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THE RIGHT OF REPRODUCTION, PUBLISHING CONTRACTS AND TECHNOLOGICAL PROTECTION MEASURES IN THE DIGITAL ENVIRONMENT

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DOCTRINE

THE RIGHT OF REPRODUCTION, PUBLISHING CONTRACTS AND TECHNOLOGICAL PROTECTION MEASURES IN THE DIGITAL ENVIRONMENT

Fernando Zapata López*

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1. Historical background of the right of reproduction of literary works

Humanity's access to knowledge has increased at various times in history through the appearance of tools and inventions that allow such knowledge, in the form of individual or collective intellectual contents or creations, to be reproduced.

In this process the influence of the emergence of printing in 1455 on the development of ideas and the dissemination of knowledge cannot be underestimated – as is shown by the steady growth of the publishing industry which resulted from that invention, and which was described by James Burke and Robert Ornstein in their book *The Axemaker's Gift*.¹ These authors point out that by 1500 – that is, barely 45 years after printing was invented – there were printing presses in 245 cities from Stockholm to Palermo.

The development of information technologies – a concept that embraces the new tools that handle information at high speed, as well as the written word and ways of reproducing it – has had a deep impact on the development of humanity, its culture and forms of interaction. In addition to making communication possible, these technologies have allowed culture to be preserved in various ways. They have made it possible to fix the various expressions of intellectual creativity, and the social diffusion of information and understanding of the evolution of humanity, thereby ensuring the protection and survival of human thought.

Writing allowed memory to be conserved, and printing, which emerged in an era characterized by the growth of religions and the consolidation of States, reproduced knowledge to such an extent that it became one of the most effective tools for social transformation and so provided the social dimension of the development of the sciences and the arts.

Until then, the possibility of communication had been denied to those who could not enter into contact with others through a language such as Latin, which was the preserve of intellectuals and members of the Church, who in that way monopolized knowledge. Once different languages started to be reproduced in books, they were used far more widely and as a result knowledge spread rapidly.

a) Development of rules governing the right of reproduction

This liberation of knowledge, which was a direct consequence of the events described above, enabled sovereigns to gain control over publications through the privileges they granted to printers allowing them to reproduce particular works, as Isidro Satanowsky has explained in his book *Derecho Intelectual* (Intellectual Law).² Such privileges allowed the sovereign a degree of control over ideas and their dissemination. Gradually, this control came to resemble a monopoly which was initially vested in the publishers (Stationers' Company).³ "However (to quote Satanowsky), as publishing became a business, publishers entered into contracts with authors and started paying them, and thus pecuniary rights began to be protected indirectly through the publishing system".

¹ Burke, James; Ornstein, Robert. *The Axemaker's Gift: Technology's Capture and Control of Our Minds and Culture*. Second edition. J.P. Tarcher, Los Angeles. 1997.

² Satanowsky, Isidro. *Derecho Intelectual* [Intellectual Law]. Volume I. Tipográfica Argentina, Buenos Aires, 1954, p. 11.

³ Satanowsky, op. cit.

Subsequently, the Statute of Anne (United Kingdom) conferred an exclusive right of reproduction on the author, restricted to 21 years for books already in print and 14 years for new works, a restriction which in time also came to be applied to publishers. As soon as this new right was created, it was thus restricted in order to protect the public interest in the dissemination of works and of culture.

France adopted the same sort of measure in 1761, when the Council of State acknowledged implicitly in its decisions that authors derived their rights from their creativity and work, though it is worth noting that this decision was taken on the initiative of Parisian publishers who objected to other publishers in the French provinces being free to reproduce works already under contract to them.⁴

Similarly, Charles III of Spain established by royal decree in 1763 that “the exclusive privilege of printing a work could be granted only to its author and should be denied to all secular or regular ecclesiastical communities.”⁵

Such principles were subsequently enshrined in law in the United States which, in its Constitution of 1787, following the Anglo-Saxon approach, established the protection of published works as a privilege to promote the progress of science and the arts.

One consequence of the French Revolution was that all privileges were abolished, including those deriving from creative work. In 1791 the Assembly remedied that error first of all by granting performing rights to authors of dramatic works, and then in 1793 through a wide-ranging law that recognized artistic and literary property.

These rules were extended to the Americas in accordance with the precepts of continental law and the principles of individualism, as seen in the laws adopted in Colombia in 1834, Chile in the same year, Peru in 1841 and Mexico in 1871.

The law passed in Colombia on 10 May 1834 by the government of General Francisco de Paula Santander to protect creative works granted an exclusive right “[...] to reproduce such works by printing, engraving, lithography or by any other similar means, which are in use now or may be used in the future to produce copies [...]”.

One of the main features of this law was its open-ended nature since its application was not restricted to the means of reproduction specified, it being made clear from the outset that any form of reproduction, whether already in use or as yet unknown, would be covered by the exclusive right.

The right of reproduction continued to be protected with the adoption of the Código de Fomento (Code of Commercial Development) of 16 October 1858, by means of a general clause along the same lines as the previous one. Law No. 32 of 1886 on literary and artistic property regulated copyright, although its clauses regarding the content of copyright were not as broad as they had been previously.

The last law in this brief outline of the history of Colombian legislation prior to the current Law No. 23 of 1982 is Law No. 86 of 1946, which gives authors the exclusive right to

⁴ Satanowsky, op. cit.

⁵ Lipszyc, Delia. *Copyright and Neighbouring Rights*. UNESCO Publishing, 1999.

exploit their works by printing, lithography, and as the law states in general “... or any other means of reproduction, multiplication or dissemination”.

It can thus be seen that, from the beginning, the right of reproduction of a work has been a decisive factor in the business of publishing and the keystone of copyright, in both the continental and the Anglo-Saxon systems. The current copyright laws in Ibero-America all present similar features in this respect, as may be seen in Annex 1 to this document.

b) International rules on the right of reproduction

The international instruments that have been developed and then abandoned throughout the history of copyright are stepping stones in the advance towards the introduction of general provisions that protect the various ways of reproducing works.

As early as 1889, the inter-American copyright system began to include the right of reproduction by means of a broad provision that protected the reproduction of works in any form, linking that right to other kinds of economic rights such as the right of translation,⁶ as established by the Montevideo Treaty of that year. This was an innovative and significant contribution to the international copyright system, since it was the first multilateral instrument setting that right out in terms of a general provision.

The 1952 Universal Copyright Convention, revised in 1971, formed a bridge between the inter-American system and the Berne Convention. It reaffirmed the exclusive right to authorize reproduction by any means, but left it to national legislation to provide for exceptions, on condition that a reasonable level of protection was ensured. Its provisions were intended to harmonize existing laws at that particular stage of the development of international copyright protection.

The Berne Convention, as revised at Stockholm in 1967,⁷ contains a provision designed to improve the protection conferred by copyright in Article 9, subparagraph 1, which stipulates: “Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form”.

Subparagraph 2 of the Article also leaves national legislators the option of authorizing exceptions to the exclusive right, but in certain special cases and on condition that the reproduction does not interfere with normal exploitation of the work and is not unjustifiably detrimental to the author’s interests.

The scope of subparagraph 1 of Article 9 is sufficiently general to cover any technological advance in the means of fixing works.

Protection granted under the right of reproduction is independent of the physical medium. It is fully applicable regardless of the medium.

⁶ Lipszyc, Delia; Villalba, Carlos Alberto; Uchtenhagen, Ulrich. *La protección del derecho de autor en el sistema interamericano* [Copyright protection in the inter-American system]. National Copyright Directorate, Universidad Externado de Colombia, Bogotá D.C., 1998.

⁷ Masouyé, Claude. *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971)*. WIPO, Geneva, 1978.

Recent methods of exploiting works have shown that the flexibility of copyright makes it possible to cover protection of the legitimate rights of authors when works are fixed in a digital medium and used on-line on the Internet and similar data communication networks.

As a cultural factor, these new – and constantly evolving – means of exploiting works will probably affect the social relations of authors and other rightholders with the public by the way in which they permit – or deny – access to intellectual products.

2. The dematerialization of works' physical medium and its impact on the exercise of the right of reproduction in publishing contracts

Careful study of the history of copyright from the invention of printing to the emergence of the Internet reveals the extent to which this discipline has contributed to the development of knowledge. The protection of works of talent, stamped with the imprint of the creative spirit of the individual, played a considerable role in the cultural and social development of national groupings, which encouraged authors and other rightholders to devise, create and disseminate works and cultural services not only for their own individual benefit, but to contribute to the cultural wealth of humanity as a whole.

The 1996 treaties of the World Intellectual Property Organization, known as the WIPO Internet Treaties, and their accompanying statements, have strengthened copyright in an equitable way, extending protection of their legitimate rights to authors and other rightholders in the multimedia digital communication environment at an opportune moment.

The ever-growing need to store and transfer information has now led to text, sound and images being fixed in binary or digital code. The significance of this phenomenon is concentrated within two fields that are shaping the birth of a digital culture: Firstly, it allows the standardization of information so that it may be stored, processed and transferred (we mean by standardization the act of reducing everything to a single form, which in this case would be zeros and ones). Secondly, the use of binary language has facilitated the transition from an analogue environment to a digital one, leading to the emergence of a new concept: the dematerialization of the work's physical medium.⁸

The right of reproduction is generally set out in publishing contracts.⁹ This legal document drawn up for the purposes of commerce governs the role of publishers in disseminating works and regulates the essential access of the public to published works.

At the outset, an unpublished work is fully under the control of the author. In a publishing contract the author and the publisher agree to bring it before the public. Recognition of copyright conferred upon the creators of works alone the right to decide whether to allow them to leave their private control and authorize their publication by reproduction and dissemination in society.

Paragraph 3 of Article 3 of the Berne Convention stipulates: "The expression of 'published works' means works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been

⁸ The concept of dematerialization and a brief assessment of the implications of the 1996 WIPO Treaties for this were presented by the author in the lecture "The Knowledge Society and the New Technologies" at the seminar "Three linguistic areas facing the challenges of globalization", in Paris, on 20 and 21 March 2001.

⁹ Lat. *Publicare*: make public.

such as to satisfy the reasonable requirements of the public, having regard to the nature of the work [...]”.

Thus, the essential element in the publishing contract is the author’s consent to the reproduction of the work in a given number of copies, although it must be pointed out that with regard to the digital field such reproduction, apart from the distribution of physical copies, involves making the works available to the public in such a way that members of the public may access these works from a place and at a time individually chosen by them, that is to say, their communication to the public in the digital environment.

The importance of the publishing contract has meant that national legislation has paid special attention to the subject. It is generally regarded as having the status of a legal statement, specifying both fundamental and supplementary rules, in particular regarding the consent of the parties to this private relationship. Annex 2 to this document contains examples of the way in which various Ibero-American laws deal with publishing contracts.

Those laws which deal extensively with the legal regime of the publishing contract, providing supplementary and substantive rules for such contracts, as does Colombian legislation, reflect the legislator’s concern to protect the weaker party in the contractual relation, in this case the author or his or her beneficiaries.¹⁰ The form of reproduction of the work will determine the provisions by virtue of which the author authorizes its publication.

Electronic reproduction brings a new element into negotiation between the parties, inasmuch as the independent nature of the various forms of exploitation established in Colombian legislation by Article 77 of Law No. 23 of 1982, as in many other systems of legislation, also established the independence of two forms of reproduction. This means that an act of analogue reproduction authorized by the rightholder in an initial negotiation does not imply authorization for an act of digital reproduction not included in the contract. Similarly, a recent legal ruling in the United States established the independent nature of the exploitation of electronic publications in a case where some *New York Times* journalists opposed the electronic publication of their writings on the grounds that provision for that kind of reproduction was not included in the contracts they had signed.

The Internet involves a paradigm shift with regard to control over works and the monitoring of their exploitation. The new technologies enable authors to consolidate their position still further. Their need to have their work made public can be satisfied without the intervention of a third party or any major financial risk, although that will mean entering the marketplace alone and facing up to competition that could mean that their work has to undergo an “ordeal by fire”.

Some laws, on the other hand, recognize the rights of publishers. In Article 125 of a Mexican law the publishers are granted exclusive rights over their books and may decide

¹⁰ Carlos Rogel Vide, in his book *Nuevos estudios sobre propiedad intelectual* [New studies on intellectual property], (J.M. Bosch, Barcelona, 1998), examining current Spanish copyright legislation, and with special reference to contracts, states the following: “The principles governing the publishing contract in the law draw their inspiration – I believe, if you’ll excuse the repetition – from the following basic idea: the author is the weakest party to the contract and it is necessary to protect him by granting inalienable benefits, expressed in prescriptive norms, thus preventing the publisher – the strongest party to the contract, who thereby has the dominant role – from imposing upon the author disadvantageous conditions contained in pre-established clauses that allow him no freedom to intervene”.

whether or not to authorize their direct or indirect reproduction, the importation of unauthorized copies of their books and the initial distribution of the original and any copy by sale or in any other way. In addition, it confers rights over typeface and the layout of the books, thus strengthening still further the role of the publisher, in the same way as United Kingdom legislation provides in the Copyright, Designs and Patents Act 1988, Article 1, paragraph 1.

