

PART ONE

QUESTIONS OF COPYRIGHT

What is copyright?

The concept behind copyright is that the creators of literary and artistic works have rights of ownership in their works, and, further, that those rights should be afforded legal protection in order to prevent unauthorized appropriation. As the Universal Declaration of Human Rights says, 'Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'. It does not matter whether he works in a developed or a developing country: he needs such protection because without it he is in danger of losing his livelihood.

So as to enable a work to be made available to a wide public, the person originating it often authorizes other people to publish it, translate it, adapt it, broadcast it, communicate it to the public, or reproduce it. In other words he assigns to people of his choice some of the rights he possesses in his work.

How is copyright protected?

Most countries have copyright laws which protect works originating within their own country against 'piracy'. Such laws, however, are not effective in other countries, and it is only through international agreements that protection in foreign countries is guaranteed. The best known international copyright agreements are the Berne Union and the Universal Copyright Convention.

The Berne Union The Berne Copyright Union was founded in 1886 and the countries belonging to it undertake to grant reciprocal protection to each other's works, in effect assimilating to the national repertoire, and protecting according to the same principles, works of which another country of the Union is the country of origin. No formalities have to be completed before protection is granted.

Universal Copyright Convention Adopted at Geneva in 1952, the Universal Copyright Convention (often abbreviated to UCC) recognizes the principle that a work by a foreign author enjoys the same protection as a work of an author who is a national of a state. It provides for the simplification of formalities which, if required by the domestic law of a contracting state, are regarded as satisfied if, when a work is first published, all copies bear the symbol © followed by the name of the copyright owner and the year of first publication. It also introduces special provisions governing translation rights.

The states that have ratified or acceded to the Berne and/or Universal Conventions are listed in Appendix A. States that are party to the Berne Convention are required to provide for a higher degree of protection. Relationships between states that are party to both Conventions are governed by the provisions of the Berne Convention rather than the UCC.

Countries that have ratified or acceded to either Convention have an obligation to keep their national copyright laws in line with the terms of the Convention to which they have become bound. Within these broad guidelines, however, it is possible for individual nations to work out their own solutions to specific issues, such as permissible photocopying practices.

Why is copyright protection necessary?

It is generally considered proper that authors should have a reasonable return for their work, in keeping with other originators. Such evidence as has been gathered shows that - apart from a tiny number of 'bestselling' authors - most authors receive little enough reward for their work, even with copyright protection.

It is also in the public interest that authors' rights should be protected. Without copyright protection, authors would be reluctant to engage in the exacting work of writing with no reasonable hope of financial reward. Publishers would also find it impractical to produce and disseminate literary works if unauthorized, competing reproductions, carrying none of the financial overheads of the original publication, could appear unrestricted on any market.

What rights are protected?

Authors and other copyright proprietors can, in many countries, control the following rights in their works:

- (a) reproducing the work in any material form including recording and filming;
- (b) publishing the work;
- (c) performing the work in public;
- (d) broadcasting the work;
- (e) causing the work to be transmitted to subscribers to a diffusion service;
- (f) making any adaptation, translation or arrangement of the work.

Most often an author works through a publisher or an agent who usually carries out negotiations on his behalf.

Under the Berne Convention, literary works remain in copyright for 50 years after the death of the author. Under the UCC the minimum term of protection is 25 years counted either from the author's death or from first publication depending on a particular country's domestic law.

What educational problems did the Conventions pose for the developing countries?

During the 1960s many countries embarked upon wide-ranging educational programmes. It was then found that problems existed, particularly in the provision of advanced books for university and other forms of higher education. The rights in these books were generally controlled by publishers in developed countries who, at least in the first instance, produced editions primarily geared to the needs and purchasing power of their home market.

Representatives of developing countries argued that it was wrong for educational programmes to be hampered by copyright restrictions. The copyright owners countered by saying that it was not right to deprive an author of his return just because his

work was educational in content, and that to do so would inhibit educational writing. Moreover, the world market for tertiary textbooks was often small, and most developing countries needed too few copies to justify local production of a separate edition. Since both sides had strong arguments, it was manifestly an issue for negotiation and compromise.

What was done about this situation?

At the two meetings of international copyright experts convened at Brazzaville in 1963 and at Geneva in 1964, representatives of the newly independent African countries pressed for revision of copyright laws to enable an author to be obliged to release his works for educational purposes, subject to reasonable financial provision being made.

What was the 'Stockholm Protocol'?

