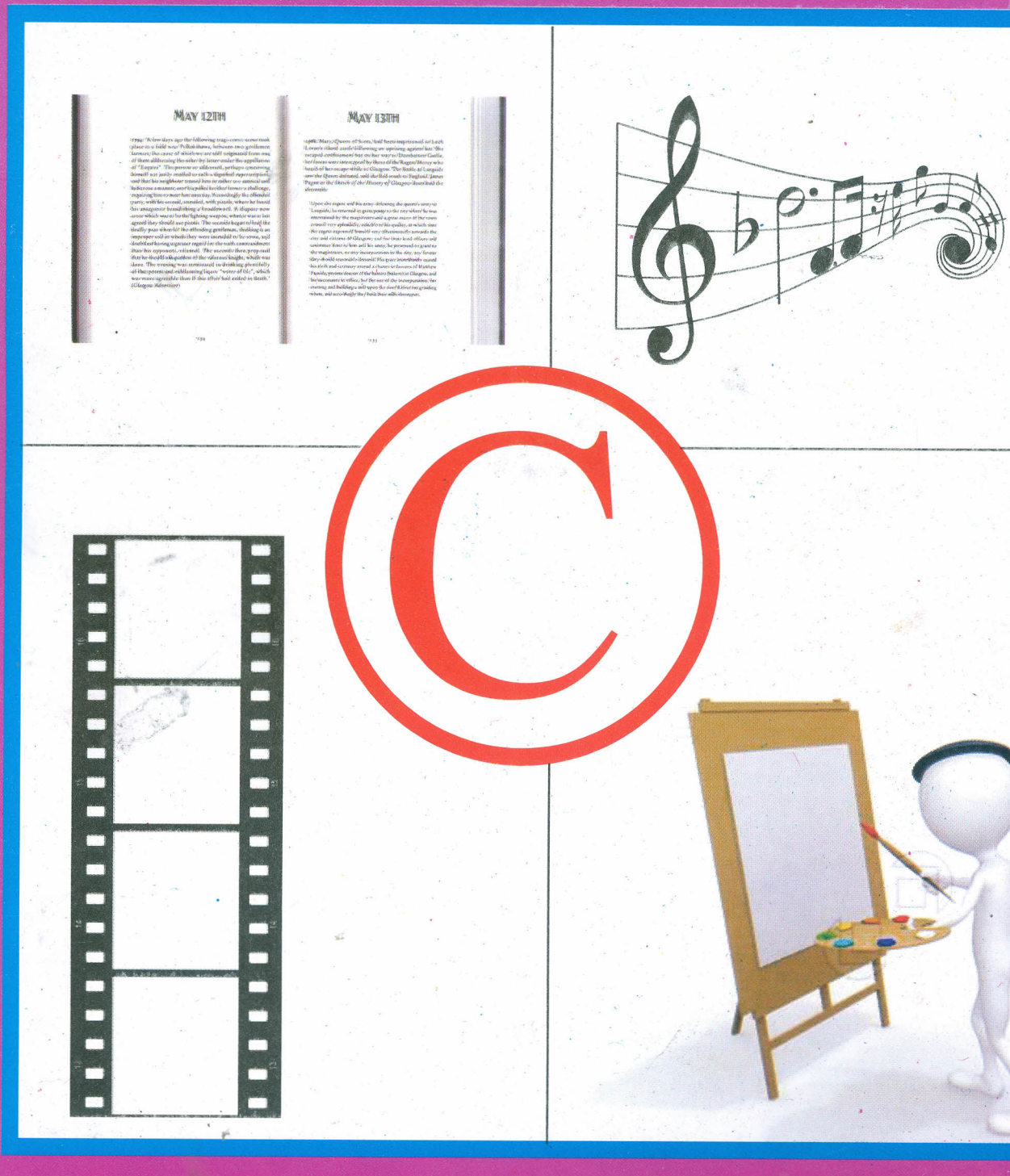
Indira Gandhi National Open University
School of Law

MIP-105
COPYRIGHT AND RELATED RIGHTS



Related Rights and International Protection of Copyright

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"शिक्षा मानव को बन्धनों से मुक्त करती है और आज के युग में तो लोकतंत्र की भावना का आधार भी है । जन्म तथा अन्य कारणों से उत्पन्न जाति एवं वर्गगत विषमताओं को दूर करते हुए मनुष्य को इन सबसे ऊपर उठाती है ।"

- इन्दिरा गाँधी

"Education is a liberating force, and in our age it is also a democratising force, cutting across the barriers of caste and class, smoothing out inequalities imposed by birth and other circumstances."

- Indira Gandhi

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MIP-105
Copyright and Related Rights

Block

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RELATED RIGHTS AND INTERNATIONAL PROTECTION OF COPYRIGHT

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BLOCK 4 RELATED RIGHTS AND INTERNATIONAL PROTECTION OF COPYRIGHT

This Block on Copyright deals exclusively with the related rights. 'Related Rights are right of persons who contribute to making works available to the public. The rights covered under related rights include the rights of producers of sound recordings, performers and broadcasting organisations.

Unit 13 of this Course will look into rights of sound recording producers. This Unit will try to explain issues like rights of producers, administration of rights, exceptions and limitations, infringement, civil remedies, offences and penalties related thereto.

Unit 14 of this Course explains the rights of broadcasting organisation, here topics like, duration of protection administration of these rights, exception and limitation and infringement and remedies thereof are discussed and explained.

Unit 15 of this course talks about a very sensitive topic the 'Performer Rights'. In this Unit, topics like the definition of performers, rights of performer, Infringement of their rights and remedies available to them are dealt with.

Unit 16 of this Block talks about international protection of Copyrights. Here topics like Berne Convention, Universal Copyright Convention, Rome Convention, Geneva Convention, The Brussels Convention, TRIPS Agreement, WIPO Copyright Treaty (WCT), WIPO performances and Phonograms Treaty (WPPT) and other related issues are dealt with.

UNIT 13 RIGHTS OF SOUND RECORDING PRODUCERS

Structure

13.1 INTRODUCTION

Related rights are right of persons who contribute to making works available to the public. The rights commonly covered under related rights are rights of producers of sound recordings, performers and broadcasting organisations. In this Unit, we are looking into the rights of producers of sound recordings.

Rights of producers of sound records are recognised "because their creative, financial and organisational resources are necessary to make sound recordings available to the public in the form of commercial phonograms; and because of their legitimate interest in having the legal resources to take action against unauthorised uses, be this the making and distribution of unauthorised copies (piracy), or the unauthorised broadcasting or communication to the public of their phonograms." (WIPO)

We have already seen in other units that copyright emerged as a response to technological developments such as the invention of printing press. The history and development of related rights are also legal responses to technological advancements. As you know, until the end of the mid-nineteenth century, printing press was the sole technology involved in carrying the works of literary authors to the public. Then, in the second half of nineteenth century new technologies evolved leading to recording of sound. The first audio recording device called the 'talking machine' appeared in 1877 as an expansion of the telephone concept. Later the technology developed much and devices in which music and other works could be recorded emerged. This new development posed certain challenges to the copyright regime. By the end of the first decade of the twentieth century,

intellectual property community realised the need for protection for photographs, cinematograph films and sound recordings in addition to the then existing printed works. Of these, photograph could be easily subsumed in the copyright regime as it has an 'author' like the other works. In the case of sound recordings and cinematograph films authorship was an issue. This led to the concept of 'neighbouring rights,' that is, rights which are neighbouring to the copyright. It means the rights are not copyrights but close to copyrights.

Essentially neighbouring rights or now more aptly termed as 'related rights' are rights in derivative works. They cover rights on sound recordings, performances and broadcastings. Cinematograph films got included in the copyright regime since they are not mere recordings of existing works but creation of new works although they may use an existing work for certain purposes. These rights pre-suppose a pre-existing work. Sound recordings are mostly recordings of musical works.

The **International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations Rome Convention** done at Rome in 1961 (**Rome Convention**) is the first major international treaty on protection of related rights.

This Convention defined phonogram as an exclusively aural fixation of sounds of a performance or of other sounds and 'reproduction' as the making of a copy or copies of a fixation. In order to overcome the issue of physical person being the author and the first owner of a work in the copyright law, it defined producer of phonogram as "the person who, or the legal entity which, first fixes the sounds of a performance or other sounds".

This Convention, following the path of the Berne Convention, provided for national treatment, that is, the same treatment accorded by the domestic law to own nationals and nationals of other contracting states.

So far as phonograms are concerned the Rome Convention provided that producers of phonograms shall enjoy the right to authorise or prohibit the direct or indirect reproduction of their phonograms.

With regard to formalities for protection, it said that they shall be considered as fulfilled if all the copies in commerce of the published phonogram or their containers bear a notice consisting of the symbol (P) or P within a circle, accompanied by the year date of the first publication.

The Rome Convention also introduced the concept of equitable remuneration in the case of phonograms. It provided that if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

The minimum duration of protection provided by the Rome Convention was twenty years from the year of fixation.

Like the Berne Convention, the Rome Convention also provided for certain permitted exceptions. These included,

a) private use;

b) use of short excerpts in connection with the reporting of current events;

c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;

d) use solely for the purposes of teaching or scientific research.

It also permitted extension of the same kind of limitations provided for copyright to related rights.

The Rome convention was followed by the **International convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms** in 1971. It provided for protection against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public. Thus it provides reproduction right, right of distribution and right of importation.

The **Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement)** provided that producers of phonograms shall enjoy the right to authorise or prohibit the direct or indirect reproduction of their phonograms. It also provided the minimum duration of protection as fifty years from the year of fixation.

Technologies in the way of recording developed very fast, LPRs were replaced by tapes, then by CDs and pen-drives, IPods and other modern electronic equipments. Each development posed its own problem.

A major thrust in the rights of phonogram producers occurred with the finalisation of the **WIPO Performances and Phonograms Treaty**. This treaty brought the rights of phonogram producers on par with copyright.

The Copyright Act, 1957 included rights of producers of sound recording within copyright. There is no discrimination between sound recordings and other works except to the extent dictated by the peculiarities of the medium. Therefore, the protection sound recording enjoyed in India was much more than what they enjoyed in most other countries until the other countries started implementing the WIPO Performances and Phonograms Treaty of 1996. They are also subject to the same kind of exceptions and limitations. Sound recording producers are also entitled for the same civil and criminal remedies and the offences are subject to the same penalties.

Self Assessment Questions **(Spend 3 minutes each)**

1) What is the definition of phonogram in the Rome convention?

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2) What are the rights provided to producers of phonograms in the Rome Convention?

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3) What are the exceptions to the rights permitted in the Rome Convention?

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4) What is the duration of protection for phonograms provided in the TRIPS Agreement?

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13.2 OBJECTIVES

After reading this unit, you should be able to:

- explain the intellectual property protection available to sound recording producers in India.

13.3 DEFINITION OF SOUND RECORDING

The Copyright Act defines sound recording as a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced.

The above definition was inserted in 1984. Prior to that, the term was 'record' which was defined as "any disc, tape, perforated roll or other device ion which sounds are embodied so as to be capable of being reproduced therefrom; other than a sound track associated with a cinematograph film." Prior to the 1984 amendment, the term 'recording' was also used and defined as "the aggregate of sounds embodied in and capable of being reproduced by means of a record."

The UK Copyright, Designs and Patents Act, 1988 defines sound recording as

a) A recording of sounds from which the sounds may be reproduced or

b) A recording of the whole or nay part of a literary, dramatic or musical work, from which sounds reproducing the work or part may be produced regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced.

The WIPO Performances and Phonograms Treaty defines 'phonogram' as the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work. This Treaty defines fixation as meaning the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device.

Broadly the definition of sound recording in the Copyright Act, 1957 is medium independent and can take care of new electronic equipments in which sounds get recorded.

In order to enjoy copyrights, the sound recording should not contain infringing material. Section 13 of the Copyright Act states clearly that copyright shall not subsist in any sound recording made in respect of a literary, dramatic or musical work, if in making the sound recording, copyright in such work has been infringed. It must also be remembered that the copyright in a sound recording shall not affect the separate copyright in any work in respect of which or a substantial part of which, the sound recording is made. Those rights will co-exist with the copyright of the sound recording producer. Therefore, those who want to use a sound recording may have to take the permission of those other right holders in that recording.

Self Assessment Questions **(Spend 3 minutes)**

5) What is the definition of sound recording in the Copyright Act, 1957?

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13.4 AUTHOR AND FIRST OWNER OF RIGHTS

The Copyright Act, 1957 defines author with reference to sound recording as the producer. In this it is following the same definition for cinematograph film. As per the Act, the first owner of copyright in a work is the author. Since the producer is the author of a sound recording, he is the first owner of the copyright in that work. Same is the law in UK too.

The WIPO Performances and Phonograms Treaty defines 'producer of a phonogram' as the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representation of sounds.

The main difference between the definition of author for literary and artistic works and for sound recording is that the latter provides for corporate entities to be authors.

Being the author, the producer of sound recording enjoys all the rights extended to authors in the Copyright Act. He can assign and licence the rights.

Self Assessment Question **(Spend 3 minutes)**

6) Who is the author of a sound recording as per the Copyright Act, 1957?

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13.5 RIGHTS OF PRODUCERS

Producers of sound recording are the authors of the sound recordings. Therefore, they have all the rights which the Copyright Act extends to authors.

The rights in the case of a sound recording are:

a) The right to make any other sound recording embodying it including storing of it in any medium by electronic or other means

b) The right to sell or give on commercial rental or offer for sale or for such rental, any copy of the sound recording;

c) The right to communicate the sound recording to the public.

Personal rights such as right to translate are not part of the copyright in a sound recording.

Communication to the public means making the sound recording available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of the sound recording, whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the sound recording so made available. An explanation to the definition of communication to the public in the Copyright Act makes it clear that communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public. This would mean that piped music played in hotels, if the same is from any sound recording needs the consent of the producer of the sound recording since that is a communication to the public. At the same time communication to a single household is not part of the right of communication to the public. Therefore, if within a household, piped music is distributed to all the rooms from a sound recording, it may not be an infringement.

Broadcasting is not specifically mentioned in the Act, but right of communication to the public is vast enough to accommodate it. The explanation clarifies that satellite or cable or any other means of simultaneous communication falls within the scope of the right to communicate to the public. Since broadcast means communication to the public by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images or by wire, it will also fall within the scope of the rights of the producers of sound recordings.

An issue that can come up is whether members of a housing society will be members of the public for purposes of the right of communication to the public. The case of ***Garware Plastics v. Telelink*** [AIR 1989 Bom 331] although about video films, is illuminating in this connection. There is broad similarity in the matter of rights between cinematograph films and sound recordings and both include the right to communicate the work to the public. The court identified the following three determining criteria from various previous judgments:

1) The character of audience and whether it can be described as a private or domestic audience consisting of family members or members of the household,

2) Whether the audience in relation to the owner of the copyright can be so considered, and

3) Whether permitting such performance would in any way whittle down the protection given to the author of a copyright under the Copyright Act resulting in the owner being deprived of monetary gains out of the intellectual property.

The court applying the above criteria to a cable TV network, the court observed:

Applying the test of the character of the audience watching these video films, can this audience be called a Section of the public or is this audience a private or domestic audience of the defendants? In the present case, it cannot be said that the audience which watches video films shown by the defendants consists of family members and guests of the defendants. The video film may be watched by a large Section of the public in the privacy of their homes. But this does not make it a private communication so as to take it out of the definition of "broadcast" under the Copyright Act ,1957. A broadcast is heard in millions of private homes. It is nevertheless a broadcast to the public . For example, if the President of India gives a Republic Day address over Doordarshan, it may be received by millions of viewers over their T.V. sets in their homes. But this does not make it a private communication to the public. the President is not making a private broadcast to each viewer or listener. The audience may be sitting in the privacy of their homes. But this makes no difference to the character of the audience, As Mc Cardie J. would have put it ***Messager v. British Broadcasting Company Ltd.,*** (1927 (2) KB 543) (supra), instead of gathering the audience in a theatre, the defendants, by modern technology, are showing the film to that audience in their homes. To hold that this is not communication to the public would be to ignore the substance of the matter and the object and intent of the Copyright Act.

The viewers of a Cable T.V. network or those who receive such broadcast through a dish antenna to which their television sets are connected, are either residents of apartments in a building which has such a network or they may be residents of a locality which is covered by this facility. A number of houses – both private

homes and public places – may avail of this facility. It is true that the network operates through the connection of a cable to all these various apartments or houses. But this cannot in any way affect the character of the audience. The viewers are not members of one family or their guests. They do not have even the homogeneity of one family or their guests. They do not have even the homogeneity of a club membership. And even club members have been held to be members of the public. The viewers are residents in different apartments or houses who are in no way connected with each other except by Cable! It may be that in some of the homes members of the household will watch the film together. But this does not mean that the entire audience taken together are members of a common household or are family members. They can only be viewed as a portion of public.

This becomes apparent if one applies the second test, namely, the nature of the relationship between the owner of the copyright and the audience. The viewers cannot be considered as domestic viewers of the owner of the copyright i.e. the plaintiffs. They must be considered as members of the public.

The last test which has been applied in such cases is the test of ascertaining the character of the audience in view of the purpose of the Copyright Act . The Copyright Act is meant to protect the owner of the copyright against unauthorised performances of his work, thereby entitling him to earn monetary gain from his intellectual property. The audience which watches such video films would have otherwise paid for watching the film. In fact, the audience does pay the defendants for watching the film. The author of the copyright is, therefore, directly affected as he is deprived of earnings from his intellectual property. What is more, an audience which pays for watching the film cannot be considered as a domestic audience of the person broadcasting the film.

Thus, applying all the three criteria or in any view of the matter, the defendants, by showing the film over a video T.V. network, are broadcasting the film or communicating it to a Section of the public.

Similar would be the case of a sound recording played over a network to several households.

The observations of a British court in regard to whether a performance is public or private are also quite illustrative of how the two are distinguished by courts. "The antithesis of performing in public is performing in private. Why should performance in private be excluded? It is perhaps just as difficult to define 'private' in this context as it is to define 'public'. But if the purpose of the Act is to preserve the copyright owner's right of property in his work against infringement and prevent unauthorised third parties from using his work to his financial disadvantage, the position becomes clearer. One has then to look at what has been described as the character of the audience and see whether the a performance before such an audience violates these rights. It thus becomes a question of fact in each individual case. At one end of the spectrum there is what has been described as the domestic situation. At the other end is the situation where the promoter invites the public to attend the performance on payment of an entrance fee. In between there is a wide range of varying situations. Domestic has been extended to include semi-domestic. What is the underlying reasoning behind the exclusion of domestic or quasi-domestic performance? It is to be found in the

relationship between the audience and the owner of the copyright. In a situation where a person organises a private party in his own home or in what might reasonably be deemed to be an extension of his own home, then it seems reasonable to assume that the unauthorised publication or use of the copyright work is not redounding to the financial advantage of the owner of the copyright, since the selected audience is not enjoying the work under conditions in which they would normally pay for the privilege in one form or another. A performance of the work in such circumstances would ordinarily be regarded as being in private." [Performing ***Right Society v. Rangers*** (1975) RPC 626]

In another case in UK, where in a record shop, records are played over loudspeaker, more or less continuously, the performance before an audience present in the shop which the public at large are permitted, indeed encouraged to enter without payment or invitation with a view to increasing the shop owner's profits, is a performance in public.

Sound recordings along with cinematograph films and computer programmes enjoy what is commonly referred to as rental rights. In the Copyright Act, the term used is 'give on hire'. The WIPO Performances and Phonograms Treaty also provide for right of rental for phonograms. The Treaty says that producers of phonograms shall enjoy the exclusive right of authorising the commercial rental to the public of the original and copies of their phonograms, even after distribution of them by, or pursuant to, authorisation by the producer. The work of public lending libraries will come under the ambit of the right to give on hire.

US provides for rental rights for cinematograph films. There the term "rental right" covers "rental" and "lending". "Rental" is defined as "making a copy of the work available for use, on terms that it will or may be returned, for direct or indirect commercial advantage". "Lending" means "making a copy of the work available for use, on terms that it will or may be returned, otherwise than for direct or indirect economic or commercial advantage, through an establishment which is accessible to the public." There is no direct or indirect economic or commercial advantage for these purposes where lending by an establishment accessible to the public gives rise to a payment the amount of which does not go beyond what is necessary to cover the operating costs of the establishment. European Union follows the following definitions for renting and lending. "Rental" means making available for use, for a limited period of time and for direct or indirect economic or commercial advantage; "lending" means making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public.

Section 51 regarding infringement of copyright also indirectly conveys the rights which a work enjoys during the term of copyright. The following are case of infringement of copyright in a work:

a) Permitting for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright

b) Selling or offering for sale or hiring or offering for hire any infringing copy

c) Distributing infringing copies either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright

d) Displaying trade exhibitions in public

e) Importing into India.

