Recent Challenges to the Protection of Copyright in Literary Works: A Study of Ghana and Canada

Josephine Asmah

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RECENT CHALLENGES TO THE PROTECTION OF COPYRIGHT

IN LITERARY WORKS:

A STUDY OF GHANA AND CANADA

By

JOSEPHINE ASMах

Submitted in partial fulfillment of the requirements

for the degree of Master of Laws

at

Dalhousie University

Halifax, Nova Scotia

December, 1998

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ABSTRACT

This work traces the historical development of the concept of copyright in literary works from the earliest forms of communication by human beings until the present day. By assessing the impact of implementing the recent international copyright agreements on literary works in Ghana, a developing country, and in Canada, a developed country, the work establishes that generally, the economies of developed countries are more suitable than those of developing countries to support a strengthened copyright regime. This is more so because the former have shorter transition periods in which to comply with the international copyright framework. The work also asserts that support for copyright is dependent on the level of development of countries. Generally, the higher the level of a country's development, the more the support for copyright. Further, the higher the level of development, the greater the tendency for copyright to be regarded more as a national issue than as a mechanism for protecting authors' rights.

Finally, the work argues that the distinction made between the copyright needs of developed and developing countries may be pointless to the actual needs of authors. The distinction becomes more apparent in view of a country's overall copyright goals and policy. Even here, and using Ghana and Canada as examples, their common position as net importers of copyright materials closes the gap between the overall copyright needs of developed and developing countries. Thus, it would appear that presently, a distinction could be said to exist between net importers and net exporters of copyright materials, a distinction which cuts across the categorisation of states as developed or developing countries. In this respect, developed and developing countries would appear to have more in common than first meets the eye.
# ABBREVIATIONS

<table>
<thead>
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<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>A.L.R.</td>
<td>Australian Law Reports</td>
</tr>
<tr>
<td>Boston U. J. Int’l L.</td>
<td>Boston University Journal of International Law</td>
</tr>
<tr>
<td>C.I.P.R.</td>
<td>Canadian Intellectual Property Reports</td>
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<td>C.L.R.</td>
<td>Commonwealth Law Reports</td>
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<tr>
<td>Cornell Int’l L. J.</td>
<td>Cornell International Law Journal</td>
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<tr>
<td>C.P.R.</td>
<td>Canadian Patent Reporter</td>
</tr>
<tr>
<td>D.L.R.</td>
<td>Dominion Law Reports</td>
</tr>
<tr>
<td>Ex. Ct.</td>
<td>Exchequer Court</td>
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<tr>
<td>F.C.</td>
<td>Federal Court Reports</td>
</tr>
<tr>
<td>F.C.A.</td>
<td>Federal Court, Appeal Division</td>
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<tr>
<td>F.C.J.</td>
<td>Federal Court of Canada Judgements</td>
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<tr>
<td>Fox Pat.C.</td>
<td>Fox’s Patent, Trade mark, Design and Copyright Cases</td>
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<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>G.L.R.</td>
<td>Ghana Law Reports</td>
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<tr>
<td>Harv. L. Rev.</td>
<td>Harvard Law Review</td>
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<tr>
<td>I.C.J.</td>
<td>International Court of Justice</td>
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<tr>
<td>J.L. &amp; Technology</td>
<td>The Journal of Law and Technology</td>
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<tr>
<td>Ind. Int’l &amp; Comp. L. Rev.</td>
<td>Indiana International and Comparative Law Review</td>
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<tr>
<td>I.P.J.</td>
<td>Intellectual Property Journal</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<td>I.L.M.</td>
<td>International Legal Materials</td>
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<tr>
<td>J. Media L. and Practice</td>
<td>Journal of Media Law and Practice</td>
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<tr>
<td>J. World T.</td>
<td>Journal of World Trade</td>
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<tr>
<td>NDC</td>
<td>National Democratic Congress</td>
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<td>Ont. H.C.</td>
<td>Ontario High Court</td>
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<td>PNDC</td>
<td>Provisional National Defence Council</td>
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<tr>
<td>Pub. L.</td>
<td>Public Law</td>
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<tr>
<td>Sup.Ct.Qc</td>
<td>Superior Court of Québec</td>
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<td>Rutgers Computer &amp; Technology L.J.</td>
<td>Rutgers Computer and Technology Law Journal</td>
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<td>S.C.R.</td>
<td>Supreme Court of Canada Reports</td>
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<td>Stat.</td>
<td>United States Statutes at Large</td>
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<td>TRIPS</td>
<td>Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods</td>
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<td>UCC</td>
<td>Universal Copyright Convention</td>
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<td>U. Cincinnati L. Rev.</td>
<td>University of Cincinnati Law Review</td>
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<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organisation</td>
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<td>U.S.</td>
<td>United States Reports</td>
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<td>Abbreviation</td>
<td>Description</td>
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<td>U.S.T.</td>
<td>United States Treaties and Other International Agreements</td>
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<td>Va. J. Int'l Law</td>
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<td>Vand. J. Transnat’l L.</td>
<td>Vanderbilt Journal of Transnational Law</td>
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<td>Wake Forest L. Rev.</td>
<td>Wake Forest Law Review</td>
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<td>WCT</td>
<td>WIPO Copyright Treaty</td>
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<td>WIPO</td>
<td>World Intellectual Property Organisation</td>
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<td>WTO</td>
<td>World Trade Organisation</td>
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And I thank God for giving me the strength and determination to persevere.
INTRODUCTION

NASCUNTUR AB HUMANO INGENIO OMNIA ARTIS INVENTORUMQUE OPERA* QUAE OPERA DIGNAM HOMINIBUS VITAM SAEPIUNT* REIPUBLICAE STUDIO PERSPICIENDUM EST ARTES INVENTAQUE TUTARI

"HUMAN GENIUS IS THE SOURCE OF ALL WORKS OF ART AND INVENTION* THESE WORKS ARE THE GUARANTEE OF A LIFE WORTHY OF MEN* IT IS THE DUTY OF THE STATE TO ENSURE WITH DILIGENCE THE PROTECTION OF THE ARTS AND INVENTIONS"\(^1\)

The history of literary works is one that spans several centuries and originates with men/women's desire to communicate with one another both orally and by means of a visible medium. The early beginnings of literary activities can be traced to the development of hieroglyphics by the ancient civilization of Egypt. This was subsequently simplified by the Phoenicians\(^2\) and modified by the Greeks, Romans and the Anglo-Saxons. Progress was continued with the discovery by the Egyptians of papyrus\(^3\) as an early writing surface, followed by the invention of paper in China in A.D. 105, \(^4\) and the development of early forms of printing. \(^5\) However, it was not until the Renaissance in the

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\(^1\) This is the inscription on the copula in the entrance hall of the headquarters of the World Intellectual Property Organisation (WIPO) in Geneva, Switzerland. This text was written by Dr. Arpad Bogsch and reproduced in WIPO, *World Intellectual Property Organization: General Information* (Geneva, 1997) WIPO Publication No. 400(E).

\(^2\) Phoenicia was a country that became part of Syria in 64 B.C. For further details on its contribution to the art of communication, see Arthur T. Turnbull and Russell N. Baird, *The Graphics of Communication: Typography, Layout, Design*, 2\(^{nd}\) ed. (New York: Holt, Rinehart & Winston, Inc., 1968) at 10.

\(^3\) Papyrus was a grass-like plant whose pith could be pressed into sheets, and its use can be traced as far back as 3500 B.C. See *ibid.*, at 10. From about the fourth century A.D., parchment replaced papyrus as the principal material for writing books. *Ibid.*

\(^4\) This early paper was made out of tree bark, hemp and cotton rags. See *ibid.*, at 11.

\(^5\) 770 A.D. is noted as the year in which the first text was printed on paper. China was a pioneer in print activities and as early as 953 A.D., printing from wooden blocks was done there. See W. Turner Berry and H. Edmund Poole, *Annals of Printing: A Chronological Encyclopaedia From the Earliest Times to 1950* (London: Blandford Press, 1966) at 3.
fifteenth century that the protection of rights in literary and artistic works was to begin to become an important issue.

The Renaissance created the need to protect authors' rights, being a period that witnessed inventions and developments in many fields of human activity. There were developments in transport and communication as well as a great interest in learning. However, the main significance of this period for literary activity was the invention of typography as a form of printing. This invention made possible the reproduction of written works on a larger scale and at a lower cost than had existed previously. Additionally, it created the need for greater protection of investment in the book trade. A series of factors such as the need to protect printers in England and the inadequacies of national copyright laws culminated in the birth of national copyright law in England in 1709, and of international copyright law in 1886, respectively. The latter grew out of the negotiation of the Berne Convention for the Protection of Literary and Artistic Works of 1886. (Berne Convention), the first multilateral copyright agreement. The history of international copyright since 1886 can be divided into two phases: the period up to the end of 1971, and the period from 1972 to present, being the traditional and the new phases respectively.

By the end of 1971, there had been many developments in international copyright. There had been several revisions of the Berne Convention, the latest being in 1971. There had also been the negotiation and revision of the Universal Copyright Convention (UCC) in 1952 and 1971 respectively. The World Intellectual Property Organization (WIPO) and

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6 This is discussed in greater detail in the first chapter.
the United Nations Educational, Scientific and Cultural Organization (UNESCO) had been established as the international institutions overseeing the administration of the Berne Convention and the UCC respectively. In addition to the challenges that resulted in the creation of international copyright law, there had been the evolution of another one: the emergence of a 'developing country perspective' on copyright. Copyright originated from the west and, generally, developed countries have regarded it as a fundamental right and have advocated for stronger protection of these rights in international copyright agreements. Developing countries were of the view that whilst these agreements might suit western societies, they might not be equally appropriate to achieve their cultural, educational and development goals. The 1971 revisions to the Berne Convention and the UCC were attempts to arrive at some compromise between these divergent views. However, those revisions did not end the differing perspectives that developed and developing countries have on the functions and utility of international copyright law for their respective interests.

The years since 1971 have ushered in a new phase of literary copyright\(^7\) in particular, and copyright in general. Since 1971, international copyright law has witnessed the formation of the World Trade Organization (WTO) as another international body with jurisdiction in copyright issues. Trade and intellectual property have 'merged' by virtue of the Agreement on Trade-Related Aspects of Intellectual Property Rights. Including Trade in Counterfeit Goods (TRIPS Agreement).\(^8\) As well, the developed

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\(^7\) In this work the use of the term 'literary copyright' refers to copyright in literary works, as opposed to musical and artistic works. This is discussed in greater detail in the following chapters.

\(^8\) The merger between trade and intellectual property is by virtue of the fact that TRIPS is an agreement that regulates trade in intellectual property goods. TRIPS is discussed at length in the second chapter.
countries, led by the United States of America (US), continue to make determined efforts to eliminate barriers to trade in intellectual property goods through a global strengthening of intellectual property rights. Further, the drafting of the WIPO Copyright Treaty. 1996 (WCT),\textsuperscript{9} attests to the challenge technology poses to the protection of intellectual property rights. These agreements have resulted in an expansion of the scope of literary works and created obligations for countries that are party to them.

In light of the foregoing, this thesis assesses the implications of the changes created by the agreements on copyright in developed and developing countries. In so doing, it examines what effect a country’s level of development has on its copyright needs and whether the support for the greater protection of copyright is directly proportional to a country’s level of development. It reveals that the length of time a country has adhered to international copyright agreements is not a determinant of the efficiency of that country’s copyright system. Rather, it is the enjoyment of, or the hope of enjoying the benefits flowing from a strong copyright regime that has more weight in this regard.

The thesis is divided into five chapters. Chapter 1 gives an overview of copyright in literary works under the traditional international copyright regime. It traces the origins of national and international copyright and discusses the relevant provisions of the Berne Convention and the UCC. This Chapter lays the foundation for a comparison of the traditional copyright framework with the developments discussed in Chapter 2.

\textsuperscript{9} This treaty is not yet in force.
Chapter 2 examines three major challenges that have confronted copyright law in the past two decades: developments in technology, the increasing importance of intellectual property to trade, and globalization. These challenges are not novel in the sense of having emerged only in the past two decades. However, they have been some of the main issues copyright has had to deal with in the years following 1971. This Chapter examines how the international community’s responses to them expanded the scope of copyright in literary works and created obligations for countries. It also discusses the protection of literary works under the TRIPS Agreement and the WCT.

The effects of these international developments on the protection of literary works in a developing and a developed country are examined in Chapters 3 & 4 respectively. Although the restriction of the sample to one country from each “country category” may not capture all the characteristics of the group thereby represented, it is meant to give an insight into the features of the issues confronting each country category.

Chapter 3 traces the origins of literacy, and copyright in literary works in colonial and post-independence Ghana, a developing country. The rest of the Chapter discusses the legislative and other changes required for Ghana to implement the new international copyright agreements and how these changes would affect the perception in Ghana of copyright in literary works. Also, recommendations are made on how Ghana can operate its copyright regime in order to benefit the most from the current international copyright system.

Chapter 4 considers copyright in literary works before and after confederation in Canada as the developed nation example. The analysis here discusses the copyright
regime in Canada, and the nature of its literary industry. In assessing the impact of the TRIPS Agreement on Canada’s copyright system, the effect of the North American Free Trade Agreement, 1993. (NAFTA), on the country’s implementation of the TRIPS Agreement is examined. The finding of this chapter is that Canada had fewer changes to make to its copyright regime than Ghana will have to make. This, of course, attests to the fact that in general, developed-country copyright regimes are more suited to strengthening copyright protection than those of developing countries. However, one major similarity is noted: that developed and developing country importers of copyright materials are in the same category in terms of their need to take measures to develop and protect their domestic literary sectors.

Chapter 5 concludes the discussion with a summary of the main points of the thesis.
CHAPTER 1

1: THE HISTORICAL DEVELOPMENT OF COPYRIGHT IN LITERARY WORKS

The purpose of this Chapter is to lay the foundation of this work by exploring the factors leading to the emergence of copyright in literary works, and by examining the role of copyright in human and economic development and in international relations. It covers the developments from the fifteenth century to the end of 1971. Developments since 1971 are discussed in Chapter 2.

This Chapter commences by tracing the evolution of copyright from the national to the international level. Nationally, the treatment traces the evolution of copyright law from when the concept of copyright first appeared in a piece of legislation and the events that led to this. This is followed by a review of the factors leading to international co-operation in the field of copyright. Thereafter, mention is made of the emergence of different perspectives on copyright, with respect to developing and developed countries. Following this is a discussion of the main features of copyright as they appear in the Berne Convention and the Universal Copyright Convention. The discussion covers moral and economic rights, the enforcement of these rights, dispute settlement, infringement and special provisions for developing countries. Next is an examination of the relationship between national and international copyright. Finally, the significance of copyright is discussed.
1.1: THE CONCEPT OF LITERARY COPYRIGHT

There is no single definition of copyright. This is because from the first copyright legislation to the present, there have been different conceptions of copyright. This phenomenon can be traced to three main factors. First is the fact that as copyright law develops, additions are made to the concept. The second factor is the differences that exist in national copyright laws. Third is the fact that there are differences between national copyright laws and international copyright agreements. These differences occur, for example, because of the time period within which countries are to comply with international copyright agreements and because, in some cases, national copyright laws move faster than those of international copyright. Thus, copyright law varies depending on time and place.

Copyright law is that branch of intellectual property law which protects authors, as opposed to patent and trademark law whose focus is on inventions, and commercial symbols, respectively. Copyright law protects the original expression of an idea rather than the idea itself. An original work is one that is not a replica of another, but, rather, is the result of a person's independent creative effort. Copyright gives authors certain property rights in their works and protects these rights by setting limits on the public's use of their works and by providing remedies for the violation of these rights.

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1 Literary copyright is employed in this work to refer to copyright in literary works, as opposed to musical and artistic works.
2 In this work, the use of the term 'authors' refers to creators of literary works, unless otherwise indicated or unless the context otherwise permits.
3 For example, it gives the copyright holder of the work the right to exercise rights of ownership in the work such as the right to prevent the use of the work without his or her consent, subject to some exceptions. This is discussed in greater detail in Section 1.5. For further discussion on the property features of copyright, see William Briggs, The Law of International Copyright: With Special Sections on the Colonies and the United States of America, 1906 (Littleton, Colorado: Fred B. Rothman &Co., 1986) 7-26.
One difference between copyright as property, and movable and immovable property is that with the sale of these last two classes of property, there is now a new owner. However, with the sale of a work in which a person has copyright, what the buyer obtains is ownership of the physical content or manifestation of the work, rather than the form in which the work is expressed. Thus the sale of the tangible object does not pass any rights in the intangible content to the buyer. Literary works are a category of works protected by copyright law.

Literary copyright is also not a static concept. It differs with respect to time, national copyright law, and international copyright agreements. By the end of 1971, it was established in international copyright law that a literary work could be oral, written or printed. Further, copyright protection existed in published and unpublished literary works. It was also clear that the types of literary works listed above were not exhaustive.

A literary work in the world of copyright is different from that in ordinary usage. In the ordinary sense of the word, a work is described as literary when it has a valued quality or merit. In the copyright plane, however, there is no requirement that a work should have some literary quality in the ordinary sense, in order to be a literary work. The basic requirement is that the work should be the original expression of an idea, meaning that it should not be a replica of another person's work.


4 See post at Section 1.5. In this work, 'written works,' 'printed works,' 'print industry,' 'traditional literary works,' or 'traditional forms of copyright protected works,' shall be used to cover written and printed literary works, unless otherwise indicated or unless the context permits otherwise.

5 The ordinary usage of 'literary' is seen in the following definition: "of, constituting, or occupied with books or literature or written composition, esp. of the kind valued for quality or form." The Concise Oxford Dictionary, R.E. Allen, ed., 8th ed. (Oxford: Clarendon Press, 1990).
1.2: THE BIRTH OF NATIONAL COPYRIGHT

Different opinions have been expressed as to the origins of copyright. Basically, the origin of copyright has been linked to print technology. Several opinions have been expressed as to the relationship between copyright and technology. It has been stated that copyright was "enacted for the protection of technology," the technology in this case being printing. Copyright has been referred to as the child of technology.

Two main factors led to the birth of national copyright in the eighteenth century. The first factor was the impact of developments in print technology during the Renaissance. Notable among these developments was Johann Gutenberg's invention of

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7 Yvonne M. Smyth, "Broadcasting, Cable and Satellite Transmissions" in James Lahore, Gerald Dworkin & Yvonne M. Smyth, Information Technology: The Challenge to Copyright (London: Sweet & Maxwell, 1984) at 61. She is of the opinion that the Stationer’s Guild needed some legislation to protect them from piracy. Thus “copyright legislation was designed to benefit a technology, that of printing, which remained predominant for several centuries as a means of disseminating information in a permanent format.” Ibid. See also Doris E. Long, ibid. at 135, on the view that intellectual property laws were passed to aid the development of the arts and sciences, which include technology: “Thus, intellectual property laws, at least facially, serve as a potential initial source for technology protection.”

8 Paul Goldstein, Copyright's Highway: From Gutenberg to the Celestial Jukebox (New York: Hill and Wang, 1994) at 27. He comments that before the printing press was invented there was no need for copyright. However, as movable type gave more people access to literature there was the need for some legal mechanism “to connect consumers to authors and publishers commercially. Copyright was the key.” Ibid. this note at 27 and 28.

9 The Renaissance started around the fifteenth century. It was a period that witnessed inventions and developments in many fields of human activity such as in the areas of transport and communications. With the Renaissance also came an interest in learning. For information on printing activities in that period, see S.H. Steinberg, Five Hundred Years of Printing, New ed., revsd. by John Trevitt (New Castle/London: The British Library & Oak Knoll Press, 1996) at 3.

10 Johann Gutenberg was from Mainz in Germany. For more information on him and on his contribution to printing, see generally: Theo L. De Vinne, The Invention of Printing, 1876 (Detroit: Gale Research Company Book Tower, 1969) at 375 - 449. See also S.H. Steinberg, ibid. at 4 - 9.
typography," being the development of mechanical processes for printing with the use of movable type. Typography was based on the principle of producing single letters from individually cast metal types, which could be moved from one place to another. It made possible the large-scale production of identical copies of a work and "foreshadowed the possibility of ever increasing the number of copies and ever reducing the length of time needed for their issue." Johann Gutenberg's process of printing has been described as epoch-making because it brought "the possibility of editing, and correcting a text which was (at least in theory) identical in every copy: in other words, mass production preceded by critical proof-reading." Before printing from movable type was invented, there was no need for long-term investment in books. However, the introduction of typography into the book trade brought changes in the "economics of book production" by creating the need for long-term investment in the book trade, and for the protection of this investment. "It was from this need for economic protection that the concept of the

11 Typography is a form of printing "in which the subject is printed from a combination of movable metal types cast in high relief." Theo L. De Vinne, ibid. at 18. For the view that typography was not an original invention, but was a new application of the old theories and methods of impression, see ibid. this note at 50. For a discussion on the controversy as to who invented typography, see ibid. this note at 27.
12 Apart from the development of typography, Johann Gutenberg made other contributions to the print industry and the book trade. He prepared ink suitable for this invention and developed a printing press for printing from movable type. See Arthur T. Turnbull and Russell N. Baird, The Graphics of Communication: Typography, Layout, Design, 2nd ed. (New York: Holt, Rinehart and Winston, 1986) at 12-15. Further, together with Fust, he developed what was later to be known as "job-printing," which "laid the foundations of modern publicity through the printed word which is dependent on the identical mass production of freely combinable letter-units in almost infinite variety of composition-the very characteristics of Gutenberg's invention." S.H. Steinberg, supra note 9 at 6.
13 S. H. Steinberg, ibid. at 7. Thus he could be regarded as having laid the foundation for the periodical press. Ibid. this note.
14 Ibid. at 20.
'privileged book' began to develop." Further, the invention of typography brought the possibility of works being reproduced and abused on a large scale and at a lower cost than had previously been the case. The spread of typography from Germany to other areas such as England resulted in the enactment of the first national copyright legislation.

The second factor was the desire of printers in England, led by the Stationers’ Company, a guild of scribes, bookbinders and publishers, to continue to exercise a monopoly over the English book trade and to be protected from the activities of pirates. Due to certain privileges it received from the Crown, the Stationers’ Company exercised control over the British book trade. With time, they and other printers suffered from foreign and domestic piracy since other printers and booksellers were printing and selling their works without any authorization. This practice was not legally wrong, since there was no legislation that prohibited such activities. However, petitions from the Stationers’ Company to the English Legislature in the eighteenth century convinced the Legislature of the need for some statutory protection of the English book trade.

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16 John Feather, *ibid.* "The producer (later to be called the 'publisher,' but at this time normally the owner of the printing shop) had to invest in a press and in type; he was an employer of skilled labour, and he needed a stock of consumables such as ink and paper." *ibid.*

17 *Ibid.* The "privilege was a form of special protection given to an individual printer by secular or ecclesiastical authorities." *Ibid.*


19 The term pirates is used here to refer to those who print, reproduce or use the works of others without due authorisation.

20 For more information on this, see John Feather, *supra* note 15 at 15 - 64.

21 For the piracy that occurred in England before its national copyright legislation, see *ibid.* at 54, 55 and 150.
Consequently, the first copyright legislation in the world, the Statute of Anne, was enacted in England in 1709. Some effects of the Statute of Anne were that it provided for registration of works, recognized rights in copies of books and gave "a means of legal redress against the activities of pirates."

Clearly, technology played a role in the birth of copyright because it was with the advent of typography and the large-scale production of books, with a resultant increase in production costs, that the publisher had a great need to protect his long-term investment. Additionally, the reduced costs in copying works made piracy more profitable. Further, the growth of literacy and the increased demand for books made it evident that there was the need to protect printers from the unauthorised duplication of their works.

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22 8 Anne, c.19 (1710). The Statute was titled "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, During the Times Therein Mentioned."

23 Although the Statute of Anne is regarded as the first national copyright legislation, this was not the first record of some protection of rights in works. It has been stated that the protection given by the late fifteenth century republic of Venice to its printers was the first record of proprietary rights in intangibles being given legal recognition. See Cees. J. Hamelink, The Politics of World Communication: A Human Rights Perspective (London: Sage Publications, 1994) at 11. Further, the word copyright did not occur in the Statute of Anne. On this point, see Simon Nowell-Smith, International Copyright in the Reign of Queen Victoria (Oxford: Clarendon Press, 1968) at 12.

24 See John Feather, supra note 15 at 62. "Failure to register the book prevented an action for damages against an infringer, but did not invalidate copyright." WIPO International Protection, supra note 6 at 2. "It provided that, after the lapse of a certain period, the privilege enjoyed by the Stationers' Company to make and distribute copies of works, would revert to the authors of works, who then had the right to assign the privilege to another publisher." WIPO International Protection, ibid. this note at 2. See also: R.R. Bowker and Thorvald Solberg, supra note 3 at 6 (commenting that the Statute of Anne "gave the author of works then existing, or his assigns, the sole right of printing for twenty-one years from that date and no longer; of works not printed for fourteen years and no longer, except in case he were alive at the expiration of the term, when he could have the privilege prolonged for another fourteen years"). For the position of authors before the Statute of Anne, see Benjamin Kaplan, An Unhurried View of Copyright (New York: Columbia University Press, 1967) at 5. However, and as events were to prove, the Statute of Anne did not solve all the problems of the English book trade. See John Feather, ibid. this note at 62-65.

25 See John Feather, ibid. at 10.

26 See WIPO International Protection, supra note 6 at 2.
Although by the end of the nineteenth century many countries had enacted copyright laws, future events were to show that a system of national copyright laws alone was inadequate to deal with the issue of piracy. In its quest to deal with this problem, Europe was to go through a series of bilateral agreements before the end of the nineteenth century. However, because of the effects of developments during the Industrial Revolution in areas such as printing, the first multilateral agreement on copyright was negotiated.

1.3: INTERNATIONAL CO-OPERATION

Just as technology played a role in the development of national copyright, it was to have a similar effect with respect to international copyright law. The Industrial Revolution brought developments in many areas of human activity. Inventions in

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27 An Ordinance passed in Denmark in 1741 recognised the rights of authors. The United States of America [hereinafter US] passed its first federal copyright statute in 1790. On the attainment of independence, national codification took place in Latin American countries such as Chile (1834), Peru (1849), Argentina (1869) and Mexico (1871). WIPO International Protection, ibid. Copyright laws were also passed in Belgium, France, the German States, Italy, Spain, Austria and Switzerland. See Cees J. Hamelink, supra note 23 at 11.


29 For the developments during that period, see Arthur T. Turnbull and Russell N. Baird, supra note 12 at 15. The history of printing from movable type has been divided into the following periods:

“(1) 1450 – 1550, the creative century, which witnessed the invention and beginning of practically every single feature that characterizes the modern printing piece; (2) 1550 – 1800, the era of consolidation which developed and refined the achievements of the preceding period in a predominantly conservative spirit; (3) the nineteenth century, the era of mechanization which began with the invention of lithography and ended with Morris’s rediscovery of the Middle Ages; (4) 1900 – 1950, the heyday of the private presses and the inception of paperbacks; and (5) the post-war world, which has seen typesetting, printing and publishing turned upside down, and reading surviving the onslaught of television.”

S. H. Steinberg, “Introduction” in S.H. Steinberg, supra note 9 at 1.

30 There are different views on whether there is such a thing as “international copyright law.” For a comment on this and on the phrase “international copyright,” see Simon Nowell-Smith, supra note 23 at 14 & 15.
transport and communications increased interaction and trade among the peoples of Europe. With respect to book production, improvements included the replacement of manpower with steam power in the operation of printing presses, changes to the composition of paper, the mechanisation of paper production, and the invention of machines which brought improvements to composition methods. Further, there was an interest in learning and an increase in literacy. These improvements, coupled with developments in transport and communications and increased interaction among countries, were to create the need for a multilateral intellectual property agreement.

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31 These inventions included the telegraph, the steamship and the locomotive. See Arthur T. Turnbull and Russell Baird, supra note 12 at 15 and 16. See also Cees J. Hamelink, supra note 23 at 6-10.

32 See Cees J. Hamelink, ibid. at 6.

33 For example in 1814, Frederick Koenig built the first steam-powered cylinder printing press. This press made it possible to produce 1100 sheets in an hour as opposed to the hand-operated press which produced 300 sheets in an hour, thus reducing the amount of man hours needed to produce that amount of work. In 1816 Fredich Koenig and Bauer built the first perfecting machine [it was able to print on both sides of a sheet]. This was an improvement on the previous presses which could only print on one side of a page. See W. Turner Berry and H. Edmund Poole, Annals of Printing: A Chronological Encyclopaedia From the Earliest Times to 1950 (London: Blandford Press, 1966) at 206 and 207. The invention of the first steam powered press has been described as an “epoch-making” one because of the replacement of man-power with steam-power. S.H. Steinberg, supra note 9 at 139.

34 Prior to this time the use of rags in the making of paper was established. This period brought with it the introduction of wood-pulp into the paper making process. In 1843 Friedrich Gottlieb was able to produce such paper. With time the use of wood-pulp in paper making spread to other parts of the world. See S.H. Steinberg, ibid. at 140.

35 Nicholas-Louis Robert invented the first paper-making machine at Esonnes, near Paris in 1798. In 1803 the first efficient paper-making machine was introduced and “marked the real beginning of large-volume mechanical paper-making.” Arthur T. Turnbull and Russell N. Baird, supra note 12 at 23. See also W. Turner Berry and H. Edmund Poole, supra note 33 at 196.

