

Study Note: This module should take around 5 hours to study. If you have less time, you could conveniently break your study after listening to the third audio segment.

Module 2: Copyright

Objectives

After completing the study of this module you should be able to:

1. Define copyright and give examples of the types of works that are covered by copyright.
2. Explain in about 250 words the rights that are protected by copyright. (Reproduction rights, rights of performance, translation and adaptation).
3. Describe in 250 words the limitations that may exist on the rights covered by objective 2.
4. State the general duration of copyright given in the Berne Convention, the European Union and in the United States of America.
5. Explain how the ownership of copyright can be obtained and transferred.
6. List 5 measures that can be used to enforce rights.
7. Given a case study involving copyright issues, first identify those issues then indicate the applicable parts of the relevant treaties, which address the identified issues.

Introduction

This module on copyright explains the types of things that are protected under the heading of **copyright**, the rights that a copyright owner has and how they can be used for commercial advantage. Much of the law concerning copyright is similar in all the countries that have signed international conventions and trade agreements. However, for a definitive answer to any copyright question your own country's laws should be consulted. You will see and hear reference to the **Berne Convention** and **TRIPS Agreement** in this module and they will be explained in some detail at the end of this module. For now just accept that they are the two most relevant international agreements in the field of copyright.

Also explained are the remedies that copyright owners may take against any abuse of their rights. Again these remedies are available in most countries but you should consult your national law to be sure of the situation in your country.

What is Covered by Copyright?

As with all fields of intellectual property **copyright** is concerned with protecting the work of the human intellect. The domain of copyright is the protection of literary and artistic works. These include **writings, music, and works of the fine arts, such as paintings and sculptures,** and **technology-based works such as computer programs and electronic databases.**

Note that copyright protects works, that is the expression of thoughts, and not ideas. So if you imagine a plot, this, as such, is not protected. For example, a plot consisting of a story about young men and women falling in love despite family and caste obstacles would not be protected. Different writers may build stories based on a similar plot. But when you express it in a synopsis or in, say, a short story, or a play, the expression of the plot in that story will be protected. Hence, for example, Shakespeare's play Romeo and Juliet would be considered as a creative expression of that plot. Still, other writers may build new stories based on a similar plot.

The Berne Convention (1886), which is the oldest international convention governing copyright, states the following in its Article 2:

"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 entertainments 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. [...] Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work. [...] Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections."



There is no requirement that the literary and artistic work should be good or have artistic merits. It should, however, be original. The exact meaning of this requirement varies from country to country, and it is often determined by case law. In very general terms one may say that in countries belonging to the **common law** tradition very little is required, other than that the work must not be a copy of another work and that the author should have displayed a minimum amount of skill, labor and judgement in making it.

In countries belonging to the **civil law** tradition, the requirement is often stronger, for example that the work must bear the stamp of the author's **personality**. A creative effort would be required from the author that may go beyond mere skill, labor or judgement.

Are the works that can be protected under the Berne Convention restricted to the list set out in Article 2?

It should be borne in mind that works that are susceptible of being protected under the Berne Convention are not restricted to the examples quoted above. Such a list is not exhaustive. You will have noticed that the Berne Convention specifies that “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...**” The expression “**such as**” opens the door to creations other than the ones set out in the list. For example, **court decisions**, in different countries, have protected material such as:

- private letters,
- a divorce guide,
- a haircut,
- a floral decoration of a bridge,
- a son -et -lumiere show,
- examination papers.

What is meant by derivative works?

Another important feature of Article 2 of the Berne Convention is that it protects what is commonly called “derivative works”. These are works that are derived from other, existing sources. Examples of derivative works include:

- translations of works into a different language;
- adaptations of works, such as making a film scenario based on a novel;
- arrangements of music, such as an orchestra version of a musical composition initially written for piano;
- other alterations of works, for example an abridgement of a novel;
- compilations of literary and artistic works, such as encyclopedias and anthologies. In such a case, the originality resides in the choice and arrangement of the materials.

You would have to bear in mind that, before embarking in a derivative work, you must respect the rights of the author of the initial work. For example, an author who wishes to translate a novel into a foreign language should seek proper authorization from the author of the novel that will be translated. Making the translation without proper authorization would expose the translator to the risk of being sued for copyright violation.