3. Choices and challenges facing the publishing industry in the context of the new technologies

The cultural industries have received support in the globalized market from a new international trade instrument that places intellectual property in general, and copyright in particular, at the heart of international trade as an item of exchange like other goods and services the income from which forms part of the balance of payments between States. The rapid growth of income from intellectual property rights in the industrialized countries' gross domestic product led to the drawing-up within the framework of the previous General Agreement on Tariffs and Trade (GATT), of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (administered by the World Trade Organization).

The elimination of all kinds of barriers and obstacles to the free trade in goods is a continuing commitment by States. One of the substantive elements of this commitment is the maintenance of efficacious and effective protection for copyright and neighbouring rights. Furthermore, copyright, which used to be regarded as coming more within the field of culture, is now seen as coming within the sphere of activities that regulate economic exchanges and plays an important part in the international exchange of goods.

The impact of the TRIPS Agreement on the market and the management of intellectual property goods has increased still further with the advent of the new information technologies, which have considerably expanded international capacity to produce and distribute protected cultural goods and services.

The 1996 WIPO Copyright Treaty is particularly significant in this respect, being applicable to the trade in cultural goods and services protected by copyright which are widely exploited on the Internet by means of digital reproduction or online availability.

Works exploited in the digital environment acquire certain features which vary according to the kind of work involved.

The original features of literary and musical works do not change when reproduced, whatever the means of production used. The set of pre-established codes used to communicate their meaning is not altered. Paintings and sculptures, on the other hand, lose the "presence in time and space" referred to by Walter Benjamin¹¹ when they are reproduced by means such as photography and lithography or, in the case of sculpture, by moulds. The integrity of such works is immediately affected by reproduction. The integrity of works transmitted by means of pre-established codes is only affected by reproduction if the structure of the code used is

¹¹ Benjamin, Walter. "The Work of Art in the Age of Mechanical Reproduction" [In: *Illuminations*, trans. by H. Zohn, ed. with introduction by Hannah Arendt, Schocken, New York, 1969]. Benjamin states in the essay: "Even the most perfect reproduction of a work of art is lacking in one element: its presence in time and space, its unique existence at the place where it happens to be".

changed, which means its language in the case of literary works. Another example is that of the computer program.

The integrity of all written works, including computer programs, which have this in common, is thus not altered when they are reproduced by digital means.

Literary works may be understood through reading, which requires no intermediary between the author and the reader. When digitized, they continue to use the same codes as in analogue medium since they cannot be understood in any other way. Musical works are different. Their form of expression, fixed in the language of codes (the score), means that they are not directly accessible to the general public. They require a performing artist who may or may not be the author of the work. Digitization may affect both the performance of the work and the work itself.¹²

These features of digitization have important practical consequences, since a literary work, once digitized, has extensive possibilities of reproduction, whilst analogue reproduction by reprographic means is determined by the existence of a physical copy that would act as the basis, and the quality and durability of the analogue medium do not have the same features as the original work. On the other hand, being a clone of the original work, a digitized work can be reproduced ad infinitum at no great cost and without losing any of its quality. It is therefore necessary to create a special device for digital works that will enable them to be controlled in a way that makes it possible to assert copyright.

Dematerialization offers all kinds of opportunities for works to be manipulated and exploited on a large scale, which poses a serious problem for the administration of the rights of reproduction and communication to the public by the rightholders. There is a need to define the known technological mechanisms which make it possible to preserve the identity of the work in terms of its integrity, ownership and authorship, and to control legitimate access to content.

The response to the demands of a large number of content users was found in the collective administration of copyright. Efficiently managed, societies of authors with the necessary transparency, can control and exercise copyright on behalf of their members. Their effective management also facilitates access to works and is instrumental in encouraging users (consumers of the works) to prefer to access works in a legal framework.

Publishers too must, in a global market, deal with the consequences of the massive use of the new information technologies by making appropriate use of the technological and legal tools that are available. The various encryption techniques could offer an effective means of controlling the legal exploitation of online works and would allow legal access to cultural works and services to be regulated in compliance with the limitations and exceptions to copyright.

¹² “The simple fact that digitalizing information involves technically compressing it and removing part of it is in itself, and in the strict sense of the word, a mutilation. In fact, the storing of music in digital form involves even information that is considered useless or redundant.” Quintanilla Madero, Carmen. *La tecnología digital y el derecho de autor lo que debe modificarse y lo que debe mantenerse*. [Digital technology and copyright: what should be changed and what should be maintained]. WIPO World Symposium on Copyright in the Global Information Infrastructure, Mexico City, 22-24 May 1995.

A wide choice of works, high quality supports and ease of accessibility and interaction will also be factors in any dynamic policy, which the cultural industries should use effectively to improve their competitiveness as suppliers on the market for cultural goods and services.

4. Management of technological protection measures and social, education and cultural needs

Human beings' efforts to satisfy their needs have been reflected since time immemorial in a vast supply of and demand for tangible and intangible goods and services. Such goods are directly related to social development and, to a great extent, their guaranteed protection and distribution determines their creation and continuing supply. Meeting cultural needs and the need for information through the Net, and also those of the creators and producers of cultural goods and services, is the starting point for globalized social exchanges whose dynamics must be based on due recompense and recognition for creative work, and guaranteed freedom of access to culture, both of which are embodied in copyright.

Throughout the history of copyright, the protection of creative work has been the best way of ensuring that society maintains a high level of cultural development. The encouragement of authors by means of established rights has enabled them to support themselves and maintain their interest in communicating their creations.

The essential characteristic of copyright as a specific type of property is based on the exclusive right conferred by law on the rightholder to allow or prohibit the various forms of public exploitation of a work. This immaterial right is independent of the physical medium of the work, which extends its application to digital exploitation.

The particular characteristics of the Internet have a specific effect on the exercise of rights. Contents fixed and transmitted by telematic networks are equipped with automatic control mechanisms that enable the holder to monitor and control the exercise of his or her rights. This technological control measure is also in itself a barrier to access to the intangible content of the cultural work or service which makes no distinction among the various users.

However, copyright is linked to a constant concern to protect and encourage cultural development, a recent example being Directive 2001/29/EC of the European Parliament and of the Council on the harmonization of certain aspects of copyright and related rights in the information society, which, in substantive paragraph 14, stresses the intention of promoting learning and culture through the protection granted by copyright law.

The exercise of the exclusive right granted to authors was limited in scope from the outset with respect to certain activities, in particular those related to education, scientific research and libraries, and with respect to its duration, as after the end of the specific term of protection the work concerned could be exploited without restriction.

The limitations of and exceptions to copyright are the reflection of its social function, since in special cases – provided there is no conflict with a normal exploitation of the work, or prejudice to the legitimate interests of the rightholder – they allow certain uses to be made without the prior express authorization of the author or rightholder. It is, therefore, through the possibility of limiting such rights that a satisfactory way is found of reconciling the author's rights with the interest of society in gaining access to education, culture and information.

However, technological barriers by themselves are incapable of determining which acts are covered by the limitations and exceptions, in fact they neutralize them, with the result that the protection of public interest is reduced in the digital environment.

Consequently, these technological measures have to be understood and limited in such a way as to guarantee the social ends that are characteristics of copyright. The 1996 WIPO Copyright Treaty leaves it to each country to establish how the limitations and exceptions will be applied in the digital environment¹³. Likewise, the TRIPS Agreement continues to guarantee such limitations and exceptions in Article 13.

This is one of the main responsibilities facing States when they formulate their policies on copyright in the information society. Authors and cultural industries that hold rights must also take their share in this responsibility so that the circulation of the content of works and cultural services in cyberspace is regulated fairly, with due respect for the interests of all involved.

The nature of copyright law in the digital environment is defined not only by the establishment and exercise of recognized rights but also by respect for the limitations and exceptions which enhance its social function. This means that we need to study how technological measures to regulate lawful access to works can be implemented without impeding the effective pursuit of education, research or access to information, which are all in the public interest. Consequently, we cannot allow these technological measures in themselves to impose a restriction. Michael S. Keplinger made this clear when he stated that the American Digital Millennium Copyright Act (hereinafter the DMCA) draws a distinction between copyright infringement and the unauthorized circumvention of technological protection measures.¹⁴

This distinction is applicable in the case of the circumvention of measures to control the exercise of rights over material protected by copyright, “[...] the DMCA does not prohibit the act of circumventing the technology that controls copies, because the observance of the exclusive right of reproduction should be sufficient to provide ‘adequate and effective’ protection”. Article 1201, subparagraphs (d), (e), (g) and (j), of the DMCA provides that in the event of the holder of copyright denying access to the legitimate beneficiaries of a limitation and exception, and where it is not possible to have reasonable access to the work, the beneficiary may circumvent access controls.

The European Community has taken a different position. Directive 2001/29/EC of the European Parliament and of the Council provides that “Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law [...] the means of benefiting from that exception or limitation ...” (Article 6, paragraph 4 of the Directive).

¹³ The agreed statement concerning Article 10 leaves open such a possibility, within the framework of the so-called Three-step rule, it being understood that none of the provisions of the Treaty shall affect the scope of applicability of the limitations and exceptions permitted by the Berne Convention.

¹⁴ Keplinger, Michael S. *Protection of intellectual property and the digital economy: the Digital Millennium Copyright Act of the United States of America*. WIPO National Seminar on Copyright and Neighbouring Rights, their Limitations and Exceptions in the Digital Environment, which took place in Bogotá, D.C., from 26 to 28 April 2000.

These two texts underwrite the social purpose of copyright in the context of the new technologies in different ways. The European law leaves it to the State to oblige rightholders to allow access that they have denied, whilst the United States law legitimizes the circumvention of technological measures in the context of a limitation or exception.

5. Public policies and copyright

The traditional concept of the nation-state showed us the type of social organization that led to the emergence of industrial society, in which the interrelation of the political, economic and cultural dimensions gave rise to conceptual categories such as: “sovereignty”, “national identity”, “domestic market” and “national memory”.¹⁵ However, the modern concept of the State is defined by two particular dimensions: the economic and the cultural, since it is these dimensions that underlie its organization and cohesion.

Changes in the conditions affecting these dimensions determine the social evolution of the State. The existence of the new technologies has extended and modified the scope of the concept of the nation-state: although it will still continue to be the main forum for social interaction where the various forces that constitute it (social organizations, bureaucracy, political parties, trade unions, and so on) find expression, there are grounds for concern regarding the individual and his or her position vis-à-vis the State in the information society.

Individuals are faced with a much larger area of expression, which has no physical borders and in which the State needs to enter to make its presence felt. Its nature as a body that defines the social, economic and political life of peoples makes its presence necessary in the areas of individual expression. This is not State interventionism, but rather the inclusion of one more social element in an area from which it has been absent. Its presence can be seen in two different ways. The first way concerns the State’s involvement in the interaction between citizens, where public policies are intended to ensure that its institutions also operate with the new technologies, using them to provide services and carry out its duties through this medium. Such policies should lead to the various State bodies being present on the Internet, forming a sort of virtual bureaucracy that can satisfy needs relating to education, transactions, services and other appropriate activities.

This would be an initial response to the paradigm of the information society: the individual who has been uprooted from the physical environment would encounter the State, with all its symbolic connotations, in the digital environment.

The second way in which the State should be involved concerns regulation, which means the way in which it controls the effects of the actions of individuals. The law can thus begin to operate as a substantive element in social interaction. As the State seeks to cover all forms of expression that can be regulated, the legal authorities should gradually join in its action, mainly in the field of private law, defining what constitutes the free exercise of the autonomy of the will and its effects in the digital environment. “Thus a new type of State is emerging, which is not the nation-state, but which is redefining it, rather than eliminating it. This State, which I call the online State, is characterized by the sharing of authority (or the institutional capacity to enforce decisions) throughout a network of institutions”.¹⁶ According

¹⁵ Zapata López, Fernando, *op. cit.*

¹⁶ Castells, Manuel. *Globalización economía e instituciones políticas en la era de la información* [Economic globalization and political institutions in the information age]. Paper presented at the seminar Society and the Reform of the State, Sao Paulo, March 1998.

to Castells, the adaptation of the State to the new situation and its challenges makes it the essential tool enabling citizens to master globalization, since the State continues to be, by definition, the outcome of the political expression of a people.

The State must meet the current requirements of e-commerce and the technical needs that this entails – it must be aware that its participation in the digital environment calls for the technology and resources that will enable it to satisfy users' needs. As we have already seen, one of its substantive elements is the protection of intellectual property, and in particular works protected by copyright. A way must be sought of combining commercial use of the material protected by copyright with access to information for cultural, educational and information purposes. It is at this stage, when public policies can affect the activities of the cultural industries, that an effective system should be introduced to protect those activities without harming social interests. The impact of technological copyright protection measures on limitations and exceptions should be studied by governments so as to identify how these opposing interests can be reconciled.

We have examined the solutions adopted by United States and European laws. It remains for us to establish how States should limit the operation of such measures. There are four basic factors to be taken into account:

- (1) the need to seek, through a synthesis of the commercial obligations States have taken on under the WTO agreements, and in particular the TRIPS Agreement, to create a system of responsibility in the digital environment that will allow effective measures to be designed to protect copyright and guarantee that works can be freely traded as commodities in a global environment.

