rights Committee (HRC).¹¹⁴

¹¹³ Peter Drahos, *The Universality of Intellectual Property Rights: Origins and Development*, Intellectual Property Rights, WIPO/OHCR (1998), p32.

¹¹⁴ Article 19 paragraphs (1) and (2) respectively provide that “Everyone shall have the right to hold opinion without interference.” And “[e]veryone shall have the right to freedom of expression ; this right shall include freedom to seek, receive and impart information and

Freedom of expression is a fundamental human right and a critical means of promoting human rights in general.¹¹⁵ Copyright shares the characteristics of a fundamental right. Copyright protects freedom of expression and of thought of citizens, and guarantees the creation of literary, artistic and scientific works. Emanating from the personality of its author, a work gives rise to a right which has all the attributes of a human right: it is a moral right, inalienable and indefeasible. From the moral point of view, copyright ensures the freedom of representation of the personality of its author.¹¹⁶

In this context, intellectual property rights and free expression are inextricably linked.¹¹⁷ Particularly, moral rights and freedom of thought and expression are relevantly intertwined in terms of 'spiritual' objectives; and violations of the author's rights shall be tantamount to violations of his freedom of expression.

6.3 Right to property

The necessities of free markets and economic freedom often underscore the importance of man's ability to own and use property by his own choice. Without the right to property, man would not be able to live and would be forced to live in a reality where the products of his work are disposed by another, thereby turning him into a slave. Property rights are imperative to man's survival and merits considerable weight and discussion.¹¹⁸

Property rights are a derivative of the ultimate right: the right to life. In this case, "right to life" means the right of all men to have ownership over their

¹¹⁵ Better World, making difference in analogy , Freedom of expression Availablel at <http://www.btplc.com/Betterworld/Humanrights/Freedomofexpression/Freedomo...>

¹¹⁶ Draft Charter of Fundamental Rights of the European Union, Comments and Proposals by CESAC, Available at <http://www.europart.eu.int/Charter/civil/pdf>.

¹¹⁷ Church of Scientology International, Freedom of Expression: Providing a Forum and Preserving the Right to Communication, Freedom Magazine, as viewed from Freedom Magazine website<<http://30th.freeommag.org/page.htm>>

¹¹⁸ Luke Thomas, Digital Freedom Network, Why Property Rights, available at http://www.dfn.org/_freedom_handbook/Property.html

physical bodies and to be free from non-coercive interaction with others.¹¹⁹

The right to property is traditionally regarded as a civil right: private property is guaranteed and property rights are protected from arbitrariness and interferences.¹²⁰

The right to property is included in the Universal Declaration of Human Rights (UDHR). Article 17 of the UDHR Provides:

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

However, the right to property is not included in the ICCPR, nor the ICESCR.

The right to property is included in regional instruments (ECHR/P.1, ACHR, ACHPR)

Copyright is also a property right. A property of a special nature since it is intangible, but it has the same nature and must have the same fate as all other kinds of property. In terms of its pecuniary dimension, copyright guarantees the economic independence that is essential to ensure freedom of expression and of creativity. Copyright is one of the « branches » of freedom of expression and creativity which, through its fundamental and universal dimension, forms part of human rights.¹²¹

6.4 The Right to Development

For any country to be able to compete in the international business environment and to improve the general welfare of its population, a fair legal and economic environment must be fostered. “The concept of the development as a “right” has opened up a new perspective directly linking

¹¹⁹ *Idem*.

¹²⁰ The Human Rights Databank, The Right to Property, Available at <http://www.hri.ca/doccentre/docs/handbook97/propert.shtml>.

¹²¹ Draft Charter of Fundamental Rights of the European Union, Comments and Proposals by CESAC, Available at <http://www.europart.eu.int/Charter/civil/pdf>.

development and human rights.”¹²¹ In fact, the United Nations formally recognized this and drafted the Declaration on the Right to Development. In Article 1 (1) it states that “[economic development is...] an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”

“Hence, the Declaration reflected, and contributed to, an altered understanding of the concept of development which is human centered.”¹²² In addition, Article 2(1) declared the human person as the central subject of development, while development itself was defined in the second perambulator paragraph as “ a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom. Finally, the Declaration included a statement which aims at eliminating potential obstacles to development to create global economic parity.

“States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development. States should realise their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence. Mutual interest and cooperation among all states, as well as to encourage the observance and realisation of human rights.”¹²³

6.4.1. Individuals as subjects of the right to development

¹²¹ Oyvind W. Thiis, Norwegian Development Assistance and the right to Development, Human Rights in Developing Countries YEARBOOK 1996, EDITED BY Peter Baehr, Lalaine Sadiwa, Jacqueline Smith in cooperation with Annelies Bosch, Kluwer Law International, Nordic Human Rights Publications, p.6.