A Study Group, composed of representatives of the Swedish Government and the Bureau of the Berne Union, noting the points made at the two earlier meetings (Brazzaville, 1963 and Geneva, 1964), and aware of the attitudes and aspirations of many African and Asian countries, proposed the inclusion in the Berne Convention of a new Article which would enable developing countries to take advantage of certain privileges. At the International Copyright Conferences held in Stockholm in 1967 these privileges or provisions were put forward and agreed upon in the form of a Protocol to be annexed to the Convention. Among these provisions was the waiving of copyright restrictions in respect of works required 'exclusively for teaching, study and research in all fields of education' provided that the author was assured of 'a compensation which conforms to standards of payment made to national authors'. It also permitted such editions to be exported between developing countries. In the event none of the major publishing countries acceded to the Stockholm Act which, as the Protocol could not be applied unilaterally by a developing country, was therefore rendered virtually unworkable.

What were the next steps?

Countries with major book industries were still concerned to identify and meet the needs of developing countries, as long as there was no undermining of the foundation of the structure of the international copyright system - the author's exclusive right to

ownership of his work. In 1969 a Joint Study Group consisting of representatives of member states of UCC and the Berne Union suggested certain relaxations of the Berne and Universal Conventions, and looked forward to parallel and concurrent revisions of both instruments. The recommendations of the Group were then considered at various international meetings leading up to the revision conferences in Paris in 1971.

What were the Paris negotiations of 1971?

For three weeks in July 1971 representatives of the Berne and UCC countries met in parallel sessions in Paris to thrash out the problems. The discussions concerned generally those literary, scientific or artistic works published in printed or analogous forms of reproduction that are used 'for teaching, scholarship or research' or 'for use in connection with systematic instructional activities'. The final agreement, applicable under both Conventions, laid down the terms under which either the state or a private publisher in a developing country could get a compulsory licence to reproduce a protected work locally, either in the original language or in translation. Developing countries could take advantage of these facilities in regard to translation, to reproduction, or to both.

In practice, should the occasion arise, the first step in trying to obtain a compulsory licence should be to approach the Ministry responsible for copyright in the applicant's country. This is frequently the Ministry of Education or of Information.

How can a copyright proprietor avoid compulsory licensing?

It was agreed that there would be no case for compulsory licensing if a copyright proprietor made freely available a translation or reprint of his book 'at a price reasonably related to that normally charged (in the developing country concerned) for comparable works'. Furthermore the copyright owner was given a period in which to make such editions available, or to grant his own licence to publish locally.

After what period, under the Paris revisions, can compulsory licences be sought for translations?

Under the Berne Convention, the translation right is protected for the life of the author and fifty years after his death. There

was, however, the so-called 'ten-year rule', an involved provision relating to translation rights, and limited in application to only certain Berne member states. There was a comparable UCC provision which, basically, gave the copyright owner a period of seven years in which to bring out a translation of his work before compulsory licensing could be invoked. So far as is known, however, no such compulsory licences were sought or issued by anyone. At Paris in 1971, it was decided to have parallel revisions of the Universal and Berne Conventions to make a limited compulsory licensing system available for the benefit of developing countries with respect to translation. The licences may be granted only if freely negotiated licences have not been possible. Also the use of material so published is restricted to teaching, scholarship or research. Copies produced under a compulsory licence may not be exported except in certain special cases. Licences may only be granted with regard to works currently available to the public, and not withdrawn from circulation by the author. The Conventions provide for three categories, as follows:

- (a) for non-world languages (i.e., languages not in general use in one or more developed countries) a non-exclusive licence may be sought one year after first publication. The licence may not be obtained, however, until a further period of nine months has elapsed from the time of the request. During this grace period of nine months, the copyright owner can himself bring out or authorize the translation sought. If this is done at a price reasonably related to that normally charged in the developing country for comparable works, no compulsory licence may be obtained.
- (b) for translation into English, French and Spanish, licences may be obtained after three years, plus a six-month grace period from the time of the request.
- (c) for other languages in general use (i.e. languages in use in one or more developed countries) the periods in (b) apply, with the proviso that if a developing country is able to secure the unanimous agreement of developed countries in which the same language is in general use, then that country may, with the developed countries' consent, issue compulsory licences after a shorter period than

three years (but never less than one year). This would mean, for instance, that Brazil would need to get permission from Portugal before applying compulsory licensing within the shorter period.

After what period, under the Paris revisions, can compulsory licences be sought for same language reprints?

In general, provisions for compulsory licences for reprints in the original language follow the overall pattern of provisions for translations. There are, however, considerable differences in time-factors. Unless national legislation determines a longer period, compulsory licences for same language reprints could be granted after the following periods:

- (a) works of the natural and physical sciences, including mathematics, and technology: three years
- (b) works of fiction, poetry, drama, music and art books: seven years
- (c) all other works: five years.