The 1996 WIPO Copyright Treaty and the Performances and Phonograms Treaty form the basic response to this objective. Domestic legislation must be adapted to meet international obligations, so that countries can enter the market with the tools required to protect their culture.

- (2) the need to link international obligations such as the above with the need to protect national cultural identities. States can do this through copyright limitations and exceptions and through technological measures which guarantee access to culture, education and information, making it possible to use a work without the prior consent of the rightholder, in those special cases that do not jeopardize the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder.
- (3) the need to pursue campaigns against piracy that will ensure the full application of copyright in the digital environment and educate citizens in this respect. Such campaigns must be effective, since although infringement of copyright committed in the Internet environment is the same as that carried out in the analogue environment, it has global repercussions. Such campaigns are thus of much greater importance in this new context.
- (4) lastly, the need to ensure that copyright protection legislation sets potentially prejudicial practices that could thus constitute an infringement of copyright in the digital environment in a broad enough context, and that the compensation may be sought on a corresponding scale, taking into account factors that demonstrate the global impact of such infringements.

Annex 1		
RIGHT OF REPRODUCTION IN IBERO-AMERICAN COUNTRIES		
Country	Law	Clause
Andean Community	Decision No. 351 of 1993	Article 13 – The author, or his successors in title where applicable, shall have the exclusive right to carry out, authorize or prohibit: (a) The reproduction of the work by any means or process;
Argentina	Law No. 11.723 of 1933	Article 2 – Copyright in a scientific, literary or artistic work shall entitle the author to dispose of, publish, publicly perform and exhibit, alienate, translate or adapt it, or authorize its translation, as well as to reproduce it in any form.
Bolivia	Law No. 1322 of 1992	Article 15 – The author of a protected work or his or her assignees shall have the exclusive right to carry out, authorize or prohibit any of the following acts: (a) Reproduce the work in full or in part. [...] Article 16 – The right of reproduction consists in the multiplication and material fixation of the work by any process that enables it to be made known to the public, such as printing, photography, engraving, lithography, cinematography, sound recording, magnetic tape with sound, image or both, or any other means of reproduction.
Brazil	Law No. 9.610 of 1998	Article 28 – The author has the exclusive right to use, profit from and dispose of literary, artistic and scientific works. Article 29 – The prior express consent of the author is required for the use of the work by any means such as: I – Partial or total reproduction ; [...] IX – Inclusion in a database, storage in a computer, microfilming and other similar forms of archiving; [...] Article 30 – In the exercise of the right of reproduction, the owner of copyright may make the work available to the public in the form, and at a time and place of his or her choice, upon payment or free of charge. 1. The right of exclusive reproduction shall not be applicable when such reproduction is ephemeral and simply intended to make the work, phonogram or

<p>Brazil (cont.)</p>		<p>performance perceptible in an electronic medium when it is of an ephemeral or incidental nature, as long as this occurs in the course of utilization of the work duly authorized by the rightholder;</p> <p>2. In any form of reproduction, the number of copies shall be reported and verified, it being the responsibility of the reproducer of the work to maintain records so that the author may monitor the economic benefits of the exploitation.</p>
<p>Chile</p>	<p>Law No. 17.336 of 1970</p>	<p>Article 18 – Only the owner of the copyright or those persons who have been expressly authorized by him, have the right to utilize the work in any of the following forms:</p> <p>(a) To disclose it by way of publication, recording, radiophonic or television emission, presentation, performance, reading, recitation, exhibition and, in general, any other means of communication to the public that may at present or hereafter be known;</p> <p>(b) To reproduce it by any process;</p>
<p>Colombia</p>	<p>Law No. 23 of 1982</p>	<p>Article 3 – Copyright shall comprise the exclusive right for its owner:</p> <p>[...]</p> <p>(b) To exploit the work with or without gainful intent, by means of printing, engraving, copying, moulding, phonograms, photography, cinematographic film, videograms and by performance, recitation, translation, adaptation, showing, transmission or any other known or future means of reproduction, multiplication or dissemination;</p> <p>[...]</p> <p>Article 12 – The author of a protected work shall have the exclusive right to do or authorize any one of the following acts:</p> <p>(a) Reproduction of the work;</p>
<p>Costa Rica</p>	<p>Decree-law No. 7397 of 1998</p>	<p>Article 16 – The author of a literary or artistic work shall have the exclusive right to use that work. Copyright contracts shall always be interpreted restrictively, the assignee not being granted rights more extensive than those expressly mentioned, except where they are the necessary consequence of the nature of the terms of the contract; the author shall therefore be entitled to authorize:</p> <p>[...]</p> <p>(b) Reproduction.</p>

Cuba	Law No. 14 of 1977	<p>Article 4 – The author has the right:</p> <p>[...]</p> <p>(c) To realize or authorize the publication, reproduction or communication to the public of his work by any lawful means, under his own name, under a pseudonym or anonymously;</p>
Dominican Republic	Law No. 65-00 of 2000	<p>Article 19 – The authors of scientific, literary and artistic works and their assignees may freely dispose of their work free of charge or upon payment and, in particular, have the exclusive right to authorize or prohibit:</p> <p>(1) The reproduction of the work by any means or process;</p>
Ecuador	Law No. 83 of 1998	<p>Article 20 – The exclusive right of exploitation of a work shall entitle the owner, in particular, to carry out, authorize or prohibit:</p> <p>(a) The reproduction of the work by any means or process;</p> <p>Article 21 – Reproduction consists in the fixation or replication of the work in any medium or by any known or future process, including its temporary or definitive digital storage, that will enable it to be perceived, communicated or copies of all or part of it obtained.</p>
El Salvador	Decree-law No. 604 of 1993	<p>Article 7 – The pecuniary right of the author is the right to receive financial reward for the utilization of works and includes, in particular, the following rights:</p> <p>(a) The right to reproduce the work, fixing it materially by any process enabling it to be communicated to the public in an indirect and lasting manner or the obtaining of copies of all or part of the work; this may be effected by means of mechanical reproduction, such as printing, lithography, polygraphy, cinematography, phonography, magnetic recordings, photography and any other means of fixation; including also the reproduction of improvisations, speeches, lectures and, in general, public recitals, effected by means of stenography, typewriting and other analogous processes;</p>
Guatemala	Law No. 33-9828 of 1998	<p>Article 21 – The copyright owner has a pecuniary or economic right to use the work directly and personally, to transfer all or part of his rights over it and to authorize its use by a third party.</p> <p>Only the rightholder, or those persons expressly authorized by him, shall have the right to use the work by any means, in any form or process; consequently, they may authorize any of the following acts:</p> <p>(a) Reproduction by any process;</p>

Honduras	Decree No. 4-99-E of 13 December 1999, Law on copyright and neighbouring rights	Article 38 – The author has the right to profit economically from the use of the work by any means, form or process. Consequently, he may carry out or authorize in particular any of the following acts: (1) Reproduction by any process and in any form, total or in part, permanent or temporary;
Mexico	Federal Law on Copyright of 24 December 1996	Article 24 – The author has an economic right to exploit exclusively his or her works, or to authorize others to exploit them in any form within the limit established by the present Law and without prejudice to the ownership of the moral rights referred to in Article 21 of this same law. Article 27 – The owners of economic rights may authorize or prohibit: 1. The reproduction , publication, publishing or material fixation of a work in copies or examples carried out by any means whether printed, phonographic, graphic, plastic, audiovisual, electronic or any other similar means;
Nicaragua	Law No. 312 of 1999	Article 22 – The author has the exclusive right to authorize or prohibit the exploitation of his work in any form. Article 23 – The economic right is alienable, temporal and, without prejudice to other means, includes the following: (1) rights of reproduction of the work in full or in part, permanently or temporarily, in any kind of medium.
Panama	Law No. 15 of 1994	Article 39 – Reproduction includes any act aimed at material fixation of the work by any means or process, or the obtaining of copies of all or part of it; <i>inter alia</i> , by printing, drawing, engraving, photography, modelling or by any technique of the graphic and plastic arts, as well as by mechanical, electronic, phonographic or audiovisual recording.
Paraguay	Law No. 1328 of 1998	Article 25 – The economic right includes, in particular, the exclusive right to carry out, authorize or prohibit: 1. The reproduction of the work by any means or process; 2. [...] Article 26 – Reproduction means any form of fixation or the obtaining of one or more copies of the work, in particular by printing or any other technique of the graphic or plastic arts, reprographic, electronic, or phonographic recording storage in digital RAM form, audiovisual in any known or future form and/or format.
Peru	Legislative decree No. 822 of 1996	Article 31 – Economic rights include, in particular, the exclusive right to carry out, authorize or prohibit:

<p>Peru (cont.)</p>		<p>(a) The reproduction of the work by any means or process; Article 32 – Reproduction means any form of fixation or the obtaining of copies of the work, permanent or temporary, especially by printing or any other technique of the graphic or plastic arts, and reprographic, electronic, phonographic, digital or audiovisual recording. The above statement is purely illustrative.</p>
<p>Portugal</p>	<p>Law No. 45 of 1985, as amended by Law No. 114 of 1991</p>	<p>Article 9 – (1) Copyright shall include economic rights and personal rights, termed moral rights. (2) In the exercise of economic rights, the author shall have the exclusive right to dispose of his work, to exploit it or to use it, or to authorize its total or partial exploitation or use by a third party.</p>
<p>Spain</p>	<p>Royal Legislative Decree 1/1996 of 12 April 1996, approving the revised text of the law on intellectual property, regulating, clarifying and harmonizing the existing legal provisions on the subject.</p>	<p>17. – <i>Exclusive right of exploitation and its forms.</i> The author has the exclusive exercise of the rights of exploitation of his or her work in any form, including the rights of reproduction, distribution, public communication and transformation, which may not be carried out without his or her authorization, except in the cases provided for by the present Law. 18. – <i>Reproduction.</i> Reproduction means the fixation of the work in a medium that enables it to be communicated and copies of all or a part of it to be obtained.</p>
<p>Uruguay</p>	<p>Law No. 9739 of 1937</p>	<p>Article 2 – Copyright in respect of works of art and of intellect shall include the right to alienate, to reproduce, to publish, to translate, to perform, and to disseminate such works in any form, or to authorize other persons so to do. The right to reproduce shall include the right to make mechanical reproductions of any kind, such as cinematographs, phonographs, discs, rolls, cylinders and other like instruments, whatever the method employed. The authority to reproduce shall include the right to make copies by printing, lithography, polygraphy and other similar methods; and to make the transcription by way of shorthand, typewriting or any other means, of improvisations, speeches, readings, etc., even when made in public, as well as of public recitations.</p>

<p>Venezuela</p>	<p>Law of 16 September 1993</p>	<p>Article 39 – The right of exploitation of an intellectual work, indicated in Article 23, shall include the right of communication to the public and the right of reproduction.</p> <p>Article 41 – Reproduction shall consist in the material fixation of the work by any means or process that enables it to be made known to the public and copies to be obtained of all or a part of it, and in particular by printing, drawing, engraving, photography, modelling and any other process of the graphic and plastic arts, or mechanical, electronic, phonographic or audiovisual recording, including cinematography.</p> <p>The right of reproduction also covers distribution, which consists in the making available to the public of the original or copies of the work by sale or any other form of transmission of property, rental or other means of use for payment.</p> <p>However, when the authorized commercialization of the copies is effected in the form of a sale, the owner of the right of exploitation shall conserve the right of communication to the public and of reproduction, and the right to authorize or prohibit the rental of the said copies.</p>
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ANNEX 2 EXAMINATION OF IBERO-AMERICAN COPYRIGHT LEGISLATION CONCERNING PUBLISHING CONTRACTS	
<p>Laws that simply refer to publishing contracts</p>	<p>Argentina: Law No. 11.723 of 26 September 1993 on intellectual property Articles 37 to 50</p> <p>Bolivia: Law No. 1322 of 13 April 1992 on copyright (see the Commercial Code, Part VI, Chapter II “Publishing contracts”, Articles 1216 to 1236)</p> <p>Cuba: Law No. 14 of 28 December 1977 on copyright Articles 31 and 32</p> <p>Guatemala: Law No. 33-9828 of 28 April 1998 on copyright and neighbouring rights Articles 84 to 92</p> <p>Paraguay: Law No. 1328 of 15 October 1998, law on copyright and neighbouring rights. Articles 92 to 104</p>
<p>Laws that deal briefly with the subject of publishing contracts</p>	<p>Chile: Law No. 17.336 of 28 August 1970 on intellectual property Articles 48 to 55</p> <p>Costa Rica: Decree No. 7397 of 20 April 1998 on copyright and neighbouring rights and their revision Articles 21 to 40</p> <p>El Salvador: Decree No. 604 of 1993 on the promotion and protection of intellectual property Articles 57 to 67</p> <p>Nicaragua: Law No. 312 of 16 July 1999 on copyright and neighbouring rights Articles 55 to 65</p> <p>Panama: Decree No. 15 of 8 August 1994 on copyright and neighbouring rights Articles 63 to 78</p>
<p>Laws that deal extensively with publishing contracts</p>	<p>Brazil: Law No. 9.610 of 19 February 1998 amends, updates and harmonizes legislation on copyright and other rights Articles 53 to 67</p> <p>Colombia: Law No. 23 of 28 January 1982 on copyright Articles 105 to 138</p> <p>Dominican Republic: Law No. 65-00 promulgated on 21 August 2000 on copyright Articles 85 to 112</p> <p>Ecuador: Law No. 83 promulgated on 19 May 1998 on intellectual property Articles 50 to 64</p> <p>Honduras: Decree No. 4-99-E of 13 December 1999 on copyright and neighbouring rights Articles 73 to 98</p> <p>Mexico: Federal law on copyright of 24 December 1996</p>

	<p>Articles 42 to 57</p> <p>Peru: Legislative Decree No. 822 of 26 May 1996 on copyright Articles 96 to 107</p> <p>Portugal: Law No. 45 of 17 September 1985; Code of copyright and neighbouring rights as amended by Law No. 114 of 3 September 1991 Articles 83 to 106</p> <p>Spain: Royal Legislative Decree 1/996 of 12 April 1996, approving the revised text of the law on intellectual property, regulating, clarifying and harmonizing the existing legal provisions on the subject Articles 58 to 73</p> <p>Venezuela: Law on copyright of 16 September 1993, Official Gazette of the Republic Articles 71 to 85</p>
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UNESCO ACTIVITIES

PROMOTION OF TEACHING OF COPYRIGHT AND NEIGHBOURING RIGHTS AT THE UNIVERSITY: ESTABLISHMENT OF A UNESCO CHAIR IN GEORGIA

Following the agreement signed by the Director-General of UNESCO, Mr. Koïchiro Matsuura, and the Rector of the Tbilissi State University, Mr. Roin Metreveli, on 6 July 2001 and 20 September 2001 respectively, a UNESCO Chair on Copyright and Neighbouring Rights was created in the Department of Law at Tbilissi State University.