In relation to sound recording 'infringing copy' means any other recording embodying the same sound recording made by any means. In regard to import, the exception of one copy for the private use of the person importing is applicable in the case of sound recordings also. Knowledge is an essential element in these cases to take an infringement action.

The following are the rights envisaged for producers of sound recordings in the WIPO Performances and Phonograms Treaty:

1) Right of Reproduction

2) Right of Distribution

3) Right of Rental

4) Right of Making Available to the Public of Phonograms

5) Right to a single equitable Remuneration for Broadcasting and communication to the public

Self Assessment Questions **(Spend 3 minutes each)**

7) What are the copyrights in a sound recording in India?

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8) What is meant by rental right?

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9) Write a paragraph on communication to the public with reference to sound recordings.

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13.6 DURATION OF PROTECTION

As per Section 27 of the Copyright Act, 1957, the term of copyright in a sound recording is until sixty years from the beginning of the calendar year next following the year in which the sound recording is published. Although sound recording is on par with literary and other works in the matter of copyrights, the criterion of life term is not provided for these works. One reason is that the author of a sound recording could be a corporate firm unlike the case with a literary work.

Like in the case with other kinds of works, the countdown for sixty years starts from 1st January following the year of publication.

The sixty year protection is more than what is provided in the WIPO Performances and Phonograms Treaty. In that treaty, it is fifty years computed in the same way as in the Indian Copyright Act.

Self Assessment Questions **(Spend 3 minutes)**

10) What is the term of copyright protection for sound recordings in India?

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11) What is the term of protection provided for phonograms in WPPT?

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13.7 ADMINISTRATION OF RIGHTS

Like copyright in other works, copyright in sound recording also are automatic. No formalities are required for the same. However, while publishing a sound recording the following particulars are required to be displayed on the sound recording and on any container thereof:

a) The name and address of the person who has made the sound recording

b) The name and address of the owner of the copyright in the work

c) The year of its first publication.

If a sound recording is published without these details then it will be a violation of the Copyright Act, and the sound recording becomes an infringing copy.

The rights are exploited either directly by the owners or through licences, just like copyrights in other works. Assignment is the way of giving the right to some one else who becomes the new owner of that right. This can be done partially or wholly. Assignment can also be made region wise and for specific period or for the entire remaining period of the copyright. In case the assignment is for a limited period, the right will revert to the assignor on expiry of the period of assignment. The assignor enjoys all the rights which have been assigned to him in the territory during the period of the assignment.

The following points have to be remembered in assignments:

- It has to be in writing
- It has to be signed by the owner of the rights or his authorised agent
- It should identify the work
- It should specify the rights being assigned
- It should specify the duration of the assignment
- It should specify the territories for which the rights are assigned
- It should specify the amount of royalty payable, if any.
- If the period of assignment is not stated in the agreement, it will be deemed as five years
- If the territorial extent of the assignment is not stated in the agreement it will be presumed as extending to the whole of India

Another way of exploitation of copyright is through licensing. In this case no right is given away but only certain acts are permitted. The licensee does not become the owner of the right unlike the case with an assignment of copyright. However, courts have held that an exclusive licensee have the privileges including the right to take legal action against infringers.

The Copyright Act does not prescribe any particular form for grant of licence, just like for assignment. The Act however insists that it should be in writing and signed by the author or his duly authorised agent. Taking into account other laws, one can say that a licence agreement should contain the following:

a) Particulars of the work which is licensed
b) Period for which licence is issued
c) Particulars of the rights licensed
d) Geographical area for which the licence is issued
e) Details of Royalty or other payments to be made to the author by the licensee
f) Terms and conditions regarding extension
g) Terms and conditions regarding revocation of the agreement
h) Terms and conditions regarding revision of the agreement
i) Whether any transfer or further licensing is permitted or not.

Section 19 of the Copyright Act regarding assignment is applicable to cases of licensing of sound recordings also. As per this, where the licensee does not exercise the rights licensed to him within a period of one year from the date of

licence, the licence will be deemed to have lapsed unless otherwise specified in the licence. Similarly, if the period of licence is not stated, it shall be presumed to be five years from the date of licence. If no territorial limit is indicated in the licence it will be taken as the whole of India.

In regard to administration of rights in sound recordings, since there are many small rights and possibilities of widespread exploitation, the system of collective administration is also used. In fact, most of the music works are exploited through the medium of sound recordings and music is widely used by people. Public performance right or communication to the pubic right which is the one administered mostly through copyright societies. The Phonographic Performances Ltd is the copyright society in India which administers the copyright in sound recordings. Most of the sound recording producing companies are members of this society. This company works in conjunction with the Indian Performing Right Society.

Compulsory Licence

In the case of sound recordings, the provisions of Section 31 regarding compulsory licence in works withheld from public has become matter of agitation between sound record producers and FM radio channels. The Section provides that if at any time during the term of the copyright in any Indian work, which has been published or performed in public, a complaint is made to the Copyright Board that the owner of the copyright in the work has refused to republish of allow re-publication of the work and by reason of such refusal has withheld the work from the public or has refused to allow communication to the public by broadcast of the work or in the case of sound recording the work recorded in such sound recording, on terms which the complainant considers reasonable, the Copyright Board, after giving to the owner of copyright a reasonable opportunity for being heard and after holding necessary inquiry, can direct the Registrar of Copyright to issue the compulsory licence. The issues come up regarding what is refusal to communicate the work and what are the powers of the Copyright Board. In most of these cases the work concerned was sound recording.

In ***Entertainment Network (India) Limited v. Super Cassette Industries Limited*** [(2008) 3 SCC 30] the Supreme Court explained the nature of a compulsory licence under Section 31 of the Act:-

The freedom to contract is the foundation of economic activity and an essential aspect of several Constitutional rights including the freedom to carry on trade or business guaranteed under Article 19(1)(g) and the right to property under Article 300A of the Constitution of India. But the said right is not absolute. It is subject to reasonable restrictions.

Section 30 enables the owner of the copyright to grant any interest in the copyright by a license in writing signed by him or by his duly authorised agent.

The underlying philosophy of the Copyright Act is that the owner of the copyright is free to enter into voluntary agreement or licenses on terms mutually acceptable to him and the licensee. The Act confers on the copyright owner the exclusive right to do the various acts enumerated in Section 14. An infringement of copyright occurs if one of those acts is done without the owner's license. A license passes no interest, but merely makes lawful that which would otherwise be unlawful.

The Act also expressly recognizes the notion of an "exclusive license" which is defined in Section 2(j). But, that does not mean, as would be noticed from the discussions made hereinafter, that it would apply in all situations irrespective of the nature of right as also the rights of others. It means a license which confers on the licensee, to the exclusion of all other persons (including the owner of the copyright) any right comprised in the copyright in a work. An exclusive licensee has specific rights under the Act such as the right to have recourse to civil remedies under Section 55 of the Act. This Scheme shows that a copyright owner has complete freedom to enjoy the fruits of his labour by earning an agreed fee or royalty through the issuance of licenses. Hence, the owner of a copyright has full freedom to enjoy the fruits of his work by earning an agreed fee or royalty through the issue of licenses. But, this right, to repeat, is not absolute. It is subject to right of others to obtain compulsory licence as also the terms on which such licence can be granted.

The meaning of a word must be attributed to the context in which it is used. For giving a contextual meaning, the text of the statute must be kept in mind. An act of refusal depends upon the fact of each case. Only because an offer is made for negotiation or an offer is made for grant of license, the same per se may not be sufficient to arrive at a conclusion that the owner of the copyright has not withheld its work from public. When an offer is made on an unreasonable term or a stand is taken which is otherwise arbitrary, it may amount to a refusal on the part of the owner of a copyright.

When the owner of a copyright or the copyright society exercises monopoly in it, then the bargaining power of an owner of a copyright and the proposed licensee may not be same. When an offer is made by an owner of a copyright for grant of license, the same may not have anything to do with any term or condition which is wholly alien or foreign therefore. An unreasonable demand if acceded to, becomes an unconstitutional (sic. unconscionable) contract which for all intent and purport may amount to refusal to allow communication to the public work recorded in sound recording. A *de jure* offer may not be a de facto offer.

Section 31(1)(b) in fact does not create an entitlement in favour of an individual broadcaster. The right is to approach the Board when it considers that the terms of offer for grant of license are unreasonable. It, no doubt, provides for a mechanism but the mechanism is for the purpose of determination of his right. When a claim is made in terms of the provisions of a statute, the same has to be determined. All cases may not involve narrow commercial interest. For the purpose of interpretation of a statute, the court must take into consideration all situations including the interest of the person who intends to have a licence for replay of the sound recording in respect whereof another person has a copyright. It, however, would not mean that all and sundry can file applications. The mechanism to be adopted by the Board for determining the right of a complainant has been provided under the Act.

Explanation appended to Section 31 also plays an important role as it seeks to make a distinction between an artistic works on the one hand and a cinematographic films or sound recording on the other. We are not concerned therewith at this stage. Admittedly in terms thereof the principles of natural justice are required to be complied with and an enquiry has to be held. The extent of such enquiry will depend upon the facts and circumstances of the case. A finding has to be arrived at that the grounds of refusal by an owner of a copyright holder

is not reasonable. Only upon arriving at the said finding, the Registrar of copyright would be directed to grant a license for the said purpose. The amount of compensation payable to the owner of the copyright must also be determined. The Board would also be entitled to determine such other terms and conditions as the Board may think fit and proper. Registration is granted only on payment of such fees and subject to compliance of the other directions.

Self Assessment Questions **(Spend 3 minutes each)**

12) What are the points to be remembered in assignments?

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13) What are the main points to be kept in view in giving licences?

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14) Write a paragraph on compulsory licence of a sound recording under Section 31.

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13.8 EXCEPTIONS AND LIMITATIONS

The acts which are declared as not infringing in Section 52 of the Copyright Act are applicable to sound recordings too.

Version Recording

Earlier, the provision for version recording was as an exception under Section 52 (1) (j). A version recording is a sound recording made of an already published song by using another voice or voices and with different musicians and arrangers. It is not copying of the original recording. That is why it was declared as an act not infringing copyright in the sound recording. This, however, is permitted only two years after the publication of the original sound recording and is also subject to certain conditions.

However, the amendments made in 2012 made this a statutory licence. A new Section 31 C provides statutory license to any person desiring to make a cover version of a sound recording in respect of any literary, dramatic or musical work. The person making the sound recording has to give to the owner prior notice of his intention in the prescribed manner, provide the copies of all covers or labels with which the version is supposed to be sold, and pay in advance the royalty at the rate fixed by the Copyright Board. Such sound recordings can be made only after the expiration of five years after publication. There is a requirement of payment of a minimum royalty for 50,000 copies of the work during each calendar year.

The issue of remix also can get mixed up in this. In the case of *Gramophone Co. Super Cassette Industries* [July 2010, Delhi] the Plaintiff's claim was that the Defendant had launched a series of audio cassettes containing version recordings which violate the copyrights of the Plaintiff. The Plaintiff had not granted any right, permission or license to the Defendant to make version recordings of the works in which it has copyrights. Some extracts from the judgment are presented below which illuminate the issues.

The limited rights conferred by Section 14 (e) on the owner of copyright in a sound recording (viz. the exclusive right to make other sound recording embodying it; to sell or hire any copy of the sound recording; or to communicate the sound recording to the public) harmonises with the rights which vest in the owner of the primary literary, dramatic and musical work utilised to make a sound recording. The owner(s) of copyright in the literary, dramatic and musical works can make or authorise the making of a new sound recording by utilising the same literary, dramatic or musical work which may earlier have been utilised for making an earlier sound recording. This right is not abridged or taken away by the said provision. Therefore, it is permissible to make another sound recording, may be by utilising the same or different set of musicians, singers or artists by utilising the same literary, dramatic or musical work. The owner of the Copyright in the earlier produced sound recording cannot object to the making of such subsequent sound recordings or version recordings merely because he is the owner of the copyright in the earlier made sound recording. His exclusive rights are confined to the exploitation of "his" work i.e. "his" sound recording in which he owns the copyright and does not give him the right to interfere or intermeddle with the exploitation of copyright(s) in the original primary works viz. the literary, dramatic and musical works by the author(s). This position is clear from Sub-section (4) of Section 13 of the Act, which states that the copyright in a sound recording shall not affect the separate copyright in any work in respect of which the sound recording is made. Any other interpretation would render sub-Section (4) of Section 13 otiose, and nullify the copyrights conferred on the author of a literary, dramatic or musical work to make or authorise, inter alia, the making of any subsequent sound recording of his work, once his work has been utilised by any person to make a sound recording. From Section 2(m) it is clear that unless a sound recording actually embodies a previous sound recording or a substantial part thereof, there is no copying or infringement of the copyright of the owner of a sound recording. The copyright of the owner of a sound recording does not get infringed on account of the making of another sound recording by using the same original literary, musical or dramatic work.

The version recording is meant to be a different recording made by utilising either the same or a different set of singers, musicians and artists. However, while making the version recording the producer is bound to maintain the integrity of the original literary, dramatic and musical works, except to the extent as may be reasonably necessary for the adoption of the work for the purpose of making the sound recordings. This is so provided in recognition of the moral rights of the author protected under Section 57 of the Act. This right gives the author a cause of action against any distortion, mutilation, modification or any other act in relation to the work, if the same would be prejudicial to the author's honour or reputation.

I, therefore, reject the submissions of learned counsel for the plaintiff that the defendant was obliged to seek express consent or permission of the plaintiff to make version recordings of the literary, dramatic and musical works of the plaintiff as, admittedly, the literary, dramatic and musical works in question in which the plaintiff presumably owns the copyright had been utilised for making sound recordings earlier in an authorised manner and the period of two years after the end of the year in which the first recordings of the works were made had expired when the defendant sought to make the version recordings. I also reject the contention that making of remixes or version recordings by use of a different orchestra, singer etc. amounts to alteration of primary works being exploited for making such version recording.

Once a version recording in compliance with Section 52(1)(j) has been made, it is as much a sound recording as any other sound recording would be of the original literary, dramatic or musical work which may have been made under a specific license from the author of such original works. Merely because it is a version recording made by resort to Section 52(1)(j), such version recording does not cease to have any of the characteristics of a sound recording.

The person making the sound recordings is obliged to comply with the conditions contained in Section 52(1)(j)(i) and (ii) and the provisos set out after Section 52(1)(j)(ii). The said conditions would continue to bind the person making the version recording, irrespective of the format in which the version recording may be exploited as a version recording. Therefore, even if the copies of the version recordings are sold or hired, or offered for sale or hire over the internet or mobile phones, the producer/owner of the copyright in the version recording is obliged to ensure that the spirit contained, inter alia, in clause (ii) read with proviso (ii) of Section 52(1)(j) are complied with. The purpose of clause (ii) and proviso (ii) to Section 52(1)(j) is to ensure that the person making and marketing the version recordings, by resort to Section 52(1)(j) does not mislead or confuse the public as to their identity as version recordings. The purpose is to prevent any confusion in the minds of the public that what is being offered by the producer of the version recordings is his version recording, and not any other earlier sound recording or version recording of the same literary, dramatic or musical work(s). Therefore, when a person making a version recording sells or hires or offers for sale or hire his version recording as ring tones on mobile phones, in my view, it is essential for him to clearly state that the same is his version recording. It would not be enough for him to merely indicate the title of the song or other composition of which he has made the version recording for the purpose of identifying the same. Similarly, when the person making the version recording sells or hires or offers for sale or hire his version recording over the internet

along with the title / icon of the version recording, it should be clearly stated on the website concerned that the same is his version recording, and if a label/icon is displayed, the same should also conform with the requirements of Section 52(1)(j).

For the unsuspecting consumer, it is important to know that what he has been offered for sale or hire is a version recording and not a recording from the original sound track. After all, it is the recording made from the original sound track which, in the first place, would have been distributed to the public at large for consumption, and it is the recording from the original sound track which, normally, would make the recording popular to attract buyers and customers. A customer may want to acquire a recording as contained in the original sound track. He may not be interested in acquiring a version recording of the same song. The mere disclosure of the names of the singers in the version recordings by itself is also not sufficient, even if made with some prominence, for the reason that the lay person who may be offered the version recording for sale/hire may not be even aware of the fact that the originally made recording, which he may have heard as a part of the cinematograph film in the first 2-3 years of the recording being released, was sung by some other artists and not by the artists whose names are contained on the cover of the version recording. The use of the word "remix" by itself also does not lead to the conclusion that the recording being offered for sale/hire under a cover is not from the original sound track as it is possible to use the song as sung by the artist on the original sound track, while adding to or altering the background music from that contained in the original sound track. What is essential is that the customer should be able to make an informed and a conscious choice. He should know when he buys/hires the sound recording that it is a version recording of the same composition (music and/or lyrics) that he may have earlier heard. It may be that to him, the version recording is just or acceptable. This may be due to various reasons. The version recording may, in his judgment, be as good as or even better than the originally made sound recording or it may be more affordable. There could be other reasons as well. But it should not happen that he is misled into buying or hiring a version recording by deception due to the use of a deceptive or confusing label or cover by the person marketing the version recording.

The above judgment elaborates in what contexts and with what procedure a version recording can be made and what are the rights that the version recording enjoys. The procedure for making version recording is given in the Copyright Rules. It provides that any person intending to make the version recording shall give a notice of such intention to the owner of the copyright and to the Registrar of Copyrights at least fifteen days in advance of making of the sound recordings and shall pay to the owner of the copyright, along with the notice, the amount of royalties due in respect of all the sound recordings to be made at the rate fixed by the Copyright Board in this behalf and provide copies of all covers and labels with which the sound recordings are to be sold.

It also provides that the notice shall contain the following information:

a) the particulars of the work in respect of which cover version is to be made;

b) alterations, if any, which are proposed to be made for the adaptation of the work to the cover version and the evidence of consent of the author of work, if required, for making such alteration;

c) the name, address and nationality of the owner of the copyright in the work;

d) particulars of the sound recording made previously of the work;

e) the total number of copies of the cover version and the calendar year in which it is going to be made;

f) the medium in which the sound recording was last made and the cover version is proposed to be made;

g) the price at which the cover version is proposed to be sold; and

h) the details of the advance payment of royalties paid as fixed by the Copyright Board

Statutory Licence for Broadcasting

A new Section 31 D provides statutory license for broadcasting of literary and musical works and sound recordings. It provides that any broadcasting organisation desiring to broadcast a work including sound recording may do so. The broadcasting organisation shall give prior notice to the right holders, pay royalty as fixed by the copyright board in advance. The names of the authors and principal performers shall be announced during the broadcast. The broadcasting organisation shall maintain records of the broadcast, books of account and render to the owner such records and books of account.

Exemption under Section 52

An exemption from infringement is provided in the case of sound recording for the following act, namely, the causing of a recording to be heard in public by utilising it,

i) in an enclosed room or hall meant for the common use of residents in any residential premises not being a hotel or similar commercial establishment) as part of the amenities provided exclusively or mainly for residents therein; or

ii) as part of the activities of a club or similar organisation which is not established or conducted for profit; or

iii) as part of the activities of a club, society or other organisation which is not established or conducted for profit;

In this case, the issue that comes up is what is private and what is public. One simple way to judge the issue is whether the audience is a paid audience or not. Another aspect to be kept in mind are the observations in of ***Garware Plastics v. Telelink*** quoted above. Essentially it should be non-profit activity and should not really be depriving the copyright owner in the sound recording of the reasonable business that he should be getting. For example, playing a sound recording in a hotel hall or a mall of even in a public transport could be an infringement and may not get the protection under the above section.

Self Assessment Questions **(Spend 3 minutes each)**

15) What is version recording and what is the procedure for making a version recording?

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16) What are the cases in which a sound recording can be played in public without licence from the copyright owner?

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13.9 INFRINGEMENT

An infringing copy in relation to sound recording is any other recording embodying the same sound recording made by any means if such copy is made or imported in contravention of the provisions of the Copyright Act.

What are the provisions of the Copyright Act in this regard? The Act says that copyright subsists throughout India in sound recording first published in India or where the work is first published outside India, the producer of the sound recording is at the date of such publication a citizen of India.

The Act gives the following exclusive rights to the producer of a sound recording:

a) The right to make any other sound recording embodying it including storing of it in any medium by electronic or other means

b) The right to sell or give on commercial rental or offer for sale or for such rental, any copy of the sound recording; and

c) The right to communicate the sound recording to the public.

Further, as per the Copyright Act the following acts will also be infringement:

a) Doing anything which is the exclusive right of the producer of the sound recording without his consent or in contravention of the conditions of the licence

b) Permits for profit any place to be used for the communication of the sound recording to the public where such communication constitutes an infringement of the copyright, unless the person doing so is not aware and had no reasonable ground for believing that such communication to the public would be an infringement

c) Making for sale or commercial rental or selling or renting out or by way of trade displaying or offering for sale or commercial rental infringing copies of the sound recording

d) Distributing either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright any infringing copies

e) Exhibiting in public by way of trade exhibits any infringing copy

f) Importing into India infringing copies of the sound recording.