Audio segment 1: *What sort of things can be protected by copyright laws?*

Copyright protects literary and artistic works, as the title of the Berne Convention states. The two concepts need to be taken in a very broad sense. The term literary, for example, does not mean just novels, poems or short stories: it could cover the maintenance manual of a car, or even things that are written but not supposed to be understood by the average human being, such as computer programs. The key to this expression in fact is the word “works”. What we mean by that is that expression, human expression, is the determining factor. So, if I have the idea of painting “sunset over the sea”, anyone else can use the same idea, which is not protected. But when I actually produce my painting of “sunset over the sea” the painting itself is expression, and that is protected.

Self-Assessment Question (SAQ)

SAQ 1: What important intellectual work, which was mentioned by the speaker, was not included in the list of "literary and artistic works", of the Berne Convention?

Type your answer here:

[Click here for answer](#)

SAQ 1 Answer:

The most important exception from the list that was mentioned in the audio segment is that of **computer programs**. These are products of intellectual creativity and are considered works. The important point to make is that the list in the Berne Convention is not meant to be complete and exhaustive. It is meant only to illustrate the nature of literary and artistic works. Another recent genre of work not listed in Article 2 of the Berne Convention, but which is clearly included in the notion of a creation "in the literary, scientific and artistic domain," is **multimedia productions**. While no acceptable legal definition has been developed, there is a consensus that the original **combination of sound, text and images in a digital format**, which is made accessible by a computer program, embodies an expression of authorship sufficient to justify the protection of multimedia productions under the umbrella of copyright.

What are the Rights Protected by Copyright?

In the introduction to this course it was explained that the most important feature of property is that the owner may use it exclusively, i.e., as she/he wishes, and that nobody else can lawfully use it without the owner's authorization. The phrase "as she/he wishes" does not, of course, mean that they can use it regardless of the legally recognized rights and interests of other members of society. For example, the owner of a car may use it "as she wishes," but this does not mean that she may drive her car recklessly and create danger to others, nor that she may disregard traffic regulations. Copyright is a branch of intellectual property. **The owner of copyright in a protected work may use the work as he wishes, and may prevent others from using it without his authorization. Thus, the rights granted under national laws to the owner of copyright in a protected work are normally "exclusive rights": to use the work or to authorize others to use the work, subject to the legally recognized rights and interests of others.**

There are two types of rights under copyright: **economic rights**, which allow the owner of rights to derive financial reward from the use of his works by others, and **moral rights**, which allow the author to **take certain actions to preserve the personal link between himself and the work**. Now listen to the next audio segment and try to distinguish the various economic rights that are described.

Audio segment 2: *What rights does a copyright holder have?*

The copyright holder has a set of different rights which are governed partly by the Berne Convention, where there are minimum rights, and partly by national law, which often takes the rights even further. Traditionally and historically, the **right of reproduction is the key**, which incidentally is reflected in the word copyright. The right of reproduction would, for instance, cover the printing of books – and photocopying too – but it also covers more modern methods of reproduction such as tape recording and the copying of tape recordings. It covers the storage of works in computer memories and of course the copying of computer programs on diskettes, CD-ROMS, CD writeable ROMS and so on.

Another right that has a long history is the **right of performance**. You perform a work when you play a tune, for example, or when you act on stage, and over the years that right has given rise to a number of other rights, such as the **right of broadcasting** and the **right of communication to the public**, the latter being sometimes defined differently in various national laws: broadcasting may actually form part of communication to the public, or they may be linked parallel concepts, but typically all kinds of communication will be covered, broadcasting being one, but cable distribution could be another, and Internet distribution another again.

Self-Assessment Question (SAQ)

SAQ 2: What were the two types of rights mentioned in the audio?
Give an example for each of them.

Type your answer here:

[Click here for answer](#)

SAQ 2 Answer:

Two were mentioned and these were:

The right of reproduction – examples of this right were the right to authorize photocopies, printed copies or copies of cassettes.

The rights related to performance, etc. – examples here were the right to perform the work e.g. as a song and the rights to communicate the work to the public and to broadcast it.

Another important group of rights, which were not mentioned in the audio segment, are those relating to **translation and adaptation**.

All of these rights will receive further coverage in the following three sections.

Right of Reproduction

The right of the owner of copyright to prevent others from making copies of his works is the most basic right under copyright. For example, the making of copies of a protected work is the act performed by a publisher who wishes to distribute copies of a text-based work to the public, whether in the form of printed copies or digital media such as CD-ROMs. Likewise, the right of a phonogram producer to manufacture and distribute compact discs (CDs) containing recorded performances of musical works is based, in part, on the authorization given by the composers of such works to reproduce their compositions in the recording. Therefore, the right to control the act of reproduction is the legal basis for many forms of **exploitation** of protected works.

