

**INTERNATIONAL COPYRIGHT LAW-**  
**PART I: THE BERNE CONVENTION FOR THE PROTECTION OF**  
**LITERARY AND ARTISTIC WORKS, 1886**

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**INTRODUCTION**

The Berne Convention for the Protection of Literary and Artistic Works (hereinafter referred to as the Convention) is the oldest international agreement in the field of copyright.<sup>1</sup> Copyright is the protection given by the law to original literary and artistic works. The Convention is the most important treaty that governs the area of copyright. It has also been described as being to copyright what the Paris Convention for the Protection of Industrial Property (hereinafter referred to as the Paris Convention) is to industrial property rights.<sup>2</sup> The Convention was signed in 1886 and has been revised several times.<sup>3</sup> These revisions typically occur at twenty-year intervals, however, the last revision was done in Paris in 1971.<sup>4</sup> The Paris 1971 Revision was notable because it added to the Convention the Appendix containing the Special Provisions Regarding Developing Countries.

The adoption of the Convention was prompted by the need to bring uniformity to the disparate bilateral treaties that existed in the nineteenth century.<sup>5</sup> The importance of the Convention was increased when the United States of America abandoned the rival Universal Copyright Convention (administered by the United Nations Educational Scientific and Cultural Organization) and joined the Convention.<sup>6</sup> Another boost for the Convention came with the signing of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Contracting States of the TRIPS Agreement are mandated to implement certain substantive provisions of the Convention.<sup>7</sup> This Article focuses on the provisions of the Convention and

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<sup>1</sup>Coenraad Visser and Tana Pistorius, Essential Copyright Law, University of South Africa/WIPO Worldwide Academy, 1.2.4.

<sup>2</sup>Paul Torremans and Jon Holyoak, Intellectual Property Law, Second Edition, Butterworths, 29.

<sup>3</sup>Introduction to Intellectual Property (DL-101), World Intellectual Property Organization/WIPO Worldwide Academy, 29.

<sup>4</sup>Ibid.

<sup>5</sup> Coenraad Visser and Tana Pistorius, *supra*, 1.2.4.

<sup>6</sup> Paul Torremans and Jon Holyoak, *supra*, 29.

<sup>7</sup> Article 9(1) of TRIPS.

the implementation of these provisions in certain Contracting States of the Convention.

## **THE BERNE UNION**

Article 1 of the Convention established a Union of Member States of the Convention, with the aim of protecting the rights of creators of literary and artistic works. The Convention also established an administrative secretariat known as the “International Bureau”.<sup>8</sup> This secretariat later amalgamated with the secretariat established by the Paris Convention and the resulting combined secretariat later became the World Intellectual Property Organization (hereinafter referred to as WIPO).<sup>9</sup>

## **WORKS PROTECTED BY THE CONVENTION**

The expression “literary and artistic works” is defined as including every production in the literary, scientific and artistic domain, irrespective of the mode or form of the production’s expression.<sup>10</sup> This expression is general in the sense that it encompasses every original work of authorship, regardless of the work’s literary or artistic merit.<sup>11</sup> According to Article 2 (1) of the Convention, literary and artistic works include-

“books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works or 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

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<sup>8</sup> Essential Elements of Intellectual Property, Overview of the Basic Notions of Copyright and Related Rights and Treaties Administered by WIPO, CD-ROM published by the WIPO Academy, World Intellectual Property Organization, 1.

<sup>9</sup> Ibid.

<sup>10</sup> Article 2(1).

<sup>11</sup> Essential Elements of Intellectual Property, supra, 4.

dimensional works relative to geography, topography, architecture or science.”.

This list is largely replicated in the Copyright Act of Trinidad and Tobago.<sup>12</sup> Section 5 of the Trinidadian Act declares that copyright is a property right subsisting in literary and artistic works that can be described as original intellectual creations in the literary and artistic domain. Section 7 (1) of the Copyright Act of Belize<sup>13</sup> states that copyright shall subsist in original literary, dramatic, musical or artistic works, sound recordings, films, broadcasts, or cable programmes, and typographical arrangements of published editions.

The list outlined in Article 2 (1) of the Convention is not a closed list. A good illustration of this point can be found in the emergence of computer programs in the field of copyright protection. Computer programs have been defined as a set of instructions that direct the operations of a computer and command the computer to perform tasks such as storage and retrieval of information.<sup>14</sup> Although computer programs were never included in the Convention’s list of protected works, it is crystal clear that such works are covered by the expression “every production in the literary, scientific and artistic domain”.<sup>15</sup> The Copyright Act of Trinidad and Tobago protects computer programs as original intellectual creations in the literary and artistic domain.<sup>16</sup> In South Africa, the courts were initially of the opinion that computer programs were literary works.<sup>17</sup> However, the South African legislature clarified the issue in 1992 by amending the Copyright Act to create a separate category for computer programs.<sup>18</sup>

Other examples of works which were not included in the Convention’s list but which are now under the umbrella of copyright are multimedia productions. The jury is still out on an acceptable legal definition of a multimedia production, however, there is a general acceptance “that the combination of sound, text and images in a digital format which is made accessible by a computer program, embodies an

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<sup>12</sup> Act No. 8 of 1997.

<sup>13</sup> Chapter 252 of the Laws of Belize, Revised Edition 2000.

<sup>14</sup> Essential Elements of Intellectual Property, *supra*, 4.

<sup>15</sup> *Ibid.*

<sup>16</sup> Section 5(1)(a).

<sup>17</sup> Northern Office Microcomputers (Pty) Ltd. and Others v. Rosentein 1981(4) SA136(c); See Coenraad Visser and Tana Pistorius, *supra*, 1.3.5.

<sup>18</sup> Section 11B of the Copyright (Amendment) Act, 1992.

original expression of authorship sufficient to justify the protection of multimedia productions under the umbrella of copyright”.<sup>19</sup>

Member States are given the discretion to prescribe, in their national legislation, the fixation of all works or certain specified works before such works can be eligible for protection.<sup>20</sup> The Copyright Act of Belize states that literary, dramatic or musical works shall only be eligible for copyright protection if such works are written down, recorded or otherwise fixed in a material form.<sup>21</sup> The ambit of the expression recording of the work in a material form is extended to include the storage of such work in a computer.<sup>22</sup>

The list of works protected by copyright also includes translations, adaptations, arrangements of music and other alterations of literary and artistic works, and collections of literary and artistic works (such as encyclopaedias and anthologies) which constitute intellectual creations, and which do not prejudice the copyright in the original works.<sup>23</sup> The Copyright Act of Trinidad and Tobago protects such works as derivative works.<sup>24</sup> Further, the Trinidadian Act adds a technological clarification to the protection given to collections of works and databases, by stating that such protection will be granted whether the collection is in machine readable or other form.<sup>25</sup> The Trinidadian legislation also adds a cultural element to the protection granted to derivative works by extending such protection to works related to the annual Trinidad and Tobago Carnival.<sup>26</sup> These works, referred to in the Trinidadian legislation as “works of mas” are defined as-

“...an original production intended to be performed by a person or a group of persons in which an artistic work in the form of an adornment or image presented by the person or persons is the primary element of the production, and in which such adornment or image may be accompanied by words, music, choreography or other works, regardless of whether the

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<sup>19</sup> Essential Elements of Intellectual Property, *supra*, 4.

<sup>20</sup> Article 2(2).

<sup>21</sup> Section 7(2).

<sup>22</sup> *Ibid.*

<sup>23</sup> Article 2(3) and (5).

<sup>24</sup> Section 6.