Import of one copy of any work for the private and domestic use of the importer will not attract infringement action, even if the copy is an infringing one.

The criteria to decide whether a particular copy is an infringing copy in the case of sound recording will be the same as for other works, that is substantial reproduction.

Publishing a sound recording without the information about the owner, publisher and other prescribed details is also a criminal offence.

13.10 CIVIL REMEDIES

The Copyright Act provides the same remedies to the owner of copyright in sound recording as it offers to other right holders. Civil remedies are given in Sections 54 to 62 of the Act. Broadly the civil remedies are the following:

- injunction
- damages
- account of profit

Injunction is defined in a case law as "a judicial process by which one who is threatening to invade or has invaded the legal or equitable rights of another is restrained from commencing or continuing such act or is commanded to restore matters to the position in which they stood previous to the action."

There is interlocutory injunction and permanent injunction. Interlocutory injunction is issued during a trial to maintain the status quo or preserve the subject matter of the litigation until the trial is over. Permanent injunction is generally issued at the end of the trial.

In the case of ***Gramophone Company of India v. Shanti Films Corporation*** [AIR 1997 Cal 63], the court stated the general principles that should guide the grant of such injunctions.

In a suit for permanent injunction while the Court is considering an interlocutory application, the Court is not called upon to decide the real disputes between the parties. The Court is called upon to see whether the party who has approached the Court has a plausible case and whether there is a possibility of such case succeeding at the trial. If that test is satisfied then it is the duly of the Court to see whether the damages the plaintiff is likely to suffer for the action of the defendants complained of can be compensated in money and if so whether there is a standard for ascertaining such compensation. If such compensation can be ascertained and afforded in money then the interlocutory order of injunction should normally be refused. But if, on the other hand, the Court is of the view that such compensation cannot be ascertained and afforded in money then it is the duty of the Court to see the balance of convenience and inconvenience of the parties. If the balance "of convenience is in favour of grant then the Court shall normally issue an interlocutory order of injunction upon undertaking of the plaintiff to compensate the defendant against whom the order of injunction is passed if at the trial it is held that the plaintiff is not entitled to such permanent injunction. On the other hand, if it is found that the balance of convenience is against passing of such order, the Court will normally refuse to pass interlocutory injunction. The aforesaid are broadly the principles on which the Court acts while exercising

discretion in deciding an interlocutory, application for temporary injunction made in a suit for permanent injunction. I think, it is also the duty of the Court to preserve the status quo as far as practicable, while dealing with such a matter.

Another remedy available to the owner of copyright is to claim damages for the loss incurred by him because of the infringing activity by the other party. Generally, damages are calculated by the actual pecuniary loss sustained. The damages being awarded are expected to be fair and reasonable. In calculating the quantum, the courts look into various aspects such as the circumstances of the infringement, any loss which the plaintiff may have suffered, the loss of profit which he might have made but for the infringement and so on.

Account of profit is claiming a share in the profits that the infringer has made. Sometimes it could be the whole profits that he might have made. The issue gets complicated when the infringing sound recording contains other works also along with some or all the works that the original sound recording contained.

13.11 OFFENCES AND PENALTIES

The offences and penalties in case of infringement involving sound recordings are the same as for other works. The offences broadly fall into the following categories:

a) Infringement of a copyright in a sound recording

b) Infringement of any other right granted by the Copyright Act, 1957

c) Abetment of any of the above offences.

Copyright in a sound recording is infringed when any one makes any other sound recording embodying it, or sells or gives on hire, or offers for sale or hire, any copy of the sound recording regardless of whether such copy has been sold or given on hire on earlier occasions;, and when communicates the sound recording to the public.

Infringement of other rights in the Copyright Act include the following:

i) Permitting for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the sound recording, unless the person permitting was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright;

ii) Making for sale or hire, or selling of letting for hire, or by way of trade displaying or offering for sale or hire any infringing copies of a sound recording

iii) Distributing either for the purpose of trade or to such an extent copies of the infringing sound recording as to affect prejudicially the owner of the copyright in the sound recording

iv) By way of trade exhibiting in public any infringing copies of a sound record

v) Importing into India any infringing copies of a sound record.

Another punishable offence is publishing of a sound recording in contravention of the provisions of Section 52A. That Section requires that every sound recording

should display the following particulars on the sound recording and on the container of the sound recording:

a) the name and address of the person who has made the sound recording

b) the name and address of the owner of the copyright in the work, and

c) the year of its first publication.

The penalties range from imprisonment for six months to three years and fine extending from Rs. 50,000 to Rs. 200,000. There are mandatory penalties. For the first offence the mandatory minimum is imprisonment of six months and fine of Rs. 50,000 and for second and subsequent offence the mandatory minimum is imprisonment for one year and fine of Rs. one lakh.

13.12 SUMMARY

In this Unit we have seen the history and development of international protection for phonograms and the provisions in the Indian Copyright Act, 1957 regarding protection of sound recordings.

We found that like in the case of copyrights, the development of related rights also is in response to the challenges posed by technology. The emergence in the second half of nineteenth of sound recording technologies and their further development later led to the creation of rights for sound recordings. This, of course, faced a major problem as to the definition of author. The sound recordings are mechanical or electrical or electronic devices which reproduce literary or artistic works and not original works. Most of such works are owned by corporate firms.

The first major treaty to provide protection for sound recordings is theInternational Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations Rome Convention done at Rome in 1961. It is also known as the Rome Convention. The agreement extended copyright like protection for the first time from the author of a work to the creators and owners of particular, physical manifestations of intellectual property, such as audiocassettes. The Convention was a response to new technologies like tape recorders that made the reproduction of sounds easier and cheaper than ever before. As per the Convention, producers of phonograms are to enjoy the right to authorise or prohibit the direct or indirect reproduction of their phonograms. Phonograms are defined in the Rome Convention as meaning any exclusively aural fixation of sounds of a performance or of other sounds. When a phonogram published for commercial purposes gives rise to secondary uses (such as broadcasting or communication to the public in any form), a single equitable remuneration must be paid by the user to the producers of phonogram. It prescribed the period of protection as twenty years.

The Rome Convention was followed by the International Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms in 1971 and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) in 1994. In 1996, the WIPO Performances and Phonograms Treaty extended almost all copyrights to phonograms.

In India, the Copyright Act, 1957 treated sound recordings on par with other copyrighted works and provided almost identical rights and remedies.

As per the Act, a sound recording means a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced. In order to enjoy copyrights, the sound recording should not contain infringing material.

Producers of sound recording are the authors of the sound recordings. The rights in the case of a sound recording are:

a) The right to make any other sound recording embodying it

b) The right to sell or give on hire, or offer for sale or hire, any copy of the sound recording regardless of whether such copy had been sold or given on hire on earlier occasions

c) The right to communicate the sound recording to the public.

Sound recordings along with cinematograph films and computer programmes enjoy what is commonly referred to as rental rights.

The term of copyright in a sound recording is until sixty years from the beginning of the calendar year next following the year in which the sound recording is published.

Like other copyright works, no formalities are required for getting protection for sound recording. However, while publishing a sound recording the following particulars are required to be displayed on the sound recording and on any container thereof:

a) The name and address of the person who has made the sound recording

b) The name and address of the owner of the copyright in the work

c) The year of its first publication.

The rights are exploited either directly by the owners or through licences, just like copyrights in other works. Assignments and licences are the ways of using the rights. Registered copyright societies are allowed to administer rights in sound recordings, apart from the owners themselves.

In the case of sound recordings also, Copyright Board has the power to issue compulsory licence in certain cases. Section 31, of the Copyright Act provides that if at any time during the term of the copyright in any Indian work, which has been published or performed in public, a complaint is made to the Copyright Board that the owner of the copyright in the work has refused to republish of allow re-publication of the work and by reason of such refusal has withheld the work from the public or has refused to allow communication to the public by broadcast of the work or in the case of sound recording the work recorded in such sound recording, on terms which the complainant considers reasonable, the Copyright Board, after giving to the owner of copyright a reasonable opportunity for being heard and after holding necessary inquiry, can direct the Registrar of Copyright to issue the compulsory licence.

There are no fair dealing provisions for sound recordings. Version recording is one of the permitted acts with reference to sound recordings. A version recording is a sound recording made of an already published song by using another voice or voices and with different musicians and arrangers. It is not copying of the original recording.

Provisions regarding infringement, civil remedies, criminal offences and penalties, are by and large common for sound recordings and other works.

As per the Copyright Act the following acts will be infringement:

a) Doing anything which is the exclusive right of the producer of the sound recording without his consent or in contravention of the conditions of the licence

b) Permits for profit any place to be used for the communication of the sound recording to the public where such communication constitutes an infringement of the copyright, unless the person doing so is not aware and had no reasonable ground for believing that such communication to the public would be an infringement

c) Making for sale or hire or selling or hiring out or by way of trade displaying or offering for sale or hire infringing copies of the sound recording

d) Distributing either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright any infringing copies

e) Exhibiting in public by way of trade exhibits any infringing copy

f) Importing into India infringing copies of the sound recording

g) Publishing a sound recording without the information about the owner, publisher and other prescribed details.

Civil remedies include injunction, damages and accounts of profit.

Infringements of copyright and violation of other rights provided in the Act are criminal offences. The penalties prescribed for offence are imprisonment ranging from 6 months to three years and fine extending from Rs. 50,000 to Rs. 200,000.

13.13 TERMINAL QUESTIONS

1) What are the major provisions of the Rome Convention?
2) What are the rights provided in the Copyright Act for sound recording producers?
3) What all acts can be an infringement in case of a sound recording?
4) What are the civil remedies provided in the Copyright Act for infringement of rights in a sound recording?
5) Write a paragraph on offences and penalties with reference to sound recordings.

13.14 ANSWERS AND HINTS

Self Assessment Questions

1) Refer to Section 13.1
2) Refer to Section 13.1
3) Refer to Section 13.1
4) Refer to Section 13.1
5) Refer to Section 13.3
6) Refer to Section 13.4
7) Refer to Section 13.5
8) Refer to Section 13.5
9) Refer to Section 13.5
10) Refer to Section 13.6
11) Refer to Section 13.6
12) Refer to Section 13.7
13) Refer to Section 13.7
14) Refer to Section 13.7
15) Refer to Section 13.7
16) Refer to Section 13.8

Terminal Questions

1) Refer to Section 13.1
2) Refer to Section 13.5
3) Refer to Section 13.9
4) Refer to Section 13.10
5) Refer to Section 13.11

13.15 REFERENCES AND SUGGESTED READINGS

1) International Copyright and Neighbouring Rights by S. M. Stewart.
2) Principles of Intellectual Property by N.S. Gopalakrishnan and T.G. Agitha.
3) Copyright and Industrial Designs by P. Narayanan.
4) Copinger and Skone James on Copyright.
5) Lal's Commentary on Copyright Act.
6) Iyengar's The Copyright Act,1957.

UNIT 14 RIGHTS OF BROADCASTING ORGANISATIONS

Structure

14.1 INTRODUCTION

Broadcast reproduction right is one of the related rights in the international intellectual property lingo. The other two recognised related rights are rights on phonograms or sound recordings and performers' rights.

The rights of broadcasting organisations are recognised because of their role in making works available to the public in a much wider way than in other media and also because of their legitimate interest in controlling the transmission and retransmission of their broadcasts so that they can get the economic reward for their investments.

The entry of broadcasting organisations in to the realm of intellectual property rights has been rather slow compared to other right holders. There were many reasons for the same. For one, most of the broadcasting organisations in the early times were in the public sector and even those in the private sector were under lots of government regulations. Therefore, there issues tended to be sorted out through public international law or through diplomatic channels. For another, their initial entry was a user. The 1928 revision of the Berne Convention (the Rome Act) established the broadcasting right of copyright owners resulting in the requirement of broadcasting organisations taking consent of the copyright owners to broadcast works in which copyright subsist. Later, in the Brussels Revision of the Berne Convention, the broadcasters were able to get the concession of compulsory licensing but as users of copyright works.

Slowly, with the emergence of new technologies and business models the situation changed. Advent of television, satellite broadcasting, cable networks, FM radios and so on required protection for broadcasting organisations also on par with producers of phonograms.

It was the **International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention)** of 1961 that first responded positively to the requirements of broadcasting organisations also as in the case of performers and producers of sound recordings.

Article 13 of the Rome Convention talks about minimum rights for broadcasting organisations. The Convention provides that broadcasting organisation shall enjoy the right to authorise or prohibit

a) The rebroadcasting of their broadcasts;

b) The fixation of their broadcasts;

c) The reproduction:

   i) of fixations, made without their consent, of their broadcasts;

   ii) of fixations, made in accordance with the provisions of Article 15, of their broadcasts, if the reproduction is made for purposes different from those referred to in those provisions;

d) The communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.

Broadcasting was defined in the Rome Convention as the transmission by wireless means for public reception of sounds or of images and sounds. By rebroadcasting is meant the simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation.

Certain permitted exceptions were provided in Article 15 such as for private use, use of short excerpts in connection with reporting of current events, ephemeral fixation by a broadcasting organisation by means of its own facilities for its own broadcasts and use solely for the purposes of teaching or scientific research.

The duration of protection provided is minimum twenty years from the year of broadcast.

One major lacuna in the Rome Convention was that it did not cover cable casting because of the definition of broadcasting which did not include transmission by wire.

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) of 1994 provided that broadcasting organisation shall have the right to prohibit the following acts when undertaken without their authorisation:

a) The fixation

b) The reproduction of fixations, and

c) The rebroadcasting by wireless means of broadcasts

d) Communication to the public of television broadcasts

The period of protection that the TRIPS Agreement provided for rights of broadcasting organisations was twenty years from the year of broadcast. Essentially, the TRIPS Agreement did not make much progress in the matter of rights of broadcasting organisations over the Rome Convention.

The Copyright Act, 1957, in section 37, has provided for rights of broadcasting organisations. Till the 1994 amendment the heading of the section was 'rights of Broadcasting Authorities'.

Self Assessment Questions **(Spend 3 minutes each)**

1) What are the rights provided to broadcasting organisations in the Rome Convention?

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2) What is the definition of broadcasting in the Rome Convention?

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3) What is the minimum period of protection of rights of broadcasting organisations as per the TRIPS Agreement?

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14.2 OBJECTIVES

After reading this unit, you should be able to:

- apprise the learners about the provisions in the Copyright Act about rights of broadcasting organisations.

14.3 DEFINITION OF BROADCAST

Section 2(dd) defines 'broadcast' as communication to the public

i) By any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or

ii) By wire

It also includes re-broadcast.

The above definition was inserted through an amendment in 1983 Before that amendment, the term used was 'radio-diffusion' which was defined as including communication to the public by any means of wireless diffusion whether in the form of sounds or visual images or both.

The main problem with the pre-1983 definition was that it did not include cable casting which was then through wire. This was the problem with the definition of broadcasting in the Rome Convention also. India, however, did include cable networks within the definition of broadcast in 1983, although the TRIPS Agreement of 1994 also did not go for that.

The second thing to be noted about the definition is that it includes all communications whether through sounds or images or signs. Thus telecasting is covered by the definition.

Communication to the public has a wide scope under the Copyright Act. It means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available. This would mean even if the work is not accessed by anyone still it will be a communication to the public if it is made available to them in an accessible way. Through an explanation, it is also clarified that communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public. This explanation further expands the scope of communication to the public. This would mean that if a radio broadcast is made available to the guests of a hotel through wire, then it will come within the scope of communication to the people and coupled with the definition of broadcast, will need authorisation of the broadcaster.

Broadcast includes within its ambit cable TV network. In the case of ***Garware Plastics and Polyester v. Telelink and Ors.*** [AIR 1989 Bom 331], the issue was whether showing cinematograph film over cable T.V. network amounted to a broadcasts, i,e., whether this amounts to a communication of the film to the public or not. Whether a communication is to the public or whether it is a private communication depends essentially on the persons receiving the communication. It they can be characterised as the public or a protein of the public, the communication is to the public. The expression "in Public" must be considered in relation to the owner of the copyright may property be decried as the performing public or part of his public , then in performing the work before that audience, he would be exercising the statutory right conferred upon him. Anyone who, without his consent, performed the work before that audience would be infringing his copyright...The court after applying various criteria held that showing the film over a video TV network is broadcasting the film or communication to the public.

The definition of broadcast is so wide that digital transmission is also covered by the same. The possibility of Internet transmission also coming within its purview is high.

Thus, radio broadcasts, television broadcasts and communication to the public through cable TV network are all covered by the definition of broadcast. It may even include transmission or diffusion through the Internet. It also includes re-broadcast.

Self Assessment Question **(Spend 3 minutes)**

4) What is the scope of the definition 'broadcast' with reference to the rights of broadcasting organisations?

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14.4 RIGHTS OF BROADCASTING ORGANISATIONS

The right granted by the Copyright Act to broadcasting organisations is called broadcast reproduction right. This consists of the following:

i) re-broadcast the broadcast; or

ii) cause the broadcast to be heard or seen by the public on payment of any charges; or

iii) make any sound recording or visual recording of the broadcast; or

iv) make any reproduction of such sound recording or visual recording where such initial recording was done without licence or, where it was licensed, for any purpose not envisaged by such licence; or

v) sell or hire to the public or offer for such sale or hire, any such sound recording or visual recording.

This means that any kind of reproduction of the broadcast is within the right of the broadcasting organisation. That includes making any sound or visual recording of the same or selling or even commercial lending of the recording. The broadcast cannot even be rebroadcast or communicated to the public for a payment.

The separate rights on the works broadcast stand.. Therefore, persons taking permission to broadcast or do any other act with a work broadcast by a broadcasting organisation, will have to obtain the rights on the work from the owner of the right. That is to say, if a cinema was broadcast by a television channel and you want to rebroadcast the same, you will have to obtain the permission of the television channel and also the cinematograph film right owner.

Self Assessment Question **(Spend 3 minutes)**

5) What is broadcast reproduction right?

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14.5 DURATION OF PROTECTION

The duration of broadcast reproduction right in the Copyright Act,1957 is twenty-five years. The countdown of 25 years will commence from the beginning of the calendar year next following the year in which the broadcast is made. That means, if a broadcast is made on 30 January 1999, the broadcast reproduction right will expire only on 31 December 2025.

The Rome convention and the TRIPS Agreement required protection for a minimum period of twenty years only. The conventions, however, allow provision of higher level of protection including longer period of protection.

Self Assessment Question **(Spend 3 minutes)**

6) What is the duration of broadcast reproduction right?

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14.6 ADMINISTRATION OF BROADCAST REPRODUCTION RIGHTS

Broadcast reproduction rights like other rights granted by the Copyright Act are private property rights. It is for the right owners to administer their rights.

This right also does not require any formality like registration.

The organisation or firm that has the right can administer it directly by themselves or they can do so through registered copyright societies whose scope includes broadcast reproduction right.

As with other copyrights, broadcast reproduction right can be administered through assignments and licences. The conditions which are applicable with reference to copyrights in case of assignments and licences such as in writing, specification of the title, the duration, the area, etc are applicable in the case of broadcast reproduction right also.

An added issue in the case of licences and assignments of broadcast reproduction right is that if the broadcast contains works or performance on which others have rights, before exploiting the same, including through making sound or video recordings, the assignees of licensees should also obtain assignment or licence from the owners of such rights which subsist in those works or performances.

Self Assessment Questions **(Spend 3 minutes each)**

7) How can broadcast reproduction right administered?

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8) Is registration necessary for broadcast reproduction right?

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14.7 EXCEPTIONS AND LIMITATIONS

Like in the case with rights conferred by the Copyright Act, in the case of broadcast reproduction right also there are exceptions and limitations. As per Section 39, Broadcast reproduction right will not be infringed by the following acts:

a) The making of any sound recording or visual recording for the private use of the person making such recording, or solely for the purpose of *bona fide* teaching or research

b) The use consistent with fair dealing of excerpts of a broadcast in the reporting of current events or for *bona fide* review, teaching or research.

c) Any act which do not constitute infringement of copyright under Section 52 of the Copyright Act.

Broadly the main exemptions are for private use of the person making the recording, teaching, research and reporting current events. The following acts also could be considered as non-infringing in view of the inclusion of acts permitted under Section 52:

a) fair dealing for the purpose of private or personal use, research and criticism or review

b) Fair dealing for reporting of current events and teaching

c) Reproduction for use in judicial proceedings

d) Reproduction for the use exclusively of members of parliament or state legislatures

e) Reproduction for use in a certified copy in accordance with any law in force

f) Use in the course of the activities of an educational institution if the audience are limited to students and parents and guardians of the students and persons directly connected with the activities of the institution.

For practical reasons these uses involve making a sound recording or video recording of the broadcast and, by extension of the logic, that is to be treated as exemption.

It may be recalled that the Rome Convention provided that exemptions to the rights of broadcasting organisations can be made for private use, use of short excerpts in connection with the reporting of current events, ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcast and use solely for the purposes of teaching or scientific research.

Self Assessment Question **(Spend 3 minutes)**

9) What are the uses permitted by the copyright Act in respect of broadcasts without consent of the broadcaster?