Other rights are recognized in national laws in addition to the basic right of reproduction. For example, some laws include a right to authorize **distribution of copies of works**; obviously, the right of reproduction would be of little economic value if the owner of copyright could not authorize the distribution of the copies made with his consent. The right of distribution is usually subject to exhaustion upon **first sale** or other transfer of ownership of a copy, which is made with the authorization of the rights owner. This means that, after the copyright owner has sold or otherwise transferred ownership of a particular copy of a work, the owner of that copy may dispose of it without the copyright owner's further permission, by giving it away or even by reselling it.

However, as regards **rental of such copies**, an increasing number of national copyright laws, as well as the TRIPS Agreement, have recognized a separate right for computer programs, audiovisual works and phonograms. The right of rental is justified because technological advances have made it very easy to copy these types of works; experience in some countries has showed that copies were made by customers of rental shops, and therefore, that the right to control rental practices was necessary in order to safeguard the copyright owner's right of reproduction. Finally, **some copyright laws include a right to control importation of copies as a means of preventing erosion of the principle of territoriality of copyright**; that is, the economic interests of the copyright owner would be endangered if he could not exercise the rights of **reproduction and distribution** on a territorial basis.

There are some acts of reproducing a work which are exceptions to the general rule, because they do not require the authorization of the author or other owner of rights; these are known as **"limitations" on rights**. For example, **many national laws traditionally allow individuals to make single copies of works for private, personal and non-commercial purposes**. The emergence of digital technology, which creates the possibility of making high-quality, unauthorized copies of works that are virtually indistinguishable from the source (and thus a

perfect substitute for the purchase of, or other legitimate access to, authorized copies), has called into question the continued justification for such a limitation on the right of reproduction.

Rights of Public Performance, Broadcasting and Communication to the Public

Normally under national law, a **public performance** is considered as any performance of a work at a **place where the public is or can be present**, or at a **place not open to the public**, but **where a substantial number of persons outside the normal circle of a family and its closest social acquaintances is present**.

On the basis of the right of public performance, the author or other owner of copyright may authorize live performances of a work, such as the presentation of a play in a theater or an orchestra performance of a symphony in a **concert hall**. **Public performance** also includes performance by means of **recordings**; thus, musical works embodied in phonograms are considered "publicly performed" when the phonograms are played over amplification equipment in such places as discotheques, airplanes, and shopping malls.

The right of **broadcasting** covers the emission by wireless means for members of the public within range of the signal, whose equipment allows reception of sounds or of images and sounds, whether by **radio, television, or satellite**.

When a work is **communicated to the public**, a signal is diffused by wire or cable, which can be received **only by persons who have access to equipment connected to the wire or cable system**.

Under the Berne Convention, owners of copyright have the **exclusive** right of authorizing public performance, broadcasting and communication to the public of their works. Under some national laws, the exclusive right of the author or other owner of rights to authorize broadcasting is replaced, in certain circumstances, by a right to equitable remuneration, although **such a limitation on the broadcasting right is less and less common**.

Rights of Translation and Adaptation

The acts of translating or adapting a work protected by copyright also require the authorization of the owner of rights. **Translation** means the expression of a work in a language other than that of the original version. **Adaptation** is generally understood as the modification of a work to create another work, for example adapting a novel to make a motion picture, or the modification of a work to make it suitable for different conditions of exploitation, e.g., by adapting an instructional textbook originally prepared for higher education into an instructional textbook intended for students at a lower level.

Translations and adaptations are works protected by copyright. Therefore, in order to reproduce and publish a translation or adaptation, authorization must be obtained from both the owner of the copyright in the original work and of the owner of copyright in the translation or adaptation.

Economic rights of the type mentioned above can be transferred or assigned to other owners usually for a sum of money or royalties depending on the proposed usage of the work. However, the second type of rights, **moral rights**, can never be transferred. They always remain with the original author of the work.

Now listen to the next audio segment for a description of **moral rights**.