36 Dr. William Church invented the first typesetting machine in 1822. See W. Turner Berry and H. Edmund Poole, ibid. at 213. This machine enabled between 12,000 and 20,000 characters to be cast in a day. It was a great improvement because before then it was possible to cast between 3000 and 7000 characters by hand in a day. See S.H. Steinberg, supra note 9 at 140. Other notable inventions included the Linotype and the Monotype in 1885 and 1887 respectively. These machines made it possible to automatically justify lines. See Arthur T. Turnbull and Russell N. Baird, ibid. at 20-22. The Linotype has been described as marking “a revolution perhaps greater than any other which has occurred in the mechanics of printing.” W. Turner Berry and H. Edmund Poole, ibid. at 256.

37 See Arthur T. Turnbull and Russell N. Baird, ibid. at 15.

38 “The emergence of the need for multilateral arrangements on author’s copyright is linked with the expansion of international trading and the related need to protect works created in one country and sold in another.” Cees J. Hamelink, supra note 23 at 11.
The first factor that moved the international community towards negotiating a multilateral intellectual property regime was the emergence of the view that in order to eliminate literary piracy, works had to be protected in foreign countries. It has been seen that piracy flourished even after several countries enacted their own copyright legislation. This was mainly due to the fact that at the time copyright was regarded as a national right. Thus these copyright laws tended to protect the works of nationals whilst those of foreigners were unprotected. Consequently, foreign works were at the mercy of whoever wanted to profit from reprinting and selling them. It has been stated that "as long as the work of a foreign author was not legally protected it was common property; it was no more piratical for a publisher to print it than for a peasant to graze his pigs on common land." Foreign literary piracy took two main forms. First, books were reprinted in other countries and sold there. Second, they were reprinted in foreign countries and sold in the country of origin of the work. This situation was particularly displeasing to authors. With time it became clear to authors in countries such as England, who suffered

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39 "The prevention of this international piracy was the principal reason for the gradual development of international copyright relations during the nineteenth century." Sam Ricketson, supra note 28 at 19.
40 See above at section 1.2.
41 An example of this is the first federal copyright statute of the United States of America, passed in 1790. It allowed "the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States." Quoted in Paul Goldstein, supra note 8 at 184. As a result of the fact that foreign works were not protected under that statute "almost half of the best-sellers were pirated mainly from England." Cees H. Hamelink, supra note 23 at 11.
42 Quoted in Simon Nowell-Smith, supra note 23 at 15.
43 In some cases proofs of books were smuggled to foreign countries and the books were produced and sold there before or contemporaneous with the sale in what should have been the original country of production of the book. See William Briggs, supra note 3 at 41.
44 Charles Dickens was especially concerned about the pirating of his books in the US and made a trip there to protest against with this practice. See John Feather, supra note 15 at 149, 150, 158 and 159.
economically from the works of their authors being pirated by other countries,\textsuperscript{45} that this situation had to be arrested.\textsuperscript{46} This led to the negotiation of bilateral copyright agreements. More than 88 such treaties were signed between 1840 and 1886.\textsuperscript{47} Thus bilateral copyright agreements came into being due to the inadequacies of the system where each country protected only the works of its nationals.

The second factor was the deficiencies and inadequacies of these bilateral treaties\textsuperscript{48} and the “need for a uniform system of protection.”\textsuperscript{49} These early bilateral treaties were guided by two principles: “national treatment”\textsuperscript{50} and “reciprocity.”\textsuperscript{51} The treaties created confusion for authors and did not give them security. The lack of uniformity of copyright laws meant that the protection of authors’ works differed from place to place. Additionally, hostilities between nations could have disrupted the protection of authors’ rights.\textsuperscript{52} It was the shortcomings of these bilateral treaties as well as the need for uniformity in the copyright system that led to the evolution of copyright from the bilateral to the multilateral stage.

\textsuperscript{45} Piracy was rampant at that time. For \textit{e.g.}, English authors suffered from the activities of US and French publishers. France suffered greatly from the activities of Belgium whilst the Prussian States pirated their own works. See William Briggs, \textit{supra} note 3 at 39 and 40. For more information on the piracy in England, France and Germany, see \textit{ibid.} this note at 44-56.

\textsuperscript{46} It was not all countries that were in favour of protecting foreign works for piracy had its ‘advantages.’ For example, works that were reprinted and sold in foreign countries tended to be cheaper than the original book would have been. For this and other reasons, the US initially refused to protect foreign works. For the position in the US, see generally: Aubert J. Clark, \textit{The Movement for International Copyright in Nineteenth Century America} (Connecticut: Greenwood Press, 1960).

\textsuperscript{47} See Cees J. Hamelink, \textit{supra} note 23 at 11.

\textsuperscript{48} See \textit{ibid.} at 12.

\textsuperscript{49} WIPO International Protection, \textit{supra} note 6 at 2.

\textsuperscript{50} Under this principle a country would protect the works of foreign nationals to the same extent that it protected the works of its nationals. The national treatment principle is also known as the principle of assimilation. See Cees J. Hamelink, \textit{supra} note 23 at 11.

\textsuperscript{51} In this case foreign works were protected to the extent that they would have been protected in their home country. See \textit{ibid.} at 11 and 12.

\textsuperscript{52} For more information on this, see \textit{ibid.} at 12.
The impetus for the creation of a multilateral copyright agreement came from a non-governmental organization, the Association Littéraire et Artistique Internationale (ALAI), formed in 1878. Its principal aim was to defend the principle of literature as intellectual property and it advocated for the formation of an international union with uniform legislation on literary property. At one of its congresses, the ALAI drew up a draft proposal for such a union. This resulted in an inter-governmental conference being held in 1884 in Berne, Switzerland to map out an international convention for the protection of literary property. It was at the third of such conferences in 1886, that the Berne Convention for the Protection of Literary and Artistic Works was adopted.

The period from 1886 to 1967 witnessed various technological developments that were to have an impact on the international protection of copyright. Reproduction technology, especially the use of photocopiers, was to limit the control that copyright holders had over the reproduction of their works. These machines “exacerbated the

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53 See ibid.
54 Berne Convention for the Protection of Literary and Artistic Works, 9 September, 1886. A copy of this Convention can be found in William Briggs, supra note 3 at the Appendix. The countries who initially signed the 1886 text were Belgium, France, Germany, Haiti, Italy, Liberia, Spain, Tunisia and the United Kingdom. See Cees J. Hamelink, ibid. at 13. The 1886 text was completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967 and at Paris on July 24, 1971 and amended on September 28, 1979, WIPO Publication No. 287(E) (Geneva: WIPO, 1996) [hereinafter Berne Convention 1971]. The Berne Convention 1971 is discussed below at section 1.5. The use of the term “Berne Convention” in this work refers to the 1886 text and subsequent revisions and amendments, unless otherwise indicated. The Berne Convention can be regarded as the backbone of the international copyright regime because it was the first international agreement to provide for the protection of copyright. The Berne Union are the countries that are party to the Berne Convention. For the advantages of being a member of the Berne Union, see WIPO International Protection, supra note 7 at 7. For the countries that have ratified the Berne Convention, the text they have ratified and the date on which the ratification was done, see WIPO homepage <http://www.wipo.org/eng/ratif/c-berne.htm> (last modified September 22, 1998, date accessed: November 5, 1998). Currently, 133 countries have ratified the Berne Convention.
55 The use of photocopiers has been traced to the 1870; it existed in a primitive form at the time. However, its use developed to the extent that by “the mid-1960s, the photocopier was ubiquitous in libraries and offices alike.” John Feather, supra note 15 at 176. For a discussion of the effects of the use of photocopiers...
implied tension in copyright law between the interests of authors, publishers and the
genral public (particularly in the field of education)." Other significant developments
were the advent of computers in the Second World War and the birth of the digital
revolution in 1947. These developments were to create new forms of works and bring
innovation into the production and reproduction of intellectual property works. They
also brought the need for some reform of the traditional international intellectual property
framework.

By 1967 there had been significant developments in the international copyright
regime. As compared with bilateral copyright agreements, the multilateral ones
dominated the international copyright framework. From 1886 to 1967 the Berne
Convention underwent several revisions which sought to deal, inter alia, with the effects
of developments in technology and other areas on the protection of literary and artistic
works. Additionally, other multilateral agreements were added to the international
copyright regime. These included the Universal Copyright Convention (the UCC) which

on copyright protection, see James Lahore, "Reprographic Reproduction" in James Lahore, Gerald
Dworkin and Yvonne Smyth, supra note 7 at 1.
56 See Cees J. Hamelink, supra note 23 at 31.
57 "The first computers were built as code - breaking devices during World War Two." John Feather, supra
note 15 at 176.
59 This is discussed in greater detail in Chapter 2.
60 See Irwin A. Olian, Jr., "International Copyright and the Needs of Developing Countries: The
Awakening at Stockholm" (1974) 7 Cornell Int'l L. J. 81 at 82.
61 On this point, see WIPO International Protection, supra note 6 at 3. For a discussion of the major
revisions before 1967, see Claude Masouye, "The Berne Convention From 1886-1967" in International
Copyright: Needs Of Developing Countries-Symposium (India: Ministry of Education, 1967) [hereinafter
Indian Symposium] 105.
UCC 1952]. The UCC 1952 was concluded at an intergovernmental conference held in Geneva from
August 18 to September 6, 1952, under the auspices of UNESCO. It came into force in 1955. For more
information on the UCC 1952, see Arpad Bognar, The Law of Copyright under the Universal Copyright
came into being as a means of getting the US to be part of the traditional international copyright regime,\textsuperscript{63} and the Inter-American system.\textsuperscript{64} There were also conventions on other intellectual property rights such as neighbouring rights.\textsuperscript{65} The membership of the Berne Convention expanded as newly independent and developing countries joined the Berne Union. Finally, it became clear that there were different perspectives on copyright and that these had to be given some recognition in the multilateral copyright framework,\textsuperscript{66} in order to ensure the 'peaceful' existence of the latter.

1.4: THE EMERGENCE OF DIFFERENT PERSPECTIVES ON COPYRIGHT

By the end of the 1960s it was possible to divide perspectives on copyright into two: developed and developing country perspectives. From the 1950s it became clear that

\textsuperscript{63} For more information on the difference between the position of the US and the Berne Convention, see John Feather, \textit{supra} note 15 at 165; Paul Goldstein, \textit{supra} note 8 at 184; Samuel W. Tannenbaum, "The Principle of "National Treatment" and Works Protected: Articles I and II" in Theodore R. Kupferman & Mathew Foner, eds., \textit{Universal Copyright Convention Analyzed} (New York City: Federal Legal Publications, 1955) 13-22; Abraham L. Kaminstein, "©: Key to Universal Copyright Protection (Article III: Formalities)" in Kupferman & Foner, eds., \textit{ibid.} this note at 23-38.

\textsuperscript{64} These treaties included the Montevideo Treaty on Literary and Artistic Property, January 11, 1889 and the Washington Inter-American Convention on the Rights of the Author in Literary, Scientific and Artistic Works, June 22, 1946. See Irwin A. Olian, Jr., \textit{supra} note 60 at 82, 86-88.

\textsuperscript{65} Neighbouring rights are the rights that are related to copyright. They have traditionally been granted to three main categories: performers, producers of phonograms and broadcasting organizations. The first major international agreement on neighbouring rights was the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, concluded in Rome in 1961. See World Intellectual Property Organization, \textit{Introduction to the Basic Notions of Copyright and Neighboring Rights}, WIPO/CNR/ACC/97/1 (presented at the WIPO National Seminar on Copyright and Neighboring Rights for Law Enforcement Agencies, Accra, Ghana, May 26 and 27, 1997) [hereinafter WIPO Introduction to the Basic Notions] at 13. In some countries copyright and neighbouring rights come under one law. An example of this is the copyright law of Ghana: The Copyright Law, 1985, (PNDC Law 110) [hereinafter Law 110].

\textsuperscript{66} In this work the terms 'multilateral copyright framework' and 'multilateral copyright agreements' refer generally to the international agreements on copyright in existence at the time in question. 'Traditional international copyright regime' and 'traditional copyright framework' refer to the system established by the Berne Convention and the UCC.
developing countries were dissatisfied with the traditional copyright regime. Their dissatisfaction arose from the fact that, since most of them had become bound to the Berne Convention and the UCC because their respective colonial masters were party to these agreements, they had not contributed to the negotiations of these multilateral agreements. Consequently, they were of the opinion that these agreements did not take their needs as developing countries into account. On attaining independence, the newly independent countries’ initial acceptance of these agreements was followed by a critical analysis of the benefits that were to be gained from these agreements. They came to the conclusion that these agreements did not reflect their aspirations as developing countries.

The development goals of the developing countries included being independent from the influences of colonialism and having access to the knowledge of the industrial world, especially in the fields of science and technology. "Colonialism left a lagging cultural and economic inheritance in Asian, African and Latin American countries. In many of these countries the majority of the population were illiterate at the time of gaining independence." Consequently, on the attainment of independence they sought to correct this situation. However, they suffered from a ‘book famine.’ A UNESCO study done in

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67 See Irwin A. Olian Jr., supra note 60 at 96.
68 This was allowed under Article 19 of the Berne Convention of 1886 which had an equivalent provision in later revisions of the Berne Convention. See Vojtech Strnad, “Developing Countries and International Copyright Protection” in Indian Symposium, supra note 61 at 81.
69 For the shortcomings of the traditional copyright framework before 1967, see Irwin A. Olian Jr., supra note 60 at 95 at 96.
70 See Vojtech Strnad, supra note 68 at 81 and 82.
72 M.M. Boguslavsky, Copyright in International Relations: International Protection of Literary and Scientific Works, English Language ed. (Sydney: Australian Copyright Council, 1979) at 36. For example the rate of illiteracy in Ghana in 1948, nine years before its independence in 1956, was 90 per cent. See Andrew Ofoe Amegatcher, The Ghanaian Law of Copyright (Accra: Omega Publishers, 1993) at 3.
the 1960s revealed that whilst 9.4% of the world's population lived in Africa, 0.15% of books published annually in the world went to Africa. 73

Colonialism also created certain links with and dependence on the colonial masters and the industrialized world that persisted after independence. For example, developing countries such as Ghana adopted the language of their colonial masters as their national language and depended on imports of items such as books from their colonial masters. The attainment of independence did not eliminate these patterns of dependence and these newly independent countries found themselves in the position of net-importers of books and reading matter from the developed world. Copyright made such imports more expensive for them since they had to pay royalties for their use to the copyright holder. Thus, the copyright system brought mixed blessings to developing countries because it protected works of their native authors, but made imports of materials such as books more expensive. 74

Developing countries increasingly expressed their discontent at conferences and meetings held in the 1960s. 75 At the meeting of African countries on copyright at Brazaville in August, 1963, developing countries expressed the view that:

International copyright conventions are designed, in their present form, to meet the needs of countries which are exporters of intellectual works; these conventions, if they are to be generally and universally applied,

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73 Mentioned in M.M. Boguslavsky, ibid. at 37. For a general overview of the state of the book trade in Africa, see Sigfried Taubert and Peter Weidhaas, eds., supra note 18.
75 These meetings included the African Study Meeting on Copyright at Brazaville in 1962 and the “joint session of the Permanent Committee of the Berne Union and the Intergovernmental Copyright Committee in 1963.” Irwin A. Olian Jr., supra note 60 at 96.
require review and re-examination in the light of the specific needs of the African continent.76

The copyright needs of the developing countries included being permitted to reprint imported books, in order to conserve the foreign exchange they spent on book imports and on accompanying copyright fees.77 Thus they wished to have access to books at affordable prices.78 In addition, they wanted to develop their local printing and publishing industries.79

These copyright needs show that developing countries regarded copyright not just as a means of encouraging authors and artists, but as a means of promoting their national development. They wished to create a copyright system that would help them to achieve economic growth. From an examination of their development goals, it appears that developing countries required a copyright system that would facilitate the transfer of knowledge and information to them at affordable prices, especially in the fields of the science and technology, and promote the development of their local publishing industries80 and thus aid their independence, culturally and otherwise.

The differences between developed and developing countries' copyright needs were evident at the discussions at Stockholm in 1967 for a revision of the Brussels text of the Berne Convention.81 The Stockholm Conference discussed the substantive provisions of

76 Quoted in ibid. at 95.
77 Sadanand Bhatkal, "The Needs of Developing Countries in the Field of International Copyright" in Indian Symposium, supra note 61 at 7. See also Irwin A. Olian Jr., ibid. at 88-92.
78 See Sadanand Bhatkal, ibid. at 9. See also K.S. Mullick, "The Copyright Situation in Developing Countries" in Indian Symposium, supra note 61 at 43.
79 See Sadanand Bhatkal, ibid. at 8.
80 For the importance of the development of local publishing, see Philip G. Altbach, ed., supra note 74.
81 "The Stockholm Revision was a response not only to technological change that had taken place since the Brussels revision of 1948, but also a response to the needs of newly independent countries for access to
the Berne Convention and a Protocol for developing countries. Developed countries wanted an extension of the rights of authors, whilst developing countries wanted some provision to be made for their cultural, developmental and educational needs. The Protocol contained preferential provisions for developing countries including a system of compulsory licenses for the purposes of translation. However, developing countries were of the view that the Protocol did not go far enough to meet their needs. Developed countries were opposed to the concessions in favour of the developing countries in the Protocol, since they regarded such concessions as not reflecting the reasons that led to the negotiation of the Berne Convention and the aims that its regime was set up to realize. Despite this opposition, the Protocol was adopted with support from the socialist countries and because it was clear to the developed countries that some concessions needed to be made in favour of developing countries, in order to keep the latter’s support for the traditional international copyright regime.

8.3 This dissatisfaction has been summarised as follows:

In the developing countries there is a lack of qualified translators, editors, compositors, and printers. Paper is scarce or too expensive. Technical facilities are often obsolete. Publishing and bookselling suffer from poor returns. Authors’ societies and copyright licensing organizations are only in the course of formation. There is a lack of money and trained specialists. Therefore, the Protocol is no suitable instrument to provide aid for developing countries.

Quoted in Irwin A. Olian, *ibid.* at 102.

85 See *ibid.* at 103. Countries such as the US and England, which were major exporters of books, launched a campaign against the ratification of the Protocol. For further details, see M.M. Boguslavsky, *supra* note 72 at 64.

86 See Irwin A. Olian Jr., *ibid.* at 102.

87 See M.M. Boguslavsky, *supra* note 72 at 60.

88 See Irwin A. Olian, *supra* note 60 at 104.
The Stockholm Conference was significant because it sought to accommodate the respective needs of developed and developing countries in the traditional copyright regime. Developed and developing countries' needs were recognised by the extension of the rights of authors and by the Protocol, respectively. Another product of the Stockholm Conference was the birth of the World Intellectual Property Organization (WIPO) which was charged with, inter alia, helping developing countries in the area of copyright. The 1971 revisions of the Berne Convention and the UCC were attempts to address the discontent that was apparent at the Stockholm Conference.

1.5: COPYRIGHT IN LITERARY WORKS UNDER THE BERNE CONVENTION AND UNDER THE UCC: THE 1971 REVISIONS

By the 1970s it was clear that unless the traditional copyright regime accommodated the needs of developing countries, they might opt to leave the regime. Consequently, the aim in revising the Berne Convention and the UCC 1971 was to:

satisfy the practical needs of developing countries for ready access to educational, scientific, and technical works without weakening the structure and scope of copyright protection offered by developing

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89 This extension included provisions on the rights of producers with respect to cinema. See M.M. Boguslavsky, supra note 72 at 60.


The objectives of WIPO are:

(i) to promote the protection of intellectual property throughout the world through cooperation among States and, Where appropriate, in collaboration with any other international organization;

(ii) to ensure administrative cooperation among the intellectual property Unions, that is, the "Unions" created by the Paris and Berne Conventions and several sub-treaties concluded by members of the Paris Union.

countries under both the Universal Copyright Convention and the Berne Convention.\footnote{Quoted in Irwin A. Olian Jr., \textit{supra} note 60 at 104.}

1.5.1: THE BERNE CONVENTION 1971

1.5.1.1: BASIC PRINCIPLES AND SCOPE OF LITERARY WORKS

The Berne Convention is based on the three principles of national treatment or assimilation,\footnote{This means that works which were made or first published in one of the Berne Union countries must be afforded the same protection in the other Berne Union countries that the latter grant to their nationals. See WIPO General Information, \textit{supra} note 90 at 61. See also \textit{World Intellectual Property Organisation, International Protection of Copyright and Neighboring Rights: The Berne Convention for the Protection of Literary and Artistic Works (1886)} at WIPO homepage \textltt{http://www.wipo.org/eng/GENERAL/COPYRIGHT/BERN.HTM} [hereinafter WIPO Berne Convention] at 1 (date accessed: November 21, 1998).} automatic protection\footnote{This means that a country's treatment of a foreign national is based on the former's copyright law and not on that of another country. "If, however, a Contracting State provides for a longer term than the minimum prescribed by the Convention and the work ceases to be protected in the country of origin, protection may be denied once protection in the country of origin ceases." \textit{Ibid.}} and independence of protection.\footnote{Minimum standards cover works, rights and the duration of protection. See WIPO General Information, \textit{ibid.} at 62. The duration of the term of protection is normally a period of 50 years after the death of the author. See Berne Convention 1971, \textit{supra} note 54 at Articles 7 and 8.} Further, it sets a minimum standard of protection that member countries should provide for in their domestic laws.\footnote{\textit{Ibid.} at Article 20.} In addition, member states are given the right to enter into other agreements which do not limit the rights granted under the Berne Convention 1971.\footnote{\textit{Ibid.} at Article 2(1). This section states:}

One feature of the Berne Convention 1971 is that the list of works it protects is not exhaustive. Article 2(1) of the Berne Convention protects literary and artistic works "whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature."\footnote{Berne Convention 1971, \textit{ibid.} at Article 2(1). This section states:} It is clear
that written and oral works, such as lectures, qualify as literary works within the meaning of the Berne Convention 1971. The wording of this Article creates room for other forms of literary works to come within its purview. Under Article 2(3) alterations of literary works such as translations are “protected without prejudice to the copyright in the original work.” Further, the Berne Convention 1971 extends copyright protection to collections of literary works including encyclopaedias and anthologies, whose selection and arrangement constitute intellectual creations. With respect to these collections, the copyright protection granted under the Berne Convention 1971 is without prejudice to any copyright subsisting in the individual works. Additionally, Article 2(2) of this Convention gives countries the authority to decide whether or not literary and artistic works must be fixed in some material form, in order to obtain copyright protection under their respective national copyright law. Although, the Berne Convention 1971 does not define fixation, the expression “fixed in some material form,” can be taken to refer to works that are contained in a permanent format such as by being written down or recorded. However, since the scope of “some material form” is not defined in the Berne

The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography, photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

For a discussion on the literary works provisions, see Sam Ricketson, supra note 28 at 238, 242 and 286.

98 The Berne Convention 1971, ibid. at Article 2(5).
Convention 1971, this provision creates room for different interpretations of material form.

Further, published and unpublished works are also protected under the Berne Convention 1971. However, the protection of published literary works excludes "the public recitation of a literary work [and] the communication by wire or the broadcasting of literary or artistic works."100

1.5.1.2: MORAL AND ECONOMIC RIGHTS

The Berne Convention gives an author moral and economic rights in his or her work, which enable him or her to be associated with his or her literary work and to obtain some pecuniary value from the use of the work respectively. Under the Berne Convention 1971 a copyright holder has the following economic rights: the right to reproduce a work, the right to communicate the work to the public through such means as public performances, and transformation rights such as the right to translate or adapt a work.101

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99 Ibid. at Article 3.
100 Ibid. at Article 3(3) provides:

The expression "published works" means works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of the copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work. The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works...shall not constitute publication.

101 Ibid. at Articles 8 (on the right of translation), 9 (the right of reproduction), 11 (right of public performance and communication to the public of certain dramatic and musical works), 11bis (the right to broadcast and communicate a work to the public by wireless and related means, 11ter (the right to recite and communicate literary works to the public), 12 (the right of adaptation, alteration and other arrangement), 14 (it gives authors of literary and artistic works the right to authorise "the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced" and to authorise "the public performance and communication to the public by wire or other means of the works thus adapted or reproduced"). Economic rights make it possible for an author to derive pecuniary value from the use of his or her work by others.
An author has two forms of moral rights under the Berne Convention. First is the right to claim authorship of or to be named as the author of a work. Second is the right to object to uses of the work that would be derogatory or prejudicial to the author’s honour or reputation. The Berne Convention 1971 does not provide a definition for acts that are derogatory or prejudicial to the author’s honour or reputation. However, this provision can be interpreted to cover acts that would lower society’s opinion of the author’s literary capability, that would subject the author to ridicule or that would result in the author being associated with something that is offensive to the author or to society as a whole.

1.5.1.3: LIMITATIONS ON RIGHTS

Although a copyright holder has several rights in his or her literary work, there are limitations on the enjoyment of these rights. These limitations are in two categories. First, Article 2(2) of the Berne Convention 1971 gives countries the authority to exclude literary and artistic works which are not fixed from copyright protection. Second, the rights of copyright holders are restricted with respect to “free uses” and non-voluntary licences, “in order to maintain an appropriate balance between the interests of copyright owners and users of protected works.” The “free uses” of works recognised by the

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102 Ibid. at Article 6bis (1). The Article provides as follows:

Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right 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 said work, which would be prejudicial to his honor or reputation.

103 This is also known as the “droit de paternité” or the “paternity right.”

104 See above at section 1.5.1. See also WIPO Introduction to the Basic Notions, supra note 65 at 9.

105 Free uses allow a person to use the protected work without authorization from and compensation to the copyright holder. Non-voluntary licenses carry an obligation to compensate the copyright holder. For a discussion of these limitations on rights, see WIPO Introduction to the Basic Notions, ibid. at 9.

106 WIPO International Protection, supra note 6 at 5.
Berne Convention 1971 cover the reproduction of works in "certain special cases," quoting a work, using a work as an illustration for teaching purposes, the reproduction by the press of articles on "current economic, political or religious topics," and ephemeral recordings made by a broadcasting organization for broadcasts. The Berne Convention 1971 provides for non-voluntary licences in two cases: first, with respect to the right of broadcasting by mechanical means and, second, concerning the right to authorize the sound recording of a musical work. Developing countries are also given the right to exercise non-voluntary licenses with respect to the reproduction and translation of works for educational purposes.

1.5.1.4: INFRINGEMENT OF RIGHTS

Although the Berne Convention provides that copies of a work that infringe an author's rights are liable to seizure, it does not expressly define infringement or an infringing copy of a work. However, it can be assumed that a person's exercise of a right reserved solely for an author under the Berne Convention 1971, without an author's consent, would constitute an infringement of copyright.

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107 Berne Convention 1971, supra note 54 at Article 9(2).
108 Ibid. at Article 10(1). However, the source and name of the author must be acknowledged when the work is quoted. Ibid. at Article 10(3).
109 Ibid. at Article 10(2). The source and name of the author must be acknowledged. Ibid. at Article 10(3).
110 Ibid. at Article 10bis. Article 10bis (1) leaves it to domestic legislation to prescribe the penalty for the failure to clearly indicate the source of the information.
111 Ibid. at Article 11bis (3). See also WIPO International Protection, supra note 7 at 5.
112 Berne Convention 1971, ibid. at Article 11bis(2).
113 Ibid. at Article 13(1). See also WIPO International Protection, supra note 6 at 5.
114 Berne Convention 1971, ibid. at the Appendix. See discussion, infra at section 1.5.1.5.
115 Berne Convention 1971, ibid. at Article 16.
116 For further discussion on infringement under the Berne Convention, see Sam Ricketson, supra note 28 at 225. See also William Briggs, supra note 3 at 386.
1.5.1.5: DISPUTE SETTLEMENT AND ENFORCEMENT OF RIGHTS

One of the weaknesses of the traditional copyright framework has been the dearth of enforcement provisions.\textsuperscript{117} There are few direct provisions in the Berne Convention 1971 dealing with the procedure for the enforcement of moral and economic rights.\textsuperscript{118} Article 16 is the main article dealing with remedies for an infringement of copyright.\textsuperscript{119} It provides for the seizure of infringing copies of a work in any country of the Union which legally protects that work and, for seizure upon the importation of the work from countries which do not protect the work or have ceased to protect it. The Berne Union countries are given considerable latitude in deciding how to carry out their obligations since Article 16(3) provides that the "seizure shall take place in accordance with the legislation of each country."\textsuperscript{120} Basically, these rights are enforceable by the author or a body designated to enforce those rights.\textsuperscript{121} Authors are also given the right to institute infringement proceedings in a Union country.\textsuperscript{122}

\begin{itemize}
  \item[\textsuperscript{119}] The Berne Convention 1971, supra note 54, provides at Article 16:
    \begin{enumerate}
      \item Infringing copies of a work shall be liable to seizure in any country of the Union where the work enjoys legal protection.
      \item The provisions of the preceding paragraph shall also apply to reproductions coming from a country where the work is protected, or has ceased to be protected.
      \item The seizure shall take place in accordance with the legislation of each country.
    \end{enumerate}
  \item[\textsuperscript{120}] This is in line with Article 5(2) of the Berne Convention 1971, which provides that "...apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed." (emphasis mine).
  \item[\textsuperscript{121}] Berne Convention 1971, \textit{ibid.} at Articles 6bis and 15.
  \item[\textsuperscript{122}] \textit{Ibid.} at Article 15(1).
\end{itemize}
Berne Convention members have three options open to them with respect to disputes concerning the interpretation or application of the Berne Convention 1971. These are settlement by negotiation, by resort to the International Court of Justice (ICJ) or settlement by any other method the countries agree upon. The impact of this provision is weakened by the fact that member countries are given the liberty to refuse to be bound by it.