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14.8 INFRINGEMENT AND REMEDIES

Section 39 of the Copyright Act states that during the period when broadcast reproduction right exists in a broadcast, if anyone, without the licence of the owner of the right, does any of the following acts with the broadcast or with any substantial part of, subject to the exceptions provided under Section 39, he will be infringing the broadcast reproduction right:

a) Re-broadcast the broadcast

b) Causes the broadcast to be heard or seen by the public on payment of nay charges

c) Makes any sound recording or visual recording of the broadcast

d) Makes any reproduction of such sound recording or visual recording where such initial recording was done without licence or where it was licensed, for any purpose not envisaged by such licence

e) Sells or hires to the public, or offers for such sale or hire, any such sound recording or visual recording.

The exceptions are as stated in para 2.7 above.

So far as remedies are concerned, civil remedies are available for infringement of broadcast reproduction right, as per Section 39 A. Civil remedies include remedies by way of injunction, damages, accounts of profit. The saving clause for the alleged infringer that on the date of the infringement he was not aware and had no reasonable ground for believing that right subsisted in the work is applicable in this case too. That means, in such a case, there will be no damages, but will be entitled for injunction in respect of the infringement and a decree for the whole or part of the profits made be the alleged infringer by the sale of the infringing copies as the court may consider reasonable.

The broadcasting organisation, however, will be entitled for the recovery of possession of all infringing sound and video recordings of the broadcast and all plates used for the production of such infringing copies. This is also subject to the saving clause of knowing infringement. The court can order delivery of the infringing copies and the plates used for making them to the owner of the broadcast reproduction right.

Any police officer not below the rank of a sub-inspector may seize without warrant all infringing copies of the broadcast and the plates used for making them and produce them before a Magistrate as soon as practicable.

Possession of plates for purpose of making infringing copies is an offence and punishable with imprisonment which may extend to two years and also with fine

Self Assessment Questions **(Spend 3minutes each)**

10) What are infringements with respect to broadcast reproduction right?

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11) What are the civil remedies available to the owner of broadcast reproduction right in case of infringement?

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12) Who has the right of ownership over the infringing copies of a sound recording made of a broadcast?

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14.9 SUMMARY

In this Unit, we have seen what are the rights of broadcasting organisations over their broadcasts.

Broadcasts came to the intellectual property right regime late. The first international treaty to accord them rights was the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations finalised at Rome in 1961. The Convention provided that broadcasting organisation would enjoy the right to authorise or prohibit

a) The rebroadcasting of their broadcasts;

b) The fixation of their broadcasts;

c) The reproduction:

   i) of fixations, made without their consent, of their broadcasts;

   ii) of fixations, made in accordance with the provisions of Article 15, of their broadcasts, if the reproduction is made for purposes different from those referred to in those provisions;

d) The communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee

The period of protection prescribed in the Convention is 20 years from the year of broadcast.

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) of 1994 also provided that broadcasting organisation shall have the right to prohibit the following acts when undertaken without their authorisation:

a) The fixation

b) The reproduction of fixations, and

c) The rebroadcasting by wireless means of broadcasts

d) Communication to the public of television broadcasts

In this treaty also the period of protection provided is 20 years.

India has provided for broadcast reproduction right for broadcasting organisations, in Section 39 of the Copyright Act. During the continuance of the broadcast reproduction right, the following act in relation to any broadcast or a substantial part of it are considered as infringement of the broadcast reproduction right:

i) re-broadcasting the broadcast; or

ii) cause the broadcast to be heard or seen by the public on payment of any charges; or

iii) making any sound recording or visual recording of the broadcast; or

iv) making any reproduction of such sound recording or visual recording where such initial recording was done without licence or, where it was licensed, for any purpose not envisaged by such licence; or

v) selling or hiring out to the public or offer for such sale or hire, any such sound recording or visual recording.

The usual exceptions of fair dealing for private use, education, research, reporting current events are available for broadcast reproduction right also. Such uses should be non-commercial.

The rights can be administered by the broadcasting organisations themselves through assignments or licences or through the collective administration societies. No registration is require for these rights.

Civil remedies are available for infringements with reference to broadcast reproduction right. Infringing copies and the plates used for the infringing activities will be the property of the owner of the broadcast reproduction right. Power of a sub-inspector to seize without warrant infringing copies is available in the case of broadcast reproduction right too.

14.10 TERMINAL QUESTIONS

1) What are the rights of a broadcasting organisation under the Copyright Act, 1957?
2) What are the remedies in case of infringement of broadcast reproduction right?
3) What are the permitted acts with regard to broadcasts?

14.11 ANSWERS AND HINTS

Self Assessment Questions

1) Refer to Section 14.1
2) Refer to Section 14.1
3) Refer to Section 14.1
4) Refer to Section 14.3
5) Refer to Section 14.4
6) Refer to Section 14.5
7) Refer to Section 14.6
8) Refer to Section 14.6
9) Refer to Section 14.7
10) Refer to Section 14.8
11) Refer to Section 14.8
12) Refer to Section 14.8

Terminal Questions

1) Refer to Section 14.4
2) Refer to Section 14.8
3) Refer to Section 14.7

14.12 REFERENCES AND SUGGESTED READINGS

1) International Copyright and Neighbouring Rights by S. M. Stewart.
2) Principles of Intellectual Property by N.S. Gopalakrishnan and T.G. Agitha.
3) Copyright and Industrial Designs by P. Narayanan.
4) Copinger and Skone James on Copyright.
5) Lal's Commentary on Copyright Act.
6) Iyengar's The Copyright Act,1957 .

ANNEXURE

37. Broadcast reproduction right

1) *Every broadcasting organisation shall have a special right to be known as "broadcast reproduction right" in respect of its broadcasts.*

2) *The broadcast reproduction right shall subsist until twenty-five years from the beginning of the calendar year next following the year in which the broadcast is made.*

3) *During the continuance of a broadcast reproduction right in relation to any broadcast, any person who, without the licence of the owner of the right does any of the following acts of the broadcast or any substantial part thereof,-*

   a) *re-broadcasts the broadcast; or*

   b) *causes the broadcast to be heard or seen by the public on payment of any charges; or*

   c) *makes any sound recording or visual recording of the broadcast; or*

   d) *makes any reproduction of such sound recording or visual recording where such initial recording was done without licence or, where it was licensed, for any purpose not envisaged by such licence; or*

   e) *sells or hires to the public or offers for such sale or hire, any such sound recording or visual recording referred to in clause (c) or clause (d) shall, subject to the provisions of Section 39, be deemed to have infringed the broadcast reproduction right.*

UNIT 15 PERFORMERS' RIGHTS

Structure

15.1 INTRODUCTION

Performers' Right is another related right. International agreements on this right too took lot of time. Given the special role of performers to bring various works such as musical and dramatic works to the public and their role in the cinematographic films, this is rather surprising. For ordinary people, most musical works are known through the performer who performed it. The success of dramas and cinematographic films depend to a very great extend on the performers. They are really close to derivative authors like translators. They are interpreters of the works which they perform and not mere mechanical reproducers of other works. They are creative in themselves. Perhaps one can compare them to translators who enjoy all rights of authors in the translated work.

While rights for authors in their literary and artistic works were recognised in the Berne Convention in 1886, it took more than forty years to recognise that performers also needed protection on their performances. At the end of the Rome Revision Conference of the Berne Convention in 1928, a view was expressed that members of the Berne Convention should "consider the possibility of measures intended to safeguard the rights of performers." The then prevailing view was that the matter could be considered in greater detail and a convention on the rights of performers could be "annexed to the revised Berne Convention" later. Still it took another two decades before an international convention that extended protection to performers, even if in a limited way was concluded.

It must be noted that performers play a very significant role in bringing works to the public. This, of course, has been there from the times when literary, dramatic and musical works were created. But, as in the case of copyrights, it was the developments in technology that really raised the issue of protection of performer's rights. With the facility for audio and video recording, performance could now be made into a movable commodity. Without such technology, it was always live performances only. Now live performances could be recorded and later enjoyed. It was this development that led to the evolution of the new system of protection of rights of performers.

With the emergence of audio and video recording industries new challenges came up for performers. Till the advent of these industries only live performances of

performers could be enjoyed by spectators. Now the performances could be recorded and enjoyed later or in other places. These ultimately led to the inclusion of performers' rights in the **Rome Convention of 1961**.

The Rome convention provided for the following rights to performers:

- Fixation of the performance
- Broadcasting of the performance
- Reproduction of fixations made without consent or against the terms of consent

This meant that the consent of the performers were necessary for any fixation of their performance or their broadcast of communication to the public. However, a performance already fixed and broadcast with their consent can be rebroadcast.

The period of protection provided in the Rome Convention is 20 years from the year of performance or from the year of fixation in case of performances incorporated in phonograms.

The Rome Convention define performers to mean actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works. This definition restricted performers to those who perform a literary or artistic work. That excluded artists like circus artists. The Convention left it to member countries to extend the protection provided to performers to artists who do not perform literary or artistic works.

Another deficiency with the Rome convention was that broadcasting meant only the transmission by wireless means for public reception of sounds or images or both but did not cover communication or transmission by wire. This excluded cable network.

The focus of the Rome Convention was audio performances and their fixations in phonograms and broadcasts.

The **TRIPS Agreement** (1994) provided for the following rights to performers:

- Fixation of their unfixed performances
- Reproduction of such fixations
- Broadcasting by wireless means and communication to the public of live performances

The TRIPS Agreement broadly followed the Rome convention except that the minimum period of protection envisaged is 50 years in place of 20 years in the Rome convention.

WIPO Performances and Phonograms Treaty (WPPT) of 1996 was the one which really took up the issue of protection of performances in a comprehensive manner.

It defined performers as "actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore." The Agreement has included those who perform expressions of folklore also which widens the scope considerably.

The WPPT extends almost all the rights which authors are entitled to, to performers. These include both economic rights and moral rights. The economic rights include

a) Right of broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance

b) Right of fixation of their unfixed performances

c) Right of reproduction of performances fixed in phonograms

d) Right of distribution of performances fixed in phonograms

e) Right of Rental

f) Right of making available to the public of fixed performances

The Treaty has made it clear that the rights extend to the digital environment. Therefore digital reproduction and copies and Internet communications are covered by these rights. To remove all doubts, in an agreed statement it is stated that the storage of a protected performance in digital form in an electronic medium constitutes a reproduction.

Further the right of making available to the public includes by wire or wireless means. It also envisages situations where members of the public may not access them simultaneously or at the time of making available or transmission but from a place and at a time individually chosen by them. This fully covers Internet communication and also cable network.

Another significant addition to the rights of performers is the right to a single equitable remuneration for broadcasting and communication to the public of the phonograms in which their performances have been fixed.

A major addition to the rights that the WPPT brought in is the provision for moral rights of performers. These rights are on par with similar rights for authors. The rights include the right of the performer to be identified as the performer of his performance and right to object to any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation. Moral rights are independent of the economic rights and will remain with the performer even after the transfer of the economic rights.

The WPPT also increased the period of protection to fifty years. This period will be computed from the end of the year in which the performance was fixed in a phonogram.

The WPPT has extended protection to performers at the same level as enjoyed by authors of literary and other works. These rights are however in the case of aural performances. Protection for audiovisual performances is under consideration of the international community.

India is a country with a rich tradition in performing arts and performers. However, performers were not having any statutory rights in their performances for long. This was a kind of denial of basic rights to them. It had even exercised the mind of the Supreme Court. Justice Krishna Iyer in the ***Indian Performing Right Society v. Eastern India Motion Pictures Association*** [AIR 1977 SC 1443] case made the following foot note while concurring with the main judgment:

A cinematograph is a felicitous blend, a beautiful totality, a constellation of stars, if I may use these lovely imageries to drive home my point, slurring over the rule against mixed metaphor. Cinema is more. than long strips of celluloid, more than miracles in photography, more than song, dance and dialogue and indeed, more than dramatic story, exciting plot, gripping situations and marvellous acting. But it is that ensemble which is the finished product of orchestrated performance by each of the several participants, although the components may, sometimes, in themselves be elegant entities. Copyright in a cinema film exists in law, but Section 13(4) of the Act preserves the separate survival, in its individuality, of a copyright enjoyed by any 'work' notwithstanding its confluence in the film. This persistence of the aesthetic 'personality' of the intellectual property cannot cut down the copyright of the film qua film. The latter right is, as explained earlier in my learned brother's judgment, set out indubitably in Section 14(1)(c). True, the exclusive right, otherwise called copyright, in the case of a musical work extends to all the sub-rights spelt out in Section 14(1)(a). A harmonious construction of s. 14, which is the integral yoga of copyrights in creative works, takes us to the soul of the subject. The artist enjoys his copyright in the musical work, the film producer is the master of his combination of artistic pieces and the two can happily co- exist and need not conflict. What is the *modus vivendi* ? The solution is simple. The film producer has the sole right to exercise what is his entitlement under Section 14(1)(c) *qua* film, but he cannot trench on I the composer's copyright which he does only if the 'music' is performed or produced or reproduced separately, in violation of Section 14(1)(a). For instance, a film may be caused to be exhibited as a film but the pieces of music cannot be picked out of the sound track and played in the cinema or other theatre. To do that is the privilege of the composer and that right of his is not crowned in the film copyright except where there is special provision such as in Section 17, proviso (c). So, beyond exhibiting the film as a cinema show, if the producer plays the songs separately to attract an audience or for other reason, he infringes the composer's copyright. Anywhere, in a restaurant or aeroplane or radio station or cinema theatre, if music is played, there comes into play the copyright of the composer or the Performing Arts Society. These are the boundaries of composite creations of art which are at once individual and collective, viewed from different angles. In 'a cosmic perspective, a thing of beauty has no boundary and is humanity's property but in the materialist plane on which artists thrive, private and exclusive estate in art subsists. Man, the noblest work of the Infinite Artist, strangely enough, battles for the finite products of his art and the secular law, operating on the temporal level, guardians material works possessing spiritual values. Theenigmatic small of Mona, Lisa is the timeless heritage of man- kind but, till liberated by the prescribed passage of time, the private copyright of the human maker says, 'hands off'.

The creative intelligence of man is displayed in multiform ways of aesthetic expression but it often happens that economic systems so operate that the priceless divinity which we call artistic or literary creativity in man is exploited and masters, whose works are invaluable, are victims of piffling payments. World opinion in defence of the human right to intellectual property led to international conventions and municipal laws, commissions, codes and organisations, calculated to protect works of art. India responded to this universal need by enacting the Copyright Act, 1957.

Not the recommendations in conventions but provisions in municipal laws determine enforceable rights. Our copyright statute protects the composite

cinematograph work produced by lay-out of heavy money and many talents but does not extinguish the copyrightable component parts in toto. The music which has merged, through the sound track, into the motion picture, is copyrighted by the producer but, on account of this monopoly, the music composer's copyright does not perish. The twin rights can co-exist, each fulfilling itself in its delectable distinctiveness. Section 14 has, in its careful arrangement of the rights belonging to each copyright, has a certain melody and harmony to miss which is to lose the sense of the Scheme. A somewhat un-Indian feature was noticed in the Indian Copyright Act falls to be mentioned. Of course, when' our law is intellectual 'borrowing from British reports, as admittedly it is, such exoticism is possible. 'Musical work', as defined in Section 2 (p) reads:

"(p) musical work means any combination of melody and harmony or either of them printed, reduced to writing or otherwise graphically produced or reproduced."

Therefore, copyrighted music is not the soulful tune, the superb singing, the glorious voice or the wonderful rendering. It is the melody or harmony reduced to print, writing or graphic form. The Indian music lovers throng to listen and be enthralled or enchanted by the nada *brahma*, the sweet concord of sounds, the rags, the *bhava*, the *laya* and the sublime or exciting singing. Printed music is not the glamour or glory of it, by and large, although the content of the poem or the lyric or the song does have appeal. Strangely enough, 'author', as defined in Section 2(d), in relation to a musical work, is only the composer and Section 16 confines 'copyright' to those works which are recognised by the Act. This means that the composer alone has copyright in a musical work. The singer has none. This disentitlement of the musician or group of musical artists to copy- right is un-Indian, because the major attraction which lends monetary value to a musical performance is not the music maker, so much as the musician. Perhaps, both deserve to be recognised by the copyright law. I make this observation only because act in one sense, depends on the ethos and the aesthetic best of a people; and while universal protection of intellectual and aesthetic property of creators of 'works' is an international obligation, each country in its law must protect such rights wherever originality is contributed. So viewed, apart from the music composer, the singer must be conferred a right. Of course, law-making is the province of Parliament but the Court must communicate to the lawmaker such infirmities as exist in the law extant.

This eloquent observation highlighted the sad plight of the performers and made government think of redressing the grievance. Consequently, through the amendment made in the Copyright Act in 1994, certain special rights were bestowed on singers and performers, called performer's rights.

Self Assessment Questions **(Spend 3 minutes each)**

1) What are the rights provided to performers in the Rome Convention?

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2) What are the rights provided to performers in the TRIPS Agreement?

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3) What are the economic rights provided to performers in the WPPT?

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4) Write a paragraph on Supreme Court's observations on the rights of performers in the case *Indian Performing Right Society v. Eastern India Motion Pictures Association.*

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15.2 OBJECTIVES

After reading this unit, you should be able to:

- examine the rights of performers in their performances from the related rights angle; and
- explore the provisions available in international agreements and in the Indian law.

15.3 DEFINITION OF PERFORMER

Like in the case with many other definitions in the Copyright Act, performer is also given an inclusive definition. It says

"Performer" includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance.

Performance has been defined as, "in relation to performer's right means any visual or acoustic presentation made live by one or more performers."

The Copyright, Designs and Patents Act, 1988 of the United Kingdom defines 'performance' in Section 180 therein as below:

'performance' means –

a) *a dramatic performance (which includes dance and mime)*

b) *a musical performance*

c) *a reading or recitation of a literary work, or*

d) *a performance of a variety act or any similar presentation*

which is, or so far as it is, a live performance given by one or more individuals.

This would mean he who gives any of the above performance is a performer as per the UK Act.

The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organnisations,1961 (Rome Convention) defines 'performers' as meaning

Actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works.

There are two points to be noted in this definition. It considers as performers only those who perform a work. That would be mean a circus artist or a juggler will not come under the ambit of this definition. So is the case with a sports person. This comes out of the philosophical view of neighbouring rights as rights of communicators of works. In fact these categories who do not come within the scope of this definition are 'original' performers and not performers of 'original works'.

A second, and a good, point about the definition is that it does not exclude performers who perform a work in the public domain. It does not make any restriction that the work should be within the copyright regime.

S.M. Stewart in his book, International Copyright and Neighbouring Rights, makes an observation that gets into the heart of the issue. He says:

"It is rather paradoxical that although of all neighbouring rights owners they are closest to derivative authors such as translators of literary works or adaptors of musical scores who receive full authors' rights their rights are in many jurisdictions and in international law the weakest. Unlike other neighbouring right owners, they are physical persons, like authors, and from a purely philosophical point of view it is difficult to see the essential difference between the work of a derivative author, say a translator, or an arranger, and that of a performer. Just as the translator renders the original work as faithfully as possible in another language, so the performer interprets the spirit of the work as truly as he can musically or on the stage. Just as the arranger, although basing himself on the original work adds another dimension to the work, so does the performer and different performances if the same work by different artists vary greatly from one another. Most languages emphasise the creativity of the performer by expressions like an actor 'creating' a part or a pianist presenting a most 'personal' or 'original' rendering of a well-known concerto.

This is applying the most stringent tests of the 'droit d'auteur'. In 'copyright' terms, there is not much doubt that performers 'spend sufficient skill and labour' to merit copyright protection."

The WIPO Performances and Phonograms Treaty (WPPT) (1996) defines performers as

Actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore.

The main difference between the Rome Convention definition and the WPPT definition is that the latter includes performance in folklore. This fits in with the Indian definition which extends the scope of the definition of performers to snake charmers and jugglers and other kind artists who perform folklore.

Compared to the definitions in the Rome Convention and the WPPT, the definition of performer in the Indian Copyright Act is much wider. It has not linked the performer with performance of a work. It also very specifically includes visual performers since definition of performance covers visual presentation.

The main thing about the definition of performer in the Copyright Act is that it takes care of many typically Indian artists such as a snake charmer or an acrobat or a juggler or a conjurer. This means that many people who perform folklore are covered by the definition of performer although folklore as such does not get any special protection under the intellectual property laws including the Copyright Act.

Another important point is that it includes lectures and lecture includes address, speech and sermon. This would mean public addresses by people, speeches in parliament and such places, lectures by teachers and so on will come under the protection of performers' rights.

Self Assessment Questions **(Spend 3 minutes each)**

5) What is the definition of performer in the Copyright Act?

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6) How is the definition of performer in the Copyright Act different from the definition of performer in the Rome Convention?