Audio segment 3: *Now what exactly are moral rights?*

The rights I have just mentioned are known as economic rights. **Moral rights are different: they are made up of two things**, the first being the **right of authorship**. That is the right to claim the status of author of a work, and to have that authorship recognized. It is basically the right to have your name mentioned, for instance when the work is reproduced. If you have written a book, then you have a right by law to have your name mentioned as its author and also to be named when the work is used, at least within reasonable limits. **We can't expect a disc jockey** in a discotheque to announce the composer, lyric writer, arranger and so on for every record he plays; it doesn't go that far obviously, **but if you play a work at a concert - a classical concert of modern music - the composer would clearly be entitled to have his name mentioned in the program**. That would certainly be the practice for more important works such as those played in theaters or concert halls; indeed for all works in principle, we must name the author. This is also true of broadcasting in some cases, but not all the time. There again, the exact weighing of the details is something that is dealt with in national law, often with reference to practice or precedent.

Moral rights are the rights of respect, that is, the right to object to the work being distorted or used in contexts that are prejudicial to the honor and literary and artistic reputation of the author. The author can for example oppose the use of his work in a pornographic context, if the work is not pornographic in itself. And he can oppose the distortion of the work in such a way that its cultural or artistic integrity is adversely affected.

Self-Assessment Question (SAQ)

SAQ 3: Suppose you have become a pre-eminent artist by virtue of an internationally acclaimed piece of art known as a tribute to the conservation of nature and later you find that it is being used, in a denigrating fashion without your permission, by a political group generally supporting genetically modified organisms. What could you do?

Type your answer here:

[Click here for answer](#)

SAQ 3 Answer:

If you have retained the relevant economic rights, you may prohibit the use under those rights. If you have transferred those rights prior to this unauthorized usage, you may still be able to stop its use under the moral right concerning the right of respect.

You should now be aware of the type of literary and artistic works that are covered by copyright and the types of rights that a copyright owner has and you may naturally be wondering how the author of such a work obtains copyright for the work. Listen to the next audio segment to find out.

Audio segment 4: *Can you tell us a little about how copyright is actually acquired?*

Of course; in fact it's simple. You don't have to do anything under the Berne Convention which works on the principle of there being no formalities. Basically, your work is protected by the fact of its creation. However, under some national legislation, notably in countries with common-law traditions, the work does have to be fixed before it is protected.

By fixed, you mean what?

Written down or recorded. You don't even have to record it yourself: if you compose a melody, hum it casually in the street and I manage to get it recorded, then it's fixed. But it also means that it's protected, so then if I use the recording of your melody, for further reproduction for example, I would be infringing your copyright. The difference here is really not that important; it is basically a question of the kind of proof you would need in a court in the very rare cases of works that are not fixed in the normal way, such as ballet routines. Nowadays you would fix a ballet on video and even use a special kind of writing to establish the choreography, but such things have not properly evolved until now. There could be a problem if you claimed that you had created a ballet and that somebody had made a play of it. The judge would then say, "Well, let me have some proof of the existence of your work." If it were not set down in some material form, proof would be hard to provide. And yet in civil-law countries, the work is typically protected from the moment of its creation. So even if you think up a poem in your head, it's protected. It would be your problem of course to prove what poem you thought up, how you did it and so on. Under common law, on the other hand, you would have to have it fixed in some way, perhaps written down or recorded on tape.

Is there anywhere in the world where you would have to observe a formality to get copyright?

In Berne Convention countries, all foreign owners of rights or authors from other Berne countries qualify for protection under the Convention without

any formalities, so there's no need to make any registration. Some countries then impose formalities on their own citizens, which they can do as the international conventions are concerned only with how foreign citizens are treated. In principle a country can deal with its own nationals as it pleases, and then in the United States, for instance, there is a history of old requirements consisting on one hand in the registration of the work with the Copyright Office, which is part of the Library of Congress, and on the other hand in the claiming of copyright, by means of the reserved-rights notice, the circled letter 'c' that you probably have seen on a great many books, followed by the year date of first publication.

These things are particularly important for American works. So, for American works, the specific United States demands have to be looked into; what is more, foreign works can qualify for improved protection that goes beyond what is provided by the Berne Convention, so for certain works that are considered to be of particular interest to the US market, it could be worth checking up on that country's registration requirements. Be that as it may, there is nevertheless protection from the outset, so in fact it is not necessary to do anything, and that goes for all Berne Convention countries.

Self-Assessment Question (SAQ)

SAQ 4: Imagine that you are a national of one of the countries that has signed the Berne Convention and you create a literary work. What steps must you take to get a copyright on your work?

Type your answer here:

[Click here for answer](#)

SAQ 4 Answer:

In general terms it is very easy: there is nothing to do. The Berne Convention builds on the principle of nonformalities; creation equals protection.