<sup>25</sup> *Ibid.*, subsection (1)(b).

<sup>26</sup> *Ibid.*, subsection (1)(c).

production is intended to be performed on stage, platform, street or other venue.”<sup>27</sup>

The issue of whether official texts on legislative, administrative and legal matters, and translations of such texts, should be protected, is left for determination by the legislation of countries of the Union.<sup>28</sup> Section 12(8) (a) of the South African Copyright Act<sup>29</sup> states that copyright shall not subsist in official texts on legislative, administrative or legal matters, or in official translations of such documents.

Member States are free to decide how, and the conditions under which, their copyright laws will apply to works of applied art and industrial designs and models.<sup>30</sup> The Copyright Act of Trinidad and Tobago and Tobago protects works of applied art as artistic works.<sup>31</sup> If a work is protected in its country of origin as a design or model, it will only be entitled to protection as a design or model in another country of the Union.<sup>32</sup> If the Union country does not offer special protection for designs or models, the work shall be protected as an artistic work in the Union country, provided that the minimum term of protection of a work of applied art protected as an artistic work shall last up to the end of a period of twenty-five years after the making of such work.<sup>33</sup> News items and other items of press information are not eligible for protection under the Convention.<sup>34</sup> The South African Act excludes items described as “news of the day” from legal protection.<sup>35</sup>

The issue of whether political speeches and speeches given during legal proceedings are protected under the Convention is left for determination by the legislation of countries of the Union.<sup>36</sup> The South African Copyright Act does not grant copyright protection to political speeches and speeches delivered during legal proceedings.<sup>37</sup> The conditions under which public lectures, addresses and other similar works are incorporated in press reports and communicated to the public for

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<sup>27</sup> Section 3.

<sup>28</sup> Article 2(4).

<sup>29</sup> Act No. 98 of 1978.

<sup>30</sup> Article 2(7).

<sup>31</sup> Section 5(1)(j).

<sup>32</sup> Article 2(7).

<sup>33</sup> *Ibid.*, read with Article 7(4).

<sup>34</sup> Article 2(8).

<sup>35</sup> Section 12(8)(a).

<sup>36</sup> Article 2<sup>bis</sup> (1).

<sup>37</sup> Section 12(8)(a).

informatory purposes, is also reserved for determination by the legislation of countries of the Union.<sup>38</sup> The South African legislation states that the copyright in a lecture, address or similar work is not infringed by reproduction in the media for informatory purposes.<sup>39</sup> The author of a political speech or a speech given during legal proceedings, or a public lecture, address or other similar work, shall always enjoy the exclusive right to make a collection of his or her works.<sup>40</sup> This provision of the Convention is replicated in the South African Copyright Act, which states that the author of a political or legal speech, or of a lecture, address or similar work, has an exclusive right to make a collection of such work.<sup>41</sup> The protection of the above-mentioned works shall operate for the benefit of the author and his or her successors in title.<sup>42</sup>

### **ELIGIBILITY FOR PROTECTION AND RIGHTS GRANTED TO THE COPYRIGHT OWNER**

The Convention protects the published or unpublished works of authors who are nationals of a Union country.<sup>43</sup> The Copyright Act of Belize qualifies a literary, dramatic, musical, or artistic work, or a typographical arrangement of a published edition, for copyright protection if the author of such work was a qualified person at the time he or she made the work.<sup>44</sup> Where the work was made over an extended period, the work will qualify for protection under the Belizean Act, if the author was a qualified person for a substantial part of that period.<sup>45</sup> The Belizean legislation gives the following definition of a “qualified person”-

- (a) in the case of an individual, means a person who is a citizen of Belize or whose habitual residence is in Belize; and

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<sup>38</sup> Article 2<sup>bis</sup>(2).

<sup>39</sup> Section 12(6)(a).

<sup>40</sup> Article 2<sup>bis</sup>(3).

<sup>41</sup> Section 12(6)(b).

<sup>42</sup> Article 2(6).

<sup>43</sup> Article 3(1)(a).

<sup>44</sup> Section 8(1)(a).

<sup>45</sup> Ibid.

- (b) in the case of a body corporate, means a body incorporated or established under any written law of Belize.”<sup>46</sup>

The inclusion of an habitual resident of Belize in the definition of a qualified person is clearly in step with Article 3 (2) of the Convention, which states that a non-Union national who is habitually resident in a country of the Union is considered as a national of that country under the Convention. The Convention also protects the published works of non-nationals of a Union country, if such works are first published in a Union country, or simultaneously in a Union country and a non-Union country.<sup>47</sup> The Belizean copyright legislation protects works first published in Belize or in a specified country, regardless of the author’s nationality.<sup>48</sup> A work published in two or more countries within a period of thirty days of its first publication, is regarded as having been published simultaneously in several countries.<sup>49</sup> Section 5 (5) of the Belizean Act prescribes that a publication of a work can still be regarded as the first publication notwithstanding an earlier publication in another country.

A published work is defined in the Convention as a work that is published with the consent of the author, irrespective of the mode of manufacture of the particular copy of the work.<sup>50</sup> This definition contains a proviso that copies of the work must be available in such a way “as to satisfy the reasonable requirements of the public, having regard to the nature of the work”.<sup>51</sup> This proviso is not present in the definition of a publication in the Belizean legislation.<sup>52</sup> However, this proviso is incorporated in the definition of “published” in the Copyright Act of Trinidad and Tobago.<sup>53</sup> The Trinidadian legislation defines the word “published” as referring to a work or a sound recording “copies of which have been made available to the public in a reasonable quantity...”.<sup>54</sup>

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<sup>46</sup> Section 3.

<sup>47</sup> Article 3(1)(b).

<sup>48</sup> Section 8(1)(b)(i).

<sup>49</sup> Article 3(4).

<sup>50</sup> Article 3(3).

<sup>51</sup> Ibid.

<sup>52</sup> Section 5.

<sup>53</sup> Section 3.

<sup>54</sup> Ibid.

The Convention excludes from the definition of publication, the performance of a dramatic, dramatico-musical, cinematographic or musical work; the public recitation of a literary work; the communication by wire or the broadcasting of a literary or artistic work; the exhibition of a work of art and the construction of a work of architecture.<sup>55</sup> The Copyright Act of Belize replicates almost all of these exclusions,<sup>56</sup> however, the Belizean legislation differs with the Convention on the issue of whether the construction of a work of architecture constitutes publication.<sup>57</sup> Section 5 (2) of the Belizean Act states that the construction of a work of architecture in the form of a building shall be regarded as publication of the work.

The more generous nature of the Belizean publication provision is also demonstrated in the fact that it also regards the construction of a building incorporating an artistic work as publication of the work.<sup>58</sup> However, the Belizean publication provision is less generous in other areas. This can be seen in the fact that the Belizean provision excludes from the ambit of publication, the issuance to the public of copies of a graphic representation, or photograph, of an architectural work in the form of a building or a model for a building, a sculpture or a work of artistic craftsmanship, or a film including an artistic work.<sup>59</sup>

The author of a work protected under the Convention is entitled in countries of the Union, other than the country of origin of his or her work, to the same rights granted to nationals of such countries and to the rights granted by this Convention.<sup>60</sup> This principle is known as the principle of national treatment, and is one of the three core principles enshrined in the Convention.<sup>61</sup> The other two principles are the lack of formalities for copyright protection and the independence of copyright protection from the existence or term of protection in the country of origin of the protected work.<sup>62</sup>

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<sup>55</sup> Article 3(3).

<sup>56</sup> Section 5(3).

<sup>57</sup> Section 5(2).