1.5.1.6: SPECIAL PROVISIONS FOR DEVELOPING COUNTRIES

One of the aims of the Berne Convention 1971 was to ensure its universality and to facilitate its implementation by “the growing number of newly independent States facing difficulties in the early stages of their economic, social and cultural development as independent nations.” Against this background, the provisions for the benefit of developing countries in the Berne Convention 1971 are meant to make the compliance with it by developing countries less burdensome. Developing countries can take advantage of these provisions by following the procedure in Article I. A developing country is defined in the Appendix as a country:

regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations which ratifies or accedes to this Act … and which, having regard to its economic situation and its social or cultural needs, does not consider itself immediately in a

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123 Ibid. at Article 33(1). See J.H. Reichman, supra note 117 at 339 note 17, on the comment that States did not avail themselves of the ICJ as a means of resolving these disputes.
124 Berne Convention 1971, ibid. at Article 33(2).
125 WIPO International Protection, supra note 6 at 6.
126 These are provided for in the Appendix to the Berne Convention 1971. The provisions in the Appendix to the Berne Convention 1971 are different from what was in the Protocol. For further discussion on this, see Sam Ricketson, supra note 28 at 631. See also Irwin A. Olian Jr, supra note 60.
127 Berne Convention 1971, supra note 54, the Appendix at Article I (1).
position to make provision for the protection of all the rights as provided in this Act ... 128

The Appendix provides for non-voluntary licensing schemes similar to those of the UCC 1971.129 These provisions enable developing countries to be granted licences for translations for “teaching, scholarship or research” purposes130 and for reproductions “in connection with systematic instructional activities.”131

In all, the Berne Convention 1971 is an attempt to balance the needs of developed and developing countries and to maintain the international copyright regime. The rights of authors were strengthened by the restriction of the relatively wider uses of authors' works that the Stockholm Protocol sought to establish.132 The developing countries had obtained some success since their needs had been given some recognition in this Convention, which they had hitherto not enjoyed.

1.5.2: THE UCC 1971

1.5.2.1: BASIC PRINCIPLES, SCOPE OF LITERARY WORKS AND RIGHTS

With respect to the relationship between the Berne Convention 1971 and the Universal Copyright Convention (UCC) 1971, the latter provides that it does not affect the provisions of the Berne Convention or membership in the Berne Union.133 The UCC

128 Ibid. the Appendix at Article I (1).
129 See Irwin A. Olian Jr., supra note 60 at 107. The UCC 1971 is discussed below at Section 1.5.2.
130 Berne Convention 1971, supra note 54 at Article II (1) and II (5). The conditions with respect to these provisions are provided for at Articles II and IV of the Appendix.
131 Ibid. the Appendix at Article III para. (2)(a). See also WIPO International Protection, supra note 6 at 6.
132 This could be regarded as being in line with the developed countries’ opposition to further free uses of authors’ works. See Irwin A. Olian Jr, supra note 60 at 107 and 108.
133 The UCC 1971, supra note 62 at Article XVII (1).
1971 also sets minimum standards and is based on the principle of national treatment.  However, it differs from the Berne Convention in areas such as the formalities required for a work to be eligible for copyright protection. Additionally, protection in a UCC country does not carry automatic protection in all other UCC countries.

Copyright protection under the UCC is granted to "literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works and paintings, engravings and sculpture." The use of the word "including" also means that the listed works are not the only ones protected under copyright. Although, the UCC does not mention the fixation of a work as a requirement for copyright eligibility, the use of the word "writings" as an example of the scope of literary works, makes it clear that the UCC 1971 protects fixed works. As is the case with the Berne Convention 1971, the UCC 1971 protects published and unpublished works.

The rights of authors in these works include "the basic rights ensuring the author's economic interests, including the exclusive right to authorize reproduction by any means.

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135 An example of this is the copyright notice, ©, which should be on a work from the time of first publication, in satisfaction of some of the formalities under the copyright law of any Contracting State. See UCC 1971 ibid. at Article III.

136 "Authors from UCC countries are only protected on a national treatment basis in other UCC countries if they comply with certain conditions. One of the principal conditions is the copyright notice." Lesley E. Harris, supra note 134 at 45.

137 UCC 1971, supra note 62 at Article I. This Article provides:
Each Contracting State undertakes to grant adequate and effective protection for the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture.

138 Ibid. at Article II
public performance and broadcasting.\textsuperscript{139} Additionally, they cover "the exclusive right of the author to make, publish, and authorize the making and publication of translations of works protected under this Convention."\textsuperscript{140} However, a Contracting State has the right to restrict the translation of writings subject to certain specified provisions.\textsuperscript{141} Unlike the Berne Convention 1971, the UCC 1971 does not make provision for the protection of the moral rights of authors. The duration of copyright in a work varies with respect to whether or not the work is published. Generally, the period of protection for published works was the life of the author and twenty-five years after the author's death, although countries were allowed to limit this to a period of twenty-five years from the date of publication of the work.\textsuperscript{142} The duration of copyright in unpublished works was to be determined by local legislation.\textsuperscript{143}

1.5.2.2: INFRINGEMENT, ENFORCEMENT OF RIGHTS AND DISPUTE SETTLEMENT

The UCC 1971 contains few provisions on infringement, enforcement of rights, and dispute settlement. As with the Berne Convention 1971, the UCC 1971 does not expressly define what constitutes an infringement of rights in copyright-protected works. Unlike the Berne Convention 1971, the UCC 1971 does not expressly indicate who can

\textsuperscript{139} Ibid. at Article IVbis. This provision was not part of the UCC 1952 and is an extension of the rights of authors. For further discussion, see Irwin A. Olian Jr., supra note 60 at 104 and 105.
\textsuperscript{140} The UCC 1971, ibid. at Article V(I).
\textsuperscript{141} Ibid. at Article V (2).
\textsuperscript{142} Ibid. at Article IV.
\textsuperscript{143} Ibid. at Article IV(4).
enforce a copyright holder's rights in protected works.\footnote{144} The similarity between the UCC 1971 and the Berne Convention 1971 in these areas is that disputes between Contracting States concerning the UCC 1971 could be brought before the ICJ for determination.\footnote{145}

1.5.2.3: PROVISIONS FOR DEVELOPING COUNTRIES

The UCC 1971 contains provisions for the benefit of developing countries in Articles Vbis, Vter, and Vquater and in the Appendix Declaration on Article XVII.\footnote{146} As with the Berne Convention, a developing country is one that is regarded as such "in conformity with the established practice of the United Nations."\footnote{147} Article Vbis deals with the procedure by which a developing country can take advantage of Articles Vter and Vquater.\footnote{148} The UCC 1971 provides for a compulsory licensing system for translations and reproductions.\footnote{149} Further, developing countries which are no longer members of the Berne Union could have their works protected in the countries of the Berne Union so far

\footnote{144} For the discussion of the enforcement of rights under the Berne Convention 1971, see above at section 1.5.1.4.\footnote{145} A dispute between two or more Contracting States concerning the interpretation or application of this Convention, not settled by negotiation, shall, unless the States concerned agree on some other method of settlement, be brought before the International Court of Justice for determination." UCC 1971, supra note 62 at Article XV. An Intergovernmental Committee was also set up to, inter alia, study problems concerning the operation and to prepare for periodic revisions of the UCC 1971. \textit{Ibid.} at Article XI and XII. A similar provision is to be found in the UCC 1952 at Article XI.\footnote{146} For a discussion of these provisions, see Irwin A. Olian Jr., \textit{supra} note 60 at 104 -107.\footnote{147} UCC 1971, \textit{supra} note 62 at Article Vbis.\footnote{148} The procedure involved a developing country's deposition of a notification to that effect with the Director-General of UNESCO. It was to be effective for an initial period of 10 years. \textit{Ibid.} at Article Vbis (1) and (2). The right to renew this notification ceases when a country is no longer classified as a developing country. \textit{Ibid.} at Article Vbis (3).\footnote{149} \textit{Ibid.} at Articles Vter and Vquater respectively.
as they take advantage of the exceptions in the UCC in “accordance with Article Vbis” of the UCC 1971. 150

Although both the Berne Convention 1971 and the UCC 1971 were attempts to prevent the disintegration of the international copyright family, the UCC has since lost some importance in the international copyright regime. This is as a result of several factors. First is the fact that the US joined the Berne Union in 1989.151 Second, recent international agreements on or related to copyright, such as the North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of The United Mexican States (NAFTA),152 the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPS)153 and the WIPO Copyright Treaty (WCT),154 have used the Berne Convention as the basis for the treatment of copyright.155 Consequently, the Berne Convention remains the backbone of the traditional international copyright regime and the foundation for the recent international copyright agreements.

150 Ibid. at the Appendix Declaration on Article XVII. Article XVII states the relationship between the UCC and the Berne Convention.
155 This is discussed further in Chapter 2.
1.6: THE RELATIONSHIP BETWEEN NATIONAL AND INTERNATIONAL COPYRIGHT

From the foregoing, it has been seen that the global copyright framework is a mixture of bilateral and multilateral agreements, and national copyright laws. The international copyright agreements have to be ratified by countries in order to be binding on them. Ratification signals that international copyright law is to direct, to some extent, the progression of national copyright legislation. Thus, a country loses part of its ‘copyright sovereignty’ upon ratifying an international copyright agreement.

A consequence of international copyright law is that national copyright laws are given the scope to be different. This is evident in the fact that the Berne Convention and the UCC lay down minimum standards. Consequently, the countries that ratify these Conventions have the discretion to extend copyright protection to other types of works.\textsuperscript{156} Additionally, in certain areas the concerned countries are given the freedom to decide on how to carry out their obligations under these Conventions.\textsuperscript{157} Thus their uniformity may end once they have put in place the minimum standards required under the international agreements.

The history of international copyright agreements reveals that international copyright is a means of unifying and harmonising national copyright laws.\textsuperscript{158}

\textsuperscript{156} One such area is that of computer programmes. This is discussed in greater detail in Chapter 2. Factors that account for the differences in national copyright laws include the level of technological development of a country. Generally, the more developed a country is the greater the possibility of the extension of its copyright law to new types of works.

\textsuperscript{157} See \textit{e.g.}: the Berne Convention 1971, supra note 54 at Article 2(2) which leaves it to domestic legislation to prescribe that works shall not be protected unless they have been “fixed in some material form.” See supra at section 1.5.1.

\textsuperscript{158} The international conventions have been able to reduce the differences between the Continental European and the Anglo-American approach to copyright. On this point, see WIPO, \textit{General Introduction to Copyright and Neighboring Rights} (Report by Ulrich Uchtenhagen for the National Workshop of
Consequently, through international copyright agreements it is possible to bring out some basic features that underlie national copyright laws. National copyright laws deal mainly with the following areas: a definition of the types of works that are copyrightable; an explanation of who owns copyright in a work; the rights which are available to the copyright holder; transfer of copyright; duration of copyright; what constitutes infringement of copyright; defences to alleged infringements of copyright; sanctions for the infringement of copyright; and, enforcement provisions.\textsuperscript{159}

It is worthy of mention that in the past the impetus for this harmonisation resulted from disparities with respect to the substance and application of national copyright laws.\textsuperscript{160} Thus, to some extent, national copyright laws created the need for international agreements in this area. Further, and as the recent developments in this area show, the national copyright policies and interests of some nations have provided the impetus for reforms to the traditional international copyright regime.\textsuperscript{161}

1.7: THE SIGNIFICANCE OF COPYRIGHT

As a theory, copyright is a western concept.\textsuperscript{162} Presently, it has come to denote a statutorily\textsuperscript{163} protected right in intangibles. The traditional theory is founded in three main

\textsuperscript{159} For general information on the main features of copyright, see WIPO Introduction to the Basic Notions, supra note 65.
\textsuperscript{160} See above discussion at section 1.3.
\textsuperscript{161} This is discussed in Chapter 2.
\textsuperscript{162} It has been stated that most developing countries were introduced to copyright from their colonial masters. See above at section 1.3. For example, the first copyright legislation in Ghana was the Imperial Copyright Legislation of 1911 passed by the British Parliament. See Andrew Ofoe Amegatcher, supra note 72 at 3.
\textsuperscript{163} During the eighteenth century, courts in England had to discuss whether copyright existed at common law or was a creature of statute and, if it existed at common law, whether the Statute of Anne superceded
approaches or views regarding the nature of copyrightable items. The first approach, the Anglo-American one, is based on the British system and views copyright as a property right as opposed to a personal right.\textsuperscript{164} Second is the Continental European approach, based on the French view which lays an emphasis on the author's right, regarding an author's work as part of the author's personality.\textsuperscript{165} The third theory, that of the pragmatic school, places an emphasis on the public interest as the key factor to be taken into consideration in the statutory protection of copyright.\textsuperscript{166}

In addition to the three dominant theories, copyright is regarded also as a means of rewarding authors for producing work. The moral justification for this view is that an author has a natural right to the products resulting from the exercise of his or her intellectual faculties in the same manner that a farmer is entitled to the fruits of his labour.\textsuperscript{167}

\textsuperscript{164} The focus of this approach, as reflected in the Statute of Anne, is to provide an incentive to authors and publishers to produce works and thus promote public learning. See Jane C. Ginsburg, "A Tale of Two Copyrights: Literary Property in Revolutionary France and America" in Brad Sherman and Alain Strowel, eds., \textit{Of Authors and Origins: Essays on Copyright Law} (Oxford: Clarendon Press, 1994) at 23.

\textsuperscript{165} See A.A. Keyes and C. Brunet, \textit{supra} note 164 at 5. See Paul Goldstein, \textit{supra} note 8 at 180, for the comment that the US in refusing to protect foreign works, based its arguments on "pragmatic, utilitarian grounds: it was then more an importer than an exporter of intellectual goods."

A related argument is that rewarding authors for producing works is seen as a means of encouraging them to produce more works. Thus, copyright protection is an incentive to authors to produce more works.\(^{168}\) It has not been easy to measure the extent of this incentive, especially when one takes into account the fact that before copyright became a statutory right, authors already had an incentive to write books.\(^{169}\) However, in view of the fact that technological developments have created sophisticated and easy ways of duplicating works, copyright does serve as some insurance against free-riding on another's work.

Another view of copyright is that it is a means of encouraging research and creativity for the public good. Thus, the protection of authors' rights should encourage them to make their work available to the public. This in turn would increase public learning and knowledge. This element is present in the UCC 1971 where it is stated that the Contracting Parties were persuaded that a universal copyright system would "facilitate a wider dissemination of works of the human mind and increase international understanding."\(^{170}\) However, in view of the fact that some research is kept secret, it may not be clear how much the dissemination of information is encouraged by copyright protection.\(^{171}\)

\(^{168}\) An Economic Analysis of Copyright Law" (1989) 18 J. of Legal Studies at 325. One issue that has been the subject of discussion is how much 'fruit' an author is entitled to. On this point, see Stephen Breyer, "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs" (1970-1971) 84 Harv. L. Rev. 281.


\(^{170}\) See David Vaver, supra note 167 at 7 and 8.

\(^{171}\) UCC 1971, supra note 62 at the Preamble.
Additionally, copyright is a means of protecting and promoting native industries and national culture\textsuperscript{172} and breaking cultural dependence on foreign works. History has shown that in a country where there is the free copying of the works of foreign authors, the local authors may not be able to compete with these low prices.\textsuperscript{173} This could result in a level of cultural dependence. It is by ceasing to rely on the works of foreign authors and by expressing one's culture that this cultural dependence will be broken and a country's cultural heritage maintained.\textsuperscript{174} An effective copyright regime leads to the building up of the industries in which it operates since it gives some protection against illegal copying and piracy and encourages the expression and growth of culture. It has been said that one lesson learnt from India is that "a strong publishing industry can be built only on respect for copyright."\textsuperscript{175

\textsuperscript{172} Cultural industries have been defined to incorporate: industries involved in both the manufacturing of explicitly cultural products and the electronic diffusion of cultural programming. Cultural products or programs are identified as those which directly express attitudes, opinions, ideas, values and artistic creativity; provide entertainment; offer information and analysis concerning the past and present. Included in this definition are both popular, mass appeal products and programs, as well as cultural products that normally reach a more limited audience, such as poetry books, literary magazines or classical records.


It has been said with respect to culture that:

To understand Canada's cultural industries, it is necessary to grasp that the term refers simultaneously to industries that produce cultural commodities (films, books, TV programs and so on) as well as to a concept deployed in the discussion of specific Canadian policy problems.


\textsuperscript{173} This occurred with American authors before the US protected the works of foreign authors. See Irwin A. Olian Jr., supra note 60 at 93. See also: William Briggs, supra note 3 at 907-102.

\textsuperscript{174} See Irwin A. Olian, ibid. at 92.

\textsuperscript{175} Gordon Graham, "Multinationals and Third World Publishing" in Philip G. Altbach, ed., supra note 74, 29 at 34.
On both a national and international level, copyright mediates between authors and the public by balancing their respective needs.\textsuperscript{176} The public has a need for access to intellectual works and the producers of intellectual works, in providing the public with intellectual materials, do not want to be deprived of the financial benefits that they should derive from their works. Thus, copyright defines the relationship between producers and consumers by stating their respective rights to a protected work.

The influence of copyright is also evident in international trade and international relations. Copyright is regarded as a means of promoting economic growth by both developed and developing countries.\textsuperscript{177} From the inception of copyright and the notion of intellectual property, trade in intellectual property goods has increased considerably.\textsuperscript{178} The protection of such works at the international level, through international agreements, facilitates trade by limiting piracy. As has been seen,\textsuperscript{179} it was partly due to the growth of international trade, especially in literary works, that the need for multilateral agreements on intellectual property arose. A look at history reveals that copyright has been used as a tool to secure trade advantages. For example, the US was against protecting the works of

\textsuperscript{176} This relationship has been described as follows:
\begin{quote}
... the legal framework of copyright adjudicates between the need to secure the free circulation of ideas, a process which is commonly accepted to be integral to the functioning of the public sphere, and the commercial demand for monopoly rights in copying and the associated creation of markets for cultural commodities. Through this process of adjudication, copyright has helped to structure relations between producers and audiences in the modes of cultural reproduction associated with print, broadcasting and communication technologies.
\end{quote}

Celia Lury, \textit{supra} note 172 at 8.

\textsuperscript{177} See Robert M. Sherwood, \textit{supra} note 168 at 39, on the view that another theory of intellectual property protection could be the ""public benefit" or the "economic growth stimulus" or "social rate of return" or "more things will happen" theory. At its base, it recognises that intellectual property protection is a tool for economic development.

\textsuperscript{178} "Knowledge is increasingly an international commodity that knows no boundaries and copyright is the arrangement that regulates the international flow." Philip G. Altbach, "Publishing in the Third World: Issues and Trends for the 21\textsuperscript{st} Century" in Philip G. Altbach, ed., \textit{supra} note 74, 1 at 4.
foreign authors when it was a net importer of books. The US became more in favour of protecting the works of foreign authors when it began to export more printed material than it imported.\footnote{See Paul Goldstein, supra note 8 at 180. He comments that it is significant that France became committed to protecting the rights of authors when the international piracy of the works of French authors was beginning to flourish. Thus, obtaining respect for French works was a way of protecting the economic interests of France. Similarly, the US became more committed to copyright protection when it became a net exporter of intellectual property works. See \textit{ibid} at 179-180.} Finally, disparities in copyright protection have resulted in hostilities between the concerned countries.\footnote{An example of this was the tension between France and England in the 18th Century over the French piracy of English works. See John Feather, \textit{supra} note 15. In recent times the developed countries,} Thus the issue of copyright protection is one of great importance to both developed and developing countries, in view of the benefits to be derived from it.

1.8: CONCLUSION

This Chapter sought to give an overview of the factors leading to the emergence of copyright in literary works and of its development to the end of 1971. It established that the main causes of this birth were the effects of technology and the need to eliminate piracy. Thus, from its inception, copyright in literary works has been influenced by technological development and trade.

It was seen that the 1970s marked an important stage in the history of copyright in literary works. By that time, there had been the emergence of developing and developed country perspectives on the role of copyright in their respective societies. The 1971 revisions of the Berne Convention and the UCC were an attempt by WIPO, UNESCO and the international community to hold the fabric of the traditional copyright regime

\footnote{See above at section 1.3.}
together, for it had become clear that unless some concessions were made in favour of developing countries in the international copyright agreements, they might no longer be a party to these agreements.

With regards to the scope of literary works, it was clear that there were many forms of expression of these works. It was settled that copyright could exist in oral, written, printed, published and unpublished literary works under the Berne Convention 1971 and under the UCC 1971, the exception being oral works which are not protected under the UCC. However, from the wording of the provisions of the international copyright agreements, it was clear that the list of literary works was not exhaustive. Thus, there was room for the addition of more works to the literary work fold.

The next chapter examines how events after 1971 were to pose challenges to copyright and to call for some responses from the international community. In this light, it assesses how these developments resulted in the recognition of other forms of expression of literary works.

especially the US' dissatisfaction with the levels of copyright protection in some developing countries has led to strained relations between them. This is discussed in greater detail in Chapter 2.
CHAPTER 2

2: RECENT DEVELOPMENTS IN THE INTERNATIONAL PROTECTION OF COPYRIGHT IN LITERARY WORKS

In Chapter 1, it was seen that under the Berne Convention 1971 and under the Universal Copyright Convention, (UCC), a literary work was an original oral or recorded, published or unpublished composition, except that oral works were not recognised as literary works under the UCC. Probably, the basic element here was that these works were capable of being appreciated by human beings. The purpose of this chapter is to analyse the events which led to an expansion of this conception of literary works. Additionally, it outlines the changes made to international literary copyright law. This discussion covers the specific changes made to these types of literary works, as well as general provisions of law on the protection of copyright.

The chapter commences by discussing the recent challenges to the protection of copyright in literary works. It focuses on technology, the increasing importance of intellectual property to trade, and globalization as the factors that have created recent challenges to the protection of copyright. This is followed by a discussion of the international response to these challenges. The discussion is divided into two sections. First, is an analysis of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). The analysis involves a discussion of the north/south divide and the key features of the Agreement on Trade - Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPS). In this light, the changes the TRIPS
Agreement makes to the international copyright regime are examined. The second section examines the World Intellectual Property Organization’s (WIPO) response to these recent challenges by discussing the key features of the WIPO Copyright Treaty (WCT). The chapter concludes with a brief mention of other responses to these challenges.

2.1: CHALLENGES

It has been seen that by the 1970s there had emerged conflicting perspectives on the form of copyright protection.\(^1\) This conflict was to continue in the following decades. Additionally, other developments with respect to technology, trade and globalization were to test the operation of the traditional international copyright regime.

2.1.1: TECHNOLOGY

Technology has played a key role in the development of intellectual property laws and of copyright law in particular. As has been seen, it was Johann Gutenberg’s invention of movable type, which brought with it the ability to produce and reproduce works on a larger scale than had previously been known, that created the need for some statutory control of the copying of works.\(^2\) From this initial relationship, technological developments have continued to create challenges for and, to an extent, determine the pace of reform of intellectual property and copyright laws. This is aptly depicted by the following opinion:

\(^1\) See above, Chapter 1 at section 1.4.

\(^2\) See above, Chapter 1 at section 1.2.
In no branch of the law other than copyright has the incidence of new
technologies revealed so many gaps and deficiencies for which the remedy
can only be regulation and supervision to an extent which may be beyond
the powers of the executive and enforcement agencies. Not only that-
curial remedies appear inadequate or insufficient to protect the owners of
copyright where protection is proper and legitimate.3

Computer and communications technologies4 have revolutionized the second half
of this century. Terms such as the Information Infrastructure,5 the Information Highway,
the Information Superhighway, Cyberspace, the Digital Era and the Internet have been

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3 Quoted by James Lahore, "Reprographic Reproduction" in James Lahore, Gerald Dworkin and Yvonne
M. Smyth, supra Chapter I note 7 at 1. He comments further that reprographic reproduction as well as the
use of the facsimile in making copies of works, pose problems to the concept of fair dealing and to an
author's right to receive remuneration for the use of his or her work since, due to these forms of
reproduction, copyright holders receive little or no payment for such copies. Ibid.
4 In this work the term "computer technology" refers to the hardware, the computer program, digitization
and the internet. "Hardware consists of the actual machinery, or physical units which make up a computer
system: the apparatus as opposed to the program." See Gerald Dworkin, "The Nature of Computer
Programs" in James Lahore, Gerald Dworkin & Yvonne M. Smyth, ibid. 89 at 90. The computer program
is the set of instructions or the code that directs the operation of the hardware. Computer programs have
been described as embracing software and firmware. Firmware is a term "coined to refer to the hybrid
programs which are fixed in some manner in a hardware element, such as a semi-conductor chip. Although,
these devices control machine functions and are intended to be permanent parts of the computer hardware,
they contain instructions and are programmed in the same manner as the software." Referred to in Gerald
Dworkin, ibid. A computer program has been defined as "a set of instructions capable, when incorporated
in a machine-readable medium, of causing a machine having information - processing capabilities to
indicate, perform or achieve a particular function, task or result." WIPO Model Provisions For Computer
Software, Section 1(i) reproduced in John Palmer, Copyright and the Computer (Consumer and Corporate
Affairs Canada, 1982) at Appendix B.
5 The Information Infrastructure has been described as follows:
An information infrastructure already exists, but it is not integrated into a whole.
Telephones, televisions, radios, computers and fax machines are used every day to
receive, store, process, perform, display and transmit data, text, voice, sound and images
in homes and businesses throughout the country. Fiber optics, wires, cable, switches,
routers, microwave networks, satellites and other communications technologies currently
connect telephones, computers and fax machines. The NII [National Information
Infrastructure] of tomorrow, however, will be much more than these separate
communications networks: it will integrate them into an advanced high-speed, interactive,
broadband, digital communications system. Computers, telephones, televisions, radios,
fax machines and more will be linked by the NII, and users will be able to communicate and
interact with other computers, telephones, televisions, radios, fax machines and
more—all in digital form.

The Working Group on Intellectual Property Rights, Information Infrastructure Task Force,
Intellectual Property and the National Information Infrastructure (United States Information
Infrastructure Task Force, 1995) at 7. The Information Infrastructure Task Force was formed by
President Clinton in 1993 "to articulate and implement the Administration's vision for the
National Information Infrastructure." Ibid. this note at 1.
used to describe the system brought into operation by technological developments in the field of information.\textsuperscript{6} These technologies\textsuperscript{7} are posing challenges to the traditional copyright regime. Digitization has been described to be “transforming the end of this century the way that the Industrial Revolution transformed the end of the last one.”\textsuperscript{8} The impact of these developments on copyright is evident in the following areas.

The first challenge of technology to copyright law is the creation of new works, referred to as new media.\textsuperscript{9} This resulted from the use of computer technology in the

\textsuperscript{6} Other names such as “new media, multimedia, and digital and electronic media” have been used to describe the present “Information Revolution.” Lesley E. Harris, \textit{supra} Chapter 1 note 134 at 214. Basically, the Internet is a system of computer networks which enables information to be accessed and transferred from one place to the other. The networks “are made up of linked information processing units which incorporate a wide range of resources, including the WWW [World Wide Web], File Transfer Protocol (“FTP”), e-mail, newsgroups, BBS, gopher, and other public and proprietary resources.” George C.C. Chen, “Electronic Commerce on the Internet: Legal Developments in Taiwan” (1997) XVI: 1 The John Marshall J. of Computer and Inf. L. 77 at 78. For a discussion of copyright in relation to the World Wide Web and the Internet, see April M. Major “Copyright Law Tackles Yet Another Challenge: The Electronic Frontier of the World Wide Web” (1998) 24 Rutgers Computer and Technology L. J. 75. The Internet originated from a US government defence project. See Ryan Yagura, “Does Cyberspace Expand Beyond the Boundaries of Personal Jurisdiction?” (1998) 38 IDEA - The J. L. & Technology 301. Cyberspace is a term coined in 1984 by William Gibson, a novelist, in relation to the Internet's future. See Ryan Yagura, \textit{ibid.} For a general discussion of legal issues related to the Internet, see (1998) 38 IDEA-The J. of L. and Technology.

\textsuperscript{7} There is some overlap between computer, communication, information and digital technologies. Information technology refers to technology used in the production, reproduction and dissemination of information. It can be gleaned from James Lahore, Gerald Dworkin and Yvonne M. Smyth. \textit{Information Technology: The Challenge to Copyright}, \textit{supra} Chapter 1 note 7, that the term covers reprographic reproduction, audio and video recording, broadcasting, cable and satellite transmissions as well as computer programs. Digital technology has been defined as follows:

Digital technology means the storage, reproduction and transmission of \textit{any} piece of information - data, sound, video, text, graphics - in the form of digits, in binary code consisting of zeros and ones. The digital pattern can be transmitted by satellite, optical fibre or co - axial cable, microwave link and conventional phone lines, and can then be converted back to its original format. Digital information is usually only machine - readable and must be converted by the machine into some other form before it can be understood by human beings.

Lesley E. Harris, \textit{supra} Chapter 1 note 134 at 215.

\textsuperscript{8} Walter Issacson. \textit{supra} Chapter 1 note 58 at 26.