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15.4 RIGHTS OF PERFORMERS

The Copyright Act provides that where any performer appears or engages in any performance, he shall have a special right to be known as the "performer's right" in relation to that performance. This right will consist of the following rights:

a) to make a sound recording or a visual recording of the performance, including—

   i) reproduction of it in any material form including the storing of it in any medium by electronic or any other means;

   ii) issuance of copies of it to the public not being copies already in circulation;

   iii) communication of it to the public;

   iv) selling or giving it on commercial rental or offer for sale or for commercial rental any copy of the recording;

b) to broadcast or communicate the performance to the public except where the performance is already broadcast

The right to broadcast will not apply to rebroadcast of a broadcast done with the permission of the performer. It also will not apply to a broadcast from a sound recording or visual recording made with the consent of the performer or a re-broadcast of the same broadcast.

Communication to the public right excludes broadcast. It will also not apply if the communication to the public is made from a sound recording or visual recording or a broadcast.

An important exception to the right of the performer is that once a performer has consented to the incorporation of his performance in a cinematograph film, then he will not object to the enjoyment by the producer of the film of the performer's right in the same film. However, the performer will be entitled for royalties in case of making of the performance for commercial use. This means if an actor agrees to act in a cinematograph film, the producer or director can take necessary action such as editing for making it a proper film and also have the theatrical display of the film without taking separate authorisation from the performer.

This is done to facilitate freedom for the director, editor and producer to do various acts required to take the film to the public. The performer can do the bargain at the time of signing the contract for acting in the film. That will help him get proper remuneration for his economic rights or performance.

Duration of Rights

The duration of the performer's right in a performance is fifty years. The countdown of the period will commence only from the beginning of the calendar year next following the year in which the performance is made. For example if a performance is made on 1st March 2000, the performer's right will last from that date until 31 December 2050.

The Rome convention required protection for a minimum period of twenty years only. However, the TRIPS Agreement and the WPPT prescribed a duration of

fifty years. India amended the earlier provision regarding period of protection in 1999 to comply with the TRIPS requirement.

Moral Rights

New Section 38B of the Copyright Act, introduced by the 2012 amendments, extends moral rights to performer. He now has the right to claim to be identified as the performer of his performance. However, depending on the use, such as a very short clip, sometimes it may not be possible to run the names of all performers. That is permissible. Also the performer has the right to restrain or claim damages in respect of any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation. However, mere removal of any portion of a performance for the purpose of editing or other modifications necessitated by technical reasons will not be affected by this right.

The moral rights are now on par with the moral rights of authors.

However, even before the 2012 amendments, courts have taken slightly lenient attitude towards performers in this matter. This is reflected in ***Neha Bhasin v. Anand Raaj Anand*** 132 [(2006) DLT 196] case. The facts of the case are as under:

Neha Bhasin, a singer, claimed that her voice has been used by the defendants for the three versions of the song "ek look ek look" in the then forthcoming Hindi feature film "Aryan unbreakable" produced by the defendant No. 2, Poonam Khubani. The defendant No. 2, in connivance with the music director (defendant No. 1-Anand Raaj Anand), has shown herself to be the singer along with the defendant No. 2. The plaintiff has been shown as a backup vocalist in all the three versions of "ek look ek look", whereas Neha Bhasin had sung as the lead singer in all the three versions of the song. Neha sought a decree of permanent injunction against the defendants. After hearing both parties, the court came to the conclusion:

The conclusion, therefore, with regard to the remix version of the song "Ek Look Ek Look" as recorded in track 3 of the Original CD is that the plaintiff is the lead-main female vocalist and not the defendant No. 2. It would be wrong to describe the plaintiff as a back-up vocalist. The defendant No.2's voice is not discernible in the Original CD at all. And, the case set up by the defendants that the vocals of the defendant No. 2 were layered with the vocals of the plaintiff has been found to be without any tangible basis.

The plaintiff has been able to establish, prima facie, insofar as the Original CD is concerned, that (1) she has sung the song in all the three versions as the lead singer and it is her voice which has been recorded and is heard when the song is played; and (2) that defendant No. 2 (Poonam Khubani) is not the lead singer, in fact, it is not her voice at all. The plaintiff's claim that instead of defendant No. 2's (Poonam Khubani's) name, her name should have been shown as the lead singer and that her name has mischievously been shown only as a backup vocalist, stands established, prima facie.

It is essentially the reproduction of the performance through sound or visual recordings without the permission of the performer that is prohibited6. While the definition of "performer" in Section 2(qq) of the Copyright Act, 1957 includes within its sweep a singer, Section 2(q) defines "performance", in relation to

performer's right, to mean any visual or acoustic presentation made live by one or more performers. Every performance has to be live in the first instance whether it is before an audience or in a studio. If this performance is recorded and thereafter exploited without the permission of the performer then the performer's right is infringed. So, as regards performers' right's the plaintiff definitely has a serious friable case. But, de hors the Copyright Act, 1957, the plaintiff's relationship with the defendants is in the realm of quasi contracts. Section 70 of the Indian Contract Act, 1872 deals with these kinds of contracts. Section 70 reads as under:

> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

The Supreme Court explained this provision in the case of State of ***W.B. v. B.K. Mondal and Sons:*** [1962 Supp (1) SCR 876] in the following words:

> It is plain that three conditions must be satisfied before this section can be invoked. The first condition is that a person should lawfully do something for another person or deliver something to him. The second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. When these conditions are satisfied Section 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore, the thing so done or delivered. In appreciating the scope and effect of the provisions of this section it would be useful to illustrate how this section would operate. If a person delivers something to another it would be open to the latter person to refuse to accept the thing or to return it; in that case Section 70 would not come into operation. Similarly, if a person does something for another it would be open to the latter person not to accept what has been done by the former; in that case again Section 70 would not apply. In other words, the person said to be made liable under Section 70 always has the option not to accept the thing or to return it. It is only where he voluntarily accepts the thing or enjoys the work done that the liability under Section 70 arises.

The plaintiff has lawfully done something for the defendants. She has sung for them. Her singing has been recorded by them. When she underwent the process of recordings she did not intend to act gratuitously. The defendants enjoyed the benefits of the plaintiff's recordings. They used the same in the cassettes and CDs and commercially sold by them. They used her voice in the original soundtrack of the film "Aryan" which is yet to be released. Since there was no formal contract between them as alleged by the defendants, they had the option not to use her recordings at all. But, because they opted to use the plaintiff's recordings, a quasi contract comes into existence. All the ingredients of Section 70 are satisfied. The liability to compensate the plaintiff has therefore fallen on the defendants. That is insofar as the question of compensation or damages is concerned which shall be decided in the suit after trial. But, what is more is that the plaintiff also has a right in equity for being given proper credit for the song sung by her. If her voice is used and commercially exploited she has the right to prevent it being attributed to somebody else. This, even (counsel for defendant)

agreed that if the plaintiff's voice were used then she must be given credit for it and the defendant No. 2 cannot take wrong credit for a song which does not have her voice. Of course, in the same breath he submitted that no wrong credits were given as the song in the Original CD was sung by defendant No. 2. This has been demonstrated to be factually incorrect. The song in all its three versions in the Original CD was sung by the plaintiff. The defendants, knowing this to be the position, mischievously attributed the role of the lead/main female singer to the defendant No. 2 and relegated the plaintiff to the status of a mere backup singer. The damage and injury caused and being caused to the plaintiff is twice over. First, she is not described as the lead female singer and in her place the name of the defendant No. 2 appears as the lead/main female vocalist. Second, the plaintiff, who indeed was the lead/main singer has been demoted to the status of a mere backup singer. The latter act in itself is likely to cause grave harm and injury to the reputation of the plaintiff as a singer. Her aspirations to rise as a female vocalist would receive a big jolt if in the market she is perceived merely as a backup singer and not as a lead singer.

The question of giving appropriate credit for services rendered in the production of a film as an interim relief came up for consideration before the Supreme Court in the case of ***Suresh Jindal v. Rizsoli Corriere Della Sera Prodzioni T.V., S.P.A.:*** 1991 Supp (2) SCC 3. This decision puts paid to all arguments on behalf of the defendants for rejection of the plaintiff's application for ad interim relief. The facts of the case before the Supreme Court were that the appellant therein, who was a film producer, entered into an arrangement with the respondents therein which were three Italian companies and a foreign film producer for the production and exhibition of a television serial based on an Italian novel. The appellant alleged that there was a concluded contract between them. The respondents, on the other hand took the position that that was no contract between them. The respondents were not making any headway in the project and they could not even get permission from the Government of India for shooting the film in India. The appellant arranged for this permission after making certain modifications in the script and also took concrete steps for the study of suitable locations for the shooting of the film and to discharge his responsibilities as a co-producer. Soon after the government permission was obtained, the respondents dissociated themselves with the appellant and went ahead with the production of the film without his participation. In these circumstances, the appellant filed a suit for specific performance and also filed two applications for interim relief. By the first, he sought an interim injunction restraining the defendants-respondents from proceeding with the production of the film and from transferring and/or assigning the rights of the appellant under the agreement to any other person. By the second application, he sought to restrain the respondents from carrying on with the production or exhibition of the picture without the participation and / or involvement of the appellant as one of the producers. Before these interim reliefs could be obtained, the respondents completed the production of the film. Therefore, when the applications for interim relief came on for hearing, the appellant confined his claim only to a three-second display, in the "credit titles" of the serial, of his name as a "co-producer". But, this relief was not granted to him by the learned Single Judge on the original side and an appeal by him to a Division Bench was also unsuccessful. While disposing of the appeal there from, the Supreme Court held:-

> The High Court seems to have taken the view that, even if the appellant had rendered some services as claimed and the respondents refused to acknowledge it, he can be adequately compensated by the award of damages. Of course, it is possible that the court may ultimately be able to assess some damages for this breach if it comes to the conclusion that there has been such breach. However, we think that in a matter of this type the award of damages is not a complete and adequate remedy or relief. As the appellant has made clear, he is not interested so much in the monetary aspect of the deal he claims to have entered into with the respondents. The gain by way of reputation as well as goodwill which the appellant would secure if his services are acknowledged in the title shots of the film is not one which can be adequately expressed in terms of money. By the time the suit is finally decided, any such exhibition of acknowledgment may become totally impossible or infructuous. In that situation, perhaps, there would be no alternative but to assess the damages somehow or other depending upon the findings of the court on the issues in the case. We, however, think, on the prima facie case made out and having regard to the fact that the necessary modifications in the "credit titles" can be easily made as the film is still in the early stages of its exhibition, that it is just and necessary that the appellant should be granted interim relief at this stage by injuncting the respondents from exhibiting the film except after displaying an acknowledgment of the appellant's services.
>
> We have pondered on the nature of the relief that should be given to the petitioner. As we have already said, there is no doubt in our minds that, whether there was a concluded contract as claimed by the appellant or not, the appellant did play some part in making the film possible and that the respondents are acting unreasonably in denying him the benefit of the limited acknowledgment he is entitled to have.... We, therefore, restrict the scope of the interim relief and direct, in the interests of justice, that in case the film is proposed to be, or is, exhibited either on the T.V. or in any other medium in India, it shall not be so exhibited by the respondent or their agents unless it carries, in its title shots, an acknowledgment of the services rendered by the appellant to the producers in some appropriate language. We direct accordingly.

In Suresh Jindal (supra), the Supreme Court found that the appellant therein was entitled to due acknowledgement being given to him as the appellant did "play some part in making the film possible" whether there was a concluded contract between them or not. The Supreme Court also held that the High Court's view that the appellant therein could be suitably compensated instead of granting the interim injunction would not be an adequate remedy. The decision is a complete answer to the argument of the defendants that if the plaintiff has been wronged she can be adequately compensated at the conclusion of suit. The plaintiff would be entitled to get a similar order for giving her due acknowledgement for having sung the song in the Cassettes, CDs and film. The plaintiff, as the discussion above reveals, has been able to establish a very strong prima facie case in her favour. The balance of convenience also lies in favour of the grant of an injunction for the benefit of the plaintiff. If the plaintiff is not granted the interim relief, she shall suffer grave harm and irreparable injury which cannot be adequately compensated by damages alone.

In these circumstances, the plaintiff is entitled to an interim order restraining the defendants, their dealers, distributors, stockists and all other persons acting on their behalf from in any manner using, selling, distributing, exhibiting, advertising the motion picture as well as cassettes, CDs, promos of the film "Aryan - Unbreakable" containing the song "Ek Look Ek Look" in any of the three versions as contained in the Original CD without displaying the name of the plaintiff as lead female singer. It is ordered accordingly. In case the defendants opt to introduce and sell the New CD which does not contain the voice of the plaintiff then the defendants shall give wide publicity in the print media, the electronic media, the internet as well in the printed inlay cards/ covers of the cassettes and CDs that (a) the three versions of the song "Ek Look Ek Look" in the Original CD were sung by the plaintiff as the lead/main female vocalist and that the defendant No. 2 was not the lead/singer thereof ; (b) the three versions of the song "Ek Look Ek Look" in the New CD have been sung by the defendant No. 2 and not by the plaintiff who had originally sung these three versions.

The above case upheld the moral right of a performer to be known as the performer of the performance. With the enactment of the 2012 amendments, performers now can really assert their moral rights.

Self Assessment Questions **(Spend 3 minutes each)**

7) What are the rights extended to a performer in the Copyright Act?

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8) Can an actor in a film assert his performer's rights after acting in the film?

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9) Write a paragraph on moral rights of a performer in India.

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15.5 INFRINGEMENT OF THE RIGHTS OF PERFORMER AND REMEDIES

Section 38 of the Copyright Act, 1957 says that during the continuance of a performer's right any person who, without the consent of the performer, does any of the following acts in respect of the performance or any substantial part thereof shall be committing an act of infringement:

a) makes a sound recording or visual recording of the performance; or

b) reproduces a sound recording or visual recording of the performance, which sound recording or visual recording was-

   i) made without the performer's consent; or

   ii) made for purposes different from those for which the performer gave his consent; or

   iii) made for purposes different from those referred to in Section 39 from a sound recording or visual recording which was made in accordance with Section 39; or

c) broadcasts the performance except where the broadcast is made from a sound recording or visual recording other than one made in accordance with Section 39, or is a re-broadcast by the same broadcasting organisation of an earlier broadcast which did not infringe the performer's right; or

d) Communicates the performance to the public otherwise than by broadcast, except where such communication to the public is made from a sound recording or a visual recording or a broadcast, shall, subject to the provision of Section 39, be deemed to have infringed the performer's right.

Any act, which falls within the scope of a performer's right, if done by a third party without the performer's consent will be an infringement. These relate to making of sound or visual recordings of the performance or broadcasting the performance either directly or after making a sound or visual recording and any other communication to the public. But once a broadcast is made with due approval of the performer, that broadcast can be rebroadcast without taking specific approval of the performer. So also, once a sound or visual recording is made with the consent of the performer, the same can be communicated to the public without any further approval.

Section 39 mentions the acts which will not be an infringement of the performer's right. These include,

a) The making of any sound recording or visual recording for the private use of the person making such recording, or solely for the purposes of bona fide teaching or research; or

b) The use, consistent with fair dealing of excerpts of a performance or of a broadcast in the reporting of current events or for bona fide review, teaching or research; or

c) Such other acts, with any necessary adaptations and modifications, which do not constitute infringement of copyright.

Essentially these exceptions are the same as those provided for copyright works. They have been adapted to the particular nature of performance and the way they are likely to be used.

Broadly the uses for purely private or personal purposes or for teaching or research or reporting current events are permitted without specific authorisation of the performer. They, however, should not be commercial use and should be fair and reasonable. The result of such use should not be such that the performer should not be deprived of his due returns from his performance.

So far as remedies are concerned, civil remedies are available for infringement of performer's right, as per Section 39 A. They are identical to the civil remedies available for a broadcast reproduction right. Civil remedies include remedies by way of injunction, damages, and accounts of profit. The saving clause for the alleged infringer that on the date of the infringement he was not aware and had no reasonable ground for believing that right subsisted in the work is applicable in this case too. That means, in such a case, there will be no damages, but will be entitled for injunction in respect of the infringement and a decree for the whole or part of the profits made be the alleged infringer by the sale of the infringing copies as the court may consider reasonable.

The performer will be entitled for the recovery of possession of all infringing sound and video recordings of the performance and all plates used for the production of such infringing copies. This is also subject to the saving clause of knowing infringement. The court can order delivery of the infringing copies and the plates used for making them to the performer.

Any police officer not below the rank of a sub-inspector may seize without warrant all infringing copies of the sound recordings and visual recordings of the performance and the plates used for making them and produce them before a Magistrate as soon as practicable.

Possession of plates for purpose of making infringing copies is an offence and punishable with imprisonment which may extend to two years and also with fine

Self Assessment Questions **(Spend 3 minutes each)**

10) What is infringement of a performer's right?

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11) What acts with reference to a performance will not be an infringement of the performer's right?

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12) What are the civil remedies available in case of infringement of performer's right?

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15.6 SUMMARY

In this Unit, we have seen what are the international treaty provisions and the Copyright Act provisions regarding the rights of performers.

Like other related rights, performer's rights also made a late entry into the international copyright regime. The Rome Convention of 1961 was the first one to extend such protection. That Convention provided the following rights to performers:

- Fixation of the performance
- Broadcasting of the performance
- Reproduction of fixations made without consent or against the terms of consent

The Rome Convention mandated a minimum period of protection of 20 years only for performer's right.

The TRIPS Agreement (1994) provided for the following rights to performers:

- Fixation of their unfixed performances
- Reproduction of such fixations
- Broadcasting by wireless means and communication to the public of live performances

The TRIPS Agreement broadly followed the Rome convention except that the minimum period of protection envisaged is 50 years in place of 20 years in the Rome convention.

The WIPO Performances and Phonograms Treaty (WPPT) of 1996 was the first treaty to treat right s of performers on par with the rights of authors of literary and artistic works. The WPPT extends almost all the rights which authors are entitled to, to performers. These include both economic rights and moral rights. The economic rights include

a) Right of broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance

b) Right of fixation of their unfixed performances

c) Right of reproduction of performances fixed in phonograms

d) Right of distribution of performances fixed in phonograms

e) Right of Rental

f) Right of making available to the public of fixed performances

The Treaty has made it clear that the rights extend to the digital environment also. The moral rights include the right of the performer to be identified as the performer of his performance and the right to object to any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation.

In India, for long the performers had no legal rights over their performances. Even the Supreme Court had noted it with concern. Consequently through an amendment in 1994 performer's rights were incorporated in the Copyright Act. With the 2012 amendments, the rights are now on par with those of authors.

The Copyright Act provides that where any performer appears or engages in any performance, he shall have a special right to be known as the "performer's right" in relation to that performance. This right will consist of the following rights:

a) Right to make a sound recording or visual recording of the performance

b) Right to reproduce the sound recording or visual recording of the performance including the storing of it in any medium by electronic or other means

c) Right to issue copies of the record

d) Right to broadcast the performance

e) Right to communicate the performance to the public

f) Right to sell or give on commercial rental

The Act makes a specific provision that once a performer agrees to perform in a cinematograph film, he will not object to the film producer enjoying the performer's right in that performance as part of the cinematograph film. However, for commercial use, not as regular exhibition in a theatre, he is entitled to a fair share of royalty.

The performer also has the moral rights to be identified as the performer as well as against any distortion or mutilation of the performance that is prejudicial to his reputation.

The Indian law extends performer's right to both aural and visual presentations.

The exceptions to such rights are the normal exceptions for private use, research, reporting of current events and the like. The basic principle is that they should not be for commercial use.

The period of protection for performer's right is now fifty years.

Like for the rights of broadcasting organisations civil remedies under the Copyright Act are available for infringement of performer's rights also.

15.7 TERMINAL QUESTIONS

1) What are the rights on a performance provided in the WIPO Performances and Phonograms Treaty?

2) What are the rights available to a performer in his performance in India?

3) What are the civil remedies available to a performer in case of infringement of his performer's right ?

4) Write a half page on the position of moral rights for performers in India.

15.8 ANSWERS AND HINTS

Self Assessment Questions

1) Refer to Section 15.1

2) Refer to Section 15.1

3) Refer to Section 15.1

4) Refer to Section 15.1

5) Refer to Section 15.3

6) Refer to Section 15.3

7) Refer to Section 15.4

8) Refer to Section 15.4

9) Refer to Section 15.4

10) Refer to Section 15.5

11) Refer to Section 15.5

12) Refer to Section 15.5

Terminal Questions

1) Refer to Section 15.1

2) Refer to Section 15.4

3) Refer to Section 15.5

4) Refer to Section 15.4

15.9 REFERENCES AND SUGGESTED READINGS

1) International Copyright and Neighbouring Rights by S. M. Stewart.

2) Principles of Intellectual Property by N.S. Gopalakrishnan and T.G. Agitha.

3) Copyright and Industrial Designs by P. Narayanan.

4) Copinger and Skone James on Copyright.

5) Lal's Commentary on Copyright Act.

6) Iyengar's The Copyright Act,1957.