<sup>58</sup> Ibid.

<sup>59</sup> Section 5(3)(b).

<sup>60</sup> Article 5(1).

<sup>61</sup> Coenraad Visser and Tana Pistorius, *supra*, 1.2.4.

<sup>62</sup> Ibid.

The rights granted to authors shall not be subject to formalities such as registration.<sup>63</sup> The most notable exception to this principle is the United States of America. Although the United States of America is a country of the Union, it has a copyright system that requires American works to be registered with the Copyright Office of the Library of Congress, and the printing of the reserved-rights notice on copies of the work.<sup>64</sup> The reserved-right notice includes the circled letter ‘c’, followed by the year of first publication of the work.<sup>65</sup>

The scope of the rights of the author, as well as the remedies open to the author, are determined exclusively by the laws of the country where the author claims protection.<sup>66</sup> The existence of protection in the country of origin of the work shall have no bearing on such determination.<sup>67</sup> The principle of national treatment is also extended to cases in which the author is not a national of the country of origin of his or her work, in such cases, the author is entitled to the same protection as nationals of such countries.<sup>68</sup>

The Convention provides several definitions of the expression “country of origin”. Where the work is first published in a country of the Union, that country is the country of origin.<sup>69</sup> If a work is published simultaneously in several countries of the Union, which have different terms of protection, the country of origin is the country with the shortest term of protection.<sup>70</sup> Where the work is published simultaneously in a country of the Union and a non-Union country, the country of origin is the country of the Union.<sup>71</sup> If the work in question is an unpublished work, or a work first published in a non-Union country without simultaneous publication in a Union country, the country of origin is the Union country of which the author is a national.<sup>72</sup> However, this last rule does not apply in the case of a cinematographic work made by a person whose headquarters or habitual residence is in a Union country, or a work of architecture built in a Union country, or other artistic works incorporated in a structure located in a Union

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<sup>63</sup> Article 5(2).

<sup>64</sup> Introduction to Intellectual Property(DL-101), supra, 19.

<sup>65</sup> Ibid.

<sup>66</sup> Article 5(2).

<sup>67</sup> Ibid.

<sup>68</sup> Article 5(3).

<sup>69</sup> Article 5(4)(a).

<sup>70</sup> Ibid.

<sup>71</sup> Article 5(4)(b).

<sup>72</sup> Article 5(4)(c).

country.<sup>73</sup> In such cases, the country of origin is the Union country in which the person's headquarters or habitual residence, or the work of architecture or structure, is located.<sup>74</sup>

A country of the Union is permitted to restrict the protection given under its laws to the works of authors who, at the date of first publication of their works, are nationals of countries which do not adequately protect the works of nationals of the Union country, and who are not habitual residents of a Union country.<sup>75</sup> The South African Copyright Act states that the provisions of the Act shall not be extended to cover countries that are not parties to the Convention, unless the Minister responsible for copyright is satisfied that such countries adequately protect the works of copyright owners under the South African Act.<sup>76</sup>

If a Union country exercises its right to restrict the protection it gives to the works of authors from countries that do not adequately protect the rights of the Union country's nationals, other Union countries shall not be required to grant wider protection to such works.<sup>77</sup> The restrictions imposed by the Union country shall not have retrospective effect,<sup>78</sup> and the Union countries imposing such restrictions are obliged to notify the Director General of WIPO (hereinafter referred to as "the Director General") of the countries affected by such restrictions and the particular restrictions imposed.<sup>79</sup> The Director General shall immediately communicate this notification to all Union countries.<sup>80</sup>

## **MORAL RIGHTS**

The author of a work has the right to be identified as the author of the work (right of paternity), and the right to object to any derogatory treatment of his or her work that will be harmful to his or her honour or reputation (right of integrity).<sup>81</sup> These rights are known as moral (non-patrimonial)

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<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Article 6(1).

<sup>76</sup> Section 37(3).

<sup>77</sup> Article 6(1).

<sup>78</sup> Article 6(2).

<sup>79</sup> Article 6(3).

<sup>80</sup> Ibid.

<sup>81</sup> Article 6<sup>bis</sup>(1).

rights and are distinct from the author's economic (patrimonial) rights. Moral rights deal with the author's personal relationship with his or her work.<sup>82</sup>

The right of paternity is basically the right to claim authorship of the work. This involves the right of the author to have his or her name mentioned, within reasonable limits, when the work is reproduced.<sup>83</sup> An exception to this rule lies in the fact that a disc jockey is not expected to announce the name of the composer, lyric writer, arranger, etc., of every record he or she plays in a discotheque.<sup>84</sup> The right of integrity on the other hand involves the right of the author to object to any distortion of his or her work, which will affect the author's literary and artistic reputation.<sup>85</sup> A good illustration can be found in the objection by the author of a non-pornographic novel to the adaptation of the novel into a pornographic film.

Moral rights are usually unaffected by the transfer of the author's economic rights. This is due to the personal nature of moral rights.<sup>86</sup> It is not unusual for the economic rights in a work to belong to one person (for example, a film producer or a publisher) and the moral rights to belong to someone else (the individual creator of a film script or novel). According to section 18 (1) of the Copyright Act of Trinidad and Tobago-

“Independently of his copyright, and even where he is no longer the owner of the copyright, the author of a work shall have the right-

- (a) to have his name indicated prominently on the copies and in connection with any public use of his work, as far as practicable;
- (b) to not have his name indicated on the copies and in connection with any public use of his work;
- (c) to use a pseudonym;

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<sup>82</sup> Coenraad Visser and Tana Pistorius, *supra*, 1.5.26.

<sup>83</sup> Introduction to Intellectual Property (DL-101), *supra*, 15.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> Coenraad Visser and Tana Pistorius, *supra*, 1.5.27.

- (d) 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 honour and reputation.”.

Section 18(3) of the Trinidadian Act touches restates the principle that even though moral rights cannot be transferred, they can be subjected to a waiver. The heirs of the author are empowered to maintain the moral rights of the author after the author’s death, at least until the expiry of the author’s economic rights.<sup>87</sup> In other words, the minimum lifespan of moral rights is the full duration of the copyright in the protected work. Only human authors qualify for moral rights protection.<sup>88</sup> The laws of the country where protection is claimed shall determine the means of redress open to owners of moral rights.<sup>89</sup> Infringements of moral rights are usually actionable as contraventions of copyright and the persons entitled to such moral rights are deemed to be the owners of the copyright in question.<sup>90</sup> Infringements of moral rights may also give rise to infringement of personality rights at common law.<sup>91</sup>

## **TERM OF PROTECTION**

The general term of copyright protection granted by the Convention is the life of the author and fifty years from the end of the year of his death.<sup>92</sup> The Convention then gives certain specific terms of protection for certain categories of works. In the case of cinematographic works, the term of protection is fifty years from the end of year in which the work became available to the public with the author’s consent.<sup>93</sup> If the cinematographic work has not been made available to the public within fifty years from the making of the work, the term of protection shall be fifty years from the end of the year of such making.<sup>94</sup>

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<sup>87</sup> Article 6<sup>bis</sup>(2).

<sup>88</sup> Essential Elements of Intellectual Property, *supra*, 7.

<sup>89</sup> Article 6<sup>bis</sup>(3).

<sup>90</sup> See section 20(2) of the South African Copyright Act (No. 98 of 1978).

<sup>91</sup> Coenraad Visser and Tana Pistorius, *supra*, 1.5.27.

<sup>92</sup> Article 7(1).

<sup>93</sup> Article 7(2).

<sup>94</sup> *Ibid*.