\textsuperscript{9} “New media consists of hybrids of print and/ or electronic media in which the content can include text, sound, graphics, and audio-visual programming. It encompasses enrichment of traditional media (e.g. digital audio-visual broadcasting), combinations of previously separate media (e.g. multimedia) and creation of entirely new ones (e.g. hypermedia).” Nordicity Group Limited, \textit{Study on New Media and
production of the traditional forms of copyright protected works. One characteristic of the traditional form of expression is that it is practically impossible to separate the physical form in which the work appears from the expression of the words used. In other words, the content is fixed in the carriage, the object on/in which the content appears. Although digital works are also contained in some carriage, they differ from print in several ways. First, such works are not fixed since digitization enables people to rearrange the format of works. Further, digitization enables perfect copies of works to be made, thus making it difficult to distinguish a copy from an original and to protect an author's economic and moral rights.10

The second challenge relates to discussion of the protection of computer programmes and databases11 centering on whether they should fall under the intellectual property umbrella and if so, under which type of intellectual property, and whether they should be included in an international agreement on intellectual property rights.12 Figures from WIPO in 1980 showed that “78 percent of software firms relied on trade secret laws for protection. 15 to 17 on copyright protection and 5 percent on patent protection.”13 Thus although prior to the Uruguay Round computer programmes had been protected

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10 "New media is copyright significant because: support and new media works become intangible; digital technology produces "perfect copies"; rights-clearance becomes more complicated; collective management becomes preferable; technological enhancements increase copyright violations; and payment of tariffs and negotiation of rights becomes more difficult." NGL Report, ibid. See also: Henry Olsson, “New Media and International Copyright Law” (1980) 1 J. Media L. & Practice 60.
11 On this point, see Henry Olsson, ibid. at 74. In this chapter computer programme, computer software and software are used interchangeably unless otherwise indicated or unless the context permits otherwise.
12 This is discussed in greater detail below in this section.
under some national laws, copyright law was not the dominant way of protecting these new products.

Several difficulties have been identified in applying copyright law to computer technology. First, since computer programmes give instructions to a machine, they have nothing to do with literary and artistic works, the subject-matter of copyright protection. Second, the fact that copyright law protects the expression of ideas means that it could not protect the algorithms of a computer programme, which are its most “fundamental creative elements.” Third, the protection of computer technology raises other issues such as whether copyright law should protect the user interface of a computer, its “look and feel.” Fourth, computer programmes differ from printed works in the area of copies. It is relatively easy to copy software but difficult to protect the creativity that

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14 Before 1983, computer software was specifically protected by legislation in only three countries, namely, the US, the Philippines and Bulgaria. See Carlos M. Correa, “Computer Software Protection in Developing Countries: A Normative Outlook” (1988) 22 J. World T 23.

15 See NGL Report, supra note 9 at 40. In a sense, there is said to be a requirement that a work be ‘human-readable’ or capable of being appreciated by human beings to be eligible for protection under traditional copyright laws. This element has been referred to as the element of “intelligibility.” Martin Greenberger, “The Long-Range Future Impact of Communications Technology on Society” in Proceedings of the Congressional Copyright and Technology Symposium, 99 Congress, 1 Session (Washington: US Government Printing Office, 1985) [hereinafter Congressional Copyright and Technology Symposium] 62 at 72. He states that “in a precedent-setting case many years ago, a piano roll was judged unsuitable for copyright protection because it was not readable. Object code in computer software is not readable, yet most would agree that it deserves protection.” Ibid. this note. The difference between the object code and the source code is that the source code is the form in which a programme is usually designed and is human readable and not machine readable. In order for the machine to read the programme the source code must be converted to the object code, the latter being machine readable and not human readable. See Paul Goldstein, supra Chapter 1 note 8 at 206. A computer program has been viewed as being different from a literary work because “the functions they perform and the purposes they serve are much more utilitarian and operational than literary.” Martin Greenberger, ibid. this note at 66.

16 See NGL Report, ibid.

17 See ibid. at 41. This issue about protecting the user interface came up in the case of Apple v. Microsoft where it was held that copyright law did not protect the “look and feel” of the Macintosh interface. For a discussion of this case, see Paul Goldstein, supra Chapter 1 note 8 at 207 & 208.

18 See Martin Greenberger, supra note 15 at 66.
went into its production. Consequently, the traditional notion of copying should be redefined before being applied to this “nonprint electronic medium.” Further, the traditional requirement that a work be fixed before it can be the subject of copyright is inapplicable to electronic communications, which are not fixed in a tangible medium.

An additional view is that patent law which was (and still is) being used to protect computer programmes, is more suitable for the protection of these programmes than is copyright. Finally, the traditional 50-year term of copyright protection might not be suitable for computer programmes because these software have a tendency of being outdated in a short time, such that their long-term protection would hinder and obstruct competition.

Cases such as the Supreme Court of Canada’s decision in the case of Apple Computer, Inc., v. Mackintosh Computer Limited bring out the difficulty of applying copyright to computer systems. The main issue was whether copyright could subsist in

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19 See ibid.
20 On this point and for the suggestion that “new definitions are needed to replace the conventional definition for fixation,” see Martin Greenberger, ibid. at 72. It has been seen that the Berne Convention 1971 gave the Berne Union the discretion to decide on whether fixation would be a prerequisite for a work to be eligible for copyright protection. See above discussion at Chapter 1 section 1.5.
21 Patent law protects new processes and products whilst copyright law protects the original expression of ideas. The problem lies in the fact that both patent and copyright law may apply to different aspects of a computer program’s operation. On this point see NGL Report, supra note 9 at 40. On the applicability of patent law to multimedia, see ibid. at 42. “The set of instructions incorporated in software is an embodiment of basic ideas as well as an expression of specific elements and interconnections. For this reason, software protection has tended to fall between the cracks - between patents which cover new processes and ideas, and copyright which covers original expressions.” Martin Greenberger, supra note 15 at 66.
22 See NGL Report, ibid. at 40. On this point and for an in-depth discussion of the problems of protecting computer programs under copyright law, see Beth Gaze, Copyright Protection of Computer Programs (Sydney: The Federation Press, 1989) esp. at Chapter 3.
a computer programme that was subsequently embedded in a silicon chip. The Supreme Court held that a computer programme that was embodied in a silicon chip was a subject-matter suitable for copyright protection. The protection of computer programmes under copyright law has since been established in international copyright by TRIPS and the WCT.

Prior to the Uruguay Round, the protection of computer software was done under domestic law, in some cases as a result of pressure from the US on both developed and developing countries. The US, being a leader in computer technology and a net exporter of such technology, saw it as being in its economic interests to ensure that this technology obtained adequate international legal protection from the activities of pirates. The computer software market is dominated by the developed countries since developing countries did not have the requisite technology to support such an industry.

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24 In arriving at its decision, the Supreme Court of Canada distinguished this case from the Australian case of Apple Computer Inc. v. Computer Edge Pty Ltd. (1983) 52 ALR 581; (1984) 53 ALR 225 (Full Court of Federal Court); (1986) 161 CLR 171, 65 ALR 33 (High Court). An analysis of the Australian case at the various courts is given in Beth Gaze, supra note 22 at 76-92. In the Australian case, the High Court reversed the decision of the Full Court of the Federal Court and held that copyright does not subsist in the object code of a computer program in a ROM. The High Court's decision was based on the law before 1984 and did not discuss the 1984 amendments. Thus, it was not clear whether the position would have been different under the 1984 amendments. Beth Gaze, ibid. at 76. The Supreme Court of Canada was of the view that the Australian decision was based on regarding a computer program as a set of "dynamic electrical impulses." In its view, the proper approach was to regard the silicon chip as a static object containing a program with instructions.

25 See the discussion on TRIPS and the WCT infra at sections 2.2.1.2 and 2.2.2.1.

26 In the 1980s the US, by virtue of its Trade Act 1974, exerted pressure on Brazil to change its Computer Law of 1984, which did not afford protection to computer software, to avert the situation of Brazilian exports to the US being subjected to severe tariffs. See Beth Gaze, supra note 22 at 25 and 26. Additionally, Korea agreed to statutorily provide for the copyright protection of computer software. Ibid. at 26. Due to opposition from the US, Japan had to abandon its proposal in 1984 to draft a "sui generis scheme of protection for computer programmes in Japan." Instead Japan amended its Copyright Act in 1985 and 1986 to cover computer programmes and databases respectively. Ibid. at 24.

27 A report released in June 1988 by the Commission of the European Community, showed, inter alia, that the US imported relatively little software and that its "share of the world market amounted to at least 70%." An extract of this report is quoted in Beth Gaze. Ibid. at 23.

28 On this point, see Carlos M. Correa. supra note 14 at 23 and 24.
position as net importers of such technology, it was in the interests of developing
countries to restrict an extension of copyright protection to such technology, in order to
conserve the foreign exchange that they would have spent in paying royalties for their use
of such technology.29

The difficulty of applying copyright law to databases whether in electronic form30
or otherwise, centres on the fact that databases are a mixture of facts and the expression
or arrangement of those facts whilst copyright protects the expression of ideas rather than
the ideas themselves. By implication, the selection and arrangement of the information in
the database would be protected rather than the data itself. Thus a person who has
expended energy on compiling and presenting data could not prevent others from making
a compilation based on the information he or she obtained. However, there are arguments
in favour of protecting the data as well as its selection and arrangement.31

Prior to the TRIPS Agreement negotiations, there had been cases on the legal
protection for rights in data, such as the U.S. Supreme Court decision in the case of Feist
Publications, Inc., (Feist) v. Rural Telephone Service Company (Rural).32 The central
issue in the case was the extent to which copyright existed in a white page telephone
directory. In 1987 the Federal Court in Kansas ruled that Rural could have copyright in

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29 On this point, see Beth Gaze, supra note 22 at 24.
30 Online databases, videotext and teletext have been described as being the components of electronic
publishing. See Haines Gaffner, in Congressional Copyright and Technology Symposium, supra note 15 at
44. For the a discussion of the differences between electronic publishing and traditional print publishing,
see April M. Major, supra note 6 at 83. See earlier discussion in this section on new media and digital
works.
31 See NGL Report, supra note 9 at 41-42.
32 499 U.S. 340, (1991). For a comment on this case and on the applicability of copyright protection to data
and databases, see Paul Goldstein, supra Chapter 1 note 8 at 211-216. For a discussion of the copyright
requirement of originality as applied in this case, see Fred A. Rowley Jr., "Dynamic Copyright Law: Its
its white pages. The Supreme Court overturned this decision by holding that Rural had copyright only in the arrangement of the data in its white pages as opposed to the data itself. Further since Rural had not shown any originality in arranging the telephone numbers alphabetically, Rural did not have copyright in that arrangement.

The third challenge posed by technological development relates to the protection of works on the Internet. The Internet enables literary compositions and technological products such as computer software, to be instantaneously transmitted and distributed online from one country to another without physically crossing a country’s borders. Whilst the use of the Internet has greatly aided commercial activity, its use has created problems for the operation of copyright and the protection of intellectual property rights. The downloading of such works and subsequent reproduction, as the case may be, makes it virtually impossible for a copyright holder to exercise his or her exclusive right to control the reproduction of a work. The infringement of copyright is as "easy as pointing and clicking." The Internet poses several problems for the enforcement of copyright law such as the difficulty of locating infringers, jurisdictional issues, and the need for specialised training to deal with this issue.

33 Between 1981 and 1989 the number of host computers linked to the Internet rose from less than 300 to 90,000. By the end of 1996 approximately 35,000,000 computers accessed the Internet. The value of online commercial transactions on the Internet grew from $6,700,000 to $103,000,000 between 1994 and 1996. See David A. Gottardo "Commercialism and the Downfall of the Internet Self Governance: An Application of Antitrust Law" (1997) XVI The John Marshall J. Computer & Inf. L. 125 at 126.

34 April M. Major, supra note 6 at 76.

35 See David A. Gottardo, supra note 33 (examining the issue of the regulation of the Internet and enforcement mechanisms, with special reference to antitrust law); Steven R. Salbu, “Who Should Govern the Internet: Monitoring and Supporting a New Frontier” (1998) 11 Harv. J. L. & Technology; April M. Major, ibid. (discussing the adequacy of the present copyright law to address Internet issues and concluding
In the 1980s it became clear that technology was a great challenge for the traditional international copyright framework. The main issues were whether to include these new works under the intellectual property umbrella and, if so, the nature that the enforcement of rights in these works should take. Technological developments brought to the fore the need for new or improved enforcement mechanisms for the protection of intellectual property rights in general, and literary works in particular.\textsuperscript{36}

2.1.2: THE INCREASING IMPORTANCE OF INTELECTUAL PROPERTY TO INTERNATIONAL TRADE

This era has witnessed a change in the traditional components of international trading relations between countries, being trade in physical goods.\textsuperscript{37} The concept of trade, as traditionally known, has been expanded to embrace trade in services, in investment and in intellectual property.\textsuperscript{38}

The latter has gained increasing significance as a component of international trade and with this new status, intellectual property protection is regarded as an important trade

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\textsuperscript{36} See WIPO Introduction to the Basic Notions, \textit{supra} Chapter 1 note 65 at 11, commenting that: The Berne Convention contains very few provisions concerning enforcement of rights, but the evolution of new national and international enforcement standards has been dramatic in recent years, due to two principal factors. The first is the galloping advances in the technological means for creation and use (both authorized and unauthorized) of protected material, and in particular, digital technology, which makes it possible to transmit and make perfect copies of any “information” existing in digital form, including works protected by copyright, anywhere in the world.

\textsuperscript{37} “Present technological trends are blurring the traditional boundaries between economic sectors, extending space and time horizons and changing the nature of international trade. Traditional trade in goods, on which orthodox theory is based, is giving way to direct investment, trade in services, technology and the transfer of knowledge.” Paolo Bifani, “Intellectual Property Rights and International Trade” in \textit{UNCTAD, Uruguay Round: Papers on Selected Issues} (New York: United Nations, 1989)[hereinafter \textit{Uruguay Round Papers}] at 129.

\textsuperscript{38} See Paolo Bifani, \textit{ibid.}
and investment issue. Their potential to promote development is recognised by
developed and developing countries alike. However, a country requires adequate
legislation and infrastructure within and beyond its borders, in order to reap the rewards
of protecting intellectual property. Increasing levels of piracy and the lack of uniformity
in the protection and enforcement of intellectual property rights brought into question the
efficiency of the traditional international copyright regime. Piracy was a problem
experienced by both developed and developing nations, and the practice was not
restricted to literary works.

In the 1980s the US took the lead in adopting measures to eliminate piracy. For
instance, studies it conducted in the 1980s revealed inadequate intellectual property
protection in foreign countries. One such study was conducted by the United States
International Trade Commission (USITC) on 736 domestic companies and reported in

39 In the US, for example, between 1947 and 1986, the contribution of intellectual property goods to its
aggregate trade rose from 9.9% to 26.4%. See R. Michael Gadbaw and Timothy J. Richards,
In the 1980s intellectual property protection was "rapidly becoming one of the most critical trade and
investment issues of this decade and beyond." Harvey E. Bale, "Statement" in Intellectual Property and
Trade - Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice,
Committee of the Judiciary, United States House of Representatives, 99 Congress, 2nd Session, February
40 While intellectual property is primarily a western, developed nation concept...there is an understanding
in developing countries that intellectual property is a form of property which can be protected by law and
which can promote innovative activity." R. Michael Gadbaw and Timothy J. Richards, ibid. at 18.
41 On this point, see Harvey E. Bale, supra note 39 at 52.
42 As noted in Chapter 1, the Berne Convention 1971 and the UCC 1971 have few enforcement provisions.
43 Figures on the music industry in Nigeria for the period from 1989 to 1991 showed that 80% of the market
for sound recordings was made up of pirated works. It was also discovered that about 10% of the pirated
music was imported into Nigeria from the Far East. See the International Federation of the Phonographic
Industry (IFPI) - Nigerian Group, Piracy & Strategies to Combat Piracy - The Nigerian Experience (Paper
prepared by Keji Okunowo for the National Workshop on Copyright, 9-11 October, 1991 at Accra, Ghana)
[hereinafter IFPI Study on Nigeria] at 4. Nigeria is one of the countries in Africa with high levels of piracy.
"Out of the 23 million units of the pirate market in Africa, Nigeria alone has a total (amount in units) of
N11,815,000.00. Nigerian pirates are truly the 'Giants of African piracy.'" ibid.
February 1988.\textsuperscript{44} The companies that responded to the study expressed dissatisfaction with intellectual property protection in over 40 countries, most of which were developing ones.\textsuperscript{45} The companies reported having lost an estimated aggregate of $23.68 billion, or 2.7% of sales, in 1986 due to inadequate intellectual property protection.\textsuperscript{46} Of this amount, the computer and software industries accounted for 17% of the total worldwide losses.\textsuperscript{47} Eighty-four US companies regarded the copyright regimes of fifty-two countries as inadequate.\textsuperscript{48}

Piracy was regarded as a huge problem because of its negative effects on creativity and on national economic development.\textsuperscript{49} First, it affects local creativity for since authors and producers do not reap the full rewards of their innovations and investment, they lose the incentive to produce and finance the production of more works.\textsuperscript{50} Second, governments lose revenue from taxes they would have derived from the

\begin{flushleft}
\textsuperscript{45} See Robert M. Sherwood, \textit{ibid.} at 3 and 4.
\textsuperscript{46} See Alan S. Gutterman, \textit{supra} note 44 at 101.
\textsuperscript{47} See \textit{ibid}. Losses by other industries were in the following proportions: scientific and photographic goods (21%), electronics (10%), motor vehicles and parts (9%), entertainment (9%) and pharmaceuticals (8%). \textit{Ibid.}
\textsuperscript{48} "The most frequently reported countries included Taiwan, Brazil, Korea, Indonesia and Argentina." \textit{Ibid.} at 102.
\textsuperscript{49} For a discussion of the significance of piracy and of the differences between the policies of developed and developing countries with respect to piracy, see generally: Janet H. MacLaughlin, Timothy J. Richards, and Leigh A. Kenny, "The Economic Significance of Piracy" in R. Michael Gadbaw and Timothy J. Richards, eds., \textit{supra} note 39 at 88.
\textsuperscript{50} See IFPI Study on Nigeria, \textit{supra} note 43 at 2 and 3, commenting that: The pitch of the whole scenario is that while the individual musician depends on the recording company for payment of royalties, the recording companies in their [turns] depend on the market strength of the musical works in order to break even, make profit and re-invest in and develop creative talents. Thus creativity is a function of sale. Since only 5% of all records are bestsellers, the recording companies are sustained by the profit
\end{flushleft}
legitimate producers of intellectual property goods.\textsuperscript{51} Third, it results in a loss of sales and investment by companies in markets where their intellectual property goods are used and sold without authorisation.\textsuperscript{52} Finally, the local intellectual property industries lose sales at home due to the competition from intellectual property imports produced with their technical skill and knowledge, but without due compensation to them.\textsuperscript{53}

In the 1980s the US actively pursued a policy of increasing the level of intellectual property protection at the domestic and international levels. This policy was fueled by demands for more international protection from its intellectual property industries and by the studies that revealed the inadequate protection of US intellectual property products in foreign countries.\textsuperscript{54} In addition to urging that intellectual property rights form a part of the Uruguay Round of the GATT\textsuperscript{55} deliberations, the US adopted a series of unilateral and bilateral measures against what it saw as unfair trade practices.

\begin{quote}
from these bestsellers and they equally use the profit to discover, train, develop and encourage upcoming musicians. But unfortunately, it is at this stage that the pirate viciously attack. This is because pirates only reproduce the bestsellers thereby sharing the market with the legitimate company. Moreover, pirates are able to sell at comparatively cheaper prices (due to the lower cost of production if they can be said to be produce anything) thereby neutralising the business of developing creativity. Both for the individual musician and the recording company, investment of time and money into musical creativity becomes a worthless venture.
\end{quote}

\textsuperscript{51} See \textit{ibid.} at 3 (commenting that since both excise and sales tax depend on sales from the recording industry, a loss of sales for the industry will result in a loss of revenue for the government).

\textsuperscript{52} See Harvey E. Bale, \textit{supra} note 39 at 52 (commenting that inadequate intellectual property protection in foreign countries could have a threefold effect on the US trade: First, U.S. companies can lose sales and the value of investment in the market where the American patent, trademark or copyright is appropriated without authorization. Second, America can lose sales to third markets, when unauthorized products are sold in third countries. Finally, ...... U.S. companies may lose sales in our own country to imports which are made using American know-how without adequate compensation.

\textsuperscript{53} See \textit{ibid.}

\textsuperscript{54} Between 1984 - 1986, US companies increasingly complained to their government about trade losses due to inadequate international intellectual property protection. See \textit{ibid.} at 51.

\textsuperscript{55} See \textit{supra} Chapter 1 note 153.
Bilateral negotiations were entered into with three categories of countries: Japan, the Least Developed Countries (LDCs) and the Newly Industrialized Countries (NICs). The unilateral measures adopted by the US consisted of threats, by virtue of the "Special 301" and "Super 301" provisions of its Trade Acts and of promises. The US's use of Section 301 resulted in countries such as Korea, Taiwan and Singapore effecting changes to their intellectual property regimes. However, it created tension in its relations with some of its trading partners and threatened the operation of multilateralism under the GATT.

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58 See Robert P. Merges, supra note 56 at 24 (commenting on the US's use of threats and promises and commenting that these unilateral measures were a means of getting other countries to widen the scope of the protection of intellectual property).


60 See Steven R. Phillips, supra note 57 at 551 (commenting that Japan and Korea were resentful as to the US's section 301 measures); Alan O. Sykes, supra note 57 at 304 (commenting that despite the condemnations of the use of Section 301, its successes have shown that it plays an important role in US trade policy); Jagdish Bhagwati, The World Trading System at Risk (Princeton, New Jersey: Princeton University Press, 1991) at 48 (commenting on the threat that the US's aggressive unilateralism posed to multilateralism under the GATT); Steven R. Phillips, ibid. at 551 (advocating for caution in the use of the new Section 301 since its use can "cut down trade barriers and open markets, or it can torture United States trade relations and cause trade wars); and Jagdish Bhagwati, ibid. at 57 (commenting that the drawbacks
Thus, by the end of the 1980s, it was clear that there had been a new perception of the relationship between intellectual property and trade. It was evident that the US’s initiatives were an attempt to bring intellectual property and trade closer together. Due to the insistence of the US and other developed countries for increased intellectual property protection at the international level, intellectual property rights were included in the Uruguay Round discussions, despite opposition from developing countries such as India and Brazil. This development was evidence of the move to provide for trade and intellectual property in one international agreement, as opposed to the former situation where they were largely dealt with under separate international agreements.

The increasing importance of intellectual property as a component of international trade created the need to find a suitable enforcement mechanism to regulate the trade in copyright goods and reduce piracy. It also raised the issues whether intellectual property and trade should come under one agreement and, if so, the nature of the relationship that should exist between them.

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from the US’s aggressive unilateral measures, with particular reference to Section 301, call for some definition of the boundaries of these unilateral measures).


62 On this point, see WIPO Introduction to the Basic Notions, supra Chapter 1 note 65 at 11 (commenting that the second factor responsible for the development of new international enforcement standards “is the increasing economic significance of the movement of goods and services protected by intellectual property rights in the realm of international trade; simply put, trade in products embodying intellectual property rights is now a booming, worldwide business.” As discussed above, the other factor responsible for renewed interest in the enforcement of intellectual property rights was developments in technology. Ibid. this note.
2.1.3: GLOBALIZATION

In this section I give an overview of the concept of globalization by commenting on its characteristics and on its prevalence in this era, with emphasis on its effect on intellectual property rights.

The past few decades have witnessed several developments that are relevant to international copyright protection. At the regional level, there have been moves towards the establishment of a single European market, the negotiation of the NAFTA and the rising strength of the Asia Pacific Zone. Internationally, there has been the collapse of communism, the establishment of the World Trade Organization (WTO) and the increased mobility of goods, services, information and capital from one part of the globe to the other; that is, globalization.

Globalization is a term that has been used to describe the current political and economic system. It is a complex term that covers not only politics and economics, but also culture and the mobility of people. It has been described as “a coalescence of varied transnational processes and domestic structures, allowing the economy, politics, culture, and ideology of one country to penetrate another.” Globalization is not a new

63 The genesis of this idea came with the 1957 Treaty of Rome that created the European Economic Community (EEC). The EEC was expanded into the European Community (EC) in 1967. In 1985 the EC devised the idea of forming a single European market by December 31, 1992. See Hazel J. Johnson, Dispelling the Myth of Globalization: The Case for Regionalization (Westport, Connecticut: Praeger Publishers, 1991) at 60. She comments that the motivation to form this market came from the desire to form a strong regional trading bloc as opposed to it being an “initiative intended to globalize these markets.” Ibid. at 59.
64 See supra Chapter 1 at note 152.
65 The formation of the World Trade Organization was one of the results of the Uruguay Round of the GATT. See below at section 2.2.1.
66 James H. Mittelman, “The Dynamics of Globalization” in James H. Mittelman, ed., Globalization: Critical Reflections (London: Lynn Rienner Publishers, 1996) I at 3. Three points have been given as guides to understanding globalization. First, it is a phase in the development of capital which has resulted in
phenomenon in this world for there have been traces of world integration at various times in the history of the human race.67

One distinguishing feature of the present international trading system is that it is geared towards the establishment of a global economy, a global marketplace. This phenomenon has been attributed to a number of factors such as:

...the end of communism and the opening up of all markets to competition; the development of new rules on market access, as a consequence of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) and the establishment of the World Trade Organization (WTO); and the boom in the transmission of news and data in real time and in every corner of the globe, as a result of progress in television and information technology (from CNN to the Internet).68

A comparison of the 1970 and 1980s on the one hand and the 1990s on the other reveals a shift in the emphasis of international trade policy discussions. In the 1970s and 1980s an issue which dominated trade policy discussions, was that of commodity prices and how to help developing countries to improve on their export position.69 However, in

different peoples and societies being brought into one system. Second, "it is also a movement of capital involving a deepening of commodified forms of political and social integration." Third, "production can be transferred overseas to drive out competitors, and its frequent spatial relocation reduces impediments to the free movement of people and ideas." James H. Mittelman, "How Does Globalization Really Work?" in James H. Mittelman, ed., ibid. 229 at 230 and 231.

67 "This is not the first time we have experienced a truly global market. By many measures, the world economy was possibly even more integrated at the height of the gold standard in the late 19th century than it is now." Dani Rodrik, Has Globalization Gone Too Far? (Washington: Institute for International Economics, 1997) at 7. See also: James H. Mittelman, "How Does Globalization Really Work" in James H. Mittelman, ed., ibid. at 230.

the late 1980s and in the 1990s international trade discussions centred on how to open up markets and reduce obstacles to trade between nations.\(^{70}\)

In an ideal situation globalization is a means of achieving fairness in economic development. One feature of a global market is that of 'openness' in that there is the free flow of information, goods and services from one country to the other, making national boundaries and borders less relevant than they are today.\(^{71}\) Since globalization is based on free trade there should be little or no barriers to trade among countries in a global economy.\(^{72}\) Under this system of trade liberalism or free trade, countries and regions would be able to reap the full benefits of producing in areas in which they have comparative advantage, since investment in and trade flows to countries would be based on their individual comparative advantages.\(^{73}\) Thus, it is to be expected that the concept of regionalization would be eclipsed by the tenets of globalization to the benefit of all peoples.\(^{74}\)

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\(^{69}\) See Anne Weston, “Globalization-For Whose Good?” in Rowena Beamish and Clyde Sanger, eds., Canadian Development Report 1996 - 1997 (Ottawa: The North-South Institute, 1996) at 24.\(^{79}\)

\(^{70}\) Ibid. She comments further that whilst protectionism and structural adjustments were also key issues of the past two decades, presently "... the priority appears to be opening up markets in developing countries, as part of their structural adjustment, to stimulate economic growth." However, there are still questions as to what the pace of this liberalization should be. Ibid. at 25.

\(^{71}\) The concept of world global markets "... conjures up images of communications and exchanges of goods and services without regard to national boundaries." Hazel J. Johnson, supra note 63 at 1; James H. Mittelman. "How Does Globalization Really Work?" supra note 66 at 229 (commenting that whilst generally "globalization means that instantaneous telecommunications and modern transportation overcome the barriers between states and increase the range of interaction across international limits..." the full picture of globalization should include how it works and the direction in which it is going).

\(^{72}\) "As an ideology extolling the efficiency of free markets, globalization offers the prospect of an open world economy in which actors compete in a positive-sum game, wherein all players are supposed to win." James H. Mittelman, ibid. at 231.

\(^{73}\) See Hazel J. Johnson, supra note 63 at 1.