In most **common law** countries fixation is a requirement: a work must be written down or recorded. As an example, ballets, earlier were notated in dance notation, and are now often simply videorecorded.

In **civil law** countries works are protected from the instant of creation, which of course leaves open the practical question of proving the creation in court. One should note, however, that there might be formalities required under national law for the protection of the country's own nationals. In Berne Convention countries, all foreign right owners from other Berne Convention states have protection without formalities (No registration).

Transfer of Copyright

Many creative works protected by copyright require financial investment and professional skills for their production and further dissemination and mass distribution. Activities such as book publishing, sound recording or film producing are usually undertaken by specialized business organizations or companies, and not directly by the authors. Usually, authors and creators transfer their rights to these companies by way of contractual agreements, in return for compensation. The compensation may take different forms, such as lump sum payments, or royalties based on a percentage of revenues generated by the work.

The transfer (or assignment) could affect all the economic rights or only some of them (partial assignment). For example, an author of a novel written in English could sell to a publisher his reproduction and distribution rights, as well as his translation rights and his adaptation rights in the novel. But the author may choose to proceed otherwise: he may decide to split the rights he has between different persons. Thus the author of a novel may assign or transfer his rights to publish and reproduce the novel written originally in English to one publisher. He may assign the right to translate the novel into, say, French, Russian and Arabic to three other publishers. In addition he may assign the right to adapt his novel into a film (or an opera or a play) to other persons.

The transfer or assignment may be granted for a specific period of time and a limited territory, or for the duration of the full term of copyright and worldwide. Hence the copyright owner of a novel could assign to one publisher the rights to publish the book in English, for a specific territory, say, the United States of America, and for a period of 20 years. Or he may decide to assign to the same person the rights to publish the novel in English worldwide, and for the duration of copyright. The combinations here are many and depend on the negotiations between the parties

As we have seen, assignments and transfers entail important consequences for the author. Legally, the assignee (the person to whom the right or rights have been assigned) is vested with the rights that have been contractually transferred to him. He thus becomes the new owner of such rights, for the agreed period of time and territory. It is thus important that the author be well aware about the consequences of such an operation. This is why many national copyright laws contain provisions requiring that assignments be made in writing and signed by or on behalf of the assignor, in order to be valid or effective. Such requirement helps to ensure that the author is well aware about the rights he is parting with, at what price, and on what conditions.

The next question you may have is once I have copyright on a work, for how long am I protected?

Audio segment 5: *How long does copyright protection actually last?*

In principle, as long as the national law says, but the minimum requirement under the Berne Convention is 50 years. The term is calculated from the end of year of the author's death which is more practical: you don't have to enquire into the day he died, you only need to know the year. But there has been a tendency in recent years to prolong that protection. In the European Union and for countries of the European economic area, the term is now 70 years from the end of year in which the author died, and the same term has been written into the US legislation – so there too it is 70 years. There is thus a definite tendency to prolong protection from 50 to 70 years.

Please note however that there are cases where in the Berne Convention the minimum requirement is less than 50 years post mortem. For example, for photographic works and works of applied art, the minimum term of protection is 25 years after the making of the work.

Self-Assessment Question (SAQ)

SAQ 5: What is the minimum duration of copyright protection under the Berne Convention? How has this since changed?

Type your answer here:

[Click here for answer](#)

SAQ 5 Answer:

The minimum duration of protection under the Berne Convention is 50 years from the date of the author's death. This has been prolonged by some countries such as the European Union countries and the United States of America to 70 years from the author's death. However, in some cases, the protection, under the Berne Convention is less than 50 years after the death of the author.

Now it is time to ask you to consider some of the common limitations on the rights of a copyright owner that exist under some national laws.

Limitations on Rights

Strictly speaking, the first limitation is the exclusion from copyright protection of certain categories of works. In some countries, as you have heard, works are excluded from protection if they are not fixed in tangible form; for example, a work of choreography would only be protected once the movements were written down in dance notation or recorded on videotape. In some (but not all) countries, moreover, the texts of laws, court and administrative decisions are excluded from copyright protection.

The second category of limitations on the rights of authors and other owners of copyright concerns particular acts of exploitation, normally requiring the authorization of the owner of rights, which may, under circumstances specified in the law, be done without authorization. There are two basic types of limitations in this category:

- 1) **Free uses**, which are acts of exploitation of works that may be carried out without authorization and without an obligation to compensate the owner of rights for the use;
- 2) **Non-voluntary licenses**, under which the acts of exploitation may be carried out without authorization, but *with* the obligation to compensate the owner of rights.