¹²² Idem.p.6.

¹²³ Declaration on the Right to Development, Article 3(3)

The starting point should be Article 1 paragraph 1 of the UNDRD which reads as follows:

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

This leads us to the interrelationship of the right to development and other human rights. All of us are familiar with the argument that the right to development (especially when understood as a right of peoples) is nothing but a pretext not to implement human rights.¹²⁴ However, it would be at least equally realistic to recognize that the non-realization of human rights in certain countries serves other countries as a pretext not to observe their duties flowing from the right to development.¹²⁵

This should be sufficient for the relationship between the right to development and other human rights. Much more interesting, is a more detailed description of what this interrelationship is, it could be summarized as follows:

1. The implementation of the right to development is a precondition for the effective enjoyment of all other human rights.¹²⁶
2. Without the implementation of human rights as a whole the realization of the right to development will not be possible.¹²⁷
3. The right to development is a human right itself; and it differs a lot from other human rights by its very nature.¹²⁸

The first thesis, the one possibly finding the widest acceptance, is the logic of everyday life that extreme poverty, starvation and disease are incompatible with economic and social rights. Because of the

¹²⁴ Prabodh Dinkarrao Desai, Right to development: improving the quality of life, Right to Development in International Law, Edited by Subrata, Erik M.G. Denters & Paul J.I.M. de Waart, Martinus Nijhoff Publishers, Dordrecht, Boston, London 1992, p.31.

¹²⁵ Idem.

¹²⁶ Pitman b. Potter, The Right to Development Philosophical differences and Their Political Implications, available at ¶ HYPERLINK "http://www.hrichina.org.as" ¶ www.hrichina.org.as¶

¹²⁷ Idem.

¹²⁸ Idem.

interdependence of these rights, on the one hand, and civil and political rights, on the other.¹²⁹

It would be unrealistic to believe that a person who is, day after day, fighting for his or her survival can, for example, ‘take part in the government of his country’ (Article 21 of the Universal Declaration).

Therefore, we should welcome the fact that the UN Commission on Human Rights stopped to deal with the right to development only within the too narrow framework of social and economic rights, but has made it a separate item.¹³⁰ This is also important from another point of view. The whole set of human rights has to be implemented if one wants to reach the aim-realization of the right to development.¹³¹

Is this a contradiction to what was said before? And is the realization of social and economic rights in poor countries simply an illusion? I imagine human rights, including the right to development, as endless spirals, moving upwards and never reaching the aim. In my imagination the movement of one spiral is caused by the movement of the other spiral with which it is interlocked.¹³²

We should stop to regard human rights problems as a simple yes or no questions. There is an evolutionary element pertaining to all human rights, including the political ones.¹³³ What today is regarded by people or by the international community as the contents of certain human rights may tomorrow be seen as much too narrow.¹³⁴ Therefore, development and implementation of human rights should be considered as a dynamic process. Of course, the evolutionary element of a human right can be more or less obvious.¹³⁵ This is a reason for a reciprocal relationship concerning the right

¹²⁹ *Idem*

¹³⁰ Available at www.cath4choice.org

¹³¹ *Idem*.

¹³² *Idem*.

¹³³ *Idem*.

¹³⁴ *Idem*.

¹³⁵ Chief Justice Madhukar Hiralal Kania, *Advancing the interests of mankind by the rule of law, Right to Development in International Law*, Edited by Subrata, Erik M.G. Denters & Paul J.I.M. de Waart, Martinus Nijhoff Publishers, Dordrecht, Boston, London 1992, p.5.

to development being the condition for all other human rights and vice versa.¹³⁶

In both cases the whole set of human rights is in question. I would only be repeating what I said before if I should elaborate on the fact that the non-implementation of the right to development is affecting both social and economic as well as civil and political rights

6.4.2 Responsibility for development

Whose duty is it to fulfill the right to development, and what types of obligations fall under it? This question forms a threshold for examining the impact of this multi-faceted concept on international economic law and policy.¹³⁷

There are a variety of duty-holders under the UNDRD. The primary focus of the Declaration is upon the responsibilities of States, at both the national and international levels. However there is also, an important individual dimension. Human being has a duty, individually and collectively, “to promote and protect an appropriate political, social and economic order for development.” It is worth recalling that other human rights documents integral to an understanding of the UNDRD, such as the Universal Declaration and the preamble paragraphs of both human rights covenants, also place duties on individuals.¹³⁸

Nevertheless, States have the primary responsibility to create “national and international conditions favorable to the realization of the right to development”. It is clear that the fundamental obligation for development lies with each national government, which are to under-take all necessary measures for the realization of the right to development and to ensure full exercise and progressive enhancement of the right.¹³⁹

¹³⁶ Idem.