The term of protection for anonymous and pseudonymous works is fifty years from the end of the year in which the work became lawfully available to the public.<sup>95</sup> If the identity of the author of an anonymous or pseudonymous work is revealed to the public, the general term of protection will apply.<sup>96</sup> Where there is a reasonable presumption that the author of an anonymous or pseudonymous work has been dead for fifty years, the obligation of Union countries to protect such a work shall lapse.<sup>97</sup> Countries of the Union are given the discretion to prescribe the terms of protection of photographic works and works of applied art protected as artistic works.<sup>98</sup> However, the minimum term of protection of a photographic work, or a work of applied art protected as an artistic work shall extend to the end of a period of twenty-five years calculated from the making of such work.<sup>99</sup>

Countries of the Union are free to grant terms of protection that are longer than those provided by the Convention.<sup>100</sup> The term of protection of a work shall not exceed the term fixed by the country of origin of the work, unless otherwise prescribed by the law of the country where protection is claimed.<sup>101</sup> In the case of works of joint authorship, the terms of protection counted from the death of the author are calculated from the death of the last surviving author.<sup>102</sup>

The Copyright Act of Belize has virtually the same terms of protection as those contained in the Convention. However, there are certain differences between the terms of protection in the Belizean legislation and the Convention. The Belizean Act gives photographic works a longer term of protection. The Belizean Act includes photographic works in the definition of “artistic works”,<sup>103</sup> and protects artistic works for a period of fifty years from the end of the calendar year in which the author dies.<sup>104</sup> With regard to anonymous works, the Belizean Act explicitly states that the general term of protection shall not apply if the identity of the author

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<sup>95</sup> Article 7(3).

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> Article 7(4).

<sup>99</sup> Ibid.

<sup>100</sup> Article 7(6).

<sup>101</sup> Article 7(8).

<sup>102</sup> Article 7<sup>bis</sup>.

<sup>103</sup> Section 3(1).

<sup>104</sup> Section 10(1).

becomes known after the end of a period of fifty years from the end of the calendar year in which the work was first made available to the public.<sup>105</sup>

In the case of works of joint authorship, references to the identity of the author becoming known shall be construed as references to the identity of any of the joint authors becoming known.<sup>106</sup> Further, the Belizean Act clarifies the fact that a reference to the death of the author for purposes of calculating the terms of protection of a work of joint authorship, in cases in which the identity of only some of the authors is known, shall be construed as a reference to the death of the last known author.<sup>107</sup> The Belizean Act protects a computer-generated work up to the end of a period of fifty years from the end of the calendar year in which the work was made.<sup>108</sup> The Belizean Act extends the protection given by the Convention to cinematographic works to include sound recordings. Thus, the term of protection for sound recordings is fifty years from the end of year in which the work became available to the public.<sup>109</sup> If the sound recording has not been made available to the public within fifty years from the making of the work, the term of protection shall be fifty years from the end of the year of such making.<sup>110</sup>

The Belizean Act protects a broadcast or a cable programme, or a repeat broadcast or repeat cable programme, for a term of fifty years from the end of the calendar year in which the broadcast was made or the cable programme was included in a cable programme service.<sup>111</sup> With regard to typographical arrangements of published editions, such works are protected in Belize up to the end of a term of twenty-five years from the end of the calendar year in which the edition was first published.<sup>112</sup> The typographical arrangement of a published edition is defined as “a published edition of the whole or any part of one or more literary, dramatic, musical or artistic works”.<sup>113</sup> The Belizean Act generally disregards unauthorized acts, when determining whether a work has been published or made available to the public.<sup>114</sup>

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<sup>105</sup> Section 10(2).

<sup>106</sup> Section 10(5)(b).

<sup>107</sup> Section 10(5)(a)(ii).

<sup>108</sup> Section 10(4).

<sup>109</sup> Section 11(1).

<sup>110</sup> Ibid.

<sup>111</sup> Section 12(1) and (2).

<sup>112</sup> Section 13.

<sup>113</sup> Section 3(1).

<sup>114</sup> Section 10(3) and 11(2).

## **EXCLUSIVE RIGHTS AND EXCEPTIONS**

### **Translation and Reproduction**

The Convention gives authors of literary and artistic works the exclusive right to translate or authorize translations of their works during the term of protection of their original works.<sup>115</sup> Translation refers to the expression of a work in a language that is different from the language of the original version.<sup>116</sup> The Convention also gives authors of literary and artistic works the exclusive right to authorize all types of reproduction of their works.<sup>117</sup> The reproduction right is basically the exclusive right of the copyright owner to make copies of the protected work.<sup>118</sup> This exclusive right of reproduction has been described as the most basic right under copyright.<sup>119</sup> Section 8 (1) (a) and (b) of the Copyright Act of Trinidad and Tobago gives the owner of copyright, the exclusive right to authorize or prohibit the reproduction or translation of the work.

### **Special Exceptions**

Countries of the Union are free to legislate exceptions to the reproduction right in certain special cases.<sup>120</sup> However, such exceptions should not conflict with a normal exploitation of the work and should not unreasonably prejudice the author's legitimate interests.<sup>121</sup> The Trinidadian legislation permits an individual to make a single and private reproduction of a published work without the authorization of the copyright owner.<sup>122</sup> Such reproduction shall only be made for personal purposes.<sup>123</sup> However, such exception does not extend to the reproduction-

- “(a) of a work of architecture in the form of a building or other construction;

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<sup>115</sup> Article 8.

<sup>116</sup> Essential Elements of Intellectual Property, *supra*, 7.

<sup>117</sup> Article 9(1).

<sup>118</sup> Bryan A. Garner, *Black's Law Dictionary*, Seventh Edition, 1305.

<sup>119</sup> Essential Elements of Intellectual Property, *supra*, 5.

<sup>120</sup> Article 9(2).

<sup>121</sup> *Ibid.*

<sup>122</sup> Section 9(1).

<sup>123</sup> *Ibid.*

- (b) in the form of reprography of the whole or a substantial part of a book or of a musical work in the form of notation;
- (c) of the whole or a substantial part of a database;
- (d) of a computer program, except as provided in section 14; and
- (e) of any work in cases where reproduction would conflict with a normal exploitation of the work or would otherwise unreasonably prejudice the legitimate interests of the owner of the copyright.”<sup>124</sup>

A work lawfully made available to the public can be quoted in another work, however, such quotation should not be done in an unfair manner and the extent of the quotation should not exceed that justified by the purpose.<sup>125</sup> Section 10(1) of the Trinidadian Act permits the quotation of a short part of a published work without the authorization of the owner. The Act goes on to state that such quotation should be compatible with fair dealing and should not exceed the extent justified by the purpose.<sup>126</sup> Also, if the work being quoted indicates the name of the author, the quotation should be accompanied by an indication of such name.<sup>127</sup>

Countries of the Union are free to enact legislation or conclude special agreements allowing the utilization of literary or artistic works in the form of illustration in publications, broadcasts or sound or visual recordings for teaching.<sup>128</sup> However, the extent of such utilization should not exceed that justified by the purpose and should not be incompatible with fair practice.<sup>129</sup> Where the work of an author is quoted or utilized as illustrations for teaching, the source, and the name (if it appears on the work), of the author shall be mentioned.<sup>130</sup>

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<sup>124</sup> Section 9(2).

<sup>125</sup> Article 10(1).

<sup>126</sup> Section 10(1).

<sup>127</sup> Section 10(2).

<sup>128</sup> Article 10(2).

<sup>129</sup> Ibid.

<sup>130</sup> Article 10(3).