ANNEXURE

38. Performer's right-

1) *Where any performer appears or engages in any performance, he shall have a special right to be known as the "performer's right" in relation to such performance.*

2) *The performer's right shall subsist until 96A fifty years from the beginning of the calendar year next following the year in which the performance is made.*

3) *During the continuance of a performer's right in relation to any performance, any person who, without the consent of the performer, does any of the following acts in respect of the performance or any substantial part thereof, namely :-*

   a) *makes a sound recording or visual recording of the performance; or*

   b) *reproduces a sound recording or visual recording of the performance, which sound recording or visual recording was-*

      i) *made without the performer's consent; or*

      ii) *made for purposes different from those for which the performer gave his consent; or*

      iii) *made for purposes different from those referred to in Section 39 from a sound recording or visual recording which was made in accordance with Section 39; or*

   c) *broadcasts the performance except where the broadcast is made from a sound recording or visual recording other than one made in accordance with Section 39, or is a re-broadcast by the same broadcasting organisation of an earlier broadcast which did not infringe the performer's right; or*

   d) *communicates the performance to the public otherwise than by broadcast, except where such communication to the public is made from a sound recording or a visual recording or a broadcast, shall, subject to the provision of Section 39, be deemed to have infringed the performer's right.*

4) *Once a performer has consented to the incorporation of his performance in a cinematograph film, the provisions of sub-sections (1), (2) and (3) shall have no further application to such performance.*

38A. (1) Without prejudice to the rights conferred on authors, the performer's right which is an exclusive right subject to the provisions of this Act to do or authorize for doing any of the following acts in respect of the performance or any substantial part thereof, namely:—

   a) *to make a sound recording or a visual recording of the performance, including—*

      i) *reproduction of it in any material form including the storing of it in any medium by electronic or any other means;*

ii) *issuance of copies of it to the public not being copies already in circulation;*

iii) *communication of it to the public;*

iv) *selling or giving it on commercial rental or offer for sale or for commercial rental any copy of the recording;*

b) *to broadcast or communicate the performance to the public except where the performance is already broadcast.*

2) *Once a performer has, by written agreement, consented to the incorporation of his performance in a cinematograph film he shall not, in the absence of any contract to the contrary, object to the enjoyment by the producer of the film of the performer's right in the same film:*

Provided that, notwithstanding anything contained in this sub-section, the performer shall be entitled for royalties in case of making of the performances for commercial use.

38B. The performer of a performance shall, independently of his right after assignment, either wholly or partially of his right, have the right,—

a) *to claim to be identified as the performer of his performance except where omission is dictated by the manner of the use of the performance; and*

b) *to restrain or claim damages in respect of any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation.*

Explanation.—For the purposes of this clause, it is hereby clarified that mere removal of any portion of a performance for the purpose of editing, or to fit the recording within a limited duration, or any other modification required for purely technical reasons shall not be deemed to be prejudicial to the performer's reputation.

UNIT 16 INTERNATIONAL PROTECTION OF COPYRIGHT

Structure

16.1 INTRODUCTION: EVOLUTION OF INTERNATIONAL PROTECTION OF COPYRIGHT

Copyright and Related Rights like other intellectual property rights are territorial in nature. That means, a literary work created in India gets protection in India and not in other countries. Since this will not be in the interest of the authors and owners of copyright and related rights, the countries of the world through discussions finalised many international treaties. These treaties provide for certain minimum rights and standards for copyright and related rights which all member countries adopt. They also contain provisions for extending the protection which each country is giving to its own nationals to the nationals of other countries. Through this mechanism authors and other right holders are able to get protection for their works in other countries. There are now a number of treaties in this area. But this has come out as a result of a long evolution. We will first look into that development before examining the salient features of the major international treaties on copyright and related rights.

From the beginning of civilization, realisation was there that creators of works that contribute to development of culture and inventors who contribute to scientific and industrial progress need to be recognised and rewarded. We find assertions of authors over their right to be recognised and rewarded for their creative outputs during the Imperial Roman times. Martial (41-104 A.D.), a Latin poet, in one of

epigrams told the readers to pay because the moneylender is asking for his interest and the slaves for their wages. He accused plagiarists as thieves. There are other writers also who expressed such feelings. Most were very vocal about their moral rights, but few only argued strongly for economic rights in the ancient times, may be because in many jurisdictions, the crown took care of creative artists and litterateurs.

During the Middle Ages, particularly in Europe, monasteries came to dominate the scene of literary and scientific output. The inmates of such places, by rule, were not to be money minded. Apart from the monasteries, another set of people who contributed to the development of songs and music were troubadours and travelling minstrels who maintained a prolific oral tradition. They were also not much of money-minded. This could be one reason for the delayed emergence of copyright as a discipline and subject.

The position, however, changed dramatically with the invention of the movable metal type printing press by the Johannes Gutenberg around 1440-1455. Whereas in earlier times copies had to be made one by one through manual manuscripting, with printing press, multiple copies could be churned out fast. One person with the help of a printing press can bring out a number of copies of a book. This not only increased number of copies of a book available in the market but also reduced the cost of production.

This led to the emergence of a new profession or trade, that of printer publisher. In England these printer booksellers were called stationers. They had to make considerable investment in the printing press, ink and paper and naturally they demanded fair returns on the investment. They also had to pay the workers. In the absence of any special rights, soon the stationers found themselves in a peculiar situation. If a stationer brought out a book which became popular, soon others also brought out that book and offered them at a cheaper rate. This resulted in the initial investors losing out. Very soon after the birth of this new trade it faced a crisis. Some were ruined and others were reluctant to take up risky publishing.

The stationers grouped together and demanded protection for the trade. The kings of England, France and Germany started extending certain privileges to the stationers sometime in the sixteenth century. These privileges guaranteed that if a work was published by one stationer, others cannot publish the same for a specified period of time. In case of anybody doing so, they were liable for fines, seizures and confiscation of the infringing copies.

In England the system of privileges started with an Act of Henry VIII of 1529. Later, in 1557 Henry VIII made the craft guild of the stationers into a company. Only the registered members of the company had the right to print books. This system prevailed for a long time. The Licensing Act of 162 of Charles I prohibited the printing of any book unless licensed and entered in the register. The privilege system finally gave way to the Statute of Queen Ann in 1709 which is regarded as the mother of all copyright laws. This Act for the first time granted real rights to authors by giving the sole right to print their works for 14 years from the date of first publication.

In Germany the privilege system started around the year 1501. Compulsory deposit with a central depository was a condition of the German privilege system. Also in Germany, the privileges were granted by separate principalities for each

province and not for the whole country. It was in 1832 that the alliance of German States provided for reciprocity between the German states in respect of the privileges. In 1837, a decision was taken to grant protection of these privileges for 10 years which was later in 1845 extended to 30 years. Finally, the first German Copyright Law was promulgated in 1871.

France also followed the privilege route. Like in England, here also the printers formed a guild whose members only could print and publish books. All the privileges were abolished by the French Revolution. Post Revolution, a decree in January 1791 established the performance right of the author. In July 1793, a decree was issued which granted exclusive reproduction right to the authors. This law prevailed till the promulgation of the Copyright Act of 1957 in France.

These developments in individual European countries slowly led to the development of an international regime. In the absence of an international regime, authors and publishers had no assurance of non-publication of the works brought out by them without authorisation in other countries. Finally, in 1886, representatives of ten countries signed the Berne Convention for the Protection of Literary and Artistic Works, which for the first time provided an international framework for the protection of copyrights.

Self Assessment Questions **(Spend 3 minutes each)**

1) How has the invention of printing press influenced the emergence of copyright?

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2) Write a paragraph on the rights of stationers in England

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16.2 OBJECTIVES

After reading this unit, you should be able to:

- acknowledge the various international treaties and conventions on protection of copyright and related rights; and
- explain the current developments taking place at the global level on matters relating to copyright and related rights.

16.3 BERNE CONVENTION

The Berne Convention for the Protection of Literary and Artistic Works was finalised at Berne, a city in Switzerland on 9 September, 1886. This followed the Paris Convention on Protection of Industrial Property of 1883 which provided for protection for new inventions, trademarks, designs, appellations of origin, etc. which were used in industry and commerce. The main inspiration for the treaty was the European authors, particularly Victor Hugo, the French author. The ten original signatories of the Berne Convention are the following:

1) Belgium
2) France
3) Germany
4) Great Britain
5) Haiti
6) Italy
7) Liberia
8) Spain
9) Switzerland
10) Tunisia

The Berne Convention has been revised many times, almost at an average of one revision per twenty years. The idea behind these revisions is to update the international protection system to meet the challenges of new technological developments. The original treaty itself was really completed on 4 May, 1896 in Paris. The first major revision took place in Berlin on13 November, 1908. This revision was completed at Berne on 20 March 1914. This was followed by the revisions in Rome on 2 June, 1928, in Brussels on 26 June, 1948, in Stockholm on 14 July, 1967 and finally in Paris on 24 July, 1971. After that certain amendments were made on 28 September, 1979. The present Berne Convention is known as the Paris Act.

Now the international copyright regime is governed mostly by the Berne Convention since it has a membership of 164 countries. The list of members and their dates of accession are given below:

Country	Date of Accession
Albania	March 6, 1994
Algeria	April 19, 1998
Andorra	June 2, 2004
Antigua and Barbuda	March 17, 2000
Argentina	June 10, 1967
Armenia	October 19, 2000
Australia	April 14, 1928
Austria	October 1, 1920

Azerbaijan	June 4, 1999
Bahamas	July 10, 1973
Bahrain	March 2, 1997
Bangladesh	May 4, 1999
Barbados	July 30, 1983
Belarus	December 12, 1997
Belgium	December 5, 1887
Belize	June 17, 2000
Benin	January 3, 1961
Bhutan	November 25, 2004
Bolivia (Plurinational State of)	November 4, 1993
Bosnia and Herzegovina	March 1, 1992
Botswana	April 15, 1998
Brazil	February 9, 1922
Brunei Darussalam	August 30, 2006
Bulgaria	December 5, 1921
Burkina Faso	August 19, 1963
Cameroon	September 21, 1964
Canada	April 10, 1928
Cape Verde	July 7, 1997
Central African Republic	September 3, 1977
Chad	November 25, 1971
Chile	June 5, 1970
China	October 15, 1992
Colombia	March 7, 1988
Comoros	April 17, 2005
Congo	May 8, 1962
Costa Rica	June 10, 1978
Côte d'Ivoire	January 1, 1962
Croatia	October 8, 1991
Cuba	February 20, 1997
Cyprus	February 24, 1964
Czech Republic	January 1, 1993
Democratic People's Republic of Korea	April 28, 2003
Democratic Republic of the Congo	October 8, 1963

Denmark	July 1, 1903
Djibouti	May 13, 2002
Dominica	August 7, 1999
Dominican Republic	December 24, 1997
Ecuador	October 9, 1991
Egypt	June 7, 1977
El Salvador	February 19, 1994
Equatorial Guinea	June 26, 1997
Estonia	October 26, 1994
Fiji	December 1, 1971
Finland	April 1, 1928
France	December 5, 1887
Gabon	March 26, 1962
Gambia	March 7, 1993
Georgia	May 16, 1995
Germany	December 5, 1887
Ghana	October 11, 1991
Greece	November 9, 1920
Grenada	September 22, 1998
Guatemala	July 28, 1997
Guinea	November 20, 1980
Guinea-Bissau	July 22, 1991
Guyana	October 25, 1994
Haiti	January 11, 1996
Holy See	September 12, 1935
Honduras	January 25, 1990
Hungary	February 14, 1922
Iceland	September 7, 1947
India	April 1, 1928
Indonesia	September 5, 1997
Ireland	October 5, 1927
Israel	March 24, 1950
Italy	December 5, 1887
Jamaica	January 1, 1994
Japan	July 15, 1899

Jordan	July 28, 1999
Kazakhstan	April 12, 1999
Kenya	June 11, 1993
Kyrgyzstan	July 8, 1999
Latvia	August 11, 1995
Lebanon	September 30, 1947
Lesotho	September 28, 1989
Liberia	March 8, 1989
Libya	September 28, 1976
Liechtenstein	July 30, 1931
Lithuania	December 14, 1994
Luxembourg	June 20, 1888
Madagascar	January 1, 1966
Malawi	October 12, 1991
Malaysia	October 1, 1990
Mali	March 19, 1962
Malta	September 21, 1964
Mauritania	February 6, 1973
Mauritius	May 10, 1989
Mexico	June 11, 1967
Micronesia (Federated States of)	October 7, 2003
Monaco	May 30, 1889
Mongolia	March 12, 1998
Montenegro	June 3, 2006
Morocco	June 16, 1917
Namibia	March 21, 1990
Nepal	January 11, 2006
Netherlands	November 1, 1912
New Zealand	April 24, 1928
Nicaragua	August 23, 2000
Niger	May 2, 1962
Nigeria	September 14, 1993
Norway	April 13, 1896
Oman	July 14, 1999
Pakistan	July 5, 1948

Panama	June 8, 1996
Paraguay	January 2, 1992
Peru	August 20, 1988
Philippines	August 1, 1951
Poland	January 28, 1920
Portugal	March 29, 1911
Qatar	July 5, 2000
Republic of Korea	August 21, 1996
Republic of Moldova	November 2, 1995
Romania	January 1, 1927
Russian Federation	March 13, 1995
Rwanda	March 1, 1984
Saint Kitts and Nevis	April 9, 1995
Saint Lucia	August 24, 1993
Saint Vincent and the Grenadines	August 29, 1995
Samoa	July 21, 2006
Saudi Arabia	March 11, 2004
Senegal	August 25, 1962
Serbia	April 27, 1992
Singapore	December 21, 1998
Slovakia	January 1, 1993
Slovenia	June 25, 1991
South Africa	October 3, 1928
Spain	December 5, 1887
Sri Lanka	July 20, 1959
Sudan	December 28, 2000
Suriname	February 23, 1977
Swaziland	December 14, 1998
Sweden	August 1, 1904
Switzerland	December 5, 1887
Syrian Arab Republic	June 11, 2004
Tajikistan	March 9, 2000
Thailand	July 17, 1931
the former Yugoslav Republic of Macedonia	September 8, 1991
Togo	April 30, 1975

Tonga	June 14, 2001
Trinidad and Tobago	August 16, 1988
Tunisia	December 5, 1887
Turkey	January 1, 1952
Ukraine	October 25, 1995
United Arab Emirates	July 14, 2004
United Kingdom	December 5, 1887
United Republic of Tanzania	July 25, 1994
United States of America	March 1, 1989
Uruguay	July 10, 1967
Uzbekistan	April 19, 2005
Venezuela (Bolivarian Republic of)	December 30, 1982
Viet Nam	October 26, 2004
Yemen	July 14, 2008
Zambia	January 2, 1992
Zimbabwe	April 18, 1980

The Preamble to the Berne Convention states its aim as "to protect, in as effective and uniform manner as possible, the rights of authors in their literary and artistic works."

There are three basic principles on which the Berne Convention rests. These are the principles of national treatment, automatic protection and independence of protection. National treatment means that works originating in one of the member states are to be given the same treatment in other member states as given to the works of the works of their own nationals. Automatic protection means that there should not be any requirement of any formality for getting the protection. The third principle of independence of protection ensures that enjoyment and exercise of the rights granted are independent of the existence of protection in the country of origin.

The Convention gives an illustrative list of works covered instead of a limiting definition of 'works'. This includes works in the literary, scientific and artistic domain. Entitlement for protection is subject to the works being fixed in some material form. However, unpublished works are also entitled for protection.

The ownership of rights is generally with the author. However, in certain types of works such as cinematograph films, national legislations can decide the ownership of copyright. In India, the Copyright Act provides the producers of cinematograph film as the owners.

The exclusive rights granted include the right of reproduction, the right of translation, the right to perform, the right to broadcast and communicate to the public, the right to public recitation, the right to make adaptations, and the right to make cinematographic adaptations and reproductions.

The Convention also provides for moral rights independently of the economic rights. These are the rights to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to the honour and reputation of the author.

The Convention lays down the minimum term of protection as the life of the author plus fifty years. For cinematographic films this period is fifty years after the work has been made available to the public and for photographs it is twenty-five years from the making of the work.

The Convention also provides for certain limitations on the exclusive rights in the public interest. Thus, the protected works can be used in certain cases without particular authorisations of the owner. This is subject to what has come to be known as the three-step test, namely, it has to be in certain special cases only, it should not come into conflict with the normal exploitation of the work and should not unreasonably prejudice the legitimate interest of the author.

The Appendix to the Paris Act of the Convention also permits developing countries to grant non-voluntary licences for translation and reproduction of works in certain uses in connection with educational activities. In these cases, the specified use is allowed without the authorization of the right holder, subject to the payment of remuneration to be fixed by the law.

A country who accedes to the treaty becomes a Member of the Convention. These Members form what is known as the Berne Union. Members of the Berne Union have an Assembly and an Executive Committee. Every country member of the Union who has adhered to at least the administrative and final provisions of the Stockholm Act is a member of the Assembly. The Stockholm Act contains the amendments made upto and including in Stockholm in 1967.

The Berne Convention initially established an International Bureau to administer the treaty. Later it got merged with the International Bureau for Paris Convention. With the establishment of the World Intellectual Property Organisation, it became the administrative body for the Berne Convention.

Self Assessment Questions **(Spend 3 minutes each)**

3) Write a paragraph on the finalisation of and subsequent amendments to the Berne Convention.

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4) What are the rights provided to authors in the Berne convention?

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5) What are the exceptions and limitations to copyrights provided in the Berne Convention?

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6) Who administers the Berne convention?

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16.4 UNIVERSAL COPYRIGHT CONVENTION

The Universal Copyright Convention was adopted at Geneva on 6 September 1952 and revised at Paris on 24 July 1971. It has currently a membership of 65 countries. List of member states of the Universal Copyright Convention is given below:

1)	United Kingdom of Great Britain and Northern Ireland	34) Dominican Republic
2)	France	35) Barbados
3)	Hungary	36) Sri Lanka
4)	United States of America	37) Saint Vincent and the Grenadines
5)	Cameroon	38) Peru
6)	Algeria	39) Netherlands
7)	Sweden	40) Finland
8)	Germany	41) Republic of Korea
9)	Kenya	42) India

10) Senegal	43) Trinidad and Tobago
11) Spain	44) Niger
12) Norway	45) Rwanda
13) Monaco	46) Bolivia (Plurinational State of)
14) Bulgaria	47) Cyprus
15) Tunisia	48) Ecuador
16) Bangladesh	49) Croatia
17) Mexico	50) China
18) Brazil	51) Slovenia
19) Morocco	52) Uruguay
20) Colombia	53) Czech Republic
21) Bahamas	54) Slovakia
22) Poland	55) Switzerland
23) Japan	56) Bosnia and Herzegovina
24) Australia	57) Saudi Arabia
25) El Salvador	58) Russian Federation
26) Denmark	59) Venezuela (Bolivarian Republic of)
27) Italy	60) The former Yugoslav Republic of Macedonia
28) Costa Rica	61) Liechtenstein
29) Holy See	62) Serbia
30) Panama	63) Togo
31) Portugal	64) Albania
32) Guinea	65) Montenegro
33) Austria	

The Universal Copyright Convention (UCC) was developed by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) as an alternative to the Berne Convention for those countries which disagreed with certain aspects of the Berne Convention but still wished to participate in some form of multilateral copyright protection. The countries who took the initiative in making the Universal Copyright Convention included the then Soviet Union, the United States of America and the Latin American countries.

The Convention seeks to provide for adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works including writings, musical, dramatic and cinematographic works and paintings and engravings and sculpture.

The rights provided under the UCC include the exclusive right of the author to reproduce make, publish, and authorise the making and publication of translation of works.

The minimum duration of protection under the Universal Copyright Convention is life of the author and twenty-five years after his death.

While the Berne Convention insists on not prescribing any formality for protection, under the Universal Copyright Convention, any formality in a national law can be satisfied by the use of a notice of copyright in the form and position specified in the UCC. A UCC notice should consist of the symbol © (C in a circle) accompanied by the year of first publication and the name of the copyright proprietor (example: © 2011 Rajinder Kumar). This notice must be placed in such a manner and location as to give reasonable notice of the claim to copyright.

With the inclusion of the substantive provisions of the Berne Convention in the Agreement on Trade Related aspects of Intellectual Property Rights administered by World Trade Organisation, and with larger memberships of Berne Convention and the World Trade Organisation, and since the rights in the Berne Convention and the TRIPS being of a higher level, the Universal Copyright Convention is now more of academic interest than practical application.

The convention is administered by the UNESCO.

India is a member of the both Berne Convention and the Universal Copyright Convention.

Self Assessment Questions **(Spend 3 minutes each)**

7) When was the Universal Copyright Convention finalised and how many members are in it now?

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8) Who administers the Universal Copyright Convention?

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9) What are the formalities prescribed under the Universal Copyright Convention for a work to become entitled for protection?

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10) What is the duration of copyright protection under the Universal Copyright Convention?