Mr David Dzamukashvili, Professor and Deputy Director-General of the Georgian National Intellectual Property Centre, was appointed as the Chairholder.

The UNESCO Chairs Programme for teaching copyright and neighbouring rights at the university was established with the aim of promoting and developing the endogenous capacity of Member States and in particular, developing countries and countries in transition to a market economy, to provide ongoing training for qualified specialists for purpose of:

- (i) Elaborating and updating national copyright and neighbouring rights legislation;
- (ii) ensuring a balanced co-operation between the actors in the field of cultural development (authors and cultural industries);
- (iii) allowing these countries to participate in the elaboration and updating of the international codification of copyright and neighbouring rights laws, in order to secure balanced international cultural co-operation.

CELEBRATION OF WORLD BOOK AND COPYRIGHT DAY - 23 April

Message by the Director-General

Books are a fundamental means of access to knowledge of values, wisdom, aesthetic sense and human imagination. As vectors of creation, information and education, they allow every culture to print their essential features and to see the identity of others. As a window on the diversity of cultures and a bridge between civilizations, beyond time and space, books are a source of dialogue, a means of exchange and a source of development.

For all of these reasons, UNESCO has celebrated World Book and Copyright Day since 1996, on the 23rd of April, with the participation of millions of people representing a hundred countries. Devoted to the promotion of reading and writing, in addition to copyright, which is closely associated, the occasion aims to bring out the various aspects of books, be they creative, industrial, standard-setting, political, national and international. The celebration of the United Nations' Year for Cultural Heritage in 2002 is a particularly appropriate event.

UNESCO has indicated two major themes to celebrate the year: "Heritage and Dialogue" and "Heritage and Development." Books and copyright exemplify these themes. As a protector of memory and a vector for creativity, a book is both a receptacle for words and a mechanism for the exchange of ideas, an incomparable instrument and a reproducible object, an echo-chamber of feeling and a source of revenue, an original work and a mirror of the social climate. Books represent a heritage that is specifically rooted in distinct cultural traditions and which is continually evolving through interaction with other traditions, in relation to and in dialogue with the Other.

The celebration of World Book and Copyright Day in 2002 is an opportunity to consider the major contribution of books to the cultural heritage and thereby spark new initiatives from the fertile interaction between the pages - be it in printed or in electronic form - and the cultural wealth of humanity, both tangible and intangible.

By safeguarding and adding to the cultural heritage of humanity, we maintain a synergy whose finest support comes from books.

Koichiro Matsuura

The Promotion of books and copyright through the annual celebration of a World Day

Georges Poussin¹

Seven years ago, the General Conference of UNESCO decided to devote 23 April of each year to books and copyright.² Books promptly became the central part of Spain's proposal, since the project was found to be very much in line with the wishes of professional organizations in the book sector (publishers, bookshops, etc.). Another factor was that the choice of date was symbolic as pertaining to authors whose date of birth or death was 23 April, regardless of year or century: Miguel de Cervantes, William Shakespeare, the Inca, Garcilaso de la Vega, the French Academician, Maurice Druon, the Icelandic Nobel Prize winner, K. Laxness, the Colombian, Manuel Mejía Vallejo, the Russian, Vladimir Nabokov and the Spaniard, Josep Pla, to name but a few. The origins of this celebration can also be traced back to Catalonia, where traditionally on Saint George's day a rose is offered with each book sold. The reference to copyright, however, was not added as an afterthought. The Russian Federation immediately proposed that it be included and this was accepted unanimously, as was the resolution as a whole.

Since 1996, the number of partners contributing to the success of the World Book and Copyright Day has constantly grown as more and more countries have participated, currently about one hundred from all over the world, plus an ever growing public, that no doubt includes more and more young people. And basically, the major professional players are present: publishers, bookshops and libraries, the media and universities together with schools in some countries – here the crucial matter of timing sometimes arises when 23 April falls during the school holidays. Some clashes with religious feast days have occasionally led to difficulties.

The following activities are commonly chosen: giving a rose with every book sold, offering a free book, displaying, decorating, designing, producing posters or bookmarks and even T-shirts and banners, organizing open days in shops or institutions, symbolically choosing 23 April for the opening of an exhibition or a book fair. The World day has seen the advent of new literary collections and the opening of exhibitions but has been celebrated in other ways too – sometimes relating to events that have taken place previously – in being directly linked to a debate such as a round table discussion or a symposium on literary themes. Some of these events are extended over an entire week, so that reference is sometimes made to “the week of the World Day”.

UNESCO grants a specially designed logo to the activities planned. That is, the Organization authorizes its use as a seal of approval for the initiative. Many applications are sent to the Organization, normally by email. UNESCO's National Commissions also serve as the prime intermediaries for information when they themselves are not initiating an event. The same applies to Units away from Headquarters and, of course, to international NGOs. UNESCO's sister organizations that is, members of the United Nations family, may also contribute to the celebration by sending a message or by organizing a particular activity.

¹ Chief, Cultural Enterprise and Copyright Section

² 28 C/Resolution 3.18 adopted at the 28th session.

As the projects vary greatly in origin, the results are often very original – imagination knowing no bounds – even though the paths are necessarily well trodden. But does it matter? An author conversing with people in a town, an actor giving a public reading, a bookseller offering flowers, and children doing drawings, are in reality never the same. One big difference perhaps lies particularly in the choice of location and although it is gratifying to note the permanent commitment of industrialized countries such as Canada, Finland and the other Nordic countries, Great Britain, Ireland, Germany, Italy and the other Latin countries where activities are wide-ranging and numerous, it is also heartening to observe the enthusiasm of many countries in Central and Eastern Europe, from the Baltic States to the Balkans, in addition to the enterprises undertaken with keen interest in African schools, the active participation in Latin America, in several Arab States and of course in Asia, from India to Indonesia, from China to Japan and to Australia, and so on. It is with emotion that we remember Days held in countries which at the time had barely emerged from periods of crisis, such as the former Yugoslav Republic of Macedonia or the young Democratic Republic of the Congo. Unfortunately, it is not possible to list all the countries, since, as already mentioned, there are about one hundred. An overall record of this variety of initiatives is to be found on the UNESCO website, which anyone interested will find helpful to consult (www.unesco.org/culture/bookday).

Without insisting on a particular theme for the Day, UNESCO has, through a message delivered each year by the Director-General, appearing on the website and featuring in many newspapers and radio and television broadcasts, placed emphasis on different aspects: the book as an instrument of freedom, the role of the book as a vehicle for the culture of peace, tolerance and universal dialogue, book donations as a means of solidarity, the book as part of our cultural heritage and as an expression of creativity, to mention but a few.

Broadly speaking, in view of the most pressing areas for reflection and the most contentious issues, it is becoming evident that copyright should play an increasingly central role in this celebration. The World Day is already focused on copyright as well as on books. Initiatives in countries such as Canada, for example, can be mentioned in this instance; these countries chose to promulgate the updating of their national legislation on copyright and neighbouring rights on the second celebration of the World Day. Debates were organized in different countries on diverse aspects of the adaptation of the protection of copyright and neighbouring rights to the new context of creation, production and circulation of cultural works and performances, the free flow of ideas, support for access to knowledge, democracy and peace. From the perspective of promoting debate and the exchange of views and comments, one can hardly remain oblivious to the multiple implications of entry into the information society and the era of digitization. Can we disregard the future of authors and other professionals faced with such upheavals? Should we not consider the many other pressing concerns relating not only to books but also clearly to copyright? The logic of highlighting these two elements together will certainly be demonstrated more clearly than ever in the future, through discussion of ways and means to improve the production, circulation and promotion of books and reading, particularly for the benefit of young people. Of further consideration is the question of how to provide better protection for the legitimate rights of authors and other rights-holders through appropriately regulating the relations between participants in cultural life, in terms of both analogue and digital environments.

To this end the Organization, from among its regular correspondents on the subject, has in particular called on the UNESCO Chairs on copyright throughout the world, but there can be little doubt that it is the usual interlocutors who, together with some others perhaps, will find it worthwhile to address many such topical issues.

As the Director-General said in his message of 23 April 2001: “Books are [...] an invaluable life-long companion. [...] the key to progress in basic education, the fight against poverty and new advances in communication and information technologies. That is why UNESCO, in accordance with its Constitution, considers it indispensable, more than ever, to promote the development of publishing, the free circulation of books, and their access to the public. Protecting writers against the unauthorized exploitation of their work is a corollary of this. This is why UNESCO equally encourages countries to develop national policy in this field, in order to ensure that writers receive a fair share of the revenue from their work”.

Paying tribute to books must also provide the opportunity to enshrine this philosophy of freedom and justice both in the “minds of men” and in national policies.

NEWS AND INFORMATION

DEVELOPMENT OF COPYRIGHT LAW IN KUWAIT

Ahmad Al-Samdani*

Introduction

As with most of the other GCC¹ countries, Kuwait did not introduce a copyright code until recently. Historically, Kuwaiti's legal system has applied the Islamic Law (*Sharia*) which does not provide authors of intellectual subjects protection for their literary, musical, dramatic or artistic works. Sharia law does not recognize intellectual property rights, and there were no rules developed to this end in the past²

In early 1960 Kuwait adopted the positive civil legal system as its law and modernized the court system accordingly. Copyright, among other norms of positive legal system such as patents and trademarks, were introduced either by their own codes or by including them in general codes, or by applying the general principles of the modern legal system to them. For example, the patents have their own code (code no.14/1962) and trademark rules were included within the commercial law code of 1960. Copyright were subject to protection by the general principles of law.

Since that time, the Kuwaiti courts have started to protect copyright by the general principles of law embodied in other codes such as those of torts, conflict of laws, and trademarks.

Both the tort law and conflict of laws have their own codes - Code no. 6 of 1960 for civil liability and code no. 5 of 1960 for the legal relations with foreign factors.

* Professor of Private International Law, College of Law, Kuwait University, Dean of the College of Law (1993 - 1998). Chairman of International Law Department (1990 - 1993).

¹ GCC" stands for Gulf Cooperation Council. The GCC was founded in 1980 among six Arab states - Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and United Arab Emirates. Except Oman which still has no copyright law, all the others were ahead of Kuwait in issuing their copyright codes. The first was Saudi Arabia who adopted its law in 1989 by the Royal Decree no. M/11 of Jammadi 1, 19, 1410 (Islamic Year) (May 1989). United Arab Emirates was the second who issued its copyright code by Law no.40/1992 on September 28, 1992. Bahrain issued its law in 1993 and Qatar issued the Law no. 25/1995 of July 22, 1995 including the law of copyright.

² Actually, at the present time there have been efforts to draft a copyright model code which conforms with the Islamic beliefs and teaching. The Islamic Organization For Education, Science, and Culture developed a draft for a copyright law in May 1993. This draft conforms with most of the modern copyright rules and principles, except there is some deference to issues that seem to be contradictory to the Islamic thoughts. See, Loutfi, M. Hussam, "The Practical Source On Literary And Artistic Property," Cairo 1993, p. 4 and appendix 7 (in Arabic).

The tort law code was repealed in 1980 when the civil code was issued containing rewritten tort law rules.

The trademarks rules were, and still are, part of the commercial law which was first introduced in 1960 and then rewritten and reissued in 1984.