The Copyright Act of Trinidad and Tobago allows short parts of published works to be reproduced, without the authorization of the copyright owner, for teaching purposes by way of illustration.<sup>131</sup> The reproduction can be done by writing or by sound or visual recordings.<sup>132</sup> However, such reproduction must be compatible with fair dealing and must not exceed the extent justified by the purpose.<sup>133</sup> The Trinidadian legislation permits the reproduction by way of reprography of published articles, short works or short extracts from works, for purposes of face-to-face teaching in educational institutions.<sup>134</sup> The reproduction must not serve any direct or indirect commercial gain and must not exceed the extent justified by the purpose.<sup>135</sup> Such reproduction must be done in isolated cases, and must only be repeated in separate and unrelated occasions.<sup>136</sup> Also, the educational institution must not be aware of any collective licence covering the work.<sup>137</sup> Section 11 (2) of the Trinidadian Act states that where a work is reproduced for teaching purposes, the source of the work and the name of the author shall be indicated as far as practicable on copies of the work.

Countries of the Union may allow articles published in the print media on current economic, political or religious topics, and broadcasted works on such topics, to be reproduced by the press, broadcasted or communicated to the public by wire.<sup>138</sup> However, such reproduction, broadcasting or communication should not be allowed if it has been expressly reserved by the owner, and the source of the work must always be clearly indicated.<sup>139</sup> This provision of the Convention is replicated in section 13 (a) of the Trinidadian Act. The Trinidadian Act also permits a lecture, address, sermon or other similar work delivered in public, to be reproduced by the print media, broadcasted or otherwise communicated to the public.<sup>140</sup> This permission is subject to an obligation to indicate the source of the work and the name of the author as far as practicable and not to exceed the extent justified by the purpose of providing current information.<sup>141</sup>

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<sup>131</sup> Section 11(1)(a).

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Section 11(1)(b).

<sup>135</sup> Ibid.

<sup>136</sup> Ibid., sub-paragraph (i).

<sup>137</sup> Ibid., sub-paragraph (ii).

<sup>138</sup> Article 10<sup>bis</sup>(1).

<sup>139</sup> Ibid.

<sup>140</sup> Section 13(c).

<sup>141</sup> Ibid.

## **Works Situated in Public Places**

The countries of the Union are also free to legislate the conditions under which the reporting of current events by means of photography, cinematography, broadcasting or communication to the public by wire may incorporate (to an extent justified by informatory purposes) literary or artistic works seen or heard during the event.<sup>142</sup> The Trinidadian legislation allows such incorporation on the condition that the source of the work and the name of the author are indicated as far as practicable.<sup>143</sup> The Trinidadian legislation also exempts from copyright infringement, the inclusion of an artistic work, which is permanently situated in a public place or in premises open to the public, in a work, broadcast or communication to the public.<sup>144</sup> The inclusion of an artistic work in a work, broadcast or other communication to the public, as background or incidental material is also exempted from copyright infringement.<sup>145</sup>

## **Public Performance and Other Communication to the Public**

The Convention gives authors of dramatic, dramatico-musical and musical works the exclusive right of authorizing any type of public performance of their works and any communication to the public of performances of their works.<sup>146</sup> A public performance of a work has been described 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”.<sup>147</sup> Authors of dramatic or dramatico-musical works are also given the exclusive right of authorizing translations of their works during the terms of protection of such works.<sup>148</sup> Section 8 (1) (h), (j) and (b) of the Trinidadian Act gives owners of the copyright in such works the right to do, authorize, or prohibit the public performance, communication to the public or translation of such works.

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<sup>142</sup> Article 10<sup>bis</sup>(2).

<sup>143</sup> Section 13(b).

<sup>144</sup> Section 17(a).

<sup>145</sup> Section 17(b).

<sup>146</sup> Article 11(1).

<sup>147</sup> Essential Elements of Intellectual Property, *supra*, 6.

<sup>148</sup> Article 11(2).

According to Article 11bis(1) of the Convention, countries of the Union are obliged to give authors of literary and artistic works the exclusive right of authorizing-

- “(i) the broadcasting of their works and the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;
- (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;
- (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.”.

Union countries are free to determine the conditions under which the rights referred to in Article 11bis (1) shall be exercised, however, such conditions shall only apply in the countries that have prescribed them.<sup>149</sup> Further, such conditions shall not prejudice the moral rights of the author or the author’s right to obtain an equitable remuneration.<sup>150</sup> The Copyright Act of Trinidad and Tobago gives the author of a literary or artistic work the exclusive and general right to do, authorize, or prohibit the broadcasting or public communication of his or her work.<sup>151</sup> The Trinidadian legislation does not specify the type of broadcast or public communication. Also, the conditions prescribed by the legislation do not adversely affect the moral rights of the author or the author’s right to an equitable remuneration.

Unless otherwise stipulated, an authorization granted by virtue of Article 11bis(1) does not include a permission to record the broadcasted work by means of audio or visual equipment.<sup>152</sup> Countries of the Union may also determine the regulations governing ephemeral (temporary) recordings made by means of the facilities of a broadcasting organization for the broadcasts of the organization.<sup>153</sup> Such regulations may also permit the

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<sup>149</sup> Article 11<sup>bis</sup>(2).

<sup>150</sup> Ibid.

<sup>151</sup> Section 8(1)(i) and (j).

<sup>152</sup> Article 11<sup>bis</sup>(3).

<sup>153</sup> Ibid.

preservation of ephemeral recordings of exceptional documentary character in official archives.<sup>154</sup>

Section 12 (5) (a) of the South African Copyright Act states that copyright in a literary and musical work is not infringed by reproduction by the broadcaster through the broadcaster's own facilities, intended exclusively for lawful broadcasts and destroyed before the expiration of six months after such reproduction or such longer period agreed to by the copyright owner. The broadcaster may preserve, in the broadcaster's archive, a reproduction that has an exceptional documentary nature, however, such reproduction shall not be used for broadcasting or other purposes without the consent of the copyright owner.<sup>155</sup>

### **Adaptations and Other Alterations**

The Convention gives authors of literary and artistic works the exclusive right of authorizing adaptations, arrangements and other alterations of their works.<sup>156</sup> An adaptation of a work occurs when the work is modified in order to create another work.<sup>157</sup> A good example can be found in the adaptation of a novel into a movie. Such an adaptation occurred when Alex Haley's best-selling novel, "Roots", was modified into a television series of the same name. Further, authors of literary and artistic works are also given the exclusive right of authorizing-

- “(i) the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced;
- (ii) the public performance and communication to the public by wire of the works thus adapted or reproduced.”<sup>158</sup>

A person wishing to adapt a cinematographic work derived from a literary or artistic work, into another artistic work, must seek the authorization of both the author of the literary or artistic work and the author of the cinematographic work derived from the literary or artistic work.<sup>159</sup>

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<sup>154</sup> Ibid.

<sup>155</sup> Section 12(5)(b).

<sup>156</sup> Article 12.

<sup>157</sup> Essential Elements of Intellectual Property, *supra*, 7.

<sup>158</sup> Article 14(1).

<sup>159</sup> Article 14(2).