Licences obtainable after three years cannot be granted until a period of six months has elapsed from the date of the request for authorization or, if the identity or address of the copyright owner is unknown, from the date of the application for a licence, as the case may be. However, this period may be concurrent with the three year period and not consecutive as in the case of translation. This 'period of grace' nevertheless gives the copyright proprietor a certain time in which to make available in the country an edition published at a price reasonably related to that normally charged there for comparable works.

What limitations are placed on publication under compulsory licence?

It is fundamental to the Paris agreement that concessions are made for educational need and not for private or national profit. Books produced under compulsory licence must therefore be printed within the developing country itself unless facilities are unavailable, in which case they must be printed in another Berne or UCC country. In this case, all copies would have to be brought into the licensing country. No copies of the book may be

exported, except in certain special cases relating to translations. In the case of developing countries which use the same language, a new translation may be used simultaneously by more than one country granting compulsory licences.

What compensation will be paid to the copyright holder?

It was agreed that all compulsory licences should carry an obligation for the payment of a 'just compensation that is consistent with standards of royalties normally operating in the case of licences freely negotiated between persons in the two countries concerned'. Often it will be found that royalties will be highest for straight reprints and less for translations.

Will compulsory licensing become common practice?

It is to be noted that a compulsory licence may not be granted until a request for a voluntary licence has been refused by the copyright proprietor. It is to be expected, therefore, that compulsory licensing will be very rare, and the Paris revisions will probably be used by publishers mostly as basis for negotiation for voluntary licences. Copyright proprietors are obviously reluctant to grant voluntary licences in cases where double taxation is levied. This occurs where royalties are subject to taxation not only in the author's country of residence but again in the licensing country. It is generally felt that voluntary licensing would be greatly facilitated, to the benefit of all interested parties, if this difficulty could be resolved.

Have the Berne and Universal Conventions as revised at Paris 1971 come into force?

The UCC as revised at Paris on 24 July 1971, having received the required number of ratifications or accessions, entered into force on 10 July 1974. Similarly, the Paris Act of the Berne Convention did so on 10 October 1974. In principle, compulsory licensing is applicable only between states which are party to the revised UCC of 1971 or the Paris Act of the Berne Convention.

By 1 January 1976 the following states had ratified or acceded to the revised UCC of 1971: Algeria, Bangladesh, Brazil, Bulgaria, Cameroon, France, Germany (Federal Republic of), Hungary, Kenya, Mexico, Monaco, Morocco, Norway, Senegal, Spain, Sweden, Tunisia, United Kingdom, United States of

America, and Yugoslavia.

By the same date the following states had become bound by the Paris Act of the Berne Union: Bulgaria, Cameroon, Chile, Dahomey, France, Gabon, Germany (Federal Republic of), Greece, Hungary, Ivory Coast, Mexico, Monaco, Niger, Senegal, Spain, Sweden, Togo, Tunisia, Upper Volta, Yugoslavia, and Zaire.

What procedures must the publisher in a developing country follow when seeking translation or reprint rights?

First, the applicant must establish either that he has requested, and has been denied, authorization by the copyright proprietor to translate or reproduce (as the case may be), or that after due diligence on his part he was unable to find the copyright proprietor.

Where the owner cannot be found, the applicant must send copies of his application, by registered airmail, to the following:

- (i) the publisher whose name appears on the work; and
- (ii) the appropriate national or regional information centre (see Appendix B) or, if there is none, to the International Copyright Information Centre established at Unesco.

If a request is refused, or if no reply is received, and the time periods noted above have already lapsed, the publisher may immediately apply to his own government for compulsory licensing.

What rules govern the reproduction of illustrations for voluntary licences?

In many cases the original publisher may not control the copyright in the illustrative material in his book and permission to use these illustrations must be negotiated separately. A list of the copyright holders will normally be found under 'Acknowledgements'. The original publisher should be prepared to give assistance in clearing rights on illustrations for books reproduced under voluntary licence.

What rules govern the reproduction of illustrations for compulsory licences?

When the owner of the rights in illustrations contained in a book is not the same as the owner of the rights in the book itself, a publisher in a developing country who has been granted a compulsory licence to reproduce such a book must apply separately for permission to reproduce the illustrations. Where permission is refused, reproduction may be undertaken, but relevant national and Convention conditions must be satisfied (e.g. making 'just compensation'). Where a work consists mainly of illustrations a compulsory licence to translate the text may be granted only if conditions governing same language reprints are satisfied.

How long do illustrations in a book remain in copyright?

Illustrations other than photographs usually have the same term of protection as literary works.

What is the situation with regard to photographs in a book for which the author or the original publisher does not control the copyright?