Until 1986, if an infringement of copyright was disputed before the courts, the tort law might be applied when considering the infringement as a wrongful act committed by the person who exercised unauthorized use of a work of copyright. This wrongful act, as the general principle of tort liability, had to be repaired by the wrongdoer in the form of compensation for the copyright holder.¹

Or, if copyright was registered under a certain trademark, the courts would consider the copyright infringement as a trademark infringement.² But when the copyright was foreign copyright, then the courts would apply the conflict of laws rule relating to the subject in the conflict of laws code.³ This rule points to the law where the copyright was first published, i.e. the place of first publishing.⁴

In 1986 when Kuwait adopted the Arab Convention for Copyright of 1981,⁵ without waiting for the National Assembly (Parliament) to issue a local code of copyright as recommended by the Convention in order to make its rules workable, the courts started to use the Convention as a tool to protect copyright which belonged to the citizens of the other states' members of the Convention, when published in the state of their citizenship.⁶

¹ Decision no. 54,56/1972 of the Court of Appeal on Dec. 31, 1972; *ALMUHAMI* journal, issue no. 3/Dec.1973. The case was about the unauthorized publication of the poems of a deceased Kuwaiti poet. The heirs brought the case against the editor and publisher for publishing without their permission. The first instance court and the court of appeal decided the case for the heirs on the basis of tort by declaring that the author is different from the editor, and if the editor published the works of the author without his permission, he would be held liable for a wrongful act which required redress by compensation. On the same basis, see Decision no. 564,565/1982 of the Court of Appeal on June 15, 1982; (unpublished); and Decisions no. 35/81 and 118/1981 on July 1, 1981 and Jan. 27, 1982 respectively of the Court of Cassations (the Supreme Court) published in *ALQADA'A WALQANOON* journal (a periodical published by the Judiciary Council quarterly), issue no. 2, tenth year, Oct., 1983.

² Decision no. 3460/86 of the First Instance court /Commercial Division, on Dec. 22, 1986. The case was about counterfeited music recordings. Among other allegations, the plaintiff alleged that the defendant counterfeited his music recordings which were registered under a certain trademark, and therefore, he infringed his trademark rights. The court agreed with the plaintiff that the trademark is an instrument to protect the author's rights because it distinguishes the works authorized for publication. But the court found against the plaintiff for the same reason, i.e. the plaintiff's recordings themselves, as the court found out, did not bear a registered trademark (unpublished decision).

³ Decision no. 118/1981 of the Cassation Court, on Jan. 1, 1982. In this case the dispute was about the distribution of musical works of Egyptian singers in Kuwait. The dispute was between two Kuwaiti recording establishments, one with permission and the other without. The authorized establishment brought the case asking for the application of the Egyptian copyright law on the basis that the dispute was about the distribution right which was raised from the author's right of exploitation. Therefore, and because the copyright was published in Egypt by the authors, the conflict of laws rule of code no. 5/1960 should apply. This rule pointed to the law of the place of publishing; i.e. the Egyptian law. The lower courts agreed and the Supreme Court sustained (unpublished decision).

⁴ Article no. 57 of the conflict of laws code (no. 5/1960) provides that "Literary and artistic property rights shall be governed by the law of the place where the works were first published or first produced."

⁵ Law no. 16 of 1986, published in the official *Gazzet*, issue no. 1657 of March 30, 1986.

⁶ As we will see in the coming section.

As the above situation will change completely after the promulgation of the code of copyright law, the present paper is introduced to explore the development since Kuwait joined the Arab Convention for Copyright and steps for drafting the copyright code, in one section, and in the second it will demonstrate and discuss the outlines of the copyright code no. 64/1999 which was published in the official Gazette of the State of Kuwait (*ALKUWAIT ALYAOUM*) on January 9, 2000.

I. Preparation grounds for the copyright code

Before 1986 the demand for a copyright code was weak. The interested groups at that time were a small number of the artists in various fields, some authors of books, and one computer programming company.

Starting in 1986, new developments occurred which added to the pressure. Those were joining the Arab Convention For Copyright court demands to legislate for new progress in the field, and the international community's request to join the international copyright conventions and to promulgate a local code. All these developments added to the pressure on the legislators to move forward on this matter and take steps toward drafting the copyright code, will be discussed in the following sub-section. Following which, the steps for drafting the copyright code will be the subject of the second sub-section.

A. - Developments

1. Joining the Arab Convention for the Protection of Copyright

In March 1986 Kuwait joined The Arab Convention for the Protection of Copyright which was ratified by the conference of ministers of cultural affairs in Bagdad in November, 1981.⁷

The Convention consisted of 7 sections. The first section stated the scope of copyright protection which included three articles. The first article defined the different kinds of copyrighted works. The second article declared that translation and glossaries were also protected. The third article stated the works which were not protected.

The second section of the Convention declared the author's rights while in article four it defined who should be considered an author. In article five it mentioned works of folklore and how they were to be protected. Article six described the author's moral rights. Article seven stated the author's tangible rights. And article eight declared how the tangible rights would be divided between a number of authors and who had a share in the work and who was excluded.

In the third section, the Convention stated the rules for the use of protected works by the public. In article nine it described the fair use by the public. Article ten declared that it was admissible without permission to copy political, economic, and religious news articles if the source was quoted. Articles eleven to fifteen authorized the public, and public and private establishments such as public libraries and educational institutions to copy within the scope of

⁷ The Preamble of the law no. 16 of 1986 adopting the Arab Convention for Copyright Protection.

fair use limits, all kinds of works with a stipulation that the authors name must always be declared and his rights protected. And article sixteen gave permission to the public authority concerned with the follow up of applying the system of copyright protection in the member state and, according to the rules of local law of that state, to license and publish the translation of any foreign work into the Arabic language after the elapse of one year from the publication of the original work for the first time.

Section four of the Convention dealt with the transfer of copyright and its duration. In this section, article seventeen stated that copyright is transferable by succession or by alienation. Article eighteen was concerned with the joint works. Article nineteen limited the copyright duration which is for the life of the author plus 25 years after his death in the case of a sole natural person. If the work was a joint work, then the protection of the work would be extended to 25 years after the death of the last joint author. For works of cinematography and applied art, the works of artificial persons, works published with false names or with no names (until the author declares his identity), and works published for the first time after the death of their authors, the duration should be 25 years from the date they were first published. For works of photography, the duration was set by the article as "at least" ten years.⁸ For works published in more than one part, the duration should be calculated for each part as it is an independent work. The last article of the section (article twenty) described how the work would be dealt with by the successors vis-à-vis third parties.

Section five of the Convention pointed to the copyright registration rules where it depended on the local laws of each member state to offer a system of registration and an authority to guard this system (Art. 21), and announced the system to exchange the information about copyright between the member states (Art. 22).

Section six dealt with the means of protection of copyright. This section had five articles. Article 24 requested the member states to establish independent authorities to deal with the protection of copyright. Article 25 considered copyright infringement to be a criminal act meriting punishment which was supposed to be determined by the local laws of each member state. Article 26 specified the subject matter of the Convention which was (as in par. a) the copyright of Arab authors who were citizens of the member states and made their residence in the state of their citizenship, and (as in par. b) copyright of foreign authors, who, whatever their nationality, did not reside in the member states, but first published their works in a member state, provided that reciprocity was applied between their country and the member state and, according to the Convention the concerned Arab state was party to. Article 27 put the Convention into force on copyright from the date of its commencement with no retroactive effect. Article 28 gave each member state the right to allow, supervise, or deny the protection of copyright according to its own public policy.

Finally, section seven of the Convention dealt with questions of public international law which have no relation with our subject.

As we have seen, the Arab ministers for cultural affairs who drafted and signed the Convention tried to make it contain all copyright protection principles and rules with the exception of three issues which they left to the local laws of each member state; i.e. the

⁸ "At least" are not suitable words here because this kept the duration open which we do not think the drafters of the Convention intended.

copyright registration rules, the criminal penalties for copyright infringement and, most importantly, the protection of the copyright of national authors first published in their own country when the infringement occurred in that country.

2. Court's Request for Legislators' Interference

The Kuwaiti courts faced the problem of a legislation vacuum in two important cases, i.e. the Alalamia company case and the Kuwait Cinema Company (KCC) case.

Alalamia case

Alalamia company was the first in the Arab world to introduce the arabization of computer programs in 1984. Their system program was named (SAKHER MSX) which was based on Microsoft's system of (MSX). Two of its employees left to join a competing company where they transferred the system to the rival company and renamed it as (BARGMSX) without the permission of Alalamia. The competing company registered its product as a trademark. Alalamia brought two cases before the courts, one for a summary judgment for the attachment on all copies of (BARG-MSX) program and to stop production and the other one was for a criminal action based on theft.

For the first case (No. 62/1987 on March 23, 1987 Summary Appellant Court Decision)⁹ the court decided against Alalamia on the basis of trademark registration without paying any attention to the copyright issue. Actually, the competing company registered its system as a trademark with the official Kuwaiti trademark office while Alalamia did not register its own, nor did it raise an objection to the competing company's registration. Despite its efforts for development, as the court mentioned, this would deprive Alalamia from getting a summary judgment because there was no imminent peril forcing the court to decide in its favor.

In the second case (No. 1693/1987 on November 14, 1987 the Appellate Court of Misdemeanors)¹⁰ Alalamia alleged that its employees who left along with the competing company who hired them, had committed a theft by stealing its computer system which was considered a property even though it was an intellectual property. Since there was no copyright code and, hence, there was no incrimination of copyright infringement, the allegation made a contrast between the act of theft of the electric current and illegally gaining control over a system program of computer. The court agreed that something had been taken from Alalamia, but it was not like the electric current. Rather it was a copyright embodied in a computer program. And since the Kuwaiti legislature had not yet incriminated copyright infringement, the defendants act could not be criminally punished. However, in the conclusion of its decision, the court urged the legislature to intervene for the protection of copyright, especially in newly developed fields such as the development of the computer programs which were proven to be "very expensive."¹¹

This case which related to computer programs, was the first and the only one since then. However, we anticipate that the court's agenda will hold a growing number of cases in

⁹ Unpublished.

¹⁰ Unpublished.

¹¹ Case no. 1693/1987 of the Appellant Court of Misdemeanors on Nov. 14, 1987 (unpublished).

this field after the passing of the copyright code by the Kuwaiti National Assembly in January of this year.

KCC Case:

Kuwait Cinema Company (KCC) was the distributor in Kuwait for the video copies of a Syrian movie. In 1991 another video copying establishment copied the film and distributed it without either the KCC or the Syrian copyright holders' permission .

KCC brought an action against the establishment asking for indemnity because the latter committed an act of civil tort against its rights.¹²

The first instance court ignored KCC's legal argument of tort law ,which was usually relied on,¹³ and decided the case in favor of KCC on the grounds of copyright according to the Arab Convention for copyright.

That was the first time where the courts, clearly, applied the convention on copyright matters.¹⁴ The court said that "the facts presented are clearly governed by the principles and rules included in law no.16/1986 adopting the Arab Convention for the Protection of Copyright.

The law in its second article ordered the ministers concerned to execute it in article one of this convention [...] (par. b) the protection includes, especially, the following [...] (6) cinematographic and audio-video broadcasting works." The court went on in reciting the convention's provisions relating to the subjects of the case such as the transfer of copyright upon which the court found for the plaintiff (KCC).

The defendant (the establishment) was not satisfied with the ruling. He appealed criticizing the application of the convention on the grounds that the latter itself calls each member state to issue executive regulations for procedures to apply its rules which the authorities in Kuwait did not issue. "Until then," as the defendant said, "the status quo should prevail where the holder of distribution rights of the copyright, to defend his rights, should advertise the holding of those rights to the public. Since the appellant did not do that, then he is not entitled to those rights and the lower court decision erred in applying the convention especially where the copyright itself was not the subject of dispute."

The appellate court sustained the lower court's decision.¹⁵ In refusing the appellant's argument the court said, "Once the convention was adopted by the appropriate authorities it becomes a part of Kuwaiti local law. Therefore, its application does not depend on issuing regulations, neither for its enforcement nor for the enforcement of the law which promulgated it. And, **even though there is a need to legislate for other subjects** [of copyright], the convention by itself is effective on the subject matter of this case with no need to issue any executive regulations." While the Convention was directed to protect the works of citizens

¹² Case no. 282/1992 of the First Instance Court on June 10, 1994 (unpublished).

¹³ As pointed out earlier in footnote no. 3.

¹⁴ There were cases where the plaintiffs tried to request application of the Convention, but they were turned away by the courts, for example, decision no. 3460/86 of the First Instance Court which was cited in footnote no.4.

¹⁵ Decision no. 291/1994 of the Civil Appellate Court on Dec. 12, 1994 (unpublished).

published in their own country and exploited in the other countries' members of the convention, which was the case in this action, the court here was pointing to the three subjects which the Convention left to the local authorities to legislate as we mentioned before, i.e. copyright registration, the copyright infringement criminal penalty and the protection of national copyright in their own country.¹⁶

A number of decisions followed this case decision in situations where the copyright disputed was first published and belonged to persons or nationals of member countries of the convention other than Kuwait. Meanwhile, in cases where the disputed copyright was a local one, then the courts would apply the rules which they initiated since the sixties as mentioned in the introduction above.

However, the KCC case along with the Alalamia case, as may be noted above, added to the pressure by their request to the concerned authorities to arrange for the copyright code issuance.