\(^{74}\) This is because in a true global economy there should not be the situation where regions with similar comparative advantages do not experience an equal amount of trade. See ibid. at 1. She comments that true globalization does not exist at present and that regionalization, rather than globalization, might be a better way to describe current trading patterns since the latter greatly influences economic activity. Ibid.
Globalization raises several issues for determination based on its operation and expected effects. These cover the role the state is to play, the fact that a reduction or fall in trade barriers make ecological problems more challenging, and the fact that globalization results in an increase in crime and drug trafficking and in the emergence of a new group of crime bosses.75 It has been suggested that a global economy could create tension for social stability in several ways. First, a reduction in barriers to investment and trade heightens the differences in the mobility of various groups in society.76 Second, it increases tension between countries with respect to “domestic norms and the social institutions that embody them.”77 Finally, in a globalized economy, governments will experience difficulties in providing “social insurance.”78

Globalization poses four main challenges to the protection of intellectual property rights. First, the opening up of and resultant greater access to foreign markets, which is one of the features of globalization, could serve as an incentive for the unauthorised production and reproduction of intellectual property goods.79 Thus a global market would facilitate the piracy of intellectual property goods. Second, a global economy heightens the already existing difficulties of protecting exports of intellectual property goods to

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76 See Dani Rodrik, supra note 67 at 4. He asserts that it would be easier for highly skilled workers and professionals to move to areas where there is a demand for these skills than it would be for unskilled and semi-skilled workers. Additionally, globalization makes the demand for the latter category more elastic since they can be more easily substituted with those in other countries. Ibid.
77 This occurs because as nations compete for the trade benefits resulting from globalization, they are forced to adopt policies that could change their domestic norms and practices. For example, some residents in the industrialized countries feel uneasy when there are pension cuts in Europe due to the Maastricht Treaty. See ibid. at 5.
78 Ibid. at 6.
countries and areas that are regarded as centres of piracy.\textsuperscript{80} An additional issue is how to protect national culture in a globalized economy and how to ensure that trade liberalization does not result in national cultures being dominated or exploited by nationals of other countries.\textsuperscript{81} This issue has special significance for copyright law as one of the primary ways of protecting culture.\textsuperscript{82} Finally is the fact that a global market could maintain the tension that has existed between countries at several times concerning the protection of intellectual property goods.

In view of the fact that peoples of the world are at different levels of cultural and economic development, it is evident that that there would be conflicting and varied reactions to the wisdom of having a globalized world policy.\textsuperscript{83} especially since national policies play a role in creating the framework in which globalization can operate. These

\textsuperscript{80} See James H. Mittelman, "How Does Globalization Really Work."
\textit{supra} note 66 at 236, commenting that:

\begin{quote}
The extension of the information economy makes protecting intellectual property more challenging, as evident in China, projected to be the world's largest market by 2010. Piracy of CDs, laser discs, books, and computer software spurs the export of black market products back to the United States and Canada, the loss of many thousands of jobs in the West, and conflict between the governments concerned over the issue of the enforcement of Western copyright in a country where the basic protection of intellectual property does not exist.
\end{quote}

\textsuperscript{81} As is already evident, free trade involves a reduction of trade barriers, and thus facilitates the free movement of culture across borders. The protection of culture is a matter of great concern as is evidenced by the fact that in July of this year a conference of several countries, excluding the US, was held in Canada to discuss how to protect culture in this era of globalization. The Canadian Minister for Culture, in an interview with C.B.C. Radio 1 on June 18, 1998, said that a country needs space for its culture to develop and the decision to exclude the US from the deliberations was partly because its culture has a dominant position in the world.

\textsuperscript{82} On this point, see the discussion on the relationship between copyright and culture, \textit{supra} Chapter 1 at section 1.7.

\textsuperscript{83} See Alberto Tita, \textit{supra} note 68 at 47 (commenting that the reactions to globalization are that of “faithful support and alarmed opposition”). Four types of responses to globalization have been identified. First is an “uncontested acceptance of globalization.” Second is those who have accepted liberal-economic globalization. Third is the corporate response to globalization. These three responses seek to accept globalization. The fourth response opposes and questions globalization. See James H. Mittelman, “How Does Globalization Really Work?,” \textit{supra} note 66 at 238-240. See also: Fantu Cheru, “New Social
conflicting reactions have been described as a clash between “neoliberal globalization” and “democratic globalization.”

Again no two countries have the same influence and impact on the globalization phenomenon. As to the phenomenon itself, there are different reactions to its emergence and spread even among the developing countries: while Asian countries such as Singapore and Korea have expressed their support for it, people in Africa have shown their aversion to it. It appears that Africa south of the Sahara has been the least affected by the move towards creating a global economy, partly because capital outflows to that region has whittled down considerably.

In short, globalization is a phenomenon that the world is still seeking to understand. Understanding it involves determining the advantages and disadvantages of global economic integration. In the event that all countries, developing and developed, would benefit from it, it would still have to be determined how best to implement a global economic policy so that its benefits are evenly distributed. Regardless of the outcome of this determination, some of the features of globalization are already in existence and the world has a challenge to tackle. It has been stated that:

84 James H. Mittelman, ibid. at 241. He describes neoliberal globalization as the “dominant force” and democratic globalization as “a far less coherent counterforce.”
85 On this point, see ibid.
86 On this point, see Hazel J. Johnson, supra note 63 at 110-115. She advised that Africa could develop more economically if there were regional cooperation as well as assistance from people of African descent in other parts of the world. Ibid. at 122 - 126. For a further discussion of Africa’s views on globalization, see Fantu Cheru, supra note 83 at 145 - 164. For the consequences of globalization on Third World Development, see Gary Gereffi, “The Elusive Last Lap in the Quest For Developed Country Status” in James H. Mittelman, ed., supra note 66 at 53 - 81.
87 On this point, see Alberto Tita, supra note 68 at 47.
the most serious challenge for the world economy in the years ahead lies in making globalization compatible with domestic social and political stability - or to put it even more directly, in ensuring that international economic integration does not contribute to domestic social disintegration.\footnote{88}

In sum, the main issue that a global market creates for policy makers in the intellectual property rights field is the form that the protection of intellectual property rights is to assume in a world in which the features of globalization are already evident.

2.1.4: CONCLUSION

The combined effect of trade, technological developments, and globalization on intellectual property has been the various challenges it has posed to the protection of intellectual property rights in general, and literary copyright in particular. Technological innovations have brought about new works, new forms of expressing traditional literary works, as well as new avenues for communicating them to the public. International trade brought to the fore the developed countries' desire to ensure the elimination of piracy, and to see the provision of stricter enforcement measures in the governing international agreements. The challenge from globalization has been how to maintain free trade and open markets, while enforcing strict rules on protection of intellectual property rights. This combined complexity required multilateral efforts to look for, \textit{inter alia}, the best means for tackling the interconnected issues raised by these developments for the protection of copyright.
2.2: THE MULTILATERAL RESPONSE

It has been seen that in the 1980s, unilateral and bilateral initiatives and technological and other developments created challenges to the traditional international copyright framework and highlighted some of its inadequacies and the need for its reform. Discussions in this field centred on two main issues: first, the nature of the reforms and, second, which international body was to be responsible for administering any agreement in this area. Subsequent developments witnessed efforts from the GATT and then WIPO to respond to the recent challenges to the traditional international copyright regime.

2.2.1: THE URUGUAY ROUND OF THE GATT

The Uruguay Round of the GATT gave countries an opportunity to deal with developments and weaknesses in the world-trading environment, which were apparent in the early 1980s.\(^8^9\) This included the fact that some countries dealt with trade-related issues on a bilateral basis out of the GATT framework and often to the detriment of the weaker trading nations, most of who were developing countries. This action threatened the operation of multilateralism.\(^9^0\) For developing countries, that period was a difficult one as it produced a lot of setbacks to their economic growth.\(^9^1\) The Uruguay Round gave

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\(^8^8\) Dani Rodrik, *supra* note 67 at 2.
\(^9^0\) See B.L. Das, “Introduction” in Uruguay Round Papers, *supra* note 37, xix at xx. He comments further that the “early 1980s have been a period in which a succession of developments in international trade has tended to negate the very idea of multilateralism. An ever-growing number of trade-related issues have been taken up on a bilateral basis, outside the framework of GATT, at the expense of weaker trading nations.” *Ibid.* at xix.
developed and developing countries a chance to gain due recognition for their respective economic policies in the international trading system.92

The agenda for the Uruguay Round of the GATT reflected the new conceptions and issues that were emerging in world economic relations, with respect to what constituted items of trade. It covered issues such as textiles and clothing, safeguards protection, agriculture and the operation of the GATT. The novel feature about the Uruguay Round was the inclusion in the negotiations of trade-related intellectual property issues. trade-related investment issues and issues concerning trade in services.93

On the intellectual property front, the Ministerial Declaration on the Uruguay Round (Punta del Este Declaration) provided for the development of a multilateral framework to deal with two main issues. First, it aimed at ensuring that the promotion and protection of intellectual property rights did not result in distortions, impediments and barriers to legitimate trade. Second, it sought to address trade in counterfeit goods, building on GATT's previous work in this area. These objectives were limited by the fact that the negotiations were not to prejudice any initiatives in this respect by WIPO or other bodies.94

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92 What developing countries required in the Uruguay Round was a "fuller recognition and integration of their development objectives in the system." K.K.S. Dadzie, supra note 89 at xvii.
93 See Ministerial Declaration on the Uruguay Round, 20 September, 1986 (Punta del Este), reprinted in Uruguay Round Papers, supra note 37 at 369-379 [hereinafter Punta del Este Declaration]. These diverse issues coupled with the different objectives of the countries at the negotiating table prolonged the Uruguay Round beyond its original deadline of 1990.
94 The full section on intellectual property rights was as follows:

In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual
This was not the first time that the GATT had been linked to intellectual property or that an attempt had been made to include intellectual property-related issues in a GATT Ministerial Declaration. GATT already contained articles on intellectual property and had overseen the negotiation of some agreements concerning intellectual property.\(^{95}\) Further, there had been previous unsuccessful attempts by the US in 1978 to have an Anti-Counterfeiting Code included in GATT Ministerial discussions.\(^ {96}\) Additionally, the Ministerial Declaration in 1982 included intellectual property rights and the origins of the section on intellectual property rights in the Punta del Este Declaration are linked to a section in the Ministerial Declaration in 1982 titled “Trade in Counterfeit Goods.”\(^ {97}\) Previously, however, GATT’s influence on the traditional intellectual property framework had been minimal, as compared to the scope of the mandate under the Punta del Este Declaration. This was one of the factors that resulted in conflict at the negotiating table.

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property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines.

Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT.

These negotiations shall be without prejudice to other complementary initiatives that may be taken in the World Intellectual Property Organization and elsewhere to deal with these matters.

See Punta del Este Declaration, ibid. at 376.

\(^{95}\) See Carlos A. P. Braga, “The Economics of Intellectual Property Rights and the GATT: A View From the South” (1989) 22 Vand. J. Transnat’l L. 243 at 247-250, commenting on the intellectual property consideration in GATT Articles IX, XX(d), XII:3(c) and XVIII:10. Some “instruments negotiated under GATT auspices, using GATT procedures and practices, took into account intellectual property rights-such as the 1958 recommendation on marks of origin, the Customs Valuation Code, and the Standards Code negotiated during the Tokyo Round.” ibid. this note at 247. For further comment on GATT Articles XX and IX, see Abdulqawi A. Yusuf, in Uruguay Round Papers, supra note 37 at 195-198.

\(^{96}\) See Carlos A. P. Braga, ibid. at 247-248.
2.2.1.1: THE NORTH/SOUTH DIVIDE

It has been seen\(^98\) that the mandate of the Punta del Este Declaration concerned the development of a framework to ensure that intellectual property rights did not create further barriers, distortions or impediments to international trade and to address trade in counterfeit goods without prejudice to any initiatives by WIPO or other bodies in this area. This mandate was to be a cause of tension between developed and developing countries, due to their respective approaches to the protection of intellectual property rights.

Traditionally, developed and developing countries have had a different conception of intellectual property rights and different objectives concerning the protection of these rights. Generally, it is the developed countries that have advocated greater protection of intellectual property rights. This policy is a result of intellectual property rights' potential to aid their economic growth, with respect to opening up new markets for technological products.\(^99\) and to the fact that they regard intellectual property as a type of "fundamental right comparable to rights in physical property."\(^100\)

More generally, the arguments in support of stronger protection of intellectual property have centred on the benefits to be derived from it. First, an efficient intellectual

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\(^97\) The section on "Trade in Counterfeit Goods" in the Ministerial Declaration of 1982, has been regarded by some commentators as a "milestone in the history of dealing with intellectual property rights within the GATT." \(Ibid.\) at 246.

\(^98\) \(Supra\) at section 2.2.1.

\(^99\) See Alan S. Gutterman, \(supra\) note 44 at 104, commenting that developed countries "with an existing stock of technological capabilities and a desire to penetrate new markets, generally seek enhanced protection for their technical assets in foreign markets."

\(^100\) R. Michael Gadbaw and Timothy J. Richards, "Introduction" in Global Consensus, \(supra\) note 39 at 2.
property regime should increase foreign direct investment (FDI) in domestic development and provide a favourable climate for technology transfer. In addition, it encourages research and development (R&D) in the domestic economy and should result in an increased flow of goods to developing countries. Finally, it will help to improve the “local knowledge base” since a strong intellectual property regime coupled with licensing and other agreements will boost local technical knowledge.

On the other hand, developing countries have regarded intellectual property protection as a matter of economic policy. Basically, the NIC/LDC countries view intellectual property “primarily as a matter of technology transfer, rather than of encouragement of innovation.” To developing countries whose development goals include promoting their economic growth and independence through measures such as having access to new technology at the lowest possible cost, stronger intellectual property

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101 Although this assertion is given as one of the benefits of a strong intellectual property regime, there is no consensus on the relationship between intellectual property rights and FDI. See United Nations Transnational Corporations and Management Division-Department of Economic and Social Development, Intellectual Property Rights and Foreign Direct Investment (New York: United Nations, 1993) [hereinafter IP and FDI] at 1. The following factors have been identified as playing a role in determining the relationship between intellectual property and FDI: “the overall economic development and the level of economic and technological development of the host country, ...the industries concerned and the nature and extent of their R&D, production and commercial activities; and the different types of IPRs available.” Ibid. this note at 5.

102 See Alan S. Gutterman, supra note 44 at 119-120 (commenting that whilst in the past companies exported mainly “older generation technology” to developing countries due to the latter’s inadequate intellectual property regime, it is expected that new technologies will be exported to developing countries once they strengthen the protection of intellectual property rights).

103 See ibid. See also: Carlos A. P. Braga, supra note 95 at 254-257.

104 A strong intellectual property regime is expected to encourage foreign intellectual property rights holders to promote and sell their works in developing countries. See Alan S. Gutterman, ibid.

105 Alan S. Gutterman, ibid. at 110. But see: Carlos A. P. Braga, supra note 95 at 254: The conventional reasons for intellectual property rights protection-to promote investments in research and development (R&D) and technological innovation, and to encourage the disclosure of new information-are not enough to make an economic case for the adoption of intellectual property rights.


107 Robert P. Merges, supra note 56 at 244.
laws may not necessarily be a means to achieving these goals. They are generally suspicious of developed countries' efforts to achieve higher standards of intellectual protection since they regard such moves as a way of further enriching the developed countries at the expense of their industrial and economic development. Further, they are resistant to having to pursue intellectual property policies based on a global intellectual property regime tailored to the needs of developed countries. In their opinion, their needs and levels of development should determine their respective intellectual property regimes. Whilst they recognise that strong domestic intellectual property protection can aid domestic innovation and creativity, they are concerned with the acquisition of foreign technological products, vital to their economic and national development.

The division between 'north and south' at the Uruguay Round could be regarded as a reflection of their levels of development and development goals. On the intellectual property front the division centred on 3 main issues. First was the interpretation of the extent of the mandate of the Punta del Este Declaration. The second issue concerned which international body was to be charged with implementing the decisions arrived at in furtherance of the mandate. Finally, there were procedural questions such as the pace of

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108 See Alan S. Gutterman, supra note 44 at 104; R. Michael Gadbaw and Timothy J. Richards, "Introduction" in Global Consensus, supra note 39 at 2; Robert P. Merges, ibid. at 244.
109 See Robert M. Sherwood, supra Chapter 1 note 168 at 1-2.
110 Countries such as India have voiced their dissatisfaction with not being given the autonomy to determine the intellectual property regime suitable for their needs. See Alan S. Gutterman, supra note 44 at 123.
111 See also the discussion on the copyright needs of developing countries, supra Chapter 1 at section 1.4.
the negotiations on trade-related aspects of intellectual property rights, including trade in counterfeit goods, the TRIPS negotiations.\(^{112}\)

With respect to the first two issues, there was disagreement on whether the Negotiating Group’s mandate permitted it “to elaborate new substantive rules and disciplines relating to the protection and enforcement of intellectual property rights.”\(^{113}\) The developing countries were of the opinion that the mandate did not. Their view was based on the fact that since the GATT was concerned with trade liberalization it was not competent to handle an issue that traditionally fell within WIPO’s domain. To them, the Negotiating Group’s consideration of GATT rules and procedures was to be limited to preventing distortions in international trade caused by intellectual property regimes.\(^{114}\) Developing countries such as India and Brazil expressed the view that WIPO, as opposed to GATT, was the proper body to deal with intellectual property protection.\(^{115}\) On the third issue, the developing countries felt that if their objections with respect to the Uruguay Round discussions were not heeded, then intellectual property discussions were not, as a matter of procedure, to be concluded more quickly than any other GATT negotiations.\(^{116}\) Further, countries such as India urged that some concessions be made in favour of developing countries.\(^{117}\)

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\(^{112}\) See Carlos A.P. Braga, *supra* note 95 at 251.

\(^{113}\) Abdulqawi A. Yusuf, *supra* note 95 at 186.

\(^{114}\) See *ibid*.

\(^{115}\) See Robert M. Sherwood, *supra* Chapter I note 168 at 5.

\(^{116}\) Brazil, in particular, adopted this position, see Timothy J. Richards, “Brazil” in Global Consensus, *supra* note 39 at 184.

\(^{117}\) These concessions included brief periods for patent protection. On this point, see Robert M. Sherwood, *supra* Chapter I note 168 at 5.
The developed countries were of the view that GATT had been given the authority to elaborate minimum standards for and to enforce intellectual property rights. In their opinion, GATT, as opposed to WIPO, was the proper body to deal with the matter. In the first place, unlike the GATT, WIPO did not have a dispute settlement mechanism in place. They regarded an ineffective intellectual property regime as a barrier to trade and wanted this issue to be addressed under the GATT. Second, past intellectual property agreements negotiated under WIPO's auspices did not have strong enforcement provisions. Third, WIPO was not viewed as an appropriate forum for advocating stronger intellectual property protection because it was governed by majority vote and the majority of its members were developing countries. With respect to the TRIPS negotiations, the US, in particular, wished for intellectual property discussions to be completed at the earliest opportunity.

Thus the TRIPS negotiations were essentially concerned with resolving three main issues: the nature of the standards of protection of intellectual property rights; the "timing of the economic impact of the results" and which institution was to be responsible for overseeing the implementation of TRIPS.

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118 See Abdulqawi A. Yusuf, supra note 95 at 187. For a comment on the policies of developed countries at the Uruguay Round, see ibid. at 187-190.
119 See Robert M. Sherwood, supra Chapter 1 note 168 at 5. See also: Robert M. Merges, supra note 56 at 240 (commenting that one of the developed countries complaints was that WIPO was influenced in its operations by the LDCs "whose ideological and economic objections to increased intellectual property protection hampered WIPO's ability to implement broader protection").
120 See Carlos A.P. Braga, supra note 95 at 25 note 38.
121 See Alan S. Gutterman, supra note 44 at 110 (on the status report issued in November 1991, by the Trade Negotiations Committee of the GATT Secretariat). The issues to be resolved in the copyright area included protecting computer programmes and providing for rental rights.
122 Alan S. Gutterman, ibid.
In addition to the north/south conflict, there were differences in opinion among the developed nations concerning issues such as the inclusion of new works in the copyright area. Though they were in general agreement on the protection of computer software, they differed on the extent of protection of computer software and other new works. For example, whilst the European nations were against interfaces and computer databases being included in the list of protected works, the US sought the extension of protection to databases whether in machine readable form or otherwise which could qualify as intellectual creations. Japan's policy in this area was to recognise the protection of computer software, but to exclude "any programming language, rule or algorithm used for making such works." 

The conclusion of the Uruguay Round of international trade negotiations marked an important turning point in the history of intellectual property and in world trading relations. The end of the Round demonstrated that some measure of success had been achieved in satisfying the divergent needs of the north and the south. It represented a compromise between and some recognition of the north/south as well as the north/north policies. The view has been expressed that the results of the Uruguay Round were more in the favour of the developed, as opposed to, the developing countries.

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123 Ibid.
124 See Doris E. Long, supra Chapter 1 note 6 at 156. See also the discussion on the argument against applying copyright law to computer software and databases, supra at section 2.1.1.
125 Quoted in Doris E. Long, ibid.
126 On the compromise arrived at in the area of computer software vis the divergent views of the developed countries, see ibid. at 156.
However, the conclusion of the TRIPS Agreement brought a new era into the intellectual property area, being an experiment in the merger of intellectual property and trade.\textsuperscript{128}

2.2.1.2: THE TRIPS AGREEMENT

The motivation of the TRIPS Agreement is to:

- reduce distortions and impediments to international trade, taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not in themselves become barriers to legitimate trade.\textsuperscript{129}

The TRIPS Agreement is based on the principles of national treatment and the Most-Favoured-Nation treatment.\textsuperscript{130} Like the Berne Convention and the UCC, it sets minimum standards for compliance by Member States. The TRIPS Agreement is binding on members of the WTO and takes the Berne Convention 1971 as the starting point for its treatment of intellectual property rights.

An examination of the TRIPS Agreement shows that the relationship between the TRIPS Agreement and the Berne Convention is in four parts. First, the TRIPS Agreement incorporates Articles 1-21, excluding Article 6bis and any rights flowing from it, and

\textsuperscript{127} See Kevin Watkins, “GATT: A Victory for the North” (1994) 59 Review of African Political Economy 60. “The Uruguay Round agreement will allow the US and other industrial countries to continue their trade war against developing countries by diplomatic means.” \textit{Ibid.} at 64.

\textsuperscript{128} The TRIPS Agreement is discussed in greater detail below at section 2.2.1.2.

\textsuperscript{129} The TRIPS Agreement, \textit{supra} Chapter 1 note 153 at the Preamble.

\textsuperscript{130} \textit{Ibid.} at Article 3 provides that Member States are to protect works of foreign nationals to the same extent as they protect those of their own nationals, subject to the exceptions in the relevant intellectual property convention. Article 4, on the Most – Favoured - Nation - Treatment, provides that subject to some specified exceptions, any privilege or benefit granted by one Member country to the national of another shall be enjoyed by nationals of all the Member countries.
incorporates the Appendix of the Berne Convention 1971. Unlike the Berne Convention 1971, the TRIPS Agreement specifically provides that such protection covers the expression of ideas rather than the ideas themselves. It has been suggested that although the Berne Convention 1971 did not have this express provision, it can be implied that the position under the Berne Convention 1971 is not different from that of the TRIPS Agreement. The TRIPS Agreement thus incorporates the substantive provisions of the Berne Convention 1971, with the exclusion of the provisions on moral rights in Article 6bis of the Berne Convention 1971. It is probable that the TRIPS Agreement excludes other provisions of the Berne Convention 1971 which have the spirit of Article 6bis of the Berne Convention 1971. The observation has been made that by the incorporation of the relevant Articles into a trade agreement, TRIPS, "the drafters necessarily tinctured Berne-in-TRIPS with a trade hue." Consequently, in the

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131 Ibid. at Article 9(1) which provides that "Members shall comply with Articles 1-21 and the Appendix of the Berne Convention (1971). However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom."

132 Ibid. at Article 9(2) provides that "Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such."

133 See World Intellectual Property Organization, Implications of the TRIPS Agreement on Treaties Administered by WIPO, 1996 (reprinted in 1997) WIPO Publication No. 464(E) [hereinafter Implications of TRIPS] at 25 (commenting that on the basis of the legislative history of the Berne Convention and because the Berne Convention protects works as opposed to ideas, then these TRIPS provisions have been applied by the Berne Convention).

134 See ibid. at 15 (on the view that Articles 10(3) (indicating that with respect to the "free uses" of works in Articles 10(1) and (2) "mention shall be made of the source, and of the name of the author if it appears thereon"): Article IV (3) of the Appendix to the Berne Convention (specifying that the author's name and the title of the work should be indicated on all copies or reproductions of works done by virtue of the licence provided for in Article II and Article III); and Article 11bis(2) (stating that although national legislation would determine an author's exercise of broadcasting and related rights under Article 11bis(1), the determination must "not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority") may necessarily be excluded from the TRIPS Agreement).

135 See Neil W. Netanel, "The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement" (1997) 37 Va. of Int'l L. 441 at 453 (commenting that since under the cardinal rule of treaty interpretation as set out in Article 31(1) of the Vienna Convention on the Law of Treaties, a treaty is to be
interpretation of the TRIPS Agreement, the Berne Convention Articles incorporated into the TRIPS Agreement could have a meaning different from what they have in the Berne Convention. This view would appear to be a plausible one since the aim of an agreement should affect the interpretation of it.\textsuperscript{136} Thus by regarding intellectual property products as goods in the international trade regime, it is possible that TRIPS would favour the interpretation of these provisions that lean towards regarding literary works as objects of trade than as tools to promote education and learning.

It is worthy of mention that WTO members who are not part of the Berne Union are bound by the substantive provisions of the Berne Convention 1971 with the exception of the provisions on moral rights. By implication, this exclusion does not apply to WTO members who are party to the Berne Convention.

Second, TRIPS makes additions to the Berne Convention 1971 by providing that computer programmes are to be protected as literary works under the Berne Convention.\textsuperscript{137} Additionally, Article 2(2) of the TRIPS Agreement provides that “Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under ... the Berne Convention...”\textsuperscript{138} The import of this Article is that the TRIPS Agreement is not to replace or limit the rights provided under

\begin{footnotesize}
\textsuperscript{136} The TRIPS Agreement has a trade focus (see the Preamble to the TRIPS Agreement), which is absent in the Berne Convention 1971. The Preamble to the Berne Convention 1971 mentions the need to protect the rights of authors in their literary and artistic works.

\textsuperscript{137} TRIPS, supra Chapter I note 153 at Article 10. This is discussed in greater detail below in this section.

\textsuperscript{138} Parts I to IV of the TRIPS Agreement deal with the following: General Provisions and Basic Principles; Standards Concerning the Availability, Scope and Use of Intellectual Property Rights; Enforcement of
the Berne Convention.\textsuperscript{139} Finally, the TRIPS Agreement could constitute a special agreement within the meaning of Article 20 of the Berne Convention 1971 for members of the Berne Union who are WTO members and hence are bound by the TRIPS Agreement.\textsuperscript{140}

The copyright provisions of the TRIPS Agreement fall into two categories: the Berne Convention provisions incorporated into the TRIPS Agreement, and the other TRIPS provisions. The TRIPS Agreement extends the scope of the protection of copyright\textsuperscript{141} in literary works. Article 10 of the TRIPS provides:

\begin{enumerate}
\item Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).
\item Compilations of data or other material, whether in machine readable or other form, which by the reason of the selection of arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or the material itself, shall be without prejudice to any copyright subsisting in the data or material itself.
\end{enumerate}

The provisions on computer programmes and compilations of data were a compromise between the divergent views of the developed countries on this issue\textsuperscript{142}.

Additionally, the TRIPS Agreement recognises a right of rental in computer programmes, phonograms and cinematographic works, subject to some qualifications\textsuperscript{143}.

\textsuperscript{139} See WIPO Recent Developments Concerning Enforcement, \textit{supra} Chapter 1 note 118 at 4 (commenting that this is an important safeguard clause since without it there might be the impression that the TRIPS Agreement is granting a lower level of protection with regards to issues such as limiting rights, than is provided for under the Berne and other intellectual property conventions).

\textsuperscript{140} See \textit{supra} Chapter 1 at section 1.5. for the import of Article 20 of the Berne Convention 1971.

\textsuperscript{141} With respect to copyright protection, TRIPS Article 1(2) relates the use of intellectual property in the TRIPS Agreement to the subject of Sections 1 to 7 of Part II of the TRIPS Agreement. Copyright protection is provided for under Section 1 of Part II.

\textsuperscript{142} See Doris E. Long, \textit{supra} Chapter 1 note 6 at 156.
The recognition of the right of rental is an innovation in the international protection of intellectual property rights. Further, TRIPS protects the rights of performers, producers of phonograms and broadcasting organisations.

The TRIPS provisions on computer programmes have several implications for the Berne Union. First, they clarify that a computer programme would qualify as a literary work "whatever may be the mode or form of its expression" under the Berne Convention 1971. Second, they extend the scope of the "free uses" of works to computer programmes. The TRIPS Agreement also "allows the reverse engineering of computer programs by honest avenues." Finally, the fact that TRIPS incorporates the relevant parts of the Berne Convention 1971 means that WTO members have an obligation to protect computer programmes as literary works regardless of whether they are part of the Berne Union. Thus the TRIPS Agreement can be regarded as having 'created' a new type of literary work for protection under international copyright law.

Unlike the Berne Convention and the UCC, the TRIPS Agreement contains elaborate provisions on the enforcement of intellectual property rights so as to overcome the

143 TRIPS, supra Chapter 1 note 153 at Articles 11 and 14(4). These qualifications are that with respect to cinematographic works, this right shall not apply if there has been copying to the extent that the exclusive right of reproduction is impaired. In the case of computer programmes, "this obligation does not apply to rentals where the program itself is not the essential object of the rental." Ibid.
144 See WIPO, Implications of TRIPS, supra note 133 at 19.
145 TRIPS, supra Chapter 1 note 153 at Article 14.
146 See supra Chapter 1 at section 1.5, for the discussion on Article 2(1) of the Berne Convention 1971.
148 Ibid. at 40.
weaknesses of the pre-TRIPS international intellectual property regime. The enforcement provisions of the TRIPS Agreement "constitute the first time in any area of international law that such rules on domestic enforcement procedures and remedies have been negotiated." These obligations fall under five heads: General Obligations, Civil and Administrative Procedures and Remedies, Provisional Measures, Special Requirements Related to Border Measures and Criminal Procedures. It has been suggested that other TRIPS Articles have some bearing on these enforcement provisions.