The Berne Convention provides that it shall be a matter for legislation in the countries of the Berne Union to determine the term of protection of photographic works, but this term is to last at least until the end of 25 years from the making of the work. The corresponding UCC minimum is 10 years.

Under the UK Copyright Act of 1956, copyright in a photograph lasts for 50 years from the end of the calendar year in which it was first published in any form. Strictly the copyright is vested in the individual who took the photograph or in the person or organization to whom he has assigned the copyright. Institutions, museums, etc., to whom collections of photographs are donated or bequeathed are therefore wise to ensure that they are given also the rights of reproduction.

What rules apply to multi-media kits?

Increasingly, educational material is being produced in the form of multi-media kits consisting of a variety of print and non-print materials. Film-strips, microfilms and slides generally pose few problems as they are treated in the same way as photographs.

Where movie-film and similar (e.g. video-tape) rights are concerned, the rights to authorship vary from country to country but the right to exploitation is usually held by the producer. In regard to radio and TV broadcasts, the originating organization is usually the owner of the rights in a programme. However, the organization has to take account of the rights of contributors (e.g. authors, composers and performers), and it may have to negotiate special terms with these and other people before a programme can be released for use in another country. Thus for broadcasts, and also for recordings, the rights of a number of people have to be respected and protected, not only the rights of the author as in the case of a book.

What rules govern copying of copyright material?

Reference must be made to domestic law, but two guidelines may be offered:

- 1) No infringement of copyright is generally considered to be committed unless a 'substantial part' of the work is involved. ('Substantial' consists of the relationship of the quotation to the length of the work and equally of the importance of the extract or extracts to the work as a whole.) Where there is any doubt at all on these matters, permission should be sought from the copyright holder. However, as the amount of protection is governed by the laws of the country where protection is claimed, national laws must always be examined.
- 2) Copying even of a substantial part of the work may be permissible as 'fair dealing' when:
 - (a) it is for the purpose of research or private study;
 - (b) it is for the purpose of published criticism or a review.

Both Conventions permit domestic legislation to vary the protection offered, provided it is reasonable and justified in the circumstances. However, it must be noted that the Conventions specifically prohibit exceptions which might conflict with the author's economic interests.

What about photocopying?

Here again reference must be made to the domestic laws of each country. Under the Berne Convention and the revised Universal Convention, provision must be made in domestic laws for the author's exclusive right to authorize reproduction of his work by any means, but both empower member states to permit reasonable exceptions to this right.

The 1971 Paris Act of the Berne Convention further states in its Report: 'If (photocopying) consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work... If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use'.

The question is being studied further as to what might constitute a reasonable solution, bearing in mind that indiscriminate photocopying practices might not only endanger authors' interests, but might also ultimately deter the production of intellectual works.

What developments are likely to come next?

In the years ahead the output of literary and artistic works in developing countries is likely to grow rapidly. There will be more books, translations, films and such-like, and where up-to-date copyright laws do not already exist they will increasingly be required. To help in this matter, UNESCO and the World Intellectual Property Organization (WIPO) have prepared a draft model law on copyright which all developing countries will find useful. The text of the model law on copyright was finalized by a Committee of Governmental Experts convened by the Government of Tunisia in February 1976.

The rise in the output of publications in developing countries will be accompanied by increased opportunities for exporting them. Consequently, more and more states are likely to find it advantageous to join the international copyright community, thereby protecting the rights of those citizens whose work is able to earn valuable foreign currency. In addition, more copyright clearing centres are likely to be established to help people locate copyright owners and obtain copyright clearance. (A list of the clearing houses existing in January 1976 appears as Appendix B.)

One of the areas of most concern is likely to be that of the best means of protecting the rights of those people whose material is photocopied for educational purposes. Another, in some countries, will be that of levying a small charge on library borrowing to recompense authors whose works are borrowed frequently.

In schools there will be greater use of multi-media kits. At present the rights in the print and non-print materials that make up these kits are not always the same so that if a kit were unlawfully reproduced there would probably be several separate acts of infringement.

For several reasons, developing countries will want to produce more local editions of titles originally published in developed countries, and UNESCO has suggested that: 'Whenever it is possible to launch a local edition on the market of a developing country at a selling price equal or less than that of an edition of the same work published in another country, either by means of co-production agreements or by virtue of an authorization to reproduce, this procedure should be preferred to any other for the dissemination of the said work in the territory of the developing country concerned.'

As has been shown (see page 9), the Paris revisions of the Berne and Universal Conventions represented a compromise of the views expressed by developed and developing countries. It was the best arrangement that could be made at the time. Possibly, further meetings will be held at which modifications to the Conventions will be considered - as, for example, to the waiting period stipulated for the compulsory licensing of technical publications which quickly go out of date.