3. International Demands

The international community represented by organizations concerned with intellectual property rights and commerce such as the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO) along with some countries interested in copyright protection such as the United States put their weight on Kuwait and other GCC countries to establish the means of protection for copyright nationally and internationally.

WIPO held two sub-regional seminars in Kuwait with the cooperation of the Kuwait Institute For Scientific Research (a governmental entity) in 1995 and 1998 respectively.¹⁷ The object of these seminars was to introduce the means for intellectual property protection and to invite Kuwait to join treaties and agreements in this field.

In 1986, Kuwait was invited to attend the UN's Uruguay Round relating to the international commerce and GATT negotiations. Kuwait did attend and, therefore, participated in the Morocco Conference of 1994 to sign the TRIPs agreement and the agreement establishing the World Trade Organization (WTO).¹⁸ The TRIPs agreement imposes an obligation on the member countries to guard and protect the foreign copyright according to the Paris convention of 1967 and the Bern convention of 1971,¹⁹ and to treat the citizens of other member countries as well as they treat its own citizens in the field of intellectual property.²⁰

The United States also declared its desire to see a serious movement toward the issuing of an effective code for copyright in Kuwait to cut down on the piracy of motion pictures, video cassettes, computer software, literary works, and sound recordings. Interested groups reached the Ministry of Information through the United States Embassy to urge it to

¹⁶ As mentioned above in sub-section A.1.

¹⁷ The WIPO Conference on Industrial Property and Licensing Technology Transfer and Promotion of Innovation for the Countries of the Gulf Cooperation Council(GCC) held in Kuwait, June5-7,1995. Also, the conference on the Information Super-Highways which was held in Kuwait on March 15-17, 1998.

¹⁸ Kuwait signed the TRIPs in April, 1994. See Salama, Dr. Mustafa ; "GAAT Rules," (in Arabic), Beirut, Lebanon, 1998, p.148. And see Marshall A. Leafer (editor); "International Treaties On Intellectual Property," The Bureau of National Affairs, Inc., Washington D.C.(second Edition).

¹⁹ Articles 2 and 9 of the TRIPs.

²⁰ Article 3 of TRIPs.

move in this direction. The US ambassador wrote a letter in the middle of 1994 to the minister of information, stating his remarks on the earlier draft of copyright law code. In January of 1996 the ambassador wrote another letter expressing concerns and remarks on the modified draft. The first and second drafts of the code will be discussed in the following sub-section.

B. Steps toward drafting the copyright code

In 1988 the National Council for Culture, Art, and Literary Works, (an independent governmental entity), issued a decision to form a committee representing the different fields concerned with copyright to draft the code.²¹ After almost a year, the committee concluded its work at the end of 1989 and submit the first draft which was presented to the ministry of information in order to take the procedural steps for an official review and promulgation. While it was included in the agenda of the Ministers Council for review, the invasion of Kuwait by Iraq occurred. After the liberation of Kuwait in late February, 1991, the priorities changed, and it was not until 1995, that a ministerial decision was taken to form a committee to establish the executive rules for the protection of copyright.²² This committee, which was presided over by the minister of information, suggested the forming of a legal committee to review and re-draft the old version of the copyright code, and to draft a new code for copyright works deposit and registration.²³ The deputy minister of information issued a decision in April 1996 forming the said committee which consisted mostly of lawyers and representatives of certain executive departments concerned with copyright protection.²⁴

The newly formed committee started working with the old draft of the code giving consideration to the new developments in the field of copyright, the US ambassador's remarks, and the treaties which Kuwait had recently joined. The committee concluded its work in August 1996 and submitted the revised draft of the copyright code and the draft code for registration and deposition of copyright works to the ministry of Information. For the copyright code there were no important changes except of adding "databases" to the protected works, deleting two articles belonging to deposition and registration of copyright (which would have its own code),²⁵ and adding the protection of the group of works of foreign authors first published in a country protecting them, when that country protects the works of Kuwaiti authors. Since most of the US ambassador's remarks were details usually contained in the executive regulations or usually left to the discretion of the courts as is the way of the "civil" law system, the committee took notice only of the issues of databases and the new group of works which confirm the Bern convention and WIPO's recommended rules.²⁶

On May 25, 1999 and after the constitutional dissolution of the National Assembly by the Amir of Kuwait, the government issued the copyright code by the law decree no. 5/1999. The code was named "Decree Law No.5/1999 Relating to Intellectual Property Rights."²⁷ The

²¹ The Author was a member of the committee, and the chairman of the sub-committee on the new technology aspects of copyright.

²² Minister of Information, Decision no. 53/1995.

²³ Deputy Minister of Information, Decision no. 4/1996 on April 8, 1996.

²⁴ The author was the chairman of this new committee.

²⁵ The committee drafted the code for copyright registration and deposition and submitted with the copyright law. However, it is still on the agenda to be brought to the national Assembly.

²⁶ WIPO Copyright Treaty (WCT) 1996, WIPO booklet, Geneva, 1997.

²⁷ Published in the official *Gazzet*, issue no. 414 in June, 1999.

latter had minimal changes in relation to the draft.²⁸ When a new Parliament was elected in October, it revoked all decree laws including the copyright decree.²⁹ But in December of the same year, the latter voted again to re- issue the code which was ratified by the Amir on December 25, 1999. The new code has a new number (64/1999) with no other changes except those concerning the new form of the code.³⁰

II. Outlines of the copyright code

Since the Copyright Code of Law no. 64/1999 (hereinafter referred to as "the Code") has only recently been issued, it is, very early to find cases decided under the copyright code. However, the latter rules conform with the law of Egypt and therefore, decisions of the Egyptian courts may be cited in the following subsections. The Kuwaiti courts usually follow the same trend.

As for the outlines, the issues which will be explored and discussed are the copyright works protected; the author's rights; the Code definition of the author in certain situations; the protection duration; the transfer of rights; the procedures, penalties, and remedies; and finally the scope of code protection and its retroactive effects.

A. Protected works and limitation of protection

1. Works Protected

The protection of the Code, as stated by article 1, "shall be enjoyed by the authors of original works of literature, art, and science, whatever their value, nature, the purpose for which they were made, or the way in which they were expressed." "Until otherwise is proven," the second paragraph of article 1 considers the person who creates the work or who the work was related to as "the author," either his name appears on the work or not. This is a rule for works with sham names or where their authorship has been disputed .

It is clear from the former article that the Kuwaiti Code follows the recognized idea for the protection of copyright; i.e. creativity. The latter represents the finger prints of the author's personality which allows the public to point to him when they are reading the work, seeing it, hearing it, etc.³¹

In article 2 the Code provides a list of particular examples of protected works. The list includes: written works; works communicated orally (e.g. lectures, addresses, religious sermons, or similar works); dramatics and dramatico-musical works; musical composition with or without words; choreographic works and pantomimes; cinematography and audio-video broadcasting works; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works; works of applied art whether handicraft or produced by industrial process; illustrations, maps, plans, sketches and three-dimensional works related to

²⁸ The draft was named the "Copyright Law" because it was, as the present code, containing copyright subjects. The new name includes subjects other than copyright such as patents which has its own code. Therefore, we think that the new name is not suitable.

²⁹ The Assembly decided that because there was no case of emergency to issue those decrees by the government in case of the absence of the Assembly as the Constitution stipulated.

³⁰ Issued in the official *Gazzet*, issue 445 on Jan. 9, 2000.

³¹ Decision nos. 54, 56, of the Kuwaiti Civil Court Of Appeals of Dec. 31, 72, mentioned supra fn.. (3). Also Egyptian Civil Court of Cassation, decision issued on Feb. 18, 1965, Collection of Technical Office (hereinafter; CTO), year 16, no. 28, p.178, mentioned in Loutfi, *ibid.*, p. 26.

geography, topography, architecture or science; computer works such as programs, databases, and similar works; and works derivative or translated (from original works). In its last paragraph, the article extends the protection to include the title of the work if it is distinguished with creativity and not merely a business expression to distinguish the work.

In the above, the Kuwaiti Code is among the few codes of Arab countries which, expressly, provide protection for the computer programs,³² and it is the second in protecting databases expressly.³³

The protection provided by the Code is also extended, by article 3, to the person who, with the permission of the author of the original work, translates into another language, summarizes, adapts, explains, or in any other way makes the original work appear in a new form. This protection shall not prejudice the protection of the original work. However, as the article proceeds, the rights of the author of photography shall not deprive others from taking new photographs of the same object even if they are taken, from the same place and, in general, in the same circumstances where the first photograph was taken.

The protection will also be extended to the author's collections of his published speeches and articles (article 12).

Finally, the Code provides for the protection of national folklore. Article (41 par.2) considers that the national folklore of the Kuwaiti society is the property of the state (public domain), and the state represented by the ministry of information shall exercise the authors' moral and economic rights on it.³⁴

³² Kuwait is among all GCC countries which issued their codes in the late 80s and the 90s mentioning the computer programs as copyright works. Egypt alone, among other Arab countries, made an amendment in 1992 to its code to include the computer programs as a category expressly protected as a copyright works. Loutfi, *ibid.*, appendix 1, p. 91.

³³ Egypt was the first Arab country to point to the databases as copyrighted works in the amendment of 1992 mentioned in the previous fn.. In Kuwait there was a debate among the members of the second drafting committee of the code in the subject. One opinion was to expressly indicate the databases as a separate category of copyright group. The other opinion was for leaving the matter to the courts to decide according to the circumstances of each case. The latter views that the databases as such were merely a group of information stored in a computer media and therefore may be protected by the rules of privacy which included in other codes. Or, on the other hand, if we look at computer programs as the media which analyzes and systems the information, then they fall under the computer programs category. In addition, as the second opinion viewed, all categories were mentioned only as examples having special attention, but what was important was the idea behind their protection; i.e. "creativity." When a work in any form or media expressed falls under the "creativity" criteria, it should be considered as a copyright work mentioned as such in the Code or not. This opinion may find its support in the decision of the Court of Cassation no.118 mentioned by fn.. (3) *supra*. The court said "The work does not mean but the "creativity" work; i.e. the idea not the material media which includes such idea." The majority, however, went with the opinion of clarity; i.e. to expressly include the databases as a separate category by name.

³⁴ This paragraph was added in the present Code. It was neither drafted nor the first edition of the code which was issued previously contained it. Folklore works usually are open to the public unless it has a recent addition, then the new addition author will have protection of his added work. Therefore, we cannot understand the purpose of this new addition by the Code. On the contrary, we see it in its present wording, an obstacle for developing the national folklore.

Except for computer programs and databases, the Kuwaiti Code conforms with the codes of all Arab countries, the Arab Convention for copyright protection, and the Bern Convention, as amended by Paris Act.³⁵

2. Limitations on Protection

The Code limits protection of the author's rights after the publication of the work in certain situations:

- The author shall not prevent others from performing a work of choreography or acting, if the performance occurs in a private meeting and has no direct or indirect financial proceeds. (article 7);
- If it is for personal use only, the author shall have no right to prevent the production of one copy of the work, translating, adopting, or altering the work in any way. (article 8);
- Subject to a clear citation of the source and the author's name, the author shall not prohibit other persons from making a short analysis and adaptations of his work, when such is only a matter of criticism, education, study or news. (article 9);
- If it is not expressly reserved by the author of the original work, it shall be a matter of the press; periodicals; radio and TV broadcasting; or any other media communications to deliver, without the permission of the author, articles of current political, economic, or religious discussions related to a subject of public debate. However, in each case, the communication or adaptation must, clearly cite the source and the author's name. (article 10);
- It is a matter for the newspapers, broadcasts, and other means of the media, to publish or communicate as news; speeches, lectures or addresses in public meetings of legislative and administrative authorities. It is, also, a matter for the news media to do the same with scientific, literary, artistic, and political meetings, when the meetings are addressed to the public. Whenever the legal procedures concede, it is also permitted without the consent of the author, to publish the judicial open proceedings. (article 11)³⁶

³⁵ WIPO; Bern Convention For The Protection Of Literary And Artistic Works; Paris Act of July 24, 1971, WIPO publications, Geneva, 1977.

³⁶ In the first and second drafts of the code which were mentioned in the first section above, there was an article which was allotted to the non-protected works. This article was deleted from the Code. Unless included in other articles either to consider them expressly protected or non-protected, these works may be understood as protected now, which we doubt it. The works were:

1. Collections of official documents of the provisions of laws, decrees, regulations, international treaties and agreements, courts decisions, and their translations.
2. Works transferred to the public domain (either by the end of the term of their protection or by alienation of the authors or their successors).
3. Collections of works of a number of authors such as collections of poems of different persons or musical works of different musicians, etc. stipulated that the rights of authors of each work shall not be prejudiced.
4. The news, and incidents reporting published, broadcasted, or printed.
5. The Folklore's.

However, as the deleted article continued, these works may be protected if they form a creative work by their organization or by their inclusion of intellectual addition or a personal creative output.

B. Author's rights

The Code recognizes two kinds of author's rights; i.e. moral and economic. Articles 4-6; 13-15, 29, 32, and 35 relate to rules providing and limiting such rights.