The Copyright Act of Trinidad and Tobago vests in the copyright owner the exclusive right to do, authorize, or prohibit the adaptation, arrangement or other transformation of the work.<sup>160</sup>

### **“DROIT DE SUITE”**

The author of an original work of art or an original manuscript, or his or her personal representatives, shall always enjoy an inalienable right to an interest in any sale of the work, after the first transfer by the author of the work.<sup>161</sup> This right is given to copyright owners and their heirs by the laws of countries such as France.<sup>162</sup> This right is founded on the rationale that copyright owners are frequently unable to sell their works for a fair price at the time such works were created.<sup>163</sup> However, the value of such works can appreciate to very high levels in the future.<sup>164</sup> A good example of such an unfortunate copyright owner is the famous Dutch painter, Van Gogh.<sup>165</sup> During his lifetime, he had great trouble selling his works, however, his works now sell for millions of pounds.<sup>166</sup>

This protection is dependent on whether the author’s country provides for such a protection, and to the extent permitted by the country where the author claims such protection.<sup>167</sup> Countries are free to determine, by national legislation, the amount of such an interest and the procedure for collecting the amount.<sup>168</sup>

### **ENFORCEMENT OF PROTECTED RIGHTS**

For a person to be regarded, in the absence of proof to the contrary, as the author of a literary or artistic work, and also to be entitled to institute infringement proceedings in countries of the Union, that person’s name must

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<sup>160</sup> Section 8(1)(c).

<sup>161</sup> Article 14<sup>ter</sup>(1).

<sup>162</sup> David Bainbridge, *Intellectual Property*, Fourth Edition, Financial Times/Pitman Publishing, 261.

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup> Article 14<sup>ter</sup>(2).

<sup>168</sup> Article 14<sup>ter</sup>(3).

appear on the work in the usual manner.<sup>169</sup> This provision also applies to authors using pseudonyms that leave no doubt as to the identity of the author.<sup>170</sup> These provisions of the Convention are replicated in the Copyright Act of Trinidad and Tobago and are collectively referred to as the presumption of authorship.<sup>171</sup>

The maker of a cinematographic work, in the absence of proof to the contrary, is the person or corporation whose name is indicated on the work.<sup>172</sup> Such person shall be entitled to enforce the protected rights under the Convention. Section 36 (2) of the Trinidadian legislation states that-

“...where copies of the audio-visual work, as issued to the public bear a statement-

- (a) that a named person was the author or director of the audiovisual work;
- (b) that a named person was the owner of copyright in the audiovisual work at the date of issue of the copies; or
- (c) that the audiovisual work was first published in a specified year or in a specified country,

the statement shall be admissible as evidence of the facts stated and shall be presumed to be correct until the contrary is proved.”.

According to Article 15 (3) of the Convention, if the identity of the author of an anonymous or pseudonymous work is not known, the publisher whose name is indicated on the work shall, in the absence of proof to the contrary, be entitled to enforce the author’s rights as the representative of the author. This Convention provision is covered under the presumption of authorship provision of the Trinidadian legislation.<sup>173</sup> Article 15 (3) of the Convention further states that the right of the publisher to enforce the author’s rights shall terminate if the author reveals his or her identity.

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<sup>169</sup> Article 15(1).

<sup>170</sup> Ibid.

<sup>171</sup> Section 35.

<sup>172</sup> Article 15(2).

<sup>173</sup> Section 35.

Where there is a strong presumption that a national of a Union country is the author of an anonymous unpublished work, the Union country shall be free to designate, in its national legislation, the competent authority that shall be entitled to enforce the author's rights in the countries of the Union.<sup>174</sup> Any Union country that makes such a designation shall issue a written declaration to the Director General giving full details concerning the designated competent authority.<sup>175</sup> The Director General shall immediately communicate this notification to all Union countries.<sup>176</sup>

Countries of the Union are empowered to seize infringing copies of any work that enjoys protection in such countries.<sup>177</sup> Infringing copies of such works imported from a country that does not protect the work are also liable to seizure.<sup>178</sup> The Copyright Act of Belize empowers a copyright owner or any person authorized by the copyright owner to seize infringing copies of the copyright owner's work.<sup>179</sup> Such infringing copies can only be seized if they were used in the course of trade.<sup>180</sup>

However, the exercise of the right to seize infringing copies of a work must be done within the realm of the law. Earlier this year, small traders in South Africa virtually united against an authorized agent of major international corporations such as Sony, Warner Brothers, Paramount Pictures, Universal Pictures, and several film distribution companies in South Africa.<sup>181</sup> The agent, the South African Federation Against Copyright Theft (Safact), had been actively seizing CD-ROMS, DVDs, Play Stations and other computer game devices sold by the small retailers.<sup>182</sup> In conducting its raids, Safact utilized personnel from the South African Police, the Department of Trade and Industry, and the South African Border Police.<sup>183</sup> These raids led to a number of court actions against Safact for

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<sup>174</sup> Article 15(4)(a).

<sup>175</sup> Article 15(4)(b).

<sup>176</sup> Ibid.

<sup>177</sup> Article 16(1).

<sup>178</sup> Article 16(2).

<sup>179</sup> Section 38(1).

<sup>180</sup> Ibid.

<sup>181</sup> Copyright Cowboys Under Fire, Mail and Guardian, Posted on the Web May 2, 2002, [www.allAfrica.com](http://www.allAfrica.com), 1.

<sup>182</sup> Ibid.

<sup>183</sup> Ibid., 2.

confiscating merchandise without showing search warrants or without producing a power of attorney from the copyright owners.<sup>184</sup>

## **GREATER PROTECTION AND SPECIAL AGREEMENTS**

The Convention does not prejudice any claim to any greater protection provided for in the copyright legislation of any Union country.<sup>185</sup> According to Article 20 of the Convention, countries of the Union are also free to enter into special agreements, among themselves, which grant authors more protection than those granted by the Convention or which do not contradict the provisions of the Convention. The Convention also saves existing agreements that satisfy these criteria.<sup>186</sup>

An example of a special agreement under Article 20 of the Convention is the WIPO Copyright Treaty (WCT), which was adopted by a Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions convened in Geneva, Switzerland, in the latter half of 1996. Professor Cornish accurately described the background to the adoption of this treaty, when he wrote that-

“Over the last five years, the amazing potential of the Internet as a source of online services for education, information, entertainment, business and government has flamed around the world and its character has changed rapidly...The publishing, record and film industries face at least partial revolutions in their methods of delivery and they are each searching actively for secure techniques by which material can be obtained from authorized sites only on payment of a fee equivalent to the purchase or hiring of a hard copy of the material. At the same time they fear the appearance of pirate sites, and the downloading and distribution of illicit copies...however, the possibilities within the new technology for monitoring the use of material is also considerable....

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<sup>184</sup> Ibid., 2 and 3.

<sup>185</sup> Article 19.

<sup>186</sup> Article 20.

Major investigations of the position of copyright material on information superhighways were launched...internationally... at WIPO.”<sup>187</sup>

These investigations focused on extending the scope of the Convention because of the rapid advances in technology. It is no wonder that the WCT and the other product of these investigations, the WIPO Performances and Phonograms Treaty (WPPT), are jointly referred to as the WIPO Internet Treaties.

### **SPECIAL PROVISIONS REGARDING DEVELOPING COUNTRIES**

The Convention includes certain special provisions regarding developing countries in the Appendix that is attached to the Convention. These provisions resulted from the clamour by developing countries during the 1960s for more changes to the Convention.<sup>188</sup> As stated earlier, the Appendix was added to the Convention by the Paris 1971 Revisions of the Convention.