¹³⁷ Isabella D. Bunn, *The Right to Development: Implications for International Economic Law*, *International Law Review*, Vol. 15, No. 6, 1439.

¹³⁸ Idem, 1439, 1440.

¹³⁹ Idem.

The increasing role of non-governmental organization (“NGOs”) also bears mention. While no express obligation is placed upon them within the text of the UNDRD, NGOs are cited in UN documents as “catalytic elements in the realization of the right to development” at the national, regional and international levels.¹⁴⁰

It clearly emerges that the right to development is not an abstract philosophical proposition but a result-oriented concept both as a principle of human rights law and as a principle of international law and that it is based on the right of self-determination of people. It is thus a part of juridical rights and not merely of political or moral rights.¹⁴¹

6.4.3 The Right to Development and Author’s rights

Copyright is a bundle of exclusive legal rights concerned with the protection of literary and artistic works. The aim of copyright is to reward authors for their intellectual effort and at the same time promote science, cultural and arts.

“States have the primary responsibility for the creation of national and international conditions favorable to the realization of The right to development”¹⁴² and their commitment to cooperate with each other in ensuring development and eliminating obstacles to development and a necessary complement to efforts at the national level. The human person is a central subject of development and "The Right to Development is an inalienable right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all Human Rights and fundamental freedoms can be realized”.¹⁴³

¹⁴⁰ Idem,p,1441.

¹⁴¹ Prabodh Dinkarrao Desai, Right to development: improving the quality of life, Right to Development in International Law, Edited by Subrata, Erik M.G. Denters & Paul J.I.M. de Waart, Martinus Nijhoff Publishers, Dordrecht, Boston, London 1992, p.31.

¹⁴² Declaration on the Right to Development, Article 3(1)

¹⁴³ Chakravarthi Raghavan, Moving forward on right to development?, Available at ¶ HYPERLINK "http://www.twinside.org" ¶ www.twinside.org as printed on 5th of May 01.Declaration on the Right to Development,Article 1(1)

One of the cornerstones of the right to development is the expression of creativity and human dignity. The UNESCO Declaration of the Principles of International Cultural Cooperation (1966) underscores the importance of broad dissemination of knowledge based on the free exchange of ideas and discussion. Article VII.1 states that it is “essential to creative activity, the pursuit of truth, and development of the personality.” The protection of authors rights is therefore indispensable, not only for individual personal development but also for collective cultural growth.

6.4.4 Legal implication of the right to development

A legal framework for the formulation of rules, which are needed for a functioning legal system help in achieving the goals to the right to development, must be defined in terms of a comprehensive system based on three essential elements.

The first element represents the legally binding rules. Such rules, whether they are legislative or administrative in character, should not only be known in advance, they must apply equally to all those addressed by them. They should not be meant to benefit or hurt a specific person or persons through an abuse of the legislative power. Their content should respond to genuine social needs and, where appropriate, reflect a preexisting or emerging public opinion. They should be based on adequate data and analysis. They must also be subject to possible modification pursuant to previously known procedures. These rules, complementing each other in a harmonious way, should include the minimum regulation of commercial and financial activities in a market economy. They would thus cover laws on movable, immovable and intellectual property. In addition, they would also include contract law, tort liability law, , labor laws and such other rules as may be needed to ensure free competition and regulate natural monopolies.

Adequate criminal law and procedures are also required to assure protection of individuals from acts of violence and political interference.¹⁴⁴

Environmental and social legislation should also be in place to protect the public from the excesses and failures of the market. Harmonization and approximation of law to international standards in certain areas such as the international sale of goods, intellectual property, commercial arbitration. Both the business community and the public at large should have access to adequate information about applicable laws and regulation. Authorized translation for the benefit of foreign investors would further facilitate this access.¹⁴⁵

The second element consists of the appropriate processes through which such rules are made and enforced in practice or are deviated from when necessary. The appropriateness of such processes of rule making, rule enforcing and rule changing obviously differs according to the culture, political system and other circumstances of each country. Experience shows, however, that legal processes will normally succeed to the extent that they are not complex or arbitrary, are based on a system of consultation with the people affected by them and are realistic in their reliance on existing institutions. Simplicity of procedures, transparency of legal processes, participation of the affected people and accountability of the public officials involved in these processes (elements of what is now typically referred to as 'good governance'), add to the legitimacy of the rules and contribute to the public's confidence in the legal framework as a whole.¹⁴⁶

The third element of the desired legal framework consists of well-functioning public institutions which are staffed by trained individuals, are

¹⁴⁴ Ibrahim F. I. Shihata, *The Rule of Law in Economic Development*, p34. available at <http://www.eces.org.eg>

¹⁴⁵ Charles Cadwell, "Legal Reform: the Path for Egypt", paper presented at Conference held in Cairo in February 1999, to discuss "Growth Beyond Stabilization: Prospects for Egypt", p,48.