1. Moral Rights

In addition to what has been mentioned above (limitations of protection in sub-section A), articles 4 (par. 1), 6, 15, 29, 32, and 35 set the rules of the moral rights. According to these articles, the author shall have the right:

- to decide whether his work is to be published and to specify the means of publication.(Art. 4 par.1);
- to have his work ascribed to him except where the work is incidentally mentioned in the reporting of current events by means of radio or TV broadcasting (Art. 6 par. 1).³⁷ Relating the work to its author as set by this rule does not need to be agreed upon with others;
- to object or to prevent any distortion, modification, mutilation, or any other changes to his work without his permission.(Art. 6 par. 2). If, however, the said changes were within the translation of the work, the author shall have no right to prevent it unless the translator's intervention has caused the author's reputation, honor, or scientific or artistic standing to be impaired. And in any case, a notification of the alteration or distortion must be referred to in the translation.(Art. 6 par. 3);
- where there are serious reasons, to ask the first instance court to order the withdrawal of his work from circulation or to make modification to his work even though he had assigned the economic rights. In the latter case, the court decision shall have no effect unless the author offers a fair compensation to the assignee on a date fixed by the court (Art. 35). This right (right of withdrawal or modification) is for the author himself and not extended to successors nor assignees;
- The performing artists such as actors, singers, musicians, and similar, shall enjoy the right to relate the work they created, as created, to them.(Art.15 par.1).

All contents of this article except the works of folklore may be, directly or indirectly, interpreted according to the rules of the Code as unprotected works. The folklore works alone, as we see in the text and footnote 36, are expressly given the protection which may be disputed.

³⁷ The Egyptian Court of Cassation came to this issue when an author complained that his name was not indicated in an advertisement about his book. The publisher (the respondent) alleged that indicating the name in the advertisement was not agreed upon. The court held for the author by saying , "The author's right for his name to be written on each copy of his work either published directly by him or by others does not need an agreement to be concluded with the others. The same rule is applicable to all advertisements for the book." Decision of Jan. 7, 1987, Judicial jour., no. 1, Jan.-June, 1988, p.75. Loutfi, *ibid.*, p. 42.

However, the moral rights of the author are not without limits. Article 32 provides that, "It shall be considered null, any alienation of rights mentioned in article (4 par.1), and article 6 of this code." This means that the author could not compromise his moral rights in any way.³⁸ And "unless authorized in writing," article 29 deprives the author of photography from exhibiting, publishing, or distributing the originals, or copies of them without the permission of the portrayed persons. Permission, however, is not needed for pictures published in the context of current public events; related to officials, or public figures; or, for the public interest, permitted by the authorities unless the exhibition or circulation of the picture shall cause impairment of the portrayed person's honor, dignity, or reputation. On the other hand and "Unless a written agreement to the contrary" as the article stated, the portrayed person may allow the publication of the picture by newspapers, magazines, and similar publications.

2. Economic Rights (Rights of Exploitation)

In addition to the moral rights, the Code gives the author the right to exploit his copyright work by any means of exploitation and exclude others from doing so unless with an advance written authorization by the author or his successors. (Art. 4 par. 2)

As set by article (5), the right to exploit includes:

- any means of copying;
- communicating the work by live performance; theatrical performance; radio, television, and cinematographic transmission; or by any other means of transmission;
- translating to any language, modifying, summarizing, explaining, or transforming the work to any other form.

The performing artists who create a work also enjoy the right of exploitation in addition to the moral rights of their work. The provision of article (14), after providing the performance artists with the moral rights of their work, prescribes that they shall enjoy the financial right to exploit their work either by communicating it to the public; performing it for the purpose of original fixing or copying; renting it; or performing it for the purpose of fixing it through radio broadcasting or computer.

The broadcasting authorities enjoy the financial rights of their recordings and have the right to prevent others from exploiting their programs without their advance written authorization.

³⁸ While recognizing that the public contract compromises the right of the author for the revision of his book which cannot be alienated otherwise, the High Administrative Court of Egypt validated the contract between the ministry of education and the author of a book. The contract contains a stipulation providing that the author should not object to the revision of his book by the ministry. The court concluded that, "Even though it is undermining the author's moral rights, it is clearly an exceptional stipulation which would be allowed because of its contribution to moving the educational domain ahead, and the author is profiting from royalties paid to him." Decision issued on May 18, 1968, Collection of Legal Principles of the High Administrative Court, the State Council, year 13, no. 127, p. 953. Loutfi; *ibid.*, p. 40.

After the death of the author, only his heirs shall be entitled to the rights of economic exploitation of the work as described by the law. However, as provided by article (13), the heirs have to observe the following:

- a) if the author agreed in writing with others for the use of his work, his agreement should be executed according to its stipulations;
- b) if the author testified not to publish his work; or fixed a date or other conditions for its publication, his will shall be executed;
- c) if there is no written agreement to the contrary, when one author among co-authors of a joint work is deceased with no heirs or devisees, his portion of the work shall be equally divided among the remaining co-authors.

When the minister of information perceives that the publication or re-publication of the work is required by the public interest, he may invite the heirs in writing to publish the work. If the heirs fail to proceed with the publication within a period of one year from the date of the invitation, the minister of information, after getting a court order to surrender the work to him, may proceed with publication. The heirs or successors of the author shall be entitled to a fair compensation to be set by the court.(Art.14).

C. The author in certain situations

The Code recognizes that a number of works involve more than one person and need to specify the author or authors of that work, the portion of the work they create, and other persons involved in the work and their role and rights.³⁹

1. Joint works

There are two joint works which were pointed out by the code:

- a) **Undividable joint works:** Unless a written agreement to the contrary, If more than one person co-authored a joint work with no possibility to assign the portion of any one of them, the entire group shall be equally considered as the owners of the work. In this case, no one of the co-authors single-handedly can exploit the authorship rights. A unanimous agreement among the co-authors is required. If no unanimous agreement is reached, the first instance court shall have the jurisdiction to decide the dispute. In case of copyright infringement, any one of the authors shall have the right to seek protective and summary judgements, and to bring an action to seek recovery for his portion from damages caused by infringement.(Art.18)

³⁹ The work will not be considered as a joint work if the others did not share in the intellectual creation of it. Or as the Egyptian civil Court of Cassation put it, "If the evidence brought by the petitioner was hand written comments on the original copy of the book, and if it was proven by the appointed expert that the comments were merely a replacing of words and examples by another which in total did not represent a production of an intellectual sharing or opinion, then the lower court position (in refusing the plaintiff action) is correct." Decision issued on Jan. 4, 1962 (CTO), year 13, no. 4, p. 34. Loutfi; *ibid.*, p. 35.

- b) Dividable joint works: Unless a written agreement otherwise, if more than one person jointly co-authors a work, and the portion of each person can be specified, every one of the co-authors shall have the right to exploit his portion stipulating that his exploitation shall not prejudice the exploitation of the joint work (Art.19).

2. Musical works

Certain musical works are mentioned by the Code:

- a) Songs:
The composer alone shall have, alone, the right to authorize to the public the performance, execution, publication, or reproduction of the joint work as a whole. This is without prejudice to the right of the author of the literary part. The latter shall have the right to publish his own part. However, and unless otherwise agreed in by writing, the author of the literary part may not dispose of this part to another musical work (Art.20);
- b) Musical works accompanied by movement:
For joint works executed by movements accompanied by music and any other similar works, the designer of the movements shall have the right to authorize the public the performance, execution and reproduction of the work as a whole. The music composer shall have the right to dispose the musical portion only. Unless otherwise agreed, in writing the latter shall not use the musical part in any similar work (Art. 21).
- c) Unfinished part of the musical joint work:
In the case of a musical work or a work prepared for radio or TV, if one of the co-authors declines to finish his part of the work or has a compelling reason which deprives him from finishing his part, he shall have no right to prevent the other co-authors from using the part he has already prepared. However, he shall be considered as an author for the part prepared and shall enjoy all the rights that emerge from it.(Art. 24).

3. Cinematographic works and works prepared for radio or television:

Cinematographic works along with works prepared for the radio and television are treated in more details in the Code. Considering who are the authors of the work, who has the right to display the work, and who is to be considered producer, are issues dealt with in the provisions of the Code formulation.

- He shall be considered a co-author of a cinematographic work and the work prepared for radio and televised broadcasting:
 - First: the author of scenario or of the written idea of the work;
 - Second: the person who adapts the original literary work to be suitable for these works;
 - Third: the author of the dialogue;
 - Forth: the composer of the piece of music specially prepared for this work;

Fifth: the director, if he undertakes an effective supervision and contributes a positive role, intellectually, to the execution of any one of such works.

If the cinematographic work or the work created for the radio and television is simplified or derived from another previous work, the author of the latter work shall be considered as a co-author of the new work (Art.22).

- Despite the objection of the author of the original literary work or the music composer, the authors of the scenario, the adaptation of the literary work, the dialogue, and the director, concurrently, shall have the right to display the cinematographic work or the work created for radio and television broadcasting. In exploiting this right, there shall be no prejudice to the rights of the objecting party as a co-author. Unless there is a written agreement to the contrary, the authors of the literary and musical parts shall have the right to publish their works in other ways (Art. 23).
- The natural or the artificial person who executes or assumes responsibility for the execution of the cinematographic work, or who puts all means available for the author of the work to realize its production, shall be considered the producer of the work. In all cases, the producer shall be also considered the publisher and has all the rights thereof. Unless there is a written agreement otherwise, the producer shall be regarded as an agent for the entire group of authors and their successors during the agreed period to conclude agreements to display or exploit the work. The enjoyment of this agency rights by the producer, shall not prejudice the rights of the authors of the literary or musical works (Art. 25).

4. Collective works

The collective works are those works of a group of people associated in their production under the direction of a natural or artificial person where it is not possible to individually break down or distinguish the work of each associated person. The person who directed the creation and organizing the work shall be considered the author of the work (Art. 26).⁴⁰

5. Works for hire

It is permitted according to the Code to hire persons to create works on behalf of natural or artificial persons. However, the person who creates the work shall be considered the author unless agreed in writing to the contrary (Art. 27).

⁴⁰ In a case brought by the author of the musical part of a movie against the owner of the hall of exhibition for the returns of his right of public performance the Egyptian court of cassation ruled out that, "If the author of the musical part in the agreement between him and the producer, insisted on keeping his right of public performance for himself, then he can directly sue the operator of the cinema house." In that decision, the court of cassation was supporting the decision of the court of appeals. The court of appeals concluded its decision by saying that, "The legal agency provided by the law to the producer does not strip the author of the musical part of his right of public performance, therefore, his permission must be obtained before the performance started." Decision issued on April 14, 1973, (CTO), year 24, no. 107, p. 608.

6. Works of anonymous authors or false names

For works with anonymous authors and works with fake names, the Code provides that unless it is proven to the contrary, the publisher whose name appears on the work shall be regarded as authorized by the author of the work to exercise the rights he is entitled to (Art. 28).

D. Duration of the economic rights

The Code fixed different durations for the different kinds of copyright works;

1. General rule:

The general rule for the duration of protection of copyright is for the author's life and fifty years after his death. In the case of joint works, the duration shall be calculated from the date of the death of last author.(Art. 17 par.1).⁴¹

2. Translation:

If the author of a work in a foreign language, or the translator of this work to another foreign language does not exercise his right to translate the work to the Arabic language, the protection of this work shall end during five years from the date of first publication of the original work or the translated copy of it. However, it is for the minister of information to authorize the translation to the Arabic language, or re-publication of a work after one year from the date of first publication of the original work or its translation to any other foreign language. In the latter case, the author or person who has the translation right shall be entitled to a fair compensation (Art. 16).⁴²

3. Other works:

Different durations were set to certain kinds of works:

- * The duration of copyright protection, as the second paragraph of article (17) provides, shall be fifty years calculated from the end of the Georgian year when the work was first published in the following:
 - a) works with fake names or no names for the authors. If the author discloses his identity or his identity is known to the public, then the duration shall be calculated as in paragraph (1) of article (17) (the general rule);
 - b) works which copyright is owned by an artificial persons;
 - c) works of cinematography, photography, applied art, computer programming, and databases;
 - d) works first published after the death of their authors.

⁴¹ In the first draft of the code the duration was 25 years after the death of the author. And that was the rule in the Arab Convention for Copyright. But when Kuwait joined the TRIPs and had the intention to join other treaties Bern, the drafter of the second draft changed it to 50.

⁴² As authorized by appendix 3 of the Bern treaty for the developing countries.

- * The performing artists shall enjoy a protection of fifty years calculated from the end of the Georgian year when they first performed the work. The same period shall be entitled to the producers of cinematography records or records prepared for radio and television broadcasting (Art. 17 par. 3).⁴³
- * For programs transmitted by the broadcasting authorities, the period of protection shall be twenty years starting from the end of the Georgian year when the program was first transmitted (Art. 17 par. 4).⁴⁴

E Transfer of economic rights

The author, as the Code provides in articles (30 par. 1) and (31 par. 1), may transfer the right of exploitation directly to others in whole or in part as a percentage or as a random partnership. But this right is not without limits. As mentioned before in the moral rights subsection, the author is absolutely deprived from transferring his moral rights (Art. 32). For exploitation rights, on the other hand, where the transfer of one of them does not mean the transfer of the others (Art. 30 par. 2), the following should be considered:

- the transfer must be in writing, the transferred right and the extent of it, which are the subjects of transfer, the duration of exploitation, and the place of exploitation are expressly indicated (Art. 30 par. 3);
- the alienation of all future intellectual rights of the author is not permitted and shall be considered null (Art. 33);⁴⁵
- the author shall refrain from any act which would cause obstruction of the material use of the transferred right (Art. 30 par. 4).