The import of Article 41(5) has been the subject of some discussion. In its own terms, it provides as follows:

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149 For the weaknesses of the traditional international copyright regime, see supra Chapter 1 at section 1.5.1.4.
150 Adrian Otten and Hannu Wager. supra Chapter 1 note 117 at 403.
151 TRIPS, supra Chapter 1 note 153 at Article 41. This Article puts Members under an obligation to give effect to the TRIPS enforcement provisions under their national laws.
152 Ibid. at Articles 42-49. Article 42 puts Members under an obligation to give "right holders" access to civil judicial procedures. Under Article 44, judicial authorities are given the authority to prevent infringements such as imported infringing goods from entering the "channels of commerce" in their jurisdiction, immediately after these goods have obtained customs clearance. There is no parallel provision on TRIPS Articles 42-49 in the treaties administered by WIPO. See WIPO. Implications of TRIPS, supra note 133 at 59.
153 TRIPS. Ibid. at Article 50. Under this Article judicial authorities can order prompt and effective provisional measures in two situations: first, in order to prevent an infringement and, second, to preserve relevant evidence regarding an infringement.
154 Ibid. at Articles 51-60. These Articles deal with the circumstances under which customs authorities can detain or suspend the release of infringing goods. Pirated copyright goods have been defined as follows: pirated copyright goods shall mean any goods which are copies made without the consent of the right holder or person duly authorized by him in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or related right under the law of the country of importation.
155 Ibid. at note 14.
156 Ibid. at Article 61. Under this Article Members are to provide for the application of criminal procedures and penalties "at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale."
157 TRIPS Articles 62, 64 and 69 may have some bearing on the TRIPS enforcement provisions. See J.H. Reichman. Enforcing TRIPS. supra Chapter 1 note 117 at 343-344.
It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of laws in general, nor does it affect the capacity of Members to enforce their laws in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of laws in general.

Article 41(5) can be interpreted to mean that intellectual property rights should not be given preferential treatment in the judicial systems of Member countries, but should be accommodated within the judicial structure in those countries. It has been suggested that this Article contradicts the spirit of Article 41 and could weaken the force of Member states’ obligations to implement the TRIPS Agreement. A Member state accused of non-compliance could argue that since it does not have a duty to set in place a separate mechanism for the enforcement of intellectual property rights, it handled the issue to the best of its ability, in view of its resources.

The dispute settlement provisions in the TRIPS Agreement do not raise the possibility of disputes being brought before the ICJ, as had been the case under the traditional international copyright agreements. The TRIPS Agreement provides for the GATT (WTO) dispute settlement mechanism to be used to resolve intellectual property disputes under TRIPS. One issue that will need some resolution is the respective jurisdiction of these two bodies.

The TRIPS Agreement seeks to make the implementation easier for the different categories of countries (developing, least-developed, those with "transitional economies")

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157 See *ibid.* at 340-341.
158 It has been seen that both the Berne Convention 1971 and the UCC 1971 provided that disputes could be brought before the ICJ. See above discussion at Chapter 1 section 1.5.
and developed countries) by providing for transitional periods within which they are to implement it. These provisions enable developing countries to postpone the application of TRIPS, with the exception of the provisions on national treatment and Most-Favoured-Nation-Treatment, until January 1, 2000 and for an additional period of 5 years, with respect to product patents. Least-developed countries also have the option of postponing the implementation of TRIPS, excluding the provisions on national treatment and Most-Favoured-Nation-Treatment until January 1, 2006. A member country that does not fall in these two categories and is in the process of transformation from a centrally-planned into a market, free-enterprise economy and which is undertaking structural reform of its intellectual property system and facing special problems in the preparation and implementation of intellectual property law and regulations may delay the implementation of TRIPS until 1 January, 2000. This delay does not apply to the two principles of national treatment and Most-Favoured-Nation-Treatment. The last category includes those Members that have to implement TRIPS as from 1 January, 1996. In order to help developing and least – developed countries to comply with TRIPS, the TRIPS Agreement provides for developed countries to assist these two categories of countries technically and financially.

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159 TRIPS, supra Chapter 1 note 153 at Article 64. For a further discussion on the dispute settlement mechanism, see Rochelle C. Dreyfuss and Andreas O. Lowenfeld, “Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together” (1997) Va. J. Intl L 275.
160 TRIPS, ibid. at Article 65. This provision is qualified by Article 5, to the effect that Articles 3 and 4 do not apply to WIPO agreements on intellectual property.
161 Ibid. at Article 66.
162 Ibid. at Article 65(3).
163 Generally, developed countries fall into this category.
164 TRIPS, supra Chapter 1 note 153 at Article 67. This Article provides:

In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreeable terms and conditions, technical and financial
There are various issues for consideration concerning the success of the TRIPS Agreement. First is the effect of the TRIPS provisions on border measures. Although these provisions operate as a "safety net in the event that enforcement at the source has not taken place," they place a greater duty on Member countries to repress imports than to repress exports of infringing goods. Under Article 51, Members are obliged to prevent pirated copyright goods from being imported into a country. However, with respect to the export of infringing copyright goods, the Article only provides that Members may have a corresponding duty to prevent pirated copyright goods from being exported from their countries. It has been stated that "critics deplore that the WTO member states are not obliged to use border controls to repress exports of counterfeit goods." It would have been advisable if the duty to prevent the piracy of intellectual property goods were shared equally by Member states, irrespective of whether they are importing or exporting goods.

Second is the cost of enforcing intellectual property rights, in accordance with TRIPS. Member countries are required to set in place a strong enforcement mechanism, which includes effective border controls. This necessitates the establishment of an efficient customs and police service, an effective judicial service and a good monitoring cooperation in favour of developing and least – developed country Members. Such cooperation shall include assistance in the preparation of domestic legislation on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.

165 Adrian Otten and Hannu Wager, supra Chapter 1 note 117 at 405.
166 J.H. Reichman, Enforcing TRIPS, supra Chapter 1 note 117 at 343 note 35.
mechanism. The cost of implementing these provisions may be burdensome to developing and least-developed countries. It is hoped that the implementation of the TRIPS Agreement would not result in a trade war between the 'haves' and the 'have nots.'

Third, developing and least-developed countries are net importers of information and technology. By affording foreign works the high level of protection that the TRIPS Agreement requires, before their domestic industries are able to attain a relatively high level of development, developing and least-developed countries may be stunting the growth of their industries.

Fourth is that TRIPS does not effectively address the challenges created by digital technology and technological products. TRIPS does not define a computer programme.

In view of the technical components of these programmes, it would have been advisable if TRIPS had provided some definition apart from stating that the source and object codes in these programmes should be protected under copyright. It would then appear that domestic legislation is to determine its own definition for computer

April 14, 1997. (Both documents were prepared by Pat Phillips for the WIPO National Seminar on Copyright and Neighboring Rights For Law Enforcement Agencies, organised by the World Intellectual Property Organization in cooperation with the Government of the Republic of Ghana at Accra, May 26 and 27, 1997).

168 On this point, see Rochelle C. Dreyfuss and Andreas F. Lowenfeld, supra note 159 at 282 (commenting that since one of the objectives behind the TRIPS Agreement was to make developing countries set in place a more efficient enforcement mechanism, it is to be expected that a great amount of the WTO litigation will be between developed countries as complainants and developing countries as respondents).

169 On this point, see ibid. at 302 and 303.

170 See UNCTAD, TRIPS and Developing Countries. supra note 147 at 40, commenting that TRIPS: does not define, however, the eligibility criteria that members must apply to computer programmes, nor apart from a generalized exclusion of "ideas, procedures, methods of operation or mathematical concepts as such" (Article 9.2), does the Agreement concern itself with the scope of copyright protection for this subject matter. Meanwhile, the
programmes. Obviously, differences in the definition of computer programme may affect the protection of rights in those programmes because countries may provide for the protection of different elements of a computer programme. Further, the nature of the TRIPS enforcement provisions, especially those on border controls are more suited to physical goods than to electronic works. It is granted that these border measures are applicable to new works contained in a physical object. For example, they are applicable to packaged computer software. The trade in “packaged software” is a booming one and in 1994 the global market for it “was estimated at US $78.8 billion of which the 22 OECD countries accounted for 94%.”

However, infringements of copyright in computer software have occurred as a result of people downloading the software from the Internet.

It is surprising that in such a recent agreement, the elaborate enforcement provisions are not more geared towards the digital environment. This omission is surprising considering the fact that the TRIPS Agreement is a trade one and at present electronic commerce and transactions using digital content are becoming the order of the day. It has been stated that “the principle [sic] weakness of the TRIPS Agreement is its back-ward looking character,” which “stems from the drafters’ technical inability and political reluctance to address the problems facing innovators and investors at work on important new technologies in an Age of Information.”

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software industry keeps evolving at a rapid pace, as does litigation in some countries concerning copyright protection.

171 Ibid. at 39.
The fifth issue for consideration is the exclusion of moral rights from the TRIPS Agreement. Moral rights are an important component of the protection of copyright and violations of such rights have been the subject of some court cases in Europe and in Canada. One would therefore wonder at the 'wisdom' of the drafters of the TRIPS Agreement in excluding moral rights from the TRIPS Agreement. It might be difficult to assess the effect the lack of the application of the TRIPS enforcement provisions to moral rights might have on trade in literary works. However, the fact that there might be a difficulty in quantifying the effect in money terms does not warrant the exclusion. The injunctions that the TRIPS Agreement makes provision for could easily have been applied to moral rights to prevent people from violating this aspect of a copyright holder's interest in his or her work. This exclusion of moral rights:

which are a central component of Berne qua Berne, alters the chemistry of the remaining provisions, underscoring their protection of copyright owners' economic interests and greatly diminishing their concern for authors' personal interest in determining the manner in which authors' expression is communicated to the public.  

Further, moral rights violations probably hold more significance for digital than for non-digital works because of the ease with which digital works can be altered and copied. A study on new media and copyright sees moral rights as becoming more significant in new as opposed to non-digital works. Taking the moral right of integrity, for example, "digital technology facilitates the mutilation, destruction or modification of an existing

173 One such case is the Canadian case of Snow v. The Eaton Centre Ltd., et al. (1982), 70 C.P.R. (2d) 105. Although this case was on artistic works, it illustrates the importance of moral rights to creators of works.
174 Neil W. Netanel, supra note 135 at 453 note 44.
175 See NGL Report, supra note 9 at 1.
work, which in turn can prejudice an artist’s reputation."\textsuperscript{176} Thus, the TRIPS Agreement, by ignoring this aspect, has weakened its ability to handle these challenges of digitization to the detriment of authors of written works in digital form. It might be argued that the Berne Union already recognises moral rights. However, since the TRIPS Agreement and the Berne Convention 1971 do not have identical membership provisions, it is possible that countries who are party to TRIPS and not to the Berne Convention 1971 would not protect moral rights. This possibility could create complications in the protection of intellectual property rights.

A sixth issue arises from intellectual property being brought more firmly under the GATT (WTO). This system has traditionally favoured free trade whilst the intellectual property regime has been based on protection. Though the differences between the two systems “may turn out to be mere semantics,” words have persuasive power both in “the world of diplomacy and the world of reasoned decision making.”\textsuperscript{177} Further, intellectual property rights have a history and objectives distinct from those of international trade. It has been stated that “Copyright ... does not serve merely to foster economic advantage. It also undergirds a system of cultural, artistic, and political expression.”\textsuperscript{178} It remains to be seen how intellectual property will survive and operate under a trade agreement monitored by a regime, the WTO, that does not favour protection and has different aims from the World Intellectual Property Organization (WIPO), which has traditionally handled intellectual property issues. In light of this, the increasing cooperation between

\textsuperscript{176} \textit{ibid.} at ii.
\textsuperscript{177} Rochelle C. Dreyfuss and Andreas F. Lowenfeld, \textit{supra} note 159 at 280 and 281.
\textsuperscript{178} Neil W. Netanel, \textit{supra} note 135 at 457.
WIPO and the WTO\textsuperscript{179} could bridge the gap between their perspectives on intellectual property rights.

However, it is clear that TRIPS is an attempt to tackle the challenges confronting the traditional international intellectual property regime. As seen, TRIPS recognised rights in new technologies and sought to eliminate piracy in those and in the traditional types of works. Further, TRIPS is evidence of the increasing importance of intellectual property rights to trade. With respect to the challenge of globalization, the fact that TRIPS aims to reduce barriers to trade, or to open up markets, can be seen as being in line with the tenets of a globalized economy.

Ultimately the effectiveness of TRIPS depends on the views of Member countries concerning the benefits of and their success in implementing it. As subsequent events have shown, piracy did not stop with the negotiation of TRIPS. Figures on the US show that in 1994 its computer software industry lost $9.894 million due to piracy.\textsuperscript{180} Additionally, a Price Waterhouse Study on software piracy in Western Europe shows that a reduction in piracy levels from 52% to 35% by the year 2000, would create 87,000 new jobs in Europe and create new tax revenues of $2.3 billion.\textsuperscript{181} Thus it became clear that there was still the need for a greater protection of intellectual property rights.

\textsuperscript{179} See infra at section 2.2.2.
2.2.2: WIPO

Notwithstanding the presence of the WTO as another multilateral organisation in the intellectual property arena and the negotiation of the TRIPS Agreement, WIPO still plays an important role in the protection of intellectual property rights. One of its activities in this decade has been the drawing up of the WIPO Copyright Treaty (WCT).

2.2.2.1: THE WCT

Under the auspices of WIPO, a diplomatic conference was held in Geneva in December 1996. Two products of this conference are the WCT and the Agreed Statements Concerning the WIPO Copyright Treaty (Agreed Statements). Membership under the WCT is open to three categories of entities: member states of WIPO, a competent intergovernmental organization and the European Community. The WCT provides under Article 20 that it shall enter into force after 30 instruments of ratification or accession by states have been deposited with the Director General of WIPO. Once it comes into force it shall be binding on those 30 states from that date; on other states, the European Community and competent inter-governmental organizations three months after they deposit their instruments of accession with the Director General of WIPO.

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181 Ibid. at 572.
183 WCT, ibid. at Article 17.
184 Ibid. at Article 20.
185 Ibid. at Article 21. By 8 March, 1998 the WCT had been signed by 51 countries and ratified only by Indonesia. As at the time of writing this work, WCT has been signed by 51 countries and ratified by Indonesia, Belarus, Kyrgyzstan and the Republic of Moldova. For a list of signatories and countries who
With respect to the relationship between the WCT and the Berne Convention 1971, WCT provides that it is a special agreement within the meaning of Article 20 of the Berne Convention, with regards to the Contracting Parties that are countries of the Berne Union.\(^\text{186}\) As with the TRIPS Agreement, reference to the Berne Convention is to be construed as reference to the Paris Act of July 24, 1971.\(^\text{187}\) Further, the WCT incorporates Articles 1 - 21 and the Appendix of the Berne Convention 1971.\(^\text{188}\) Thus, unlike the TRIPS Agreement, WCT does not exclude the moral rights of the Berne Convention 1971. Additionally, the WCT is not to "derogate from existing obligations that Contracting Parties have to each other under the Berne Convention."\(^\text{189}\) With reference to the Vienna Convention on the Law of Treaties, the WCT and the Agreed Statements could constitute subsequent agreements and subsequent state practice for the Berne Union states.\(^\text{190}\)

Concerning the relationship between TRIPS and the WCT, it would at first appear that there is no connection between them other than the fact that they incorporate similar provisions of the Berne Convention 1971, with the exception of Article 6bis of the Berne Convention. Article 1(1) of WCT strengthens this viewpoint since it expressly states that the WCT is not to have "any connection with treaties other than the Berne Convention. nor shall it prejudice any rights and obligations under any other treaties."

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\(^\text{186}\) WCT, *ibid.* at Article 1.
\(^\text{189}\) "Article 1(2) of the WCT provides that "Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works.""
However, upon closer examination it is clear that there is a greater relationship between them than just the incorporation of similar provisions of the Berne Convention 1971. First, the notes to the initial draft of the WCT, presented to the Geneva Conference, stated that the objective of WCT was not to be “an accessory to the Berne Convention.” but rather to “supplement and update the international regime of protection for literary and artistic works based fundamentally on the Berne Convention and recently also on the Agreement on Trade-Related Aspects of Intellectual Property Rights. Including Trade in Counterfeit Goods.”\textsuperscript{191} Further, the Agreed Statements concerning Articles 4, 5 and 7 of WCT, state that these provisions are on a par or consistent with the relevant TRIPS provisions.\textsuperscript{192} This gives the impression that the two agreements are related and reference could be made to them for purposes of interpretation.

The interpretative force of the WCT on the TRIPS Agreement will depend on whether the WCT comes into force. If the WCT does come into force, then it might constitute a subsequent agreement and subsequent practice within the meaning of Article 31 of the Vienna Convention on the Law of Treaties for members of the Berne Union

\textsuperscript{190} For a discussion on this, see Neil W. Netanel, \textit{supra} note 135 at 465.
\textsuperscript{191} See Memorandum prepared by the Chairman of the Committee of Experts on the Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, WIPO DOC. CRNR/DC/4, August 30, 1996 [hereinafter Memorandum on WCT] at note 0.01. A copy is available at WIPO homepage <http://www.wipo.org/eng/diplconf/4dc_all.htm> (accessed March 25, 1998).
\textsuperscript{192} The provision in the Agreed Statements on Article 4 of WCT, for example, provides that the scope of the protection afforded to computer programs under Article 4 of WCT when read with Article 2 “is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement.”
who adhere to it and, possibly, for those members who do not adhere to it.\textsuperscript{193} For this reason, the WCT and the Agreed Statements would also have some bearing on the Berne Convention provisions as incorporated into the TRIPS Agreement. It is also worthy of mention that as between Members of the TRIPS Agreement who are party to the Berne Union, WCT would constitute a special agreement within the meaning of Article 20 of the Berne Convention as incorporated in the TRIPS Agreement. Finally, it would be probable that whether or not the WCT comes into force, the WCT and the Agreed Statements would "qualify as evidence of state practice under TRIPS."\textsuperscript{194}

\textbf{2.2.2.1.1: THE SCOPE OF PROTECTION FOR LITERARY WORKS}

From the Preamble of WCT, it is clear that WCT has a focus in line with that of the Berne Convention 1971 and different from that of TRIPS. The Preamble states that the Contracting Parties seek to,\textit{ inter alia}, maintain the balance between the rights of authors and that of the public as reflected in the Berne Convention.\textsuperscript{195}

\textsuperscript{193} On this point, see Neil W. Netanel. \textit{supra} note 135 at 467 to 469.
\textsuperscript{194} See \textit{ibid}. at 473.
\textsuperscript{195} WCT, \textit{supra} Chapter 1 note 154. provides at the Preamble:
\begin{quote}
The Contracting Parties,
Desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible,
Recognizing the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the question raised by new economic, social, cultural and technological developments,
Recognizing the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works,
Emphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation.
Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.
Have agreed as follows: ...
The WCT protects copyright in literary and artistic works, as opposed to "ideas, procedures, methods of operation or mathematical concepts as such." As with the Berne Convention and the TRIPS Agreement, the WCT does not specify the exact form in which the works must be expressed. In addition, the WCT recognises moral and economic rights in these works. With respect to moral rights, it does this not only by the incorporation of Article 6bis of the Berne Convention, but also by the fact that Article 3 of the WCT provides that Contracting Parties are to apply "mutatis mutandis the provisions of Articles 2 to 6 of the Berne Convention in respect of the protection provided for in this Treaty." The WCT recognises three economic rights of authors: the right of distribution, the right of communication to the public and the right of rental. As with the TRIPS Agreement, the right of rental applies to computer programmes, cinematographic works and phonograms, subject to similar qualifications as provided in TRIPS. Contracting Parties are given the right to limit the rights of authors of literary and artistic works provided for by the WCT under their respective national legislation so far as this measure does not "conflict with a normal exploitation of the work" nor "unreasonably prejudice the legitimate interests of the author."

The WCT differs from the TRIPS Agreement and the Berne Convention with respect to digitization and new technologies. From the Preamble, it is clear that one of the aims of the WCT is to address technological developments. The WCT provides for

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196 "Ibid." at Article 2 provides that "Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such." This provision is identical to TRIPS' Article 9(2), discussed above at section 2.2.1.2.
computer programmes to be protected as literary works within the meaning of Article 2 of the Berne Convention. By implication, the provisions on economic rights in literary works provided for under both the Berne Convention and WCT apply to computer programmes. Additionally, the moral rights provided for under the Berne Convention would also apply to computer programmes under the WCT, unlike the TRIPS Agreement which does not provide for moral rights. Further, the WCT provides for the protection of compilations of data which constitute intellectual creations. However, this does not solve the issue in the Feist case as to whether copyright should exist in the data itself. Finally, since the WCT incorporates Article 2 of the Berne Convention, which makes no distinction between the forms in which a literary work may exist, written works which exist in a digital form would be protected as literary works.

2.2.2.1.2: ENFORCEMENT PROVISIONS

The WCT is silent on who can enforce the rights in literary and artistic works. However, by the incorporation of the provisions of the Berne Convention specifying persons who can enforce moral and economic rights, it can be presumed that those natural and legal persons would be the ones to enforce the rights provided for by the WCT.

200 Ibid. at Article 10.
201 Ibid. at Article 4.
202 Ibid. at Article 5. The full Article provides:
Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or the material contained in the compilation.
203 For discussion of the Feist case, see supra at Section 2.1.1.
Unlike the TRIPS Agreement, the WCT contains few enforcement provisions. Article 14, the main enforcement provision, puts member states under an obligation to adopt measures necessary for the application of the WCT and to provide for enforcement provisions including expeditious remedies to prevent infringements and remedies to deter further infringements. These Articles must be read together with Article 16 of the Berne Convention 1971, providing for the seizure of infringing goods, by virtue of WCT's incorporation of this Article of the Berne Convention 1971.

Additionally, there are provisions in WCT relevant to the enforcement of rights in works in digital form. Contracting Parties have an obligation to provide "adequate legal protection and effective legal remedies" against the circumvention of anti-copying technological measures, and, against the unauthorised dealing with electronic rights management information, respectively.\textsuperscript{205} Article 12(2) in particular, which defines "rights information management" as including information that identifies "...the author of the work...." can be construed as recognising moral rights in digital works since moral rights, \textit{inter alia}, enable an author to claim authorship of a work. The difference between WCT and the TRIPS Agreement is that WCT makes it an offence to tamper with the name of an author of a work which has been indicated by the use of electronic means. As with the Berne Convention and unlike the TRIPS Agreement, WCT leaves the finer details to domestic legislation.

In comparison with the TRIPS Agreement, WCT might be welcomed more by developing countries for the following reasons: first, it does not impose as heavy an

\textsuperscript{204} See Articles 15 and 6bis of the Berne Convention 1971 and above discussion at section 1.5.1.
enforcement duty on them as the TRIPS Agreement does. Second, like the Berne Convention 1971 and unlike the TRIPS Agreement, WCT gives countries room to decide how to implement its enforcement provisions. Third, the WCT does not limit national sovereignty to the extent that the TRIPS Agreement does in the sense of specifying how domestic legislation should be constructed, irrespective of the cultural and legal philosophies of countries.206

Concerning the effect of the WCT on the Berne Union, their obligations with respect to the protection of the traditional forms of literary works would not change much when compared with their obligations under the Berne Convention 1971. With respect to the rights of authors and the general public, it has been seen that WCT like the Berne Convention, aims to maintain a balance between these competing interests. This is a good thing even, and especially, from a trade angle because authors of traditional literary works depend on their consumers for their income and in order for authors to maximise the production of their works, the cost of such works should be affordable to consumers.

With respect to the recent challenges to the international protection of intellectual property rights, it is clear the WCT has made some improvements on the TRIPS provisions on the protection of rights in new works and technological products. Its weakness may lie in the fact that it leaves it to the Contracting Parties to put in place the measures necessary to give effect to the provisions of the WCT. The future will tell whether for this reason the WCT will end up being labelled as not going far enough on

205 WCT, supra Chapter 1 note 154 at Articles 11 and 12.
206 On this point, see J.H. Reichman, Enforcing TRIPS, supra Chapter 1 note 117 at 340 (commenting that TRIPS lays out "in considerable detail" how a country’s legal and judicial process should operate and.
the enforcement of copyright, as was the case with the international intellectual property agreements of the pre-TRIPS era.

It appears that TRIPS is more responsive than is the WCT to issues of globalization and the increasing importance of intellectual property to trade.\(^{207}\) The Preamble to the WCT does not mention trade nor the need to reduce barriers or distortions to trade. This fact notwithstanding, it is clear that the WCT is concerned with the effective protection of the rights of authors. which would necessarily involve a reduction in piracy of copyright protected works.\(^{208}\)

2.2.2.2: OTHER ACTIVITIES

WIPO is involved in cooperation programmes with developing and other countries and with international organisations, with the objective of assisting them to protect intellectual property rights. WIPO’s development cooperation programme is intended to ensure that developing countries respect intellectual property rights at the domestic and international levels.\(^{209}\) One is in respect of copyright and neighbouring rights.\(^{210}\) In furtherance of this programme WIPO has organised training courses.\(^{211}\)

\(^{207}\) TRIPS and the WCT could be described as the trade and the technology agreement respectively.

\(^{208}\) WCT, supra Chapter I note 154 at the Preamble.

\(^{209}\) On this point, see WIPO, WIPO Development Cooperation Programme in the Field of Copyright and Neighbouring Rights (Report by Henry Olsson, presented at the National Workshop on Copyright, Accra, Ghana, October 9 – 11, 1991) [hereinafter WIPO Development Cooperation] at 6.

\(^{210}\) The main objectives of this program are the following:

(i) to encourage and increase the creation of literary and artistic works by their own nationals and thereby to maintain their national culture in their own languages and/or corresponding to their own ethnic and social traditions and aspirations;

(ii) to facilitate access to intellectual creations in developing countries based on
information seminars and meetings for the benefit of developing countries. Additionally, it provides legal and technical assistance in the drafting of national legislation and assists in the establishment and modernization of collective agencies for the administration of rights. With respect to countries that are not developing countries, WIPO's cooperation includes participation at meetings and assistance with the implementation of intellectual property agreements. WIPO has also set up a Permanent Committee for Development Cooperation Related to Copyright and Neighbouring Rights. As at December 31, 1995, the Permanent Committee had a membership of 107 states.\footnote{WIPO General Information, supra Chapter 1 note 90 at 81.}

WIPO has also embarked on projects which have some significance for copyright. First, it has drafted treaties such as the WIPO Performances and Phonograms Treaty (WPPT) of 1996\footnote{WIPO Performances and Phonograms Treaty, December 23, 1996, WIPO DOC. CRNR/DC/95. adopted December 20, 1996 [hereinafter WPPT]. A copy of this treaty is available at WIPO homepage: <http://www.wipo.org/eng/diplconf/distrib/95dc.htm> (accessed August 7, 1998).} and a draft treaty on databases.\footnote{See WIPO, Basic Proposal for the Substantive Provisions of the Treaty on Intellectual Property in Respect of Databases to be Considered by the Diplomatic Conference, August 30, 1996, WIPO DOC. CRNR/DC/6. A copy is available at WIPO homepage <http://www.wipo.org/eng/diplconf/6dc_all.htm> (date accessed: November 24, 1998). The draft treaty on databases aims at providing a \textit{sui generis} form of protection for databases irrespective of whether they are eligible for copyright protection. See WIPO General Information, supra Chapter 1 note 90 at 88. Europe and the US have also taken some steps in this regard, through the European Database Directive, Directive No. 96/9/EC of the European Parliament and the Council of 11 March, 1996 on the legal protection of databases and, the US Database Anti-Piracy Act of 1996 respectively. For further details on these developments, see Jane C. Ginsburg, "Copyright,}
treaty for the settlement of intellectual property disputes between states.\textsuperscript{215} Second, it has established a Standing Committee on Information Technologies (SCIT) and is working on the establishment of the WIPO Global Information Network (WIPONET), the "first global project to be undertaken by the World Intellectual Property Organization (WIPO) using information technology."\textsuperscript{216} WIPONET is based on the Internet and will increase communication between countries with the aim of using information technology to protect intellectual property.

Another development is the increasing cooperation between WIPO and the WTO. On January 1, 1996 an agreement of cooperation between WIPO and WTO came into force.\textsuperscript{217} Its provisions include legal-technical assistance and technical cooperation for the benefit of developing countries, to aid them in implementing TRIPS.\textsuperscript{218} Additionally, WIPO and WTO have recently "agreed on a joint initiative to provide technical cooperation for developing countries."\textsuperscript{219} The aim of this venture is to enable developing-country-WTO members to meet the January 1, 2000 deadline for implementing TRIPS. It involves "bringing their laws on copyright, patents, trademarks and other areas of

\begin{flushleft}
\textsuperscript{215} WIPO was already working on a dispute settlement mechanism before the WTO was established.
\textsuperscript{218} For further information on this agreement, see WIPO General Information, supra Chapter 1 note 90 at 4 and 87.
\end{flushleft}
intellectual property into line with the agreement, providing for effective enforcement of these laws in order to deal with piracy, counterfeit goods and other forms of intellectual property infringements. This is a welcome development for developing countries and should assure them a measure of success in implementing the TRIPS Agreement in due time. Additionally, this venture could mean that there would be few distinctions between the operation of copyright under WIPO and under WTO.  