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16.5 ROME CONVENTION

The International Convention for The Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961) was finalised in Rome and has come to be known as the Rome Convention. It is the first major international treaty on related rights.

The Convention secures protection in performances for performers, in phonograms for producers of phonograms and in broadcasts for broadcasting organisations.

Performers include actors, singers, musicians, dancers and those who perform literary or artistic works. They are protected against certain acts to which they have not consented. Such acts are: the broadcasting and communication to the public of a live performance; the fixation of the live performance; the reproduction of the fixation if the original fixation was made without the performer's consent or if the reproduction was made for purposes different from those for which consent was given.

Producers of phonograms have the right to authorise or prohibit the direct or indirect reproduction of their phonograms (sound recording). As per the Convention, "phonograms" means any exclusively aural fixation of sounds of a performance or of other sounds. Where a phonogram published for commercial purposes gives rise to secondary uses such as broadcasting or communication to the public in any form, a single equitable remuneration must be paid by the user to the performers, to the producers of the phonograms, or to both. Contracting States are free, however, not to apply this rule or to limit its application.

Broadcasting organisations have the right to authorise or prohibit certain acts, namely:

- the rebroadcasting of their broadcasts;
- the fixation of their broadcasts;
- the reproduction of such fixations;
- the communication to the public of their television broadcasts if such communication is
- made in places accessible to the public against payment of an entrance fee

The Rome Convention allows for exceptions and limitations to the above-mentioned rights in national laws as regards private use, use of short excerpts in

connection with reporting current events, ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts, use solely for the purpose of teaching or scientific research and in any other cases where national law provides exceptions to copyright in literary and artistic works. Overall, exceptions cover non-commercial private uses.

Furthermore, once a performer has consented to the incorporation of a performance in a visual or audiovisual fixation, the provisions on performers' rights have no further application.

Protection must last at least until the end of a 20-year period computed from the end of the year in which (a) the fixation was made, for phonograms and for performances incorporated therein; (b) the performance took place, for performances not incorporated in phonograms; (c) the broadcast took place. However, national laws increasingly provide for a 50-year term of protection, at least for phonograms and performances.

WIPO is responsible, jointly with the International Labour Organisation (ILO) and UNESCO, for the administration of the Rome Convention.

The Rome Convention at present has a membership of 91 countries. The list of the members of the Rome Convention is given below:

Country	Date of Joining
Albania	September 1, 2000
Algeria	April 22, 2007
Andorra	May 25, 2004
Argentina	March 2, 1992
Armenia	January 31, 2003
Australia	September 30, 1992
Austria	June 9, 1973
Azerbaijan	October 5, 2005
Bahrain	January 18, 2006
Barbados	September 18, 1983
Belarus	May 27, 2003
Belgium	October 2, 1999
Bolivia (Plurinational State of)	November 24, 1993
Bosnia and Herzegovina	May 19, 2009
Brazil	September 29, 1965
Bulgaria	August 31, 1995
Burkina Faso	January 14, 1988
Canada	June 4, 1998
Cape Verde	July 3, 1997

Chile	September 5, 1974
Colombia	September 17, 1976
Congo	May 18, 1964
Costa Rica	September 9, 1971
Croatia	April 20, 2000
Cyprus	June 17, 2009
Czech Republic	January 1, 1993
Denmark	September 23, 1965
Dominica	November 9, 1999
Dominican Republic	January 27, 1987
Ecuador	May 18, 1964
El Salvador	June 29, 1979
Estonia	April 28, 2000
Fiji	April 11, 1972
Finland	October 21, 1983
France	July 3, 1987
Georgia	August 14, 2004
Germany	October 21, 1966
Greece	January 6, 1993
Guatemala	January 14, 1977
Honduras	February 16, 1990
Hungary	February 10, 1995
Iceland	June 15, 1994
Ireland	September 19, 1979
Israel	December 30, 2002
Italy	April 8, 1975
Jamaica	January 27, 1994
Japan	October 26, 1989
Kyrgyzstan	August 13, 2003
Latvia	August 20, 1999
Lebanon	August 12, 1997
Lesotho	January 26, 1990
Liberia	December 16, 2005
Liechtenstein	October 12, 1999
Lithuania	July 22, 1999
Luxembourg	February 25, 1976

Mexico	May 18, 1964
Monaco	December 6, 1985
Montenegro	June 3, 2006
Netherlands	October 7, 1993
Nicaragua	August 10, 2000
Niger	May 18, 1964
Nigeria	October 29, 1993
Norway	July 10, 1978
Panama	September 2, 1983
Paraguay	February 26, 1970
Peru	August 7, 1985
Philippines	September 25, 1984
Poland	June 13, 1997
Portugal	July 17, 2002
Republic of Korea	March 18, 2009
Republic of Moldova	December 5, 1995
Romania	October 22, 1998
Russian Federation	May 26, 2003
Saint Lucia	August 17, 1996
Serbia	June 10, 2003
Slovakia	January 1, 1993
Slovenia	October 9, 1996
Spain	November 14, 1991
Sweden	May 18, 1964
Switzerland	September 24, 1993
Syrian Arab Republic	May 13, 2006
Tajikistan	May 19, 2008
the former Yugoslav Republic of Macedonia	March 2, 1998
Togo	June 10, 2003
Turkey	April 8, 2004
Ukraine	June 12, 2002
United Arab Emirates	January 14, 2005
United Kingdom	May 18, 1964
Uruguay	July 4, 1977
Venezuela (Bolivarian Republic of)	January 30, 1996
Vietnam	March 1, 2007

As you could see, India is not yet a Member of the Rome Convention.

Self Assessment Questions **(Spend 3 minues each)**

11) What is the scope of the Rome Convention?

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12) What are the rights it has provided to performers?

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13) What are the rights that the Rome Convention has provided to producers of phonograms?

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14) What are the rights that the Rome Convention has provided to the broadcasting organisations?

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16.6 GENEVA CONVENTION FOR THE PROTECTION OF PRODUCERS OF PHONOGRAMS AGAINST UNAUTHORISED DUPLICATION OF THEIR PHONOGRAMS (1971)

The Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms was established in Geneva in1971.It is also known as the Geneva Phonograms Convention. It provides for the obligation of each Contracting State to protect a producer of phonograms

who is a national of another Contracting State against the making of duplicates without the consent of that producer; against the importation of such duplicates, where the making or importation is for the purpose of distribution to the public; and against the distribution of such duplicates to the public.

"Phonogram" has the same meaning as in the Rome convention. It means an exclusively aural fixation, that is, it does not comprise, for example, the sound tracks of films or videocassettes, whatever its form.

Protection should last for at least 20 years from the first fixation or the first publication of the phonogram.

The Convention permits the same limitations as those provided in relation to the protection of authors. It allows non-voluntary licences if reproduction is intended exclusively for teaching or scientific research, limited to the territory of the State whose authorities give the license, and if equitable remuneration is provided

WIPO is responsible, jointly with the International Labour Organisation (ILO) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO), for the administration of this Convention.

The Convention has a membership of 77 countries. The list of members is given below:

Country	Date of Joining
Albania	June 26, 2001
Argentina	June 30, 1973
Armenia	January 31, 2003
Australia	June 22, 1974
Austria	August 21, 1982
Azerbaijan	September 1, 2001
Barbados	July 29, 1983
Belarus	April 17, 2003
Bosnia and Herzegovina	May 25, 2009
Brazil	November 28, 1975
Bulgaria	September 6, 1995
Burkina Faso	January 30, 1988
Chile	March 24, 1977
China	April 30, 1993
Colombia	May 16, 1994
Costa Rica	June 17, 1982
Croatia	April 20, 2000
Cyprus	September 30, 1993
Czech Republic	January 1, 1993

Democratic Republic of the Congo	November 29, 1977
Denmark	March 24, 1977
Ecuador	September 14, 1974
Egypt	April 23, 1978
El Salvador	February 9, 1979
Estonia	May 28, 2000
Fiji	April 18, 1973
Finland	April 18, 1973
France	April 18, 1973
Germany	May 18, 1974
Greece	February 9, 1994
Guatemala	February 1, 1977
Holy See	July 18, 1977
Honduras	March 6, 1990
Hungary	May 28, 1975
India	February 12, 1975
Israel	May 1, 1978
Italy	March 24, 1977
Jamaica	January 11, 1994
Japan	October 14, 1978
Kazakhstan	August 3, 2001
Kenya	April 21, 1976
Kyrgyzstan	October 12, 2002
Latvia	August 23, 1997
Liberia	December 16, 2005
Liechtenstein	October 12, 1999
Lithuania	January 27, 2000
Luxembourg	March 8, 1976
Mexico	December 21, 1973
Monaco	December 2, 1974
Montenegro	June 3, 2006
Netherlands	October 12, 1993
New Zealand	August 13, 1976
Nicaragua	August 10, 2000
Norway	August 1, 1978

Panama	June 29, 1974
Paraguay	February 13, 1979
Peru	August 24, 1985
Republic of Korea	October 10, 1987
Republic of Moldova	July 17, 2000
Romania	October 1, 1998
Russian Federation	March 13, 1995
Saint Lucia	April 2, 2001
Serbia	June 10, 2003
Slovakia	January 1, 1993
Slovenia	October 15, 1996
Spain	August 24, 1974
Sweden	April 18, 1973
Switzerland	September 30, 1993
the former Yugoslav Republic of Macedonia	March 2, 1998
Togo	June 10, 2003
Trinidad and Tobago	October 1, 1988
Ukraine	February 18, 2000
United Kingdom	April 18, 1973
United States of America	March 10, 1974
Uruguay	January 18, 1983
Venezuela (Bolivarian Republic of)	November 18, 1982
Viet Nam	July 6, 2005

16.7 THE BRUSSELS CONVENTION RELATING TO THE DISTRIBUTION OF PROGRAMME-CARRYING SIGNALS TRANSMITTED BY SATELLITE (1974)

The Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite was finalised in 1974. It requires each Member country to take adequate measures to prevent the unauthorised distribution on or from its territory of any programme carrying signal transmitted by satellite. A distribution is considered unauthorised if it has not been authorised by the broadcasting organisation that decided on the programme's content.

The Convention permits certain limitations on protection. The distribution of programme carrying signals by non-authorised persons is permitted if the signals carry short excerpts containing reports of current events or, as quotations, short excerpts of the programme carried by the emitted signals or, in the case of

developing countries, if the programme carried by the emitted signals is distributed solely for the purposes of teaching, including adult teaching or scientific research. The Convention does not establish a term of protection, leaving the matter to domestic legislation.

The provisions of this Convention are not applicable, however, where the distribution of signals is made from a direct broadcasting satellite.

The Convention is administered by WIPO.

At present it has a membership of 35 countries whose list is given below.

Country	Date of Accession
Armenia	December 13, 1993
Australia	October 26, 1990
Austria	August 6, 1982
Bahrain	May 1, 2007
Bosnia and Herzegovina	March 6, 1992
Chile	June 8, 2011
Costa Rica	June 25, 1999
Croatia	October 8, 1991
El Salvador	July 22, 2008
Germany	August 25, 1979
Greece	October 22, 1991
Honduras	April 7, 2008
Italy	July 7, 1981
Jamaica	January 12, 2000
Kenya	August 25, 1979
Mexico	August 25, 1979
Montenegro	June 3, 2006
Morocco	June 30, 1983
Nicaragua	August 25, 1979
Oman	March 18, 2008
Panama	September 25, 1985
Peru	August 7, 1985
Portugal	March 11, 1996
Republic of Moldova	October 28, 2008
Russian Federation	January 20, 1989
Rwanda	July 25, 2001
Serbia	April 27, 1992

Singapore	April 27, 2005
Slovenia	June 25, 1991
Switzerland	September 24, 1993
Former Yugoslav Republic of Macedonia	November 17, 1991
Togo	June 10, 2003
Trinidad and Tobago	November 1, 1996
United States of America	March 7, 1985
Viet Nam	January 12, 2006

Self Assessment Question **(Spend 3 minutes)**

15) What are the obligations of member countries of the Brussels Convention?

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16.8 TRIPS AGREEMENT

So far the most comprehensive agreement on intellectual property rights is the Agreement on Trade Related Aspects of Intellectual Property Rights that was finalised at the end of the Uruguay Round of GATT (General Agreement on Trade and Tariff) negotiations in 1994. It covers almost all the areas of intellectual property such as copyrights and related rights, trademarks, geographical indications, industrial designs, patents, layout-designs of integrated circuits and trade secrets.

The three main features of the Agreement are provisions relating to standards, enforcement and dispute settlement:

- *Standards.* In respect of each of the main areas of intellectual property covered by the TRIPS Agreement, the Agreement sets out the minimum standards of protection to be provided by each Member. Each of the main elements of protection is defined, namely the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection. The Agreement sets these standards by requiring, first, that the substantive obligations of the main conventions such as the Berne Convention for the Protection of Literary and Artistic Works in their most recent versions must be complied with. With the exception of the provisions of the Berne Convention on moral rights, all the substantive provisions of these conventions are incorporated by reference and thus become obligations under the TRIPS Agreement for TRIPS Member countries. Secondly, the TRIPS Agreement adds a substantial number of additional obligations on matters where the pre-existing conventions are silent or were seen as being inadequate.

- *Enforcement.* The second main set of provisions deals with domestic procedures and remedies for the enforcement of intellectual property rights. The Agreement lays down certain general principles applicable to all intellectual property right enforcement procedures. In addition, it contains provisions on civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures, which specify, in a certain amount of detail, the procedures and remedies that must be available so that right holders can effectively enforce their rights.

- *Dispute settlement.* The most significant improvement of the TRIPS Agreement over previous intellectual property agreements is on its provision for dispute settlement. The Agreement makes disputes between WTO Members about the respect of the TRIPS obligations subject to the WTO's dispute settlement procedures.

In addition, the Agreement provides for certain basic principles, such as national and most-favoured-nation treatment, and some general rules to ensure that procedural difficulties in acquiring or maintaining intellectual property rights do not nullify the substantive benefits that should flow from the Agreement.

National treatment obligation requires each country to accord the same treatment in regard to the protection of intellectual property that it accords to its own nationals to nationals of other member countries.

The obligations under the Agreement will apply equally to all Member countries, but developing countries and least developed countries have been provided longer periods to phase them in. Special transition arrangements operate in the situation where a developing country does not presently provide product patent protection in the area of pharmaceuticals.

The TRIPS Agreement is a minimum standards agreement, which allows Members to provide more extensive protection of intellectual property if they so wish. Members are left free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice.

The general goals of the TRIPS Agreement are contained in the Preamble of the Agreement, which reproduces the basic Uruguay Round negotiating objectives established in the TRIPS area by the 1986 Punta del Este Declaration and the 1988/89 Mid-Term Review. These objectives include the reduction of distortions and impediments to international trade, promotion of effective and adequate protection of intellectual property rights, and ensuring that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade. These objectives should be read in conjunction with Article 7, entitled "Objectives", according to which the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. Article 8, entitled "Principles", recognises the rights of Members to adopt measures for public health and other public interest reasons and to prevent the abuse of intellectual property rights, provided that such measures are consistent with the provisions of the TRIPS Agreement.

Copyright Protection

During the Uruguay Round negotiations, it was recognized that the Berne Convention already, for the most part, provided adequate basic standards of copyright protection. Thus it was agreed that the point of departure should be the existing level of protection under the latest Act, the Paris Act of 1971, of that Convention. The point of departure is expressed in Article 9.1 under which Members are obliged to comply with the substantive provisions of the Paris Act of 1971 of the Berne Convention, i.e. Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members do not have rights or obligations under the TRIPS Agreement in respect of the rights conferred under Article 6*bis* of that Convention, i.e. the moral rights (the right to claim authorship and to object to any derogatory action in relation to a work, which would be prejudicial to the author's honour or reputation), or of the rights derived therefrom. The provisions of the Berne Convention referred to deal with questions such as subject-matter to be protected, minimum term of protection, and rights to be conferred and permissible limitations to those rights. The Appendix allows developing countries, under certain conditions, to make some limitations to the right of translation and the right of reproduction.

In addition to requiring compliance with the basic standards of the Berne Convention, the TRIPS Agreement clarifies and adds certain specific points.

Article 9.2 confirms that copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

Article 10.1 provides that computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971). This provision confirms that computer programs must be protected under copyright and that those provisions of the Berne Convention that apply to literary works shall be applied also to them. It confirms further, that the form in which a program is, whether in source or object code, does not affect the protection. The obligation to protect computer programs as literary works means e.g. that only those limitations that are applicable to literary works may be applied to computer programs. It also confirms that the general term of protection of 50 years applies to computer programs. Possible shorter terms applicable to photographic works and works of applied art may not be applied.

Article 10.2 clarifies that database and other compilations of data or other material shall be protected as such under copyright even where the databases include data that as such are not protected under copyright. Databases are eligible for copyright protection provided that they by reason of the selection or arrangement of their contents constitute intellectual creations. The provision also confirms that databases have to be protected regardless of which form they are in, whether machine readable or other form. Furthermore, the provision clarifies that such protection shall not extend to the data or material itself, and that it shall be without prejudice to any copyright subsisting in the data or material itself.

Article 11 provides that authors shall have in respect of at least computer programs and, in certain circumstances, of cinematographic works the right to authorise or to prohibit the commercial rental to the public of originals or copies of their copyright works. With respect to cinematographic works, the exclusive rental right is subject to the so-called impairment test: a Member is excepted from the

obligation unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title. In respect of computer programs, the obligation does not apply to rentals where the program itself is not the essential object of the rental.

According to the general rule contained in Article 7(1) of the Berne Convention as incorporated into the TRIPS Agreement, the term of protection shall be the life of the author and 50 years after his death. Paragraphs 2 through 4 of that Article specifically allow shorter terms in certain cases. These provisions are supplemented by Article 12 of the TRIPS Agreement, which provides that whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorised publication, or, failing such authorised publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.

Article 13 requires Members to confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. This is a horizontal provision that applies to all limitations and exceptions permitted under the provisions of the Berne Convention and the Appendix thereto as incorporated into the TRIPS Agreement. The application of these limitations is permitted also under the TRIPS Agreement, but the provision makes it clear that they must be applied in a manner that does not prejudice the legitimate interests of the right holder.

Related rights

The provisions on protection of performers, producers of phonograms and broadcasting organisations are included in Article 14. According to Article 14.1, performers shall have the possibility of preventing the unauthorised fixation of their performance on a phonogram (e.g. the recording of a live musical performance). The fixation right covers only aural, not audiovisual fixations. Performers must also be in position to prevent the reproduction of such fixations. They shall also have the possibility of preventing the unauthorised broadcasting by wireless means and the communication to the public of their live performance.

In accordance with Article 14.2, Members have to grant producers of phonograms an exclusive reproduction right. In addition to this, they have to grant, in accordance with Article 14.4, an exclusive rental right at least to producers of phonograms. The provisions on rental rights apply also to any other right holders in phonograms as determined in national law. This right has the same scope as the rental right in respect of computer programs. Therefore it is not subject to the impairment test as in respect of cinematographic works. However, it is limited by a so-called grand-fathering clause, according to which a Member, which on 15 April 1994, i.e. the date of the signature of the Marrakesh Agreement, had in force a system of equitable remuneration of right holders in respect of the rental of phonograms, may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders.

Broadcasting organisations shall have, in accordance with Article 14.3, the right to prohibit the unauthorised fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of their television broadcasts. However, it is not necessary to grant such rights to broadcasting organisations, if owners of copyright in the subject-matter of broadcasts are provided with the possibility of preventing these acts, subject to the provisions of the Berne Convention.

Article 14.5 lays down the term of protection as at least 50 years for performers and producers of phonograms, and 20 years for broadcasting organisations.

Article 14.6 provides that any Member may, in relation to the protection of performers, producers of phonograms and broadcasting organisations, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention.