However, if at a later date it appears that the agreement to transfer was unfair for the authors' rights, or unforeseen circumstances occurred after the conclusion of the agreement which made it so, the court in consideration of the circumstances, and balancing between the parties' interests, may decide for the author to withdraw the copies, and above of what has been agreed, an additional portion of the net profits arises from the exploitation of the work (Art. 31 par. 2).⁴⁶

The above rules also apply to the transfer of the rights of the artist of performance (Art. 31, par. 5).

⁴³ The same situation discussed in fn. 43.

⁴⁴ This was not drafted either in the first draft or in the second. However, in a later meeting with officials in the ministry of information, the concern was about the works previously transmitted by the radio and television which were and still are owned by the government. The official wanted to exclude them from protection. This provision serves this end.

⁴⁵ The reason for this provision was to prevent the prejudice to the author's personality and his pure moral rights, and as the Egyptian Court of Appeals put it, "what he may financially earn for it will be dwindled if compared with what he will lose." Decision issued on April 24, 1954, published in the journal *ALMUHAMAT*, no. 354, year 41, p. 683. It will not be considered as alienation of future right of exploitation, however, if the author will be represented by an association of authors in the same field which collect on their behalf and to their individual accounts the royalties they are entitled to. A decision of the same court issued on May 23, 1972 (no. 69). jour. *ALMUHAMAT*, year 53, nos. 7 and 8, pp. 67 and 69. Loutfi; *ibid.*, p. 46.

⁴⁶ This provision is an application of the principle of " unforeseen circumstances" which the civil legal system recognizes as an excuse to reduce or increase the legal obligations of the contracted parties when the balance of their interests is dramatically turned over. Alsanhori; A. Razzak; *ALWASEET*, part 8, pp. 520-21, Cairo, second edition, 1991.

- **Special case (the transfer of the original copy):**

A special provision is offered by the Code for the transfer of the original copy of the work. Article (34) indicates that the transfer of the only original copy of the work whatever its kind shall not be considered as a transfer of the author's rights. However, and unless there is a written agreement otherwise, the owner of this copy shall not be obliged to facilitate the author for its copying, transmitting, or exhibiting.

F. Procedures, penalties and remedies

The Code provides the copyright with certain protective procedures, penalties, and rules to redress the author or his successors for infringements committed against such rights.

1. Protective Procedures

According to a petition to be raised by the author (or his successors) of a work published or exhibited, without his(or their) written permission, the judge of the temporary judgments division of the first instance court, may issue an order for the following procedures:

- a) conducting a detailed description of the work;
- b) ceasing the publication, exhibition, or production of the work;
- c) pursuing a seizure on the original copy of the work or its copies and the materials used to republish the work;
- d) establishing evidence for the public performance of works relating to music, acting, or transmission; and preventing the current or future performance of the work;
- e) assessment of proceeds resulting from publishing or exhibiting of the work and making attachment thereof . The assessment may be performed by an expert, if necessary.

For these procedures, the petitioning party shall bring a suitable guaranty determined by the ordering judge, and bring his dispute before the competent court in a period of eight days (Art.36).

Copyright, moral or economic, is not subject to attachment. But published copy of the work may be seized.⁴⁷ However, if the author dies before publishing his work the copies thereof may not be subject of seizure unless it is proven without doubt that he intended to publish his work (Art. 39).

Moreover, buildings shall not be subject to attachment, demolition, nor confiscation for the purpose of the protection of rights of an architect author whose designs and drawings were used without his permission (Art. 40).

⁴⁷ Copyright itself is not subject of possession. The reason for that, is that it is stuck with the being of the person. On the other hand, the copies of the work are not, therefore, they may be seized or attached. Decision of the Egyptian Court of Cassation issued on May 12, 1966, (CTO), year 17, no. 151, p. 1114.

2. Penalties

Article (42) provides the legal penalties that shall be imposed on persons who commit infringements against the copyright. The penalty for the crime of copyright infringement is imprisonment for a period not exceeding one year and a fine of five hundred Dinars (approx.\$1750), or any one of them. Shall be considered committing a crime of copyright infringement:

- a) any person who infringes the author's rights provided by articles 4, 5, 6 (par.1), and 12 of this law;
- b) any person who sells; offers for sale or circulation; announces to the public in any way; or imports to or exports from the country, any counterfeited work;
- c) any person who discloses or facilitates the disclosure of computer programs or the publication thereof;
- d) any person who removes or facilitates removal of a protection organizes or limits the public learning of a work, or its performance, broadcasting, or recording.

The court may decide for the confiscation of all instruments used for unauthorized publication if not useful for other uses, and the confiscation of all copies of the work (par. 2).

The court may also decide for the publication of its decision in the newspapers, one or more, at the expense of the convicted person (par. 3).

If the defendant was convicted during the past five years calculated from the date of the final decision, for a crime among those mentioned above, the court may decide for the present crime a punishment higher than the above but not exceeding half of it. The court may also decide the closing of the foundation used in committing the crime for a period not exceeding six months.

3. Author Remedies

In the case of infringement, the Code gives the author the right for a compensation and redress.

Article (40 par.1) provides that "if an infringement occurs against the rights provided by this law, the author shall have the right to compensation." This right, as article (38 par. 2) describes it, gives the author a "prior lien" upon the net value of the attached money and the price of sold things seized. That is after the deduction of judicial expenses, expenses for preserving and maintaining of the seized things, and expenses incurred in money collection.

The author or his representative is entitled also to ask the competent court to decide on the expenses of the liable party, the distraction of the copies or photographs of the unauthorized published work and the materials used for the work publication if not reusable for other purposes. The court may decide, as an alternative, to change the features of the copies or to make the instrument unusable.

However, if the protection of the copyright shall end in less than two years, the court may, alternatively and without prejudice to the authors' rights, decide for the

ascertainment of the temporary protective attachment in satisfaction for the author's compensation.

Ascertainment of the temporary attachment is a matter of necessity, if the unauthorized work is a translation to the Arabic language (Art. 38 par.1).

G. Scope of protection and retroactive effects of the code

Finally, in addition of other rules relating to constitutional subjects and designated authorities in charge of the application of the Code which are the Ministry of Information and the office of the General Attorney, the Code draws its scope of protection and retroactively of its rules.

1. Scope of Protection

In article (43), the Code puts its scope of works protected by the aforementioned rules stipulating that such protection shall not prejudice the rules of international treaties to which Kuwait is a party.

The works within the scope of the protection of the Code are those:

- a) relating to authors citizens of the State of Kuwait which are published anywhere;
- b) relating to Arab authors citizens of countries members of the Arab Convention for the protection of copyright which are published in one of these countries;
- c) relating to foreigner authors which first published in the State of Kuwait;
- d) relating to authors citizens of member countries of the Treaty of the World Organization for Intellectual Property which first published in one of these countries.

Finally, there is a fifth group of authors whose works are protected. This group was included in the draft and the Decree of Law no.5/1999 mentioned above.⁴⁸ Unfortunately, this group was missed out by the present Code. But we think that it was a mere inadvertence of legislature or a printing slip. Our opinion for that is supported by the mention of the group in the explanatory note of the present Code, the absence of any decision or discussion of the issue by legislators in the meeting of the National Assembly in which the present Code was adopted, and the reciprocity principle which it depends on. The group is of works of foreign authors, citizens of countries according the works of Kuwaiti authors a similar treatment.

2. Retroactive effects of the Code

In article (44) the Code draws its retroactive effects. This article provides that, "The rules of this law shall be applied on the works mentioned in the previous article[article 43] which are in existence at the time of its entry into force. However, for the propose of calculating the term of protection of these works, that term shall include the period elapsed between the date of the event designated for the starting date of the term and the date on which the law came into force."

⁴⁸ Section 1/ sub-sec. B, and fn.. 29.

In addition, the article in the second paragraph, calls for the application of the rules of the Code, on all facts and agreements concluded after it is being in force even though they relate to works published, exhibited, or performed before the Code came into force. The agreements concluded before the Code came into force shall not, as the article provided, be affected by its rules, but remain subject to legal rules applicable at the date of their conclusion.

Conclusions

Despite the late adoption of the Code by the Kuwaiti Legislature, it was clear that the courts did not hesitate in facing the problem by finding other means of protection for copyright. The Kuwaiti courts rule in the subject was evidenced, as indicated, throughout the period between the sixties until the year 2000.

Of course, the courts rule was merely civil not with criminal actions. As it is a civil legal system principle that, "no crime without a provision, and no punishment without determination," the courts would not criminally punish offenders. Rather they used the Civil Law means of civil liability to redress the copyright holder for the infringement of his rights. Even though it was without clear permission from the legislator, the application and effect of the civil liability rules upon copyright was evident.

Moreover, when Kuwait joined the Arab Convention for the Protection of copyright, the courts were warned to apply it before the issuing of its local regulations for execution as its rules demanded.

The Code, on the other hand, was drafted in the same way the civil legal system codes are usually drafted, i.e. with general principles and outlines, and few details. Details were left either to executive regulations or to courts when interpreting the Code rules. However, the Code's Formulation was not without small slumps here and there. The most important were the protection duration of the computer programs and the protection of folklore works.

Since the unbelievably rapid development in the field of computers and computer programs, the cycle of the financial exploiting of the computer programs is very short. Therefore, the protection duration of fifty years which the Code provides is too long and nonsense. As the sub-committee on new technology aspects of copyright concluded in 1989, a twenty years term lap was more than enough for the duration of computer programs. This was reflected in the first and second drafts of the Code. But the legislators chose to extend it to fifty years. As it may be visualized, this long duration of protection will have a hindering effect on this field progress.

In the same trend, is the present rule for the folklore. As we mentioned previously, there was an article in the first and second drafts which expressly kept the folklore among some other works open to the public use. The first issued code deleted this article in its entirety without mentioning the folklore. The present Code followed it up, but by making the entire folklore works as protected, not just works which have new creative additions as the drafts stipulated. The folklore works by their name fall in the category of works which exhausted their duration of protection and entered the conscious of the people. Consequently, folklore works by their nature should not be protected or limited in use. On the contrary, the present rule which was hastily added, as we think, will limit the folklore development and use. The rule as appears in the Code text will lead to those who need to use folklore works for

performance, or want to develop a folklore work, to request permission of the ministry of information before he can proceed with his purpose. With the bureaucratic procedures and financial fee if applied, this will pose an obstacle to development as we anticipate. This is not recommended for folklore works. Therefore, we wish that the legislature move forward to amend the Code in the above subjects without waiting. Encouragement, not hindrance, is badly needed in these fields.

BIBLIOGRAPHY

Black, Trevor, *Intellectual Property in the Digital Era*, Sweet and Maxwell, London, 2002, 136 pp. This book explores existing forms of intellectual property protection, assessing in turn the problems confronting each of the players in the information economy, from authors and performers to publishers and broadcasters and new players such as the digital media industry. The reports helps you understand how existing and new intellectual property rights are likely to affect the clients' commercial interests and alerts you to areas where legal advice is most needed. The report is in three part . Part I sets out what the Intellectual Property legal needs of industry are, and are likely to be, in the digital era and the industry's call for legal certainty in what constitutes reproduction and distribution. Part II examines the individual needs of major players such as authors, artists and performers; software and database developers; the music, film and broadcasting industries; the fledgling multi-media/digital media industry. Part III deals with international considerations. Its bibliographical details are: ISBN 0421 824107.

Les droits de propriété intellectuelle sur les inventions et créations des chercheurs salariés [Intellectual property rights in regard to inventions and creations by salaried researchers]. Brought out by the French Académie des Sciences and Académie des Sciences Morales et Politiques. Published by Tec et Doc. This book is the outcome of a seminar that took place on 5 December 2000 at the Fondation de la Maison de la Chimie. In these early years of the twenty-first century, world economic competition is largely based on the results of research, that is to say on the creations and inventions of human ingenuity. Nowadays, inventions require considerable input in terms of staff, instruments and equipment. As a result, investment plays a major role. This is particularly visible and well known in the pharmaceutical industry, where the development of an effective molecule against a given infection calls for lengthy and costly research. In such circumstances, the job of inventing and creating products can no longer be left to individual initiative. Research is thus carried out by enterprises and public bodies, which explains why 90% of such creations and inventions are the work of salaried researchers. What are the rights of these researchers over their inventions? How can they be given a financial interest in their discoveries in order to foster their creativity? These are the two core questions tackled by the authors of the contributions brought together in this first volume of an investigation by the inter-academy working group. The work is divided into two parts, devoted respectively to the “recognition of rights” and the “promotion of research”. The inter-academy working group is chaired by Pierre Potier and Jean Foyer. Scientific officer: Ms Catherine Blaizot-Hazard. For further information: Jean-Yves Charon, Head of Publications, Académie des Sciences
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