2.3: CONCLUSION

The above discussion analysed the challenges facing the traditional international copyright regime and the efforts made by the international community to deal with them. It was seen that several changes have been made to the traditional international copyright framework. First, through the TRIPS Agreement and the WCT, there is the recognition of a computer programme as a new type of literary work. There is still room for more works to be added to this list since under the Berne Convention, the TRIPS Agreement and the WCT, literary works are protected “whatever may be the mode or form” in which they are expressed. Additionally, there has been the recognition that databases, in the nature of intellectual creations, qualify for protection under intellectual property laws. Further, there are now more comprehensive enforcement provisions in the new international copyright system. Finally, the establishment of the WTO as another player in the intellectual property field and the existing cooperation between the WTO and WIPO has ushered in another phase in the protection of intellectual property rights.

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220 Ibid. at 1.
Ultimately, the impact of these developments on the international protection of copyright depends on the success that the individual Berne Union and WTO members have in implementing the TRIPS Agreement. The next two chapters examine the impact of these overall changes on Ghana and Canada.

221 See supra at Section 2.2.1.2.
CHAPTER 3

3: RECENT DEVELOPMENTS FROM A DEVELOPING COUNTRY'S PERSPECTIVE: THE CASE OF GHANA

In Chapter Two, it was noted that the multilateral response to the recent challenges confronting copyright was to sign new international agreements which created obligations for the parties to the agreements. Developing countries that are members of the World Trade Organisation (WTO) are obliged to implement the TRIPS Agreement by January 1, 2000. This deadline applies to 70 members of the WTO\(^1\) including Ghana. The WIPO Copyright Treaty (WCT) is not yet binding on Ghana since it is not yet in force.

The purpose of this chapter is to present an overview of the environment for the protection of literary works in developing countries, using Ghana as the subject for discussion. This chapter is also devoted to outlining the impact that the new agreements will have on the protection of literary works in Ghana. The main emphasis is on TRIPS, since that agreement is binding on Ghana. However, minor comments are made on the effect of the WCT. The assessment of the impact of TRIPS and the WCT on the protection of literary works in Ghana is done by examining Ghana’s efforts to implement these agreements and discussing whether these measures would address Ghana’s copyright concerns. Additionally, this chapter also considers the effect of these agreements on Ghana’s overall copyright position.

This chapter is divided into five sections. Section 1 focuses on the development of Ghana's literary industry, and the problems confronting it. The second section traces the origins of, and gives an overview of Ghana's national and international copyright obligations. The third section describes the main features of the administration of copyright in Ghana, examining the main features of Ghana's copyright legislation, The Copyright Law 1985, PNDC Law 110 (Law 110), and discusses Ghana's copyright concerns. Section 4 discusses the implications of the recent developments in international copyright on the literary industry in Ghana. It examines the changes that Ghana has to make to its copyright legislation and copyright environment and, the administrative issues that must be addressed, in order for it to fulfill its obligations under the new agreements. The Chapter ends by evaluating Ghana's efforts to comply with TRIPS and with the WCT and to address the copyright concerns of its literary industry. The evaluation also provides recommendations on additional measures Ghana should adopt, in order to fulfill its international copyright obligations, to promote the growth of its literary industry and to benefit from the present copyright system.

3.1: OVERVIEW OF LITERARY ACTIVITIES IN GHANA

As noted in Chapter One, copyright is important to the protection of rights in literary works. An examination of Ghana's copyright position reveals that copyright's roles as a means of encouraging authors to produce literary works and rewarding them for the production of such works holds special significance. This is because in a developing country such as Ghana, which is dependent on imported printed materials from developed
countries, especially from its former colonial master, England, the protection of local works is expected to reduce this dependence by encouraging indigenous publishing and promoting culture. As local creativity is encouraged and more literary works are produced locally, Ghana should experience greater economic development through revenue from local sales and, hopefully, from exports of these works.

However, copyright’s ability to fulfill its roles depends on the nature of literary works in Ghana and of Ghana’s literary industry. The aim of this section is to present an overview of literary works in Ghana against the background of the origins of literary activities on the African continent. This would provide a clear picture of the issues to be addressed, in order for Ghana’s expectation regarding the contribution of literary copyright to its economic development to be met. It must be borne in mind that in Ghana, as in other developing countries, the level of education in the country plays a significant role in the extent of literary activities in the country. It is also worthy of mention that this section considers oral, written and printed works.

3.1.1: ORAL WORKS

Oral literature occupies an important position in Ghana. A large part of cultural works in Ghana exists in an oral form. These include poems and stories handed down orally from one generation to the other. It has long been recognised in Ghana that different ethnic societies have their distinct oral literature. Thus communal ownership of

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2 See Betty Mould-Iddrisu, “Development and Current Status of Copyright Protection in Ghana” (Paper presented at the WIPO National Seminar on Copyright and Neighboring Rights for Law Enforcement
oral literature has been established in Ghana for centuries. There is also the issue of individual ownership of oral literature. This is even more significant in view of the fact that Ghana has a high illiteracy rate. Thus it should be accepted in Ghana that individuals could be authors of oral works especially in cases where it is possible to determine the authorship of such works.\textsuperscript{3} This would appear to be the view held by the international community since the Berne Convention does not specify that a work must be fixed in order to obtain copyright protection and recognises that copyright exists in oral works such as sermons.

\section*{3.1.2: WRITTEN/PRINTED LITERATURE}

Africa has had a long association with written works, especially with book production. With the discovery of papyrus along the banks of the river Nile, Africa took “historical leadership in book production.”\textsuperscript{4} There were indigenous alphabets in Africa before the Europeans came to West Africa in the fifteenth century.\textsuperscript{5} There were several autochothonous alphabets in Africa before the colonial era\textsuperscript{6} and before the introduction of the Roman alphabet into Africa. Ethiopia, for instance, “has a rich history of manuscript production” and produced written works in its indigenous languages “before the earliest literature appeared in Western Europe.”\textsuperscript{7} It is not clear when printing from movable type

\begin{footnotesize}
\begin{itemize}
\item See Kofi Anyidoho and Fui Tsikata, “Copyright and Oral Literature” (Background Paper prepared on Law 110, 23 August, 1988, on file with the author) at 1.
\item See \textit{ibid.} at 11.
\item The oldest of such alphabets was that of early Ethiopia or the Nubian kingdom. See \textit{ibid.} at 12 and 13.
\item Hans M. Zell, \textit{supra} Chapter 1 note 18 at 18.
\end{itemize}
\end{footnotesize}
first appeared in Africa, though it is possible that it may have been introduced into Africa before Napoleon established a printing press in Egypt in 1798.\(^8\)

There were two influences on early publishing in Africa: Islam and Christianity. The beginnings of publishing in Africa are traced to the advent of Islam and by the 17\(^{th}\) century. Arabic scripts were to be found in several parts of the western Sudan.\(^9\) The decline of the Trans-Saharan trade in the 19\(^{th}\) century and the shift towards trade with Europe resulted in a corresponding fall in the spread of Arabic literacy and culture and a rise in the influence of Western culture and Christian publishing in Africa.\(^10\)

As with most African countries, missionary activities contributed to the growth of the book trade and to publishing in Ghana.\(^11\) These activities included the establishment of printing presses,\(^12\) the introduction to Christian education, and the production of books in local languages.\(^13\) Missionaries explored the production of books in three of Ghana's languages: Ga, Twi and Ewe, and by 1850, they published four Twi spelling and reading books.\(^14\)

Despite the growth in the book trade and in printing that took place in subsequent years, especially during the periods of 1907-1928 and 1932-1940, there were still

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\(^8\) See ibid. at 18. Opinions on places in Africa where printing first appeared include Fez in 1516, Azores in 1583, Port Louis in 1768, in West Africa at the turn of the 16/17\(^{th}\) century, and Cape Town in 1784. ibid.

\(^9\) See ibid. at 18.

\(^10\) See ibid. at 19.

\(^11\) See Amu Djoleto, “Publishing in Ghana: Aspects of Knowledge and Development” in Philip G. Altbach, Amadio A. Arboleda & S. Gopinathan, eds., supra Chapter 1 note 74 at 76. See also Hans M. Zell, supra Chapter 1 note 18 at 18.

\(^12\) One of such presses was established at Cape Coast by the Methodist Mission and used by the Basel Mission in 1851. See Amu Djoleto, ibid. at 77.

\(^13\) See ibid. at 77.

\(^14\) See Amu Djoleto, supra note 11 at 77. See also, D. A. Nimako, “Ghana: The Republic of Ghana” in Taubert and Weidhaas, eds., supra Chapter 1 note 18, 125 at 126.
problems with literary activities in Ghana. Illiteracy was reported to be as high as 90% in 1948.\textsuperscript{15} The majority of books were in English rather than in the Ghanaian dialects,\textsuperscript{16} which was a matter of grave concern in view of the fact that Ghana is a multilingual country with approximately 60 different dialects.\textsuperscript{17} Further, multinational publishing companies dominated the publishing scene in Ghana.

The 1950s to 1970s witnessed several efforts by Ghanaian governments to increase literacy, education, and to encourage the book trade and indigenous publishing. "In Ghana, as in most developing countries, book development is closely linked with education policies."\textsuperscript{18} Government policies, such as the passage of the Education Act (1961),\textsuperscript{19} the Free Textbook Scheme (1963),\textsuperscript{20} and the establishment of the Ghana State Publishing Corporation in 1965\textsuperscript{21} had some measure of success in giving more Ghanaians access to education at little or no cost to themselves.

The present position of the literary industry is an improvement over what existed in the past. The introduction in 1984 of the three-year degree course in Book Industry at the University of Science and Technology with the help of UNESCO, has provided

\hspace{1cm}\textsuperscript{15} See Andrew O. Amegatcher, \textit{supra} Chapter 1 note 72 at 3.
\textsuperscript{16} See Amu Djoleto, \textit{supra} note 11 at 77.
\textsuperscript{17} \textit{Ibid.} at 84.
\textsuperscript{18} D. A. Nimako, \textit{supra} note 14, 125 at 134.
\textsuperscript{19} This Act provided for fee-free and compulsory education. See \textit{ibid.} at 36. See also S.I.A. Kotei, \textit{supra} note 4 at 36.
\textsuperscript{20} Under this scheme the Government of Ghana became solely responsible for the production and free supply of textbooks to primary and elementary schools and later to second cycle schools. See D. A. Nimako, \textit{supra} note 14 at 127. See also, Amu Djoleto, \textit{supra} note 11 at 80.
\textsuperscript{21} This Corporation was set up in an attempt by the Government of Ghana to bring a Ghanaian perspective to books published and/or distributed in Ghana. The Corporation's duties included printing, publishing, distributing and marketing educational materials as well as developing an export operation. See D. A. Nimako, \textit{ibid.} at 128. For the reasons behind the setting up of this Corporation, see also, S.I.A. Kotei, \textit{supra} note 4 at 36 and 37. The name of this Corporation was later changed to the Ghana Publishing Corporation.
training in various areas of publishing. There has been an increase in local publishing companies and there are presently over 17 publishing houses in Ghana. There was a decline in illiteracy from 90% in 1948 to 70% and 60% in 1970 and 1982 respectively. Recognition was given to Ghanaian writers for their outstanding literary works as evidenced by the winning of the Noma Award in 1983 by Austin N.E. Amissah’s book, Criminal Procedure in Ghana. Ghanaian authors have also sold translation rights for several children’s books.

Despite these successes, Ghana’s literary industry is beset with problems. First, there is the lack of printing materials, simply because Ghana, like many developing nations, imports almost all of its paper:

In 1987, sub-Saharan Africa produced only 0.4 million metric tons of printing and writing paper (nonnewsprint) out of a world total of 54.3 million metric tons. African consumption was at 0.5 million metric tons, leaving a shortfall of 0.1 million metric tons, which had to be imported from outside the continent.

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23 These include Advent Press in Accra, Ghana Publishing Corporation (Publishing Division) in Tema and the Book Industry Unit of the University of Science and Technology in Kumasi. See Edem K. Tettey, Understanding Book Publishing (Kumasi: Book Industry Publication Unit of the University of Science and Technology, 1997) at 59 - 60.
24 See D.A. Nimako, supra note 14 at 126.
25 Ibid. at 138. Previously, in 1972, Meshack Asare’s Tawiah Goes to Sea was declared as “the best children’s book published in Africa in 1972” by UNESCO. Ibid. at 131.
26 For example, Meshack Aseare’s Tawiah Goes to Sea was translated into Japanese, French and German, while T.J.Enin’s, Seidu Drives His Father’s Cow (1975) and J. O. de Graft Hanson’s The Fetish Hideout (1975) were translated into Russian. See Ibid. at 131.
Ghana’s paper consumption in 1978 was 3,331,700 kg at a cost of 3.1 million cedis.\(^{28}\) This not only put a strain on its already inadequate foreign exchange reserves, but also hampered the growth of the book trade.\(^{29}\)

Another concern is how to promote indigenous publishing and to reduce the dependence on English works. The problems of publishing in Ghanaian languages have been identified as including the following: the absence of standard orthographies, the limited audience for works in the vernacular, multilingualism, the high capital input involved in publishing and the concomitant high cost of books, the need for better organisation of the book trade and the fact that most Ghanaian writers write in English.\(^{30}\) An increase in literacy in Ghanaian languages is required to provide an audience for local books, encourage publishing in the vernacular and reduce the dependence on English works. There is also the need for local expertise in the book industry. This issue is being largely addressed by the Book Industry Degree at the University of Science and Technology.\(^{31}\)

\(^{28}\) See D. A. Nimako, supra note 14 at 126.

\(^{29}\) It is said that most Third World countries do not produce the “cultural paper” needed for book production, and many produce virtually no paper at all and are forced to import paper from industrialised countries such as Canada and Sweden. See Philip G. Altbach, “Publishing in the Third World: Issues and Trends for the 21st Century” in Philip G. Altbach, ed., supra Chapter 1 note 74, 1 at 8 & 9.

3.2: THE COPYRIGHT REGIME

3.2.1: HISTORICAL OVERVIEW OF NATIONAL AND INTERNATIONAL COPYRIGHT OBLIGATIONS

Ghana falls within the category of countries introduced to copyright by their respective colonial masters and, as such, its early copyright history was influenced by that of its colonial master, Britain. Ghana's first copyright legislation was the Imperial Copyright Act of 1911,\(^3\) which became binding on Ghana by virtue of it being a British Colony.\(^3\) The copyright position in England continued to exert some influence on the progress of copyright in Ghana even after Ghana attained its independence on 6 March, 1957. The Ghana Independence Act\(^3\) made provision for the effect that a repeal or amendment of the Imperial Copyright Act would have on legal rights in existence prior to the said repeal or amendment. The fact that before 1964 the Ghana law reports were filled with cases on contract, land and succession as opposed to covering copyright issues,\(^3\) suggests that in that period Ghana did not experience much copyright litigation.

Ghana's relative inexperience in copyright issues is evident in the fact that in the forty years following Ghana's independence, it has had only two pieces of copyright legislation, neither of which was amended during their period of operation. First was the

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\(^{3}\) Imperial Copyright Act, 1-2 Geo. V, c. 46 [hereinafter Imperial Copyright Act]. It came into force in 1912 and was applicable to the British Empire as a whole. On this point, see Andrew O. Amegatcher, supra Chapter 1 note 72 at 3.

\(^{3}\) By the Copyright Ordinance of 1911, all laws passed in the United Kingdom were applicable to Ghana. See Betty Mould-Iddrisu, Development and Current Status, supra note 2 at 1.

\(^{3}\) See The Ghana Independence Act, 1957, 5 & 6 Eliz.2, c. 6, at Schedule 2 paragraph 12 on this issue. This paragraph of the Ghana Independence Act was repealed by the British Copyright, Designs and Patents Act, 1988 at Schedule 8.

\(^{3}\) See Andrew O. Amegatcher, supra Chapter 1 note 72 at 3.
Copyright Act, 1961 (Act 85), which put an end to the application of the Imperial Copyright Act to Ghana. However, Act 85 was “essentially, a mere re-enactment of the existing law in the United Kingdom.” Act 85 was repealed and replaced by the Copyright Law, 1985, PNDC Law 110 (Law 110). A Copyright Bill has recently been drafted with the aim of amending Law 110.

Ghana’s position in international copyright relations can be grouped into two periods: the colonial era and the post-independence era. By virtue of being a colony of the United Kingdom, the international treaties to which the United Kingdom was a party were applied to Ghana. Consequently, Ghana’s adherence to the Berne Convention originates from when the United Kingdom adhered to the Berne Convention 1886 for itself and its colonies and possessions. Although Ghana’s copyright obligations stem from its colonial days, it has since its independence ratified some of the international copyright agreements in its own right.

Since the attainment of independence on 6 March, 1957, Ghana has assumed several international copyright obligations. First, it became bound by the UCC 1952 and its protocols 1 and 2 as from August 22, 1962. In addition, Ghana ratified the Berne

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37 Ibid. Act 85 section 17 provided that “The Copyright Act, 1911 of the United Kingdom shall cease to have effect in Ghana and the Copyright Ordinance (Cap. 126) is accordingly hereby repealed.”
38 Betty Mould-Iddrisu, Development and Current Status, supra note 2 at 1.
39 This is discussed in greater detail in section 3.3.3.
40 For details on how the United Kingdom’s adherence to the Berne Convention 1886 affected its colonies, see Harold G. Fox, The Canadian Law of Copyright and Industrial Designs, 2 ed. (Toronto: The Carswell Company Limited, 1967) at 37.
41 See Arpad Bogsch, supra Chapter 1 note 62 at 353.
Convention 1971 in 1991. Further, it became a member of the WTO on 1 January 1995 and is thus bound to implement TRIPS as from 1 January 2000. Finally, it is a signatory to the WCT and is reported as having played a leading role in its conclusion.

It is important to note that after independence and until 1991 when Ghana ratified the Berne Convention 1971, Ghana’s international copyright obligations were primarily those of the UCC. This position is reflected in Law 110 which, like Act 85 before it, specifies that Ghana has a duty to protect works of countries that are parties to the UCC, and makes no mention of the Berne Convention.

3.2.2: BASIC PRINCIPLES OF LITERARY COPYRIGHT IN GHANA

3.2.2.1: PROTECTED WORKS AND RIGHTS

Copyright law in Ghana is a blend of principles derived from English copyright law as well as from the UCC. Although at the time of the passage of Law 110 Ghana had not ratified the Berne Convention 1971, Law 110 reflects some of the Berne Convention principles as is seen from the following discussion.

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42 See Betty Mould-Iddrisu, Development and Current Status, supra note 2 at 3. For a list of countries that have ratified the Berne Convention, the version they have ratified and the date of such ratification, see WIPO homepage <http://www.wipo.org/eng/ratific/e-berne.htm> (date accessed: October 18, 1998).
43 For the list of the members of the WTO and the date on which they became members, see <http://www.wto.org/wto/about/organsn6.htm> (date accessed: October 18, 1998).
44 See <http://www.wipo.org/eng/ratific/s-copy.htm> (date accessed: October 18, 1998). Ghana is yet to ratify the WCT.
45 Betty Mould-Iddrisu, Development and Current Status, supra note 2 at 3 and 4.
46 See Act 85, at sections 3(1) and (2) and the Schedule to the Act.
47 Law 110, supra Chapter 1 note 65 at section 50(1) and at the Schedule to the Law.
Copyright protection in Ghana is granted to a wide range of works, including literary, artistic and musical works. An examination of Law 110 reveals that there are two categories of literary works in Ghana: works of Ghanaian folklore and non-folklore works. Works of Ghanaian folklore are

all literary, artistic and scientific work belonging to the cultural heritage of Ghana which were created, preserved and developed by ethnic communities of Ghana or by unidentified Ghanaian authors, and any such works designated under this law [Law 110] to be works of Ghanaian folklore.

Authorship rights in these works are vested in the Republic of Ghana as though it was the original creator of these works. As compared with Act 85, the protection of works of Ghanaian folklore is an innovative provision. However, this protection is ambiguous since Law 110 does not expressly state that the fixation requirement for a work to qualify for copyright protection does not apply to works of Ghanaian folklore. If it were to be presumed that oral works of Ghanaian folklore are protected by copyright, since it is generally known that folklore exists in both an oral and tangible form, then there would still be the question as to whether this protection of oral works extends to those works which are not works of Ghanaian folklore. At present it does not appear that this question could be answered in the affirmative.

The following are recognised as literary works under Law 110:

48 Law 110, provides at section 2(1) that subject to the conditions of section 2 (for a work to be eligible for copyright protection) literary works, artistic works, musical works, sound recordings, broadcasts, cinematographic works, choreographic works and programme-carrying signals are eligible for copyright protection. In this work reference to Ghana's copyright industries shall cover the above-mentioned works.

49 Ibid. at section 53.

50 Ibid. at sections 5(1) and (2).

51 See infra on the eligibility requirements for copyright protection in Ghana. By virtue of the fixation requirement, it appears that oral works are not protected under Ghana's copyright legislation.
"literary work" include irrespective of literary quality, any of the following:
(a) novels, stories or poetical works;
(b) plays, stage directions, film scenarios or broadcasting scripts;
(c) textbooks, treaties, histories, biographies, essays or articles;
(d) encyclopaedias, dictionaries, directories or anthologies;
(e) lectures, reports or memoranda; and
(f) lectures, addresses or sermons. 52

This reveals that the focus of Ghana's literary industry has been the traditional forms of literary material as opposed to computer programmes and electronic databases. This is the position with most developing countries.

To be eligible for copyright protection such a work should be original, 53 should be fixed 54 and should

1. be created by a Ghanaian citizen or a person ordinarily resident in Ghana; 55
2. have Ghana as its first place of publication or, if published outside Ghana, should be published in Ghana within 30 days after its publication; 56 or
3. be a work which Ghana has a treaty obligation to protect. 57

Copyright protection "does not extend to ideas, concepts, procedures, methods or other things of a similar nature" 58 and registration is not a prerequisite for copyright protection.

52 Law 110, at section 53.
53 Ibid at section 2(2)(a). A "work is original if it is the product of the independent efforts of the author."
54 Ibid at section 2(4).
55 Ibid. section 2(2)(b) provides that the work should have "been written down, recorded or otherwise reduced to some material form..."
56 Ibid. at section 2(2)(c)(i).
57 Ibid. at section 2(2)(c)(ii).
58 Ibid. at section 2(2)(c)(iii).
59 Ibid. at section 3. This provision has been interpreted to mean that scientific principles used to operate a device cannot "themselves be the subject-matter of copyright. These principles being truisms, one person cannot claim monopoly to them though a discovery of them might have been made by him." Quoted in Andrew O. Amegatcher (from the case of Nana Akwasi Yeboah v. Kramer, reported in 2 Ghana Copyright News, December 1990) supra Chapter 1 note 72 at 18.
Under Ghanaian copyright law an author, "a person who creates a work," has moral and economic rights in eligible works. However, an author does not have unlimited rights in his or her work since the law provides for permitted uses of copyright protected works. Further, Law 110 provides for compulsory reproduction and translation licences in literary works.

Basically, the duration of copyright is the life of the author plus a period of 50 years after the death of the author. The exceptions to this are that rights in folklore are vested in perpetuity in the Republic of Ghana and that moral rights exist in perpetuity.

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59 Law 110, at section 53.
60 Law 110, *ibid.* at section 6 (on the rights of authors) does not categorize these rights of authors into moral and economic rights. However, it can be ascertained that the economic and moral rights provisions are found in sections 6(1) and 6(2) respectively. These sections provide as follows:
61 The author of any work which is protected by copyright shall have the exclusive right in respect of such a work to do or authorise the doing of any of the following acts—
(a) the reproduction of the work;
(b) the translation, adaptation, arrangement or any other transformation of the work; or
(c) the communication of the work to the public by performance, broadcasting or any other means.

(2) In addition to the rights referred to in subsection (1) of this section, the author of any work which is protected by copyright, shall have the sole right—
(a) to claim the authorship of his work and in particular, to demand that his name or pseudonym be mentioned when any of the acts referred to in subsection (1) of this section is done in relation to the work;
(b) to object to, and to seek relief in connection with any distortion, mutilation or other modification of the work where such an act would be or is prejudicial to his honour or reputation or where the work is discredited thereby,
(c) or alter the work at any time.
64 See *ibid.* at section 10.
3.2.2.2: INFRINGEMENT AND ENFORCEMENT OF RIGHTS

The provisions on infringements of copyright under Law 110 can be grouped into two categories: those concerning copyright (moral and economic rights) and, those relating to folklore. With respect to the first category, it is an offence for a person to deal with an author's work in a manner that adversely affects an author's economic and moral rights.66 With respect to works of Ghanaian folklore, these offences include importing works of Ghanaian folklore or adaptations thereof into Ghana without obtaining the consent of the Secretary (now the Minister) for Information.

Infringements of copyright and of rights in Ghanaian folklore attract both civil and criminal sanctions.67 The civil remedies include injunctions, the recovery of damages for the infringement and orders for the removal and disposal of "copyright infringing materials" from the defendant's premises whilst the criminal sanctions are in the form of fines and prison sentences.68 Although Law 110 has no express provision entitling an aggrieved author to an order for the destruction of infringing copies of a work and the equipment used in the production of the copies, as was the case with Act 85, Law 110 can be construed to be following the position under Act 85 since it enables the courts to order the disposal of such material.69

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66 Ibid. at section 43.
67 Ibid. at sections 43–49. Law 110 provides for the criminal sanctions in respect of infringements of copyright and folklore in sections 45 and 46 respectively. However, the main difference between these sections is that continuing offences in respect of copyright attract an additional fine of between 5,000 and 50,000 for each day the offence continues. The minimum additional fine in respect of offences related to folklore is also 5,000, although there is no maximum limit.
68 Ibid. at sections 44–46.
69 Ibid. at section 48.
3.2.3: ADMINISTRATION OF COPYRIGHT

One feature of Ghana’s copyright administration has been the government’s increasing commitment to and support for the protection of rights in the copyright industries. Law 110 is regarded as evidence of the erstwhile PNDC government’s commitment to copyright in Ghana and has been described as “a strong and vibrant law which safeguards and enshrines the legal and moral rights of authors...[and] re-emphasises the commitment of the PNDC government to the preservation and protection of the rights of our authors.”

In view of the fact that for a period of 24 years after Act 85 was enacted there was no revision to the Act, the passage of Law 110 was a welcome development for authors. It strengthened rights in literary works by the extension of the duration of copyright from a period of the life of the author plus 25 years after his/her death to the life of the author plus 50 years after the author’s death. Additionally, it gave authors moral rights in their works, rights which were not provided for under Act 85.

However, the problems experienced in the enforcement of these rights show that Law 110 would have been more effective had there been more determined efforts to cultivate Ghanaian society’s support for the protection of authors’ rights. Further, a

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70 Justice D.F. Annan, “Keynote Address” (Delivered at the National Workshop on Copyright organised by the Copyright Administration in Co-operation with WIPO and held under the auspices of the National Commission on Culture, Accra, Ghana, October 9-11, 1991) at 2. “The P.N.D.C. government has shown its commitment to the stimulation of artistic creativity in this country by enacting a strong copyright law.” Betty Mould-Iddrisu, “An Overview of Ghana’s Copyright System and How it Works in Practice” (Paper prepared for the National Workshop on Copyright organised by the Copyright Office in Cooperation With WIPO and held under the auspices of the National Commission on Culture, Accra, Ghana, October 9-11, 1991) [hereinafter Overview of Ghana’s Copyright System] at 10.

71 The copyright concerns of the literary industry are discussed in section 3.2.4.
provision for periodic reviews and revisions of the law would have enabled Ghana to keep abreast of technological developments in this area.

Nevertheless, the support of the PNDC Government for copyright in Ghana is evidenced in the fact that although Ghana assumed international copyright obligations after 1961, and despite the 1971 revisions to the Berne Convention and to the UCC, the PNDC is the first Ghanaian government since 1961 to regard these developments as necessitating some revision to Act 85. This was probably due to the fact that during those years Ghana experienced some political instability and had a succession of different governments in a relatively short time. Consequently, Act 85 was outdated and in need of some revision. The support shown by the PNDC Government has been continued by the NDC government, as evidenced, for example, by Ghana being a signatory to the WCT.

Copyright is collectively administered in Ghana. This is not a new development in Ghana since it was in existence during the colonial period when Ghanaian musicians assigned some of their rights in their works to the Performing Rights Society (PRS) in England. Collective administration of rights experienced a setback under Act 85 since, upon Ghana's independence, the PRS no longer applied to Ghana and Act 85 did not provide for any institution to perform the tasks the PRS had been performing for Ghanaians. After the enactment of Act 85, there were unsuccessful attempts by

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72 The PRS then administered copyright for authors in the U.K. With the assignment by Ghanaian musicians of some rights to the PRS, the PRS also administered these rights by collecting royalties and distributing them to these musicians. See Bernard K. Bosumprah, “Collective Administration of Rights: Copyright Society of Ghana – COSGA” (Paper prepared for the National Workshop on Copyright organised by the Copyright Office of Ghana in cooperation with WIPO and under the auspices of the National Commission on Culture, Accra, Ghana, October 9-11, 1991) [hereinafter COSGA] at 3.