¹⁴⁶ Ibrahim F. I. Shihata, *The Rule of Law in Economic Development*, p39. available at <http://www.eces.org.eg>

transparent and accountable to citizens, are bound by and adhere to regulation, and apply such regulations without arbitrariness or corruption. An efficient and honest civil service, along with regulatory bodies for the financial sector and public utilities in particular, ensures the appropriate application of legal rules, especially when their decision are subject to judicial review. An independent and fair judicial system represents the institution that acts as the final arbiter of a functioning legal system. Without efficient and honest institutions for the enforcement of rules and the resolution of conflicts, the previous elements of ‘rules’ and ‘processes’ would fail to provide a sound legal framework.¹⁴⁷

Clearly, an independent and fair judicial system is also required since the judiciary plays a particularly important role in systems based on the rule of law. This role is usefully complemented by alternative business-oriented mechanisms for dispute resolution, notably mediation, conciliation and arbitration. Other private or semiprivate institution such as bar association, law schools, consumer rights groups and human rights organizations also have an important role to play, not only in support of the judiciary but of the proper functioning of the legal system as a whole.¹⁴⁸

As it must be clear by now, the legal framework should not be conceived as merely a collection of written laws and regulation. It also includes the manner in which these rules are implemented by government agencies and applied and interpreted by judges and arbitrators. A well-functioning law enforcement apparatus and judiciary in which administrators and judges respectively apply the law in a faire, even and predictable manner, without undue delays or unaffordable costs is, in my view, part and parcel of the legal framework needed for a functioning economic system. Such a framework requires that respect for rules be ensured in the final analysis by the force of the state and that an independent body exists to resolve disputes. The judiciary may also identify inconsistencies in the applicable rules or between them and the basic law or the constitution. It serves as the final

¹⁴⁷ Idem, p,43

¹⁴⁸ Peter H. Aranson, “Wealth-Increasing Law, With Application to Egypt”, paper presented at Conference held in Cairo in Febuary 1999, to discuss “Growth Beyond Stabilization: Prospects for Egypt,p,15.

monitor of allegations of corruption, arbitrariness and lack of accountability by other branches of government.¹⁴⁹

This broad understanding of the legal framework is not limited to the formal legal system. In all societies, informal norms and rules of custom and usage play an important role. This is particularly true in three situations: when law enforcement is weak, when the formal law ignores important interests in the community it addresses (e.g., when the business sector is strong but not represented in official rulemaking), and when corruption is widespread. In such situations, formal law may, in many respects, be replaced in practice by informal rules, which receive greater compliance.¹⁵⁰

A sound legal framework cannot therefore serve its purpose if adequate attention is not paid to the issues of enforcement, compliance and effectiveness. The concern we have highlighted with processes and institutions may help address these issues. Equally important for compliance and effectiveness is the fairness of the content of the formal rules, the extent to which they respond to broad social needs, and the degree and quality of state intervention under them.

6.4.5 Conclusions

How to achieve these features which are essential to the right to development, depends upon the unique circumstances prevailing in each country and its position in the global economy. In today's closely interwoven world, lawmakers in each country must fit their system of laws into continually changing rules of an emerging global society in order to be effective in the international community.

¹⁴⁹ Idem,p,17.

¹⁵⁰ Idem,p,18.

7. Conclusion

The digital age clearly presents copyright with a challenge. The area of exploitation rights of the author and moral rights raises particular concern in this respect. Private international law rules can play a role in assisting with the protection of exploitation rights and moral rights

The issue of which law is applicable in case of cross-border on-line transmission merits particular attention.

It is recommended to expand the international jurisdiction of national courts to the effect that, in cases of obvious infringement, the courts of those states in which the defendant is not domiciled and does not have a place of business, are also entitled to issue a cross-border injunction order and award compensation for the entire damage caused by an infringement that took place in several countries.

Steps should be taken towards creating an international convention for the recognition of foreign judgements, applicable throughout the world.

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The Universal Copyright Convention

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WIPO Performances and Phonograms Treaty

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