All Member States of World Trade Organisation are bound by the TRIPS Agreement. At present there are 153 countries who are members of the WTO. India is a member of WTO. The following is the list of members of WTO along with the dates they became members:

Country	Date of Joining
Albania	8 September 2000
Angola	23 November 1996
Antigua and Barbuda	1 January 1995
Argentina	1 January 1995
Armenia	5 February 2003
Australia	1 January 1995
Austria	1 January 1995
Bahrain, Kingdom of	1 January 1995
Bangladesh	1 January 1995
Barbados	1 January 1995
Belgium	1 January 1995
Belize	1 January 1995
Benin	22 February 1996
Bolivia, Plurinational State of	12 September 1995
Botswana	31 May 1995
Brazil	1 January 1995
Brunei Darussalam	1 January 1995
Bulgaria	1 December 1996
Burkina Faso	3 June 1995
Burundi	23 July 1995
Cambodia	13 October 2004

Cameroon	13 December 1995
Canada	1 January 1995
Cape Verde	23 July 2008
Central African Republic	31 May 1995
Chad	19 October 1996
Chile	1 January 1995
China	11 December 2001
Colombia	30 April 1995
Congo	27 March 1997
Costa Rica	1 January 1995
Côte d'Ivoire	1 January 1995
Croatia	30 November 2000
Cuba	20 April 1995
Cyprus	30 July 1995
Czech Republic	1 January 1995
Democratic Republic of the Congo	1 January 1997
Denmark	1 January 1995
Djibouti	31 May 1995
Dominica	1 January 1995
Dominican Republic	9 March 1995
Ecuador	21 January 1996
Egypt	30 June 1995
El Salvador	7 May 1995
Estonia	13 November 1999
European Union	1 January 1995
Fiji	14 January 1996
Finland	1 January 1995
Former Yugoslav Republic of Macedonia (FYROM)	4 April 2003
France	1 January 1995
Gabon	1 January 1995
The Gambia	23 October 1996
Georgia	14 June 2000
Germany	1 January 1995
Ghana	1 January 1995
Greece	1 January 1995

Grenada	22 February 1996
Guatemala	21 July 1995
Guinea	25 October 1995
Guinea Bissau	31 May 1995
Guyana	1 January 1995
Haiti	30 January 1996
Honduras	1 January 1995
Hong Kong, China	1 January 1995
Hungary	1 January 1995
Iceland	1 January 1995
India	1 January 1995
Indonesia	1 January 1995
Ireland	1 January 1995
Israel	21 April 1995
Italy	1 January 1995
Jamaica	9 March 1995
Japan	1 January 1995
Jordan	11 April 2000
Kenya	1 January 1995
Korea, Republic of	1 January 1995
Kuwait	1 January 1995
Kyrgyz Republic	20 December 1998
Latvia	10 February 1999
Lesotho	31 May 1995
Liechtenstein	1 September 1995
Lithuania	31 May 2001
Luxembourg	1 January 1995
Macao, China	1 January 1995
Madagascar	17 November 1995
Malawi	31 May 1995
Malaysia	1 January 1995
Maldives	31 May 1995
Mali	31 May 1995
Malta	1 January 1995
Mauritania	31 May 1995
Mauritius	1 January 1995

Mexico	1 January 1995
Moldova	26 July 2001
Mongolia	29 January 1997
Morocco	1 January 1995
Mozambique	26 August 1995
Myanmar	1 January 1995
Namibia	1 January 1995
Nepal	23 April 2004
Netherlands	1 January 1995
New Zealand	1 January 1995
Nicaragua	3 September 1995
Niger	13 December 1996
Nigeria	1 January 1995
Norway	1 January 1995
Oman	9 November 2000
Pakistan	1 January 1995
Panama	6 September 1997
Papua New Guinea	9 June 1996
Paraguay	1 January 1995
Peru	1 January 1995
Philippines	1 January 1995
Poland	1 July 1995
Portugal	1 January 1995
Qatar	13 January 1996
Romania	1 January 1995
Rwanda	22 May 1996
Saint Kitts and Nevis	21 February 1996
Saint Lucia	1 January 1995
Saint Vincent & the Grenadines	1 January 1995
Saudi Arabia, Kingdom of	11 December 2005
Senegal	1 January 1995
Sierra Leone	23 July 1995
Singapore	1 January 1995
Slovak Republic	1 January 1995
Slovenia	30 July 1995
Solomon Islands	26 July 1996

South Africa	1 January 1995
Spain	1 January 1995
Sri Lanka	1 January 1995
Suriname	1 January 1995
Swaziland	1 January 1995
Sweden	1 January 1995
Switzerland	1 July 1995
Chinese Taipei	1 January 2002
Tanzania	1 January 1995
Thailand	1 January 1995
Togo	31 May 1995
Tonga	27 July 2007
Trinidad and Tobago	1 March 1995
Tunisia	29 March 1995
Turkey	26 March 1995
Uganda	1 January 1995
Ukraine	16 May 2008
United Arab Emirates	10 April 1996
United Kingdom	1 January 1995
United States of America	1 January 1995
Uruguay	1 January 1995
Venezuela	1 January 1995
Viet Nam	11 January 2007
Zambia	1 January 1995
Zimbabwe	5 March 1995

Self Assessment Question **(Spend 3 minutes)**

16) What are the intellectual property rights covered by the TRIPS Agreement?

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16.9 THE WIPO COPYRIGHT TREATY (WCT) (1996)

The WIPO Copyright Treaty (WCT) was finalised in December 1996 and entered into force on March 6, 2002.

The WCT is a special agreement under the Berne Convention. A country must comply with the substantive provisions of the 1971 Paris Act of the Berne Convention for the Protection of Literary and Artistic Works (1886) before joining the WCT.

The Treaty mentions two subject matters to be protected by copyright: (i) computer programmes, whatever the mode or form of their expression; and (ii) databases, which, by reason of the selection or arrangement of their contents, constitute intellectual creations.

As to the rights of authors, the Treaty deals with three rights: (i) the right of distribution; (ii) the right of rental; and (iii) the right of communication to the public. Each of them is an exclusive right, subject to certain limitations and exceptions. The right of distribution is the right to authorise the making available to the public of the original and copies of a work through sale or other transfer of ownership. The right of rental is the right to authorise commercial rental to the public of the original and copies of three kinds of works: (i) computer programmes (except where the computer program itself is not the essential object of the rental); (ii) cinematographic works; and (iii) phonograms. The right of communication to the public is the right to authorise any communication to the public, by wire or wireless means, including "the making available to the public of works in a way that the members of the public may access the work from a place and at a time individually chosen by them." This covers, in particular, on-demand, interactive communication through the Internet.

Article 10 of the WCT incorporates the so-called "three-step" test to determine limitations and exceptions, as provided for in Article 9(2) of the Berne Convention, extending its application to all rights.

The Treaty obliges member countries to provide legal remedies against the circumvention of technological measures such as encryption used by authors in connection with the exercise of their rights, and against the removal or altering of rights management information, such as data that identify works or their authors, necessary for the management of their rights. These are new obligations on member countries. These were not in the Berne Convention. They are specifically made for copyright protection in a digital environment.

The WCT is administered by the WIPO. It now has a membership of 89 countries. The list of members along with their dates of accession is given below.

Country	Date of Accession
Albania	August 6, 2005
Argentina	March 6, 2002
Armenia	March 6, 2005
Australia	July 26, 2007

Austria	March 14, 2010
Azerbaijan	April 11, 2006
Bahrain	December 15, 2005
Belarus	March 6, 2002
Belgium	August 30, 2006
Benin	April 16, 2006
Bosnia and Herzegovina	November 25, 2009
Botswana	January 27, 2005
Bulgaria	March 6, 2002
Burkina Faso	March 6, 2002
Chile	March 6, 2002
China	June 9, 2007
Colombia	March 6, 2002
Costa Rica	March 6, 2002
Croatia	March 6, 2002
Cyprus	November 4, 2003
Czech Republic	March 6, 2002
Denmark	March 14, 2010
Dominican Republic	January 10, 2006
Ecuador	March 6, 2002
El Salvador	March 6, 2002
Estonia	March 14, 2010
European Union	March 14, 2010
Finland	March 14, 2010
France	March 14, 2010
Gabon	March 6, 2002
Georgia	March 6, 2002
Germany	March 14, 2010
Ghana	November 18, 2006
Greece	March 14, 2010
Guatemala	February 4, 2003
Guinea	May 25, 2002
Honduras	May 20, 2002
Hungary	March 6, 2002
Indonesia	March 6, 2002

Ireland	March 14, 2010
Italy	March 14, 2010
Jamaica	June 12, 2002
Japan	March 6, 2002
Jordan	April 27, 2004
Kazakhstan	November 12, 2004
Kyrgyzstan	March 6, 2002
Latvia	March 6, 2002
Liechtenstein	April 30, 2007
Lithuania	March 6, 2002
Luxembourg	March 14, 2010
Mali	April 24, 2002
Malta	March 14, 2010
Mexico	March 6, 2002
Mongolia	October 25, 2002
Montenegro	June 3, 2006
Morocco	July 20, 2011
Netherlands	March 14, 2010
Nicaragua	March 6, 2003
Oman	September 20, 2005
Panama	March 6, 2002
Paraguay	March 6, 2002
Peru	March 6, 2002
Philippines	October 4, 2002
Poland	March 23, 2004
Portugal	March 14, 2010
Qatar	October 28, 2005
Republic of Korea	June 24, 2004
Republic of Moldova	March 6, 2002
Romania	March 6, 2002
Russian Federation	February 5, 2009
Saint Lucia	March 6, 2002
Senegal	May 18, 2002
Serbia	June 13, 2003
Singapore	April 17, 2005

Slovakia	March 6, 2002
Slovenia	March 6, 2002
Spain	March 14, 2010
Sweden	March 14, 2010
Switzerland	July 1, 2008
Tajikistan	April 5, 2009
the former Yugoslav Republic of Macedonia	February 4, 2004
Togo	May 21, 2003
Trinidad and Tobago	November 28, 2008
Turkey	November 28, 2008
Ukraine	March 6, 2002
United Arab Emirates	July 14, 2004
United Kingdom	March 14, 2010
United States of America	March 6, 2002
Uruguay	June 5, 2009

Self Assessment Questions **(Spend 3 minutes each)**

17) What are the two subject matters of copyright specifically mentioned by the WCT?

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28) What are the three rights specifically dealt with in the WCT?

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19) What are the two new obligations in the WCT meant for digital environment?

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16.10 THE WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT) (1996)

The WIPO Performances and Phonograms Treaty (WPPT) was also finalised in the Diplomatic Conference in December 1996 that finalised the WCT. It entered into force on May 20, 2002.

The Treaty deals with the intellectual property rights of two kinds of beneficiaries: (i) performers; and (ii) producers of phonograms. These rights are addressed in the same instrument, because most of the rights granted by the Treaty to performers are rights connected to their fixed, purely aural performances.

As far as performers are concerned, the Treaty grants performers four kinds of economic rights in their performances fixed in phonograms:

i) the right of reproduction;

ii) the right of distribution;

iii) the right of rental; and

iv) the right of making available.

Each of them is an exclusive right, subject to certain limitations and exceptions. The right of reproduction is the right to authorise direct or indirect reproduction of the phonogram in any manner or form. The right of distribution is the right to authorise the making available to the public of the original and copies of the phonogram through sale or other transfer of ownership. The right of rental is the right to authorise the commercial rental to the public of the original and copies of the phonogram. The right of making available is the right to authorise the making available to the public, by wire or wireless means, of any performance fixed in a phonogram, in such a way that members of the public may access the fixed performance from a place and at a time individually chosen by them. This right covers, in particular, on-demand, interactive making available through the Internet.

The Treaty grants three kinds of economic rights to performers in respect of their unfixed performances:

i) the right of broadcasting

ii) the right of communication to the public, and

iii) the right of fixation.

The Treaty also grants performers moral rights, i.e., the right to claim to be identified as the performer and the right to object to any distortion, mutilation or other modification that would be prejudicial to the performer's reputation.

As far as producers of phonograms are concerned, the Treaty grants them four kinds of rights in their phonograms:

i) the right of reproduction;

ii) the right of distribution;

iii) the right of rental; and

iv) the right of making available.

Each of them is an exclusive right, subject to certain limitations and exceptions. The right of reproduction is the right to authorise direct or indirect reproduction of the phonogram in any manner or form. The right of distribution is the right to authorise the making available to the public of the original and copies of the phonogram through sale or other transfer of ownership. The right of rental is the right to authorise the commercial rental to the public of the original and copies of the phonogram. The right of making available is the right to authorise making available to the public, by wire or wireless means, a phonogram in such a way that members of the public may access the phonogram from a place and at a time individually chosen by them. This right covers, in particular, the on-demand, interactive making available of a phonogram through the Internet.

Furthermore, the Treaty provides that performers and producers of phonograms have the right to a single equitable remuneration for the direct or indirect use of phonograms, published for commercial purposes, broadcasting or communication to the public.

The Treaty also provides for national treatment as stated in the TRIPS Agreement.

The WPPT incorporates the "three-step" test to determine limitations and exceptions, as provided for in Article 9(2) of the Berne Convention, extending its application to all rights.

The minimum term of protection provided in WPPT for both performer's rights and the rights of phonogram producers is 50 years.

As in the case of copyright under the Berne Convention, the enjoyment and exercise of the rights provided in the Treaty cannot be subject to any formality.

The WPPT also Treaty obliges members to provide legal remedies against the circumvention of technological measures used by performers or phonogram producers in connection with the exercise of their rights, and against the removal or altering of rights management information such as the indication of certain data that identify the performer, performance, producer of the phonogram and the phonogram necessary for the management.

The WPPT is administered by the WIPO. It also has the same 89 of the WCT.

16.11 CURRENT INTERNATIONAL ISSUES

WIPO is the body where new developments in the field of copyright and related rights take place. This body is currently considering new exceptions and limitations for copyright, a new international treaty for the protection of audio-visual performances and another treaty for the protection of broadcasting organisations.

In order to maintain an appropriate balance between the interests of right holders and users of protected works, copyright laws allow certain limitations on economic rights, that is, cases in which protected works may be used without the authorisation of the right holder and with or without payment of compensation. Limitations and exceptions to copyright and related rights vary from country to country due to particular social, economic and historical conditions. International treaties acknowledge this diversity by providing general conditions for the application of exceptions and limitations and leaving to national legislators to

decide if a particular exception or limitation is to be applied and, if it is the case, to determine its exact scope. Due to the development of new technologies and the ever-increasing worldwide use of the Internet, it has been considered that the above balance between various stakeholders' interests needs to be recalibrated. Limitations and exceptions is an issue considered in the agenda of the WIPO Standing Committee for Copyright and Related Rights (SCCR) and, recently, its debate has been focused mainly on three groups of beneficiaries or activities in relation to exceptions and limitations – on educational activities, on libraries and archives and on disabled persons, particularly visually impaired persons.

The protection of performers in audiovisual media has not yet been effectively established at international level. This lack of protection not only affects actors in different media such as film and television but also musicians in such situations as when rock performance is recorded in a DVD. WIPO had convened a Diplomatic conference to finalise a treaty for the protection of audio-visual performers in 2000 but it could not reach any consensus.

The updating of the international protection of broadcasting organisations has been discussed at length at the WIPO in the ambit of the Standing Committee on Copyright and Related Rights (SCCR). The issue at stake is to update the protection of broadcasting organisations, which are holders of related rights, in response to the digital and other new technologies and the growing use of the Internet. Important developments in technology and marketplace have taken place in the broadcasting sector since the adoption of the Rome Convention in 1961. On this issue also so far no consensus has emerged.

16.12 SUMMARY

In this Unit we have perused the major international treaties relating to copyright and related rights.

The current international protection for copyright and related rights is the result of a long evolution. Copyright itself is a response to technological developments. The invention of printing press resulted in the development of a new trade of publishing. When one publisher published a book and which became popular others also started publishing the same book, which resulted in economic loss for the first entrepreneur. In order to protect their interests and to attract business men to the field governments in European countries started giving them royal privileges. Most of these privileges ensured that for a fixed time after first publication by a publisher others will not publish that book. Since these privileges were restricted to the country, nationals of other countries could publish the same book without any remuneration to the author or the publisher. The attempts to find a solution to this resulted in the Berne Convention for the Protection of Literary and Artistic Works in 1886.

There are three basic principles on which the Berne Convention rests. These are the principles of national treatment, automatic protection and independence of protection. The Convention gives an illustrative list of works covered instead of a limiting definition of 'works'. This includes works in the literary, scientific and artistic domain. Entitlement for protection is subject to the works being fixed in some material form. The Convention however mandates formality free protection.

The exclusive rights granted include the right of reproduction, the right of translation, the right to perform, the right to broadcast and communicate to the public, the right to public recitation, the right to make adaptations, and the right to make cinematographic adaptations and reproductions. The Convention also provides for moral rights, i.e., the rights to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to the honour and reputation of the author.

The Convention also provides for certain limitations on the exclusive rights in the public interest subject to the three-step test, namely, (i) uses in certain special cases only,(ii) it should not come into conflict with the normal exploitation of the work and (iii) it should not unreasonably prejudice the legitimate interest of the author.

The Convention lays down the minimum term of protection as the life of the author plus fifty years.

The Convention has a membership of 164 countries.

The Universal Copyright Convention (UCC) was developed by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) as an alternative to the Berne Convention for those countries which disagreed with certain aspects of the Berne Convention but still wished to participate in some form of multilateral copyright protection. It was adopted at Geneva on 6 September 1952. And has a membership of 65 countries.

The Convention seeks to provide for adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works including writings, musical, dramatic and cinematographic works and paintings and engravings and sculpture. The rights provided under the UCC include the exclusive right of the author to reproduce make, publish, and authorise the making and publication of translation of works.

The minimum duration of protection under the UCC is life of the author and twenty-five years after his death.

The International Convention for The Protection of Performers, Producers of Phonograms and Broadcasting Organisations was finalised in Rome in 1961 and is the first major international treaty on related rights.

The Convention secures protection in performances for performers, in phonograms for producers of phonograms and in broadcasts for broadcasting organisations. Performers are protected against certain acts to which they have not consented like the broadcasting and communication to the public of a live performance; the fixation of the live performance; the reproduction of the fixation if the original fixation was made without the performer's consent or if the reproduction was made for purposes different from those for which consent was given. Producers of phonograms have the right to authorise or prohibit the direct or indirect reproduction of their phonograms. Broadcasting organisations have the right to authorise or prohibit certain acts, namely, the rebroadcasting of their broadcasts, the fixation of their broadcasts, the reproduction of such fixations, and the communication to the public of their television broadcasts if such

communication is made in places accessible to the public against payment of an entrance fee.

The Rome Convention at present has a membership of 91 countries.

The Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms was established in 1971. It provides for the protection of producers of phonograms in other countries That is to say no making of duplicates of their phonograms without their consent and also no importation of such duplicates, and no distribution of such duplicates to the public. The Convention has a membership of 77 countries.

The Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite was finalised in 1974. It requires each Member country to take adequate measures to prevent the unauthorised distribution on or from its territory of any programme carrying signal transmitted by satellite. At present it has a membership of 35 countries.

So far the most comprehensive agreement on intellectual property rights is the Agreement on Trade Related Aspects of Intellectual Property Rights that was finalised s in 1994. It covers all the areas of intellectual property including copyrights and related rights.

TRIPS Agreement has incorporated the substantive provisions of the Berne Convention and the Rome Convention and has also provided for strong enforcement and dispute settlement mechanisms. All Member States of World Trade Organisation are bound by the TRIPS Agreement. At present there are 153 countries who are members of the WTO.

The WIPO Copyright Treaty (WCT) was finalised in December 1996. The Treaty mentions two subject matters to be protected by copyright: (i) computer programmes, whatever the mode or form of their expression; and (ii) databases, which, by reason of the selection or arrangement of their contents, constitute intellectual creations. It provides for protection for technological measures of protection employed by an owner to protect his copyright and also the rights management information recorded on a work. It is treaty prepared to handle the issues which right owners were facing in the digital era including the Internet communications and has measures to deal with them. The WCT is administered by the WIPO. It has a membership of 89 countries

The WIPO Performances and Phonograms Treaty (WPPT) was also finalised along with the WCT. It deals with the intellectual property rights of two kinds of beneficiaries: (i) performers; and (ii) producers of phonograms. This treaty has provided rights identical to those enjoyed by authors under the Berne Convention to performers and producers of phonograms. The exceptions and limitations are also the same. The minimum period of protection mandated is 50 years. The treaty does not deal with audio-visual performers. It also has 89 members.

WIPO is the body where new developments in the field of copyright and related rights take place. This body is currently considering three issues, namely, new exceptions and limitations for copyright, a new international treaty for the protection of audio-visual performances and another treaty for the protection of broadcasting organisations.

16.13 TERMINAL QUESTIONS

1) What are the rights provided in the Berne Convention?
2) What is the scope of the Rome Convention?
3) Write a paragraph on the TRIPS Agreement.
4) What are the new protection envisaged under WCT andWPPT?

16.14 ANSWERS AND HINTS

Self Assessment Questions

1) Refer to Section 16.1
2) Refer to Section 16.1
3) Refer to Section 16.3
4) Refer to Section 16.3
5) Refer to Section 16.3
6) Refer to Section 16.3
7) Refer to Section 16.4
8) Refer to Section 16.4
9) Refer to Section 16.4
10) Refer to Section 16.4
11) Refer to Section 16.5
12) Refer to Section 16.5
13) Refer to Section 16.5
14) Refer to Section 16.5
15) Refer to Section 16.7
16) Refer to Section 16.8
17) Refer to Section 16.9
18) Refer to Section 16.9
18) Refer to Section 16.9

Terminal Questions

1) Refer to Section 16.3
2) Refer to Section 16.5
3) Refer to Section 16.9
4) Refer to Section 16.9 and 16.10

16.15 REFERENCES AND SUGGESTED READINGS

1) International Copyright and Neighbouring Rights by S. M. Stewart.
2) Copyright Protection by T. Vidya Kumari.
3) WIPO Intellectual Property Handbook.

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