Countries classified as developing countries by the United Nations which accept the Convention, may notify the Director General of WIPO at the time of depositing their instrument of ratification or accession, or may at any time after such deposit declare, that they are availing themselves of the provisions of Article II or III or of both these Articles.<sup>189</sup> Such a country may instead of relying on the provisions of Article II, make a declaration under Article V (1)(a).<sup>190</sup> A country making a declaration under Article V is barred from subsequently relying on the provisions of Article II, even if it withdraws the declaration under Article V.<sup>191</sup>

If the Director General is notified of such a declaration before the expiration of a period of ten years calculated from the commencement of Articles 1 to 21 and the Appendix, the declaration shall be effective until the expiration of the ten-year period.<sup>192</sup> A country availing itself of the

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<sup>187</sup> W.R. Cornish, *Intellectual Property: Patents, Copyrights, Trade Marks and Allied Rights*, 4<sup>th</sup> Ed. (1999), 9-36; See Coenraad Visser and Tana Pistorius, *supra*, 1.2.8.

<sup>188</sup> Paul Torremans and Jon Holyoak, *supra*, 11.

<sup>189</sup> Article I(1).

<sup>190</sup> *Ibid.*

<sup>191</sup> Article V(1)(c).

<sup>192</sup> Article I(2)(a).

provisions of Article II or III may renew its declaration (wholly or partly) for successive ten-year periods by depositing a notification with the Director General.<sup>193</sup> Such notification should be deposited within a period of not more than fifteen months and not less than three months before the expiration of the existing ten-year period.<sup>194</sup>

If the Director General is notified of the declaration after the expiration of a period of ten years calculated from the commencement of Articles 1 to 21 and the Appendix, the declaration shall be effective until the expiration of the existing ten-year period.<sup>195</sup> Such a declaration may also be renewed for periods of ten years each by notifying the Director General within a period of not more than fifteen months and not less than three months before the expiration of the existing ten-year period.<sup>196</sup>

### **Article II Licenses**

A country that is relying on Article II shall be entitled to grant non-transferable and non-exclusive licenses for the translation of works published in printed or similar forms of reproduction, instead of relying on the exclusive right of translation under Article 8.<sup>197</sup> The guiding principle in the granting of such licenses is that the translation should only be done for purposes of teaching, scholarship or research.<sup>198</sup> Such licenses are granted by the competent authority of the Union country subject to certain conditions and to Article IV.<sup>199</sup> A country of the Union shall grant such a licence, if the owner of the right of translation of the work has not published, or authorized the publication of, the work in a language in general use in the Union country after the expiration of a period of three years calculated from the date of first publication of the work.<sup>200</sup> Countries are free to extend the three-year period in their legislation.<sup>201</sup>

The period of three years shall not be applicable in the case of translations into a language that is not generally used in a developed country

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<sup>193</sup> Ibid.

<sup>194</sup> Ibid.

<sup>195</sup> Article I(2)(b).

<sup>196</sup> Ibid.

<sup>197</sup> Article II (1).

<sup>198</sup> Article II (5).

<sup>199</sup> Article II (1); Article IV is dealt with later on in the Paper, under the heading "Provisions Common to Articles II and III Licenses".

<sup>200</sup> Article II (2)(a).

<sup>201</sup> Ibid.

of the Union.<sup>202</sup> In such cases, translations can be made after the expiration of a period of one year.<sup>203</sup> A country relying on Article II may, with the unanimous agreement of certain developed Union countries, authorize the translation of the work into a language that is generally used in such developed countries (excluding English, French or Spanish) after the expiration of a period of one year calculated from the date of first publication of the work.<sup>204</sup> A licence under Article II may also be granted if copies of the translated work published in the language concerned are no longer available.<sup>205</sup>

According to Article II (4)(a)-

“(a) No license obtainable after three years shall be granted under this Article until a further period of six months has elapsed, and no licence obtainable after one year shall be granted under this Article until a further period of nine months has elapsed

- (i) from the date on which the applicant complies with the requirements mentioned in Article IV(1), or
- (ii) where the identity or the address of the owner of the right of translation is unknown, from the date on which the applicant sends, as provided for in Article IV(2), copies of his application submitted to the authority competent to grant the licence.”.

A country relying on Article II shall not grant a licence under that Article, if the owner of the translation right publishes, or authorizes the publication of, the work in the language in respect of which the application was made during the period of six or nine months referred to in Article II (4)(a).<sup>206</sup> Also, a licence already granted should be terminated, if the owner of the right of translation publishes, or authorizes the publication of, the same work in the same language in respect of which the licence was granted.<sup>207</sup> The price of such a translation by the right holder should be

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<sup>202</sup> Article II (3)(a).

<sup>203</sup> Ibid.

<sup>204</sup> Article II (3)(b).

<sup>205</sup> Article II (2)(b).

<sup>206</sup> Article II (4)(b).

<sup>207</sup> Article II (6).

similar to that normally charged for comparable works in the country that granted the licence.<sup>208</sup> Existing copies made under the terminated licence may continue to be sold until their stock is exhausted.<sup>209</sup>

### **Article III Licenses**

A country that is relying on Article III shall be entitled to grant non-transferable and non-exclusive licenses for the reproduction of works, instead of relying on the exclusive right of reproduction under Article 9.<sup>210</sup> Such licenses shall be granted by the competent authority of the country, subject to certain conditions and to Article IV.<sup>211</sup>

Article III applies to works published in printed or similar forms of reproduction, audio-visual reproductions of lawfully made audio-visual fixations including any protected works incorporated in such works, and translations of incorporated text into a language generally used in the country in which the application for the licence is made.<sup>212</sup> The audio-visual fixations in question should only be prepared and published for use related to systematic instructional activities.<sup>213</sup>

A national of such country shall be entitled to obtain a licence to reproduce and publish a work to which this Article applies, if copies of the work have not been distributed in the country, by the owner of the reproduction right or with his authorization, and at the price normally charged for such work in that country, before the expiration of five years or a longer period calculated from the date of first publication of a particular edition of the work.<sup>214</sup> The price charged by the licensee must be equal to, or lower than, the price normally charged for such work in that country.<sup>215</sup> Also, the licensee shall only publish the work in relation to systematic instructional activities.<sup>216</sup> The period of five years shall not apply for works of natural and physical sciences (including mathematics) and works of technology, or for works of fiction, poetry, drama, and music and for art

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<sup>208</sup> Ibid.

<sup>209</sup> Ibid.

<sup>210</sup> Article III(1).

<sup>211</sup> Ibid.

<sup>212</sup> Article III(7).

<sup>213</sup> Article III(7)(b).

<sup>214</sup> Article III(2)(a).

<sup>215</sup> Ibid.

<sup>216</sup> Ibid.

books.<sup>217</sup> The period for works of natural and physical sciences, and works of technology, shall be three years, while the period for works of fiction, poetry, drama, music, and for art books shall be seven years.<sup>218</sup>

Where an edition of the work has been distributed, by the owner of the reproduction right or with his authorization, at the price normally charged for such work in that country, a licence to reproduce and publish the work may still be granted if, after the expiration of the applicable five year or three year or longer period, no authorized copies of that work have been sold for a period of six months in the country at the price normally charged for such work in that country.<sup>219</sup>

According to Article III (4)(a)-

“(a) No license obtainable after three years shall be granted under this Article until a period of six months has elapsed

- (i) from the date on which the applicant complies with the requirements mentioned in Article IV(1), or
- (ii) where the identity or the address of the owner of the right of reproduction is unknown, from the date on which the applicant sends, as provided for in Article IV (2), copies of his application submitted to the authority competent to grant the license.”.

Article III (4)(b) covers licenses obtainable after periods not exceeding three years and where Article IV (2) is applicable. In such a case, a license under Article III shall not be granted until after a period of three months calculated from the date of dispatch of the copies of the application.<sup>220</sup> A license under Article III shall not be granted, if an edition of the work has been distributed, by the owner of the reproduction right or with his authorization, at the price normally charged for such work in that country, during the period of six or three months referred to in Article III

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<sup>217</sup> Article III(3).