Examples of free uses include: the making of quotations from a protected work, provided that the source of the quotation, including the name of the author, is mentioned and that the extent of the quotation is compatible with fair practice; use of works by way of illustration for teaching purposes; and use of works for the purpose of news reporting. In respect of the right of reproduction, the Berne Convention contains a general rule, rather than explicit detailed limitations: Article 9(2) provides that member States may provide for free reproduction in "certain special cases" where the acts do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. As noted above, numerous laws contain provisions allowing reproduction of a work exclusively for the personal, private and non-commercial use of individuals. However, the ease and quality of this individual copying, made possible by audiotaping or videotaping and even more recent technological improvements, has led some countries to narrow the scope of such provisions. Certain legal systems allow copying but incorporate a mechanism for payment to owners of

rights for the prejudice to their economic interests, through a fee imposed on sales of blank tapes and / or tape recorders.

In addition to specific free uses enumerated in national laws, the laws of some countries recognize the concept known as **fair use** or **fair dealing**, which allows use of works without the authorization of the owner of rights, taking into account factors such as the following: the nature and purpose of the use, including whether it is for commercial purposes; the nature of the work used; the amount of the work used in relation to the work as a whole; and the likely effect of the use on the potential commercial value of the work.

As noted above, **non-voluntary licenses** allow use of works in certain circumstances **without the authorization of the owner of rights, but which, by operation of law, require that compensation be paid in respect of the use.** Such licenses are called "non-voluntary" because they are authorized by the law and do not result from the exercise of the copyright owner's exclusive right to authorize particular acts. Non-voluntary licenses were usually created in circumstances where a new technology for the dissemination of works to the public had emerged, and where the national legislature feared that owners of rights would prevent the development of the new technology by refusing to authorize use of works. This was true in the Berne Convention, which recognized two forms of non-voluntary licenses: firstly, to allow the mechanical reproduction of musical works and secondly for broadcasting. It should be noted, however, that the justification for non-voluntary licenses is called increasingly into question, since effective alternatives now exist for making works available to the public based on authorizations given by the owners of rights, including in the form of collective administration of rights.

Whatever the situation in your country relating to copyright there will inevitably be situations occurring where copyright is infringed so it is important to consider the types of remedies the copyright owner can take.

Enforcement of Rights

The Berne Convention contains few provisions concerning enforcement of rights, but the evolution of new national and international enforcement standards has been dramatic in recent years, due to two principal factors. The first is the galloping advances in the technological means for creation and use (both authorized and unauthorized) of protected material, and in particular, digital technology, which makes it possible to transmit and make perfect copies of any "information" existing in digital form, including works protected by copyright, anywhere in the world. The second factor is the increasing economic importance of the movement of goods and services protected by intellectual property rights in the realm of international trade; simply put, trade in products embodying intellectual property rights is now a booming, worldwide business. The TRIPS Agreement, which contains detailed provisions on the enforcement of rights, is ample evidence of this new link between intellectual property and trade. The following paragraphs identify and summarize some of the enforcement provisions found in recent national legislation, which may be divided into the following categories: **conservatory or provisional measures; civil remedies; criminal sanctions; measures to be taken at the border; and measures, remedies and sanctions against abuses in respect of technical devices.**

Conservatory or provisional measures have **two purposes**: first, to **prevent infringements** from occurring, particularly to **prevent the entry of infringing goods into the channels of commerce**, including entry of imported goods after clearance by customs; and second, to **preserve relevant evidence in regard to an alleged infringement**. Thus, judicial authorities in some countries may have the authority to order that provisional measures be carried out without advance notice to the alleged infringer. In this way, the alleged infringer is prevented from relocating the suspected infringing materials to avoid detection. The most common provisional measure is a search of the premises of the alleged infringer and seizure of suspected infringing goods, the equipment used to manufacture them, and all relevant documents and other records of the alleged infringing business activities.

Civil remedies **compensate the owner of rights for economic** injury suffered because of the infringement, usually in the form of monetary damages, and create an effective deterrent to further infringement, often in the form of a judicial order to destroy the infringing goods and the materials and implements which have been predominantly used for producing them; where there is a danger that infringing acts may be continued, the court may also issue injunctions against such acts, failure to comply with which would subject the infringer to payment of a fine.

Criminal sanctions are intended to punish those who willfully commit acts of piracy of copyright and related rights on a commercial scale, and, as in the

case of civil remedies, to deter further infringement. The purpose of punishment is served by the imposition of substantial fines, and **by sentences of imprisonment** consistent with the level of penalties applied for crimes of corresponding seriousness, particularly in cases of repeat offenses. The purpose of deterrence is served by orders for the seizure, forfeiture and destruction of infringing goods, as well as the materials and implements the predominant use of which has been to commit the offense.

Measures to be taken at the border are different from the enforcement measures described so far, in that they involve action by the customs authorities rather than by the judicial authorities. Border measures allow the owner of rights to request from customs authorities the suspension into circulation of goods that are suspected of infringing copyright. The purpose of the suspension into circulation is to provide the owner of rights a reasonable time to commence judicial proceedings against the suspected infringer, without the risk that the alleged infringing goods will disappear into circulation following customs clearance. The owner of rights must generally satisfy the customs authorities that there is *prima facie* evidence of infringement, must provide a detailed description of the goods so that they may be recognized, and must provide a security to indemnify the importer, the owner of the goods, and the customs authorities in case the goods turn out to be non-infringing.

The final category of enforcement provisions, which has achieved greater importance in the advent of digital technology, includes **measures, remedies and sanctions against abuses in respect of technical means**. In certain cases, the only practical means of preventing copying is through so-called "copy-protection" or "copy-management" systems, which contain technical devices that either prevent entirely the making of copies or make the quality of the copies so poor that they are unusable. Technical devices are also used to prevent the reception of encrypted commercial television programs except with use of decoders. However, it is technically possible to manufacture devices by means of which copy-protection and copy-management systems, as well as encryption systems, may be circumvented. The theory behind provisions against abuse of such devices is that their manufacture, importation and distribution should be considered infringements of copyright to be sanctioned in ways similar to other violations.

International Agreements Concerning Copyright

Please listen to the following audio segment, which describes the main international agreements in the copyright field.

Audio segment 6: *What are the main international conventions or treaties that govern the area of copyright?*

The first treaty is the Berne Convention for the Protection of Literary and Artistic Works. It dates back to 1886, but has been revised several times, typically at about 20-year intervals. The latest version was adopted in Paris in 1971.

The Berne Convention deals with the protection of copyright. It is based on principles such as that of national treatment, meaning that under national law you cannot discriminate against works from other countries party to the Convention. It lays down very important minimum protection standards that have to be met by national law, although of course national law can go further – and establishes various other principles.

Recently, we had the TRIPS Agreement. This is the Agreement on Trade-Related Aspects of Intellectual Property Rights, which is one of the Agreements that emerged from the Uruguay Round of trade negotiations and is administered by the World Trade Organization.

The TRIPS Agreement among other things contains a reference to the substantive provisions of the Berne Convention, leaving aside moral rights, which are not considered trade-related. In order to comply with the TRIPS Agreement, countries have to comply with the provisions of the Berne Convention for a start, after which there are a number of additional norms of protection that are introduced by the TRIPS Agreement, most importantly regarding new types of creations (computer programs and original databases) and new forms of exploitation (right of rental).

So countries that acceded to or ratified the TRIPS Agreement must also comply with the Berne Convention (although Berne's Article 6*bis* on **moral rights** specifically excluded in the TRIPS language, as it does not concern trade by virtue of the moral right's inalienable nature); in addition the TRIPS Agreement seeks to address aspects of copyright relating to new technologies.

To expand from the sound segment you just listened to, in December of 1996, a Diplomatic Conference was held, which concluded the newest international agreement protecting copyright: the WIPO Copyright Treaty (WCT). This treaty responded to the need to protect works when transmitted by digital means, including via the Internet. The subject matter to be protected through copyright by the WCT includes that of *computer programs, whatever may be the mode or form of their expression, and compilations of data or other material, (databases)* in any form, which by reason of the *selection or arrangement of their content* constitute intellectual creations. The *rights of authors* include the previously mentioned rights of *distribution, rental, and communication to the public, and it is made clear that the right of communication to the public covers the transmission of works through digital networks such as the Internet.* It is also stated that the right of reproduction as set out in the Berne Convention, fully applies in the digital environment. Hence the storage of a work in digital form in an electronic medium (for example by storing it in a computer memory) should constitute a reproduction of that work. These rights, as is normal, are subject to certain limitations and exceptions.

(NOTE: another treaty was concluded at that same Diplomatic Conference, which was designated the WIPO Performances and Phonograms Treaty (WPPT). That treaty is discussed in the Related Rights course module).