<sup>218</sup> Ibid.

<sup>219</sup> Article III(2)(b).

<sup>220</sup> Article III(4)(b).

(4)(a) or (b).<sup>221</sup> Also, a license under Article III shall not be granted, if the owner of the reproduction right has withdrawn all copies of the edition from circulation.<sup>222</sup>

With regard to translations, a license to reproduce and publish a translation of a work under Article III shall not be granted if the translation was not published by the owner or with his consent, or if the translation is not in a language that is generally used in the country in which the application for the license is made.<sup>223</sup>

A license already granted should be terminated, if the owner of the right of reproduction distributes, or authorizes the distribution of, the same work in the country applying Article III and in the same language in respect of which the license was granted.<sup>224</sup> The price of such a translation by the right holder should be similar to that normally charged for comparable works in the country that granted the license.<sup>225</sup> Existing copies made under the terminated license may continue to be sold until their stock is exhausted.<sup>226</sup>

### **Provisions Common to Articles II and III Licenses**

A license under Article II or III may only be granted if the applicant proves that he has applied for authorization from the owner of the right, to make, or to reproduce, and publish the translation or edition and has been denied such authorization, or that he has made sufficient and unsuccessful efforts to locate the owner.<sup>227</sup> If the applicant cannot locate the owner, the applicant shall send copies of his application by registered mail to the publisher identified on the work and to any designated national or international information center.<sup>228</sup> The designation of such center must have been done by notification deposited with the Director General by the Government of the country that is believed to be the publisher's principal place of business.<sup>229</sup>

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<sup>221</sup> Article III(4)(c) .

<sup>222</sup> Article III(4)(d).

<sup>223</sup> Article III(5).

<sup>224</sup> Article III(6).

<sup>225</sup> Ibid.

<sup>226</sup> Ibid.

<sup>227</sup> Article IV(1).

<sup>228</sup> Article IV(2).

<sup>229</sup> Ibid.

A person granted a license under Article II or III should indicate the name of the author, and the title of the work, on all published copies of the translation or reproduction.<sup>230</sup> A license granted under Article II or III shall be valid only for domestic publication of the translation or reproduction.<sup>231</sup> Such a license shall not be valid for exports.<sup>232</sup> The Convention defines the word “export” as including the sending of copies from a developing territory (a dependent territory) to the country that has made a declaration for that territory under Article I.<sup>233</sup> Article IV (4)(c) states that-

“Where a governmental or other public entity of a country which has granted a license to make a translation under Article II into a language other than English, French or Spanish sends copies of a translation published under such license to another country, such sending of copies shall not, for the purposes of subparagraph (a), be considered to constitute export if all the following conditions are met-

- (i) the recipients are individuals who are nationals of the country whose competent authority has granted the license, or organizations grouping such individuals;
- (ii) the copies are to be used only for the purpose of teaching, scholarship or research;
- (iii) the sending of the copies and their subsequent distribution to recipients is without any commercial purpose;
- (iv) the country to which the copies have been sent has agreed with the country whose competent authority has granted the license to allow the receipt, or distribution, or both, and the Director General has been notified of the agreement by the Government of the

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<sup>230</sup> Article IV(3).

<sup>231</sup> Article IV(4)(a).

<sup>232</sup> Ibid.

<sup>233</sup> Article IV(4)(b).

country in which the license has been granted.”.

A copy of a work published under an Article II or III license shall contain a notice in the relevant language stating that such copy is only available for distribution in the country or territory covered by the license.<sup>234</sup> An Article II or III license must provide for the payment of just compensation to the copyright owner.<sup>235</sup> Such compensation shall be determined by the normal royalty rates for voluntary licenses between persons in the country granting the license and the country of the copyright owner.<sup>236</sup> The competent authority of the country granting the license shall ensure that national currency regulations should not hinder the transmittal of the compensation in an internationally convertible currency or its equivalent.<sup>237</sup> Union countries shall make provision in their national legislation mandating the correct translation, or accurate reproduction, of the work or particular edition that is subject to the Article II or III license.<sup>238</sup>

### **Addendum**

As was stated earlier, the Special Provisions Regarding Developing Countries contained in the Appendix to the Convention, resulted from the pressure applied by developing countries during the 1960’s.<sup>239</sup> However, these special provisions have been described by two notable intellectual property academics as containing “only minimal concessions with a lot of strings attached to them....”<sup>240</sup> We posit the view that by allowing certain foreign works, that have not been made available in a developing country, to be translated and reproduced in that country under a license, the drafters of the Appendix sought to strike an equitable balance between the interests of developing countries and copyright owners. The Appendix contained serious concessions with equitable strings attached to them.

It is worth noting that most developing countries (Belize being a good example) have opted to fully implement the provisions of the Convention, rather than availing themselves of the facilities provided by the Appendix.

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<sup>234</sup> Article IV(5).

<sup>235</sup> Article IV(6)(a)(i).

<sup>236</sup> Ibid.

<sup>237</sup> Article IV(6)(a)(ii).

<sup>238</sup> Article IV(6)(b).

<sup>239</sup> Paul Torremans and Jon Holyoak, *supra*, 11.

<sup>240</sup> Ibid.

Admittedly, the main reason for such countries opting out of the Appendix might well be the provision in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) requiring Contracting States to comply with most of the provisions of the Convention. Nevertheless, it can be argued with a lot of merit, that such countries are not averse to the idea of fully implementing the provisions of the Convention and that this fact is a far more plausible explanation for them opting out of the Appendix, rather than the alleged “minimal” nature of the concessions offered by the Appendix. As was highlighted earlier, the Convention balances the rights given to owners of protected works with a series of exceptions aimed at promoting worthy developmental causes like education.

## **CONCLUSION**

The Convention can best be described as the most versatile international agreement in the arena of copyright law. It can also be described as the most dominant international copyright agreement on the basis of the fact that it has virtually eclipsed the rival Universal Copyright Convention.<sup>241</sup>

As was stated earlier, the Convention protects a host of literary and artistic works thereby ensuring that the creators of these protected works recover some compensation for the time, money, effort and thought they invested into the creation of such works. This protection has fostered the growth of copyright industries such as the music industry into multi-billion dollar businesses.<sup>242</sup>

This success of the music industry has not only benefited developed countries but also developing countries as well. The popularity of “world music” is a testament to this fact. World music is a brand of music from the developing world involving the fusion of traditional music and modern pop music.<sup>243</sup> Examples of world music range from calypso, soca, punta and zouk from the Caribbean, to township jive from South Africa and Soul Makossa from Cameroon.

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<sup>241</sup> Ibid., 29.

<sup>242</sup> Sales of recorded music reached the \$33.7 billion mark in 2001 – Global music sales drop, <http://news.bbc.co.uk/1/hi/English/entertainment/music/>, Tuesday, 16 April, 2002, 1.

<sup>243</sup> The Concise Oxford Dictionary, Tenth Edition, Oxford University Press, 1648.

The importance of effectively protecting intellectual property is eloquently summed up in the inscription on the cupola of the headquarters of WIPO-

“Human genius is the source of all works of art...these works are the guarantee of a life worthy of men. It is the duty of the State to ensure with diligence the protection of the arts....”<sup>244</sup>

The Convention is surely one of the best weapons in the armory of copyright protection. The adherence of developing countries such as Belize, Trinidad and Tobago and South Africa to the provisions of the Convention is a testament to this fact.

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<sup>244</sup> Essential Elements of Intellectual Property, *supra*, 1.