Self-Assessment Question (SAQ)

SAQ 6: What is covered under the 'WCT'?

Type your answer here:

[Click here for answer](#)

SAQ 6 Answer:

The WCT came into existence because the Contracting States recognized the need to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments. This refers in particular to the need of protection of literary and artistic works transmitted via the Internet. Works specifically mentioned by the WCT include computer programs and databases. The WCT extends the scope of copyright protection to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such. Authors of works covered by the WCT also enjoy the rights of distribution, rights of rental and rights of communication to the public.

Finally, to conclude this module on copyright, let's address the question of the importance of copyright laws in developing countries.

What benefits are there for developing countries from copyright protection?

What are the benefits from Copyright protection for developing countries?

There are cultural, as well as economic benefits. We should not forget, in fact, that copyright also has to do with culture. All developing countries have very strong artistic communities. There are no people on earth who are not creative, and of course if there is no copyright protection, the artistic community is going to be cheated and prevented from earning money from their efforts. Nowadays literary and artistic works have become a very broad concept, including of course the cultural part, the artistic community, but also the information technology industry, or more specifically computer program industry.

A large amount of money might be invested in making a computer program, or film or a television program. But if as soon as one copy is out on the market, everybody is allowed to copy it, then the earning potential is gone and there will be no incentive to create or further invest. Creativity will, hence, be discouraged instead of being stimulated and national cultural output would be adversely affected. That's one aspect. The response to this could be to say that local works should be protected, while no protection should be afforded to foreign works, because then money would go out of the country, which developing countries can ill afford.

This would, however, be a somewhat shortsighted view. There are some solid arguments that could be stated in favor of international protection of works.

First, if protection were to be limited only to national works, foreign works would be allowed into the local market without any copyright cost. They would be sold at cut prices. Of course, consumers may benefit from such low prices. But this practice could detrimentally affect the sale of locally made products, which would have to compete with works of foreign origin distributed at a more attractive price. The dangerous result is that consumers might turn their backs on nationally made products and buy foreign but less expensive products. National culture, whether it is the music, or book or other industry may, therefore, suffer.

Second, one cannot emphasize enough the gains that local artists and creators, whether in developing countries or not, may derive from **protection of their works abroad**. Local markets may be limited and there is a need to derive revenues from cultural products that are **exported and marketed outside**. Nowadays, and thanks to modern means of communications, works are listened to, or read, or seen, not only in the local community or country in which they have been created, but also further afield. So much so, that in some instances, the income generated from the exploitation of a work on foreign soil may exceed substantially the revenues that are reaped from its national exploitation. Such a phenomenon can be observed frequently in the areas of music, TV programs, software, film, books, etc. Protection abroad, in foreign markets, is, thus, extremely important for authors and creators. **And one has to be aware that an artist or a creator from a particular country will not, in all likelihood, enjoy protection abroad, if foreign authors and artists are not also themselves granted protection in his or her country.**

Summary

This module has addressed the general structure of copyright law and has provided an overview of:

- (1) the 'literary and artistic works' protected by copyright;
- (2) the rights granted to the owner of copyright;
- (3) the ownership and transfer of copyright;
- (4) the duration of protection;
- (5) the limitations on rights;
- (6) the enforcement of rights, and
- (7) international agreements concerning copyright.

The Berne Convention expansively listed 'literary and artistic works' so that "every production in the literary, scientific and artistic domain, whatever may be the mode or form of expression", were included. Covered under this broad term is every original work of authorship, irrespective of its literary or artistic merit.

The owner of copyright in a protected work may use the work as he wishes, and may prevent others from using it without his authorization. Thus, since the holder may exclude others from acting against the holder's interests, these rights are referred to as "exclusive rights". There are two other types of rights covered under copyright: economic rights and moral rights. Within the umbrella of *economic rights* are those several rights and applicable limitations, which may be alienable from the original holder. *Moral rights* will always remain with the original holder no matter whether the economic rights have been transferred.

In addition to the categories of works mentioned above, a new genre of work to be covered under copyright has emerged. This is multimedia production and although there is no legal definition, there is a consensus that the combination of sound, text, and images in digital format, which is made accessible by a computer program is considered an original expression of authorship and is therefore covered under the umbrella of copyright.

Legislative Texts:

- Berne Convention for the Protection of Literary and Artistic Works
- TRIPS Agreement
- WIPO Performances and Phonograms Treaty (WPPT)
- WIPO Copyright Treaty (WCT)