73 See ibid. at 4 and 5.
individuals and associations including The Musicians Association of Ghana (MUSIGA) to set up a society to collectively administer copyright.\textsuperscript{74}

Law 110 came to fill the vacuum created by Act 85 by providing for a copyright framework comprising the Copyright Office,\textsuperscript{75} headed by the Copyright Administrator,\textsuperscript{76} and providing for the establishment of a body charged with collectively administering copyright.\textsuperscript{77} In accordance with the latter provision, the Copyright Society of Ghana (COSGA) was set up in 1986. It has since been working with the various national associations, such as the Writers and Publishers Association and MUSIGA, in deciding how best to administer their rights. Musicians have been the "initial and main beneficiaries"\textsuperscript{78} of COSGA's activities due to the fact that they have been actively engaged in ensuring the protection of their rights.\textsuperscript{79}

COSGA has enjoyed a measure of success since its establishment. Its membership has grown from 250 in 1991\textsuperscript{80} to include 900 local members in 1997.\textsuperscript{81} On the domestic front, royalties were initially collected mainly from the National Broadcasting Corporation. The royalty coverage has since been extended to other areas of activity. This is regarded as "no mean achievement, especially within the context of a community of users of works most of who are still unable to grasp the concept that they must pay for the

\textsuperscript{74} See \textit{ibid.} at 5.
\textsuperscript{75} Law 110, at section 41 provides for the establishment of a Copyright Office with the duty of implementing this law.
\textsuperscript{76} \textit{Ibid.} at section 40(1) provides for the Copyright Administrator to keep registers for the registration of "works, productions and associations of authors."
\textsuperscript{77} \textit{Ibid.} at section 42.
\textsuperscript{78} See Bernard K. Bosumprah, \textit{supra} note 72 at 7. See also Betty Mould-Iddrisu, Overview of Ghana's Copyright System, \textit{supra} note 70 at 8.
\textsuperscript{79} Bernard K. Bosumprah, \textit{ibid.}
\textsuperscript{80} \textit{Ibid.} at 7.
use of musical works."\(^8^2\) COSGA is linked to collecting societies in other countries and administers copyright in respect of local and foreign works in Ghana.\(^8^3\)

There are other institutions that are worthy of mention, including two Monitoring Teams or Anti-Piracy Units. The first of these was set up in 1992 to enforce the Banderole system.\(^8^4\) At the time of its establishment it comprised two police officers on permanent attachment to the Copyright Office. Finally, a National Folklore Board of Trustees was established in 1991 to administer works of Ghanaian folklore.\(^8^5\)

3.2.4: COPYRIGHT ISSUES

Ghana’s overall position as a net importer of copyright materials is typical of developing countries. It relies heavily on imports of such materials, notably books. Generally, African countries import approximately 80-90% of educational books.\(^8^6\) Even a developing country like India, which has built a strong publishing industry with book exports going to places such as Southeast Asia and Africa, imports a considerable number of books from abroad.\(^8^7\) It is expected that the reliance of developing countries on imports of scientific reading materials will continue for quite a while.\(^8^8\)

\(^8^1\) See Betty Mould-Iddrisu, Development and Current Status, supra note 2 at 6.
\(^8^2\) Ibid.
\(^8^3\) Ibid. at 7.
\(^8^4\) See Betty Mould-Iddrisu, Development and Current Status, supra note 2 at 12. The Banderole System is discussed in greater detail in section 3.2.4.
\(^8^5\) See Betty Mould-Iddrisu, ibid. at 3.
\(^8^6\) See E. Cabutey-Adodoadji, supra note 30 at 131 & 148.
\(^8^7\) See Philip G. Altbach, "Publishing in the Third World: Issues and Trends" in Philip G. Altbach, ed., supra Chapter 1 note 74, 1 at 12. He comments further that "for many in the publishing business in India, there is more profit in importing and selling foreign books than in producing domestic titles." Ibid. this note.
\(^8^8\) See ibid. at 12.
Like other developing countries, Ghana's copyright administration is facing the problem of piracy. Piracy has been described as "the biggest single threat to the copyright system in Ghana."\textsuperscript{89} The effects of piracy in Africa and Ghana in particular, include the exodus of local artists to developed countries, a loss of revenue for the copyright industries and the government, all of which hinder the development of local creativity and culture.\textsuperscript{90} The activities of pirates have affected local industries including the music, film and literary industries. Ghanaian literary works have been pirated by countries, such as Nigeria, especially in the latter part of the 1980s. Piracy was perpetrated against Ghana almost entirely from Nigeria and affected mostly Ghanaian literary works recommended for 'O' and 'A' level examinations conducted by the West African Exams Council. What was most galling was the reckless abandon with which the Nigerian pirates operated and the easy welcome they received from Ghanaian booksellers.\textsuperscript{91}

Technological developments have compounded the copyright administration's attempts to eliminate piracy and ensure a respect for copyright. First, Ghana like other Third World countries has benefited from the reprographic reproduction of literary works. "Reprography has permitted Third World users of published materials to photocopy easily, often in violation of copyright guidelines."\textsuperscript{92} This fact notwithstanding, it has also enabled Ghanaians to produce materials necessary for education and research quickly and cheaply. Although Law 110 permits the reproduction of works for the user's

\textsuperscript{89} Beny Mould-Idcirisu, Overview of Ghana's Copyright System, supra note 70 at 7.
use only, in reality, the majority of works are reproduced on a commercial scale. Additionally, the difficulty of protecting copyright in the face of information and computer technologies is compounding Third World problems in enforcing copyright. It has been stated that "The traditional solutions to copyright problems which we, in Africa have barely had time to understand, let alone implement, have had in the light of rapidly emerging technologies, to be set aside."

The lack of awareness and ignorance of the copyright law also contributes to infringements of copyright. Consequently, the majority of copyright violations occur not so much because the offenders wilfully intend to break the law, but because they do not appreciate why there should be some regulation of their use of these materials. The following quotation, referring to musical works, aptly demonstrates the lack of acceptance of copyright by some Ghanaians.

This abuse is understandable, however, when one looks at it both culturally and from the view point of one who is totally uninitiated. Why should the owner of a shop have to pay for playing music on his or her premises? You try explaining the points of copyright law to irate shop owners, for the most part, semi-literate, who are people already overburdened by the extortion of a variety of rates by either central government or local council officials.

91 See S. A. Amu Djoletto, "Copyright and the Literary Industry – The Ghanaian Experience" (Paper prepared for the National Workshop on Copyright at the Academy of African Music and Arts, Kokrobite, Accra, Ghana, October 9-11, 1991) at 8.
93 Law 110, at section 18(1)(a).
94 See Betty Mould-Iddrisu, Problems of Copyright, supra note 90 at 10.
95 Betty Mould-Iddrisu, Development and Current Status, supra note 2 at 7.
96 Betty Mould-Iddrisu, Overview of Ghana's Copyright System, supra note 70 at 9.
Although copyright inspectors have faced "stiff opposition and more [often] than not, downright abuse, when they try to enforce the collection of fees," it is unlikely that there are organised groups in Ghana opposed to the protection of copyright.  

Another major problem the copyright administration is facing is that of enforcing copyright. The effectiveness of the Ghana police in arresting infringers has been hampered by their lack of adequate knowledge of the copyright law. The "lack of adequate enforcement coupled with wide-spread ignorance and various misguided concepts of the law makes the administration of copyright extremely difficult in any developing country."  

The operation of copyright within Ghana has brought further issues for consideration to the literary industry. First was the term of protection of copyright under Act 85: this was 25 years after the end of the year in which the author died with respect to unpublished literary works, and, with respect to published literary works, at "the end of the year in which the author died" or "twenty-five years after the end of the year in which the work was first published," whichever event occurred later. This provision was regarded both as inadequate protection for the investment of a publisher and as continuing the tradition of writing being a part-time profession in Ghana. The extension of the duration of copyright to the life of the author plus 50 years after the author's death under Law 110, can therefore be regarded as a step towards making

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97 Ibid.  
98 See Betty Mould-Iddrisu, Problems of Copyright, supra note 90 at 14.  
99 Justice D. F. Annan, supra note 70 at 4.  
100 Act 85, at section 2(2).  
101 See Amu Djoleto, supra note 11 at 82; S. A. Amu Djoleto, supra note 91 at 6-8.
writing and publishing more profitable. However, writing is still considered more as a part-time activity than as a profession.

Another concern is the distrust of Ghanaian authors in the operation of publishing contracts between authors and publishers which specify the extent of their respective rights in an author’s work, and are one way by which copyright has been administered with respect to literary works.\(^{102}\) The effectiveness of these agreements to protect author’s rights has been hindered by the fact that some authors have a tendency to hand their manuscripts to publishers without entering into any agreements. Further, some of these publishing contracts are more in favour of the publisher than of the author.\(^{103}\) Ghanaian authors need to be more vigilant in ensuring that their rights are adequately protected in these agreements.

Finally, one may question the appropriateness of the requirement that a work be “fixed” before being eligible for copyright protection, viewed against the background that Ghana has an oral literature and a high illiteracy rate. It is the author’s opinion that the requirement of fixation applies to all Ghanaian literary works (folklore and non-folklore). As already mentioned, folklore is defined in section 53 of Law 110 as

all literary, artistic and scientific work belonging to the cultural heritage of Ghana which were created, preserved and developed by ethnic communities of Ghana or by unidentified Ghanaian authors, and any such works designated under this Law to be works of Ghanaian folklore.

Even if one were to presume that this was a drafting error and that the fixation requirement does not apply to works of Ghanaian folklore, then it still means that other

\(^{102}\) See S.A. Amu Djoletou, supra note 91 at 3-6; Andrew O. Arnegatcher, supra Chapter 1 note 72 at 117-124.
non-fixed compositions such as oral works are not protected by Ghana's copyright law. The fixation requirement for eligibility excludes a lot of possible Ghanaian authors from having their works protected under copyright.

This position was questioned by Hayfrofn Benjamin J. (as he then was) in the case of Archibold v. C.F.A.O.¹⁰⁴ as follows:

This problem [of protecting works which are not reduced into writing or some permanent form] is of great practical importance in a country such as Ghana, where the incidence of illiteracy, despite the strenuous and commendable efforts of the government to eradicate it is still high. Ought the law not to afford protection to illiterate composers of songs and other cultural or original works solely on the ground that they are not written down, or ought the law to insist that all illiterate composers employ the services of literate ghost writers to reduce their composition into writing before they are legally protected? In other words, ought the law to recognise ownership of any kind of property in [an] original work even though unwritten? A negative answer to the problems will mean that several of our illiterate composers of talent unless they can undertake a crash programme in literacy, must always remain at the mercy of literate speculators or pirates, who may reap huge profits at their expense.¹⁰⁵

Although this case was decided during the operation of Act 85 and in respect of musical works, the judge's observation is still relevant in view of the fact that Act 85 and Law 110 made the fixation of a work a criteria for copyright eligibility.

Further, there is a bias in Law 110 in favour of the music industry.¹⁰⁶ Musical works hold a prominent place in Ghana's copyright industries, and the passage of Law

¹⁰³ See S.A. Amu Djoleto, ibid. at 4 and 5.
¹⁰⁴ Archibold v. C.F.A.O. [1966] G.L.R. 79. In the earlier case of C.F.A.O. v. Archibold [1964] G.L.R. 718, the Supreme Court of Ghana held that the plaintiff/respondent did not have copyright in musical works because to be eligible for copyright protection the work had to be written down in an intelligible manner. However, the plaintiff/respondent's notebook contained "just the words or verses of the songs but no intelligible musical notation to indicate the melody or music of each piece." Per Adumua-Bossman J.S.C. (as he then was), ibid. this note at 730.
¹⁰⁵ Archibold v. C.F.A.O., ibid. at 83.
¹⁰⁶ See Betty Mould-Iddrisu, Development and Current Status, supra note 2 at 1.
110 was a result of pressure from the musicians for greater protection of their rights and for a reform of Act 85.107 The Musicians Union of Ghana, MUSIGA, was one of the first bodies to demand the establishment of a collective society for the administration of copyright.108 MUSIGA is a relatively well-organised union to the extent that of all the copyright industries, the music industry has benefited the most from the collection and distribution of royalties.109 Additionally the banderole system110 was instituted with respect to musical works and there is no similar device with respect to literary works. The operation of the banderole system has resulted in a measure of success in identifying pirated musical works.

There is also the need for greater organisation of the literary industry and collaboration with COSGA, and the Copyright Office, to enable it to reap the benefit of the collection and distribution of royalties.111 There has been the conception that COSGA is only for the benefit of those in the music industry. It is therefore commendable that the Copyright Office and COSGA have the aim of assisting national associations, such as the

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107 The musicians' activities included a march to the Castle, the seat of Government in Ghana, in 1979, to demand changes to Act 85. See Andrew O. Amegatcher, supra Chapter 1 note 72 at 125.
108 In 1980, they submitted a memorandum dated 4th April, 1980, to the Government of Ghana to the effect that MUSIGA be converted into a statutory collecting society. With the passage of Law 110 a collecting society distinct from MUSIGA was established. See ibid.
109 See Bernard K. Bosumprah, supra note 72 at 7.
110 The Banderole has been used in Ghana since 1992 as a means of distinguishing pirated musical works from original ones. Basically, the banderole is an adhesive tape or stamp attached to a musical work. "This stamp is a security device by which sequentially numbered individual numbers are allocated to genuine producers of musical works and imports of all musical works have to be authenticated." Betty Mould-Iddrisu, supra note 2 at 11. Provision was made for it under Section 27(3) & (5) of Law 110, although the phrase "adhesive label" is used instead of banderole.
111 See Bernard K. Bosumprah, supra note 72 at 9.
Writers and Publishers Association, by collecting and distributing royalties for their members.\textsuperscript{112}

In order for the literary industry to develop further, it is essential that the problems confronting it be tackled. It is when this is done that the impact of copyright, with respect to encouraging the growth of the literary industry, will become apparent. The recent developments in the field of international copyright have ushered Ghana's literary industry into a new phase, the effects of which will be better appreciated in the coming years.

\section*{3.3: EVALUATION OF THE COPYRIGHT BILL IN THE LIGHT OF TRIPS AND THE WIPO COPYRIGHT TREATY (WCT)}

As noted, the TRIPS Agreement has created obligations for WTO members. As a developing country WTO member, Ghana has a duty to implement TRIPS by January 1, 2000, with the exception of the principles of National Treatment and Most-Favoured-Nation Treatment. It does not have a corresponding duty to implement the WCT because the latter is not yet in force.

The aim of this section is to assess the implications of these agreements on the protection of literary works under Ghanaian copyright law. In so doing it examines the specific legislative and general changes to be made to Law 110 and to Ghana's copyright environment, respectively. It also comments on the impact of these agreements on Ghana's overall copyright position. Further, it discusses Ghana's draft Copyright Bill

\textsuperscript{112} See \textit{ibid.} at 9 and 10.
with the aim of determining the extent to which these changes are reflected in the Bill and the extent to which the Bill addresses Ghana's copyright concerns.

3.3.1: THE IMPLICATIONS OF IMPLEMENTING TRIPS

3.3.1.1: POSITIVE EFFECTS

Ghana has not been blind to the advantages of having a strong intellectual property regime and of eliminating piracy. It was realised that piracy is a big threat to the productivity and creativity of Ghanaian authors.\textsuperscript{113} Thus a strong copyright system is a means of encouraging Ghanaian creativity, culture and authorship.\textsuperscript{114} Further, the elimination of piracy would promote the development of local industries by encouraging Ghanaian authors and artists to stay and work at home.\textsuperscript{115} Additionally, a reduction in the copying of foreign works would reduce reliance on such works and provide a stimulus for the growth of Ghanaian culture.

Ghana and other developing countries are expected to derive benefits including technology transfer, foreign direct investment and increased research and development of domestic industries from greater protection and enforcement of intellectual property rights. However, and as discussed,\textsuperscript{116} a strong intellectual property regime alone is not a guarantee that a developing country will reap the expected benefits. For countries such as Ghana which have experienced some political instability in the past and are making

\textsuperscript{113} Justice D.F. Annan, \textit{supra} note 70 at 5.
\textsuperscript{114} Betty Mould-Iddrisu, \textit{supra} note 2 at 8. The PNDC Government believed that "piracy must be eliminated if national authorship, national culture, national publishing and production is to be promoted and encouraged." Justice D. F. Annan, \textit{ibid.} at 5.
\textsuperscript{115} See Betty Mould-Iddrisu, \textit{ibid.} at 9.
efforts to boost their respective economies, it is clear that these factors would affect its ability to experience these benefits. However, the existence of the advantages of having a stronger protection of intellectual property rights is an incentive to establish an efficient copyright regime.

3.3.1.2: THE COST OF COMPLYING WITH TRIPS

The measures Ghana will have to institute in order to comply with TRIPS cover changes to Law 110 and general measures.

With respect to the general aspect, Ghana’s copyright system must deal with the cost of meeting TRIPS’ administrative and enforcement standards. Ghana, like other developing countries, is a country whose people are still in the process of getting accustomed to the concept of copyright. In order to meet the new international copyright standards, there is the need to create a greater public awareness of the importance of copyright, and to elevate the level of respect for it. There must be in existence a local environment receptive to and supportive of copyright protection. This will also involve educating, in particular, the law enforcement agencies in the country, so their enforcement efforts will fill in the gap created by the absence of litigation in the copyright field in Ghana, and help instill into the mind and attitude of the population the fact that the institution of copyright is one founded in law. It is obvious that the strong monitoring system that WTO members are obliged to establish will require a lot of

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116 See supra Chapter 2 at section 2.2.1.1.
financial investment. To make copyright protection effective in Ghana, it is necessary for the government to do its best to allocate reasonable financial resources through the provision of the facilities needed to institutionalise a functioning copyright regime in the country.

Second, there must be strong border measures to prevent suspected pirated copyright goods from being imported into the country. As seen, piracy is one of the main problems confronting Ghana’s copyright administration and is a matter of great concern to the Copyright Administration. There must be a reduction in the piracy level in order for the administration of copyright in Ghana to adequately protect the interests of Ghanaian authors. “It is only recently that African governments have regarded the activities of pirates as being inimical to the interests of the state as a whole.”

In terms of addressing the foregoing issues, Ghana’s copyright administration has made some efforts, with particular reference to creating awareness of copyright, and the need for its enforcement. In co-operation with WIPO, several copyright seminars have been held in Ghana to educate the public and the law enforcement agencies on the importance of copyright protection. Obviously, the other problems await addressing.

Law 110 clearly requires some revision or amendment, to enable Ghana to fulfill its TRIPS obligations. Provision must be made for the protection of computer programmes as literary works as provided for under TRIPS, and rental rights in such

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117 For further details on the administrative requirements that developing countries must handle, see UNCTAD, TRIPS and Developing Countries, supra Chapter 2 note 147 at 20.
118 See above at section 3.2.4.
119 Betty Mould-Iddrisu, supra note 2 at 9.
programmes must be recognised. Additionally, there should be the protection of compilations of data, whether in machine-readable or other form, which by their nature qualify as intellectual creations. Although Law 110 does not use the term "compilations," it does protect "encyclopaedias, dictionaries, directories or anthologies," which are recognised as collections of literary works under the Berne Convention 1971. However, the Berne Convention 1971, as well as TRIPS, specify that such works are only to be protected by copyright to the extent that from the selection and arrangement of their contents, they constitute intellectual creations. Such a provision is absent in Law 110.

Additionally, the fact that in Ghana the protection of copyright in a work is not dependent on its form of expression suggests that compilations of data in machine-readable or other form are covered under Law 110. However, for the avoidance of any doubt, it would be advisable if it were made clear that the protection of compilations extends to those in machine-readable form, and that what is being protected is the selection and the arrangement of the work. It is also to be noted that this does not solve the question of whether data should be protected or just its selection and arrangement. Overall, the implementation of TRIPS will result in an extension of the scope of Ghana's literary industry.

3.3.2: THE IMPLICATIONS OF COMPLYING WITH THE WCT

As discussed in Chapter 2, one of the aims of the WCT is to tackle the challenge that developing technology poses to the protection of copyright. In light of this, it is clear

120 These seminars include that held at Kokrobite in Accra, from October 9-11, 1991, and the one held for
that the main significance the WCT holds for Ghanaian copyright law is to make it more capable of addressing the impact of information and communication technologies on the creation and protection of literary works.

With respect to the new types of literary works protected under the WCT, it can be seen that by complying with the TRIPS provisions on the protection of computer programmes as literary works, on the establishment of rental rights in these programmes, and on the protection of databases to the extent that they are intellectual creations, Ghana would be complying with the relevant WCT provisions. The difference here would be the issue of moral rights which are recognised by the WCT, but not by TRIPS.

On a general level, the ratification of the WCT means that Ghana’s copyright legislation should clearly address technological issues. Thus, for example, there should be legal remedies against wrongful dealings with electronic rights management information, and against the circumvention of technological measures authors use in exercising their rights under the WCT or the Berne Convention.

In short, by implementing the WCT, Ghanaian authors will, at least on paper, have greater protection of their rights. Since as with the Berne Convention the WCT is concerned more with substance than with procedure, and has sketchy enforcement provisions, it is up to the government of Ghana to institute effective enforcement measures to ensure that rights on paper become rights in practice. The next sub-section

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notes:

121 The WCT, supra Chapter 1 note 154 at Article 11. See also discussion in Chapter 2 at section 2.2.2.1.
122 The WCT, at Article 12. See also discussion in Chapter 2 at section 2.2.2.1.
examines the extent to which this is reflected in the proposed Copyright Act currently under consideration as a Bill by the Ghanaian Parliament.

3.3.3: THE PROPOSED COPYRIGHT ACT

The purpose of this section is to examine the Copyright Bill in order to establish two things: first, whether the TRIPS and WCT provisions are covered in the Bill, and to examine the extent to which the protection of rights in literary works will change when the Bill becomes law, as compared with the position currently subsisting under Law 110. Consequently, only the relevant portions of the Bill are discussed.

First, with respect to who qualifies as an author, there is no difference between the definition of an author under Law 110 and under the Bill. Thus, an author is still "a person who creates a work." There is the presumption that the person whose name or pseudonym appears on a work as the author of that work, is the author, in the absence of evidence to the contrary. With respect to works of Ghanaian folklore, authorship rights are vested in the Republic of Ghana and administered on its behalf by a National Folklore Board established under the Bill.

Second, with respect to the requirements for the eligibility of a work for copyright protection, there is evidence of efforts being made to tackle the challenge of technology.

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123 The Bill is entitled "The Copyright Bill." The Copyright Bill is yet to be finalised. The preamble to the Bill reads as follows: "An Act to re-enact the Copyright Law, 1985 (PNDC L 110) to regulate copyright; make provision for the Copyright Office in conformity with the Constitution and for connected purposes."
124 Ibid. at section 58.
125 Ibid. at section 48. It would have been advisable, from a drafting point of view, if this provision had come at the beginning of the Bill or in the interpretation section.
126 Ibid. at section 4.
This is reflected in the difference between the provisions of the Bill and of Law 110 with respect to the expression of the fixation requirement. The Bill provides that to be eligible for copyright protection, a work should have "been affixed in any definite medium of expression now known or later to be developed with the result that the work can either directly or with the aid of any machine or device be perceived, reproduced or otherwise communicated."¹²⁷ By the use of the words "machine" and "reproduced" in this provision, the Bill is covering reproduction technologies. In addition, it would appear that a literary work that is saved on a computer diskette and must be inserted into a computer in order to be viewed is also protected.

As compared with Law 110, the Bill makes it clearer that a work need not be directly visible to the human eye in order to gain protection. Law 110 can be regarded as already protecting works not directly visible to the human eye since it protects works including recorded music or video tapes. However, the provision in the Bill emphasises that the eligibility of a work for copyright protection is not dependent on the manner or form of its expression. With the pace at which technology is moving these days, one can envisage a situation where books and magazines are sold on a computer disk. Just as people browse through magazines or books in bookstores before purchasing them, the browsing here will be done by inserting the disk into a computer and viewing the contents.

A third feature of the Bill is the expansion of the definition of literary work. The new definition is as follows:

¹²⁷ Ibid. at section 1(2)(b). Law 110 provides at section 2(2)(b) that the work should "have been written
“literary work” includes the audio visual aspect, private rentals and public lending of any of the following —

(a) novels, stories or poetical works;
(b) plays, stage directions, film scenarios or broadcasting scripts;
(c) textbooks, treaties, histories, biographies, essays or articles;
(d) encyclopaedias, dictionaries, directories, anthologies, databases or compilations of data or other material, whether in machine readable form, which by reason of the selection or arrangement of contents constitutes intellectual creations;
(e) letters, reports or memoranda;
(f) lectures, address or sermons; and
(g) computer programmes whatever may be the mode or form of expression.\(^{128}\)

The Bill’s definition incorporates and extends the scope of literary works as provided under Law 110. The additions made by the Bill are, first, that the concept of literary works in Ghana would cover any expression of computer programmes. Second, protection will be granted to databases, compilations of data or other materials that qualify as intellectual creations. Further, the definition of “literary work” has been expanded to include “the audio visual\(^{129}\) aspect, private rentals and public lending” of the works eligible for protection as literary works. This definition of “literary work” also signals another departure from the position under both Act 85 and Law 110 where the types of literary works and the rights authors have in these works were treated in different sections. However, much as it would be appreciated that the definition of “literary work” has been expanded by the addition of the “audio-visual aspect, private rentals and public lending of a work,” it would have been advisable if these provisions had been placed down, recorded or otherwise reduced to some material form.”

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\(^{128}\) The Bill, ibid. at section 58.

\(^{129}\) “Audio-visual work” is defined in section 58 of the Bill follows:

... a work that consists of a series of related images which import the impression of motion, with or without accompanying sounds, susceptible of being made visible, and where accompanied by sounds susceptible of being made audible.
under the sections on authors’ rights since they are rights rather than types of literary works.

The main significance of Ghana meeting the requirements of the TRIPS and WCT provisions by protecting computer programmes under literary works, is an extension of the concept of literary work under Ghanaian copyright law. It is unfortunate that neither the Bill, TRIPS nor the WCT, defines a computer programme. Thus, it is not clear exactly what the term “computer programme” covers. However, it is to be expected that the protection of computer programmes in the Bill covers both the source code and the object code. The probability of it covering the object code arises from the fact that the fixation provision permits the use of a machine in viewing or appreciating a work. Thus, it can be argued that since an object code can be converted into a source code and be appreciated by human beings, the fact that it is not human-readable until is it converted would not put it out of the scope of this provision. This view is further strengthened by the fact that the protection of computer programmes under the WCT is meant to include the source and object codes. Further, TRIPS itself provides that source and object codes are to be protected as literary works.

In any case, it is doubtful that without the express provision contained in the Bill, computer programmes would have been protected under Ghana’s existing copyright law. This is even more apparent in view of the fact that Ghana is not engaged much in the production of computer programmes. At the moment, it is not clear what effect the

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130 See the discussion on source code and object code, supra Chapter 2 at section 2.1.1.
131 See discussion above in this section.
132 See Memorandum on WIPO, supra Chapter 2 note 191, Notes on Article 4.
protection of computer programmes under copyright law and under the umbrella of literary works will have on both Ghana's computer and literary industries. Due to the lack of statistical data, it is not possible to give an accurate picture of the state of Ghana's computer industry. There are several companies in Ghana engaged in software production.\textsuperscript{134} There are also several Internet service providers.\textsuperscript{135} In view of the small size of the computer software industry in Ghana, it can be seen that few Ghanaians will benefit from the extension of copyright to cover computer programmes. It can be expected that in view of Ghana's relative inexperience in computer software technology, its copyright position vis-a-vis computer programmes will be that of a net importer. Further, even though TRIPS permits some reverse engineering of computer programmes,\textsuperscript{136} it is unlikely that the short-run effect would be to boost the local production of computer programmes. The encouragement of local manufacture and, possibly, of the exportation of such programmes might be a long-run effect. Then again, Ghana might never export computer programmes.

With respect to compilations of data, it is seen from the discussion above that by the provisions of the Bill, Ghana would be complying with the TRIPS provisions making compilations of data in machine-readable form a subject for copyright protection. In view

\textsuperscript{133} See TRIPS, Article 10(1).
\textsuperscript{134} Examples of such companies are TARA Systems and Soft Limited.
\textsuperscript{135} Examples of these are Network Computer Systems Ltd. (NCS), Africaonline and Internet Ghana. For further information on these companies, visit the following websites: for NCS, see \textless www.ghana.com\textgreater ; for Africaonline, see \textless www.africaonline.com.gh\textgreater ; and for Internet Ghana, see \textless www.Internetghana.com\textgreater  (accessed October 16, 1998).
\textsuperscript{136} "This means that, although wholesale copying of computer programmes is prohibited, the practice of reimplementing functional components of a protected programme in "clones" is not. Programmes that are independently coded and yet that deliver essentially the same functional performance do not infringe the latter's rights." UNCTAD, TRIPS and Developing Countries, \textit{supra} Chapter 2 note 147 at 40.
of the fact that Law 110 protects compilations, it is possible that copyright protection would have been extended to those in machine-readable form even without the TRIPS provisions. This is because under Ghana's existing copyright law, as under the Berne Convention, the form of expression of a work is immaterial to its being accorded copyright protection.

The protection of rights in databases is a problematic one for Ghana and other developing countries. On the one hand, it is welcome for Ghanaians in this industry, but in terms of the effect on Ghana as a whole, the protection of foreign rights in data will make the cost of using such data more expensive for the country. While accurate information on Ghana's database industry is not readily available, developing countries like Ghana, are generally net importers of information and of technical knowledge.137 The observation has been made that

Data-bases and computer-based means of knowledge dissemination have been a mixed blessing for the Third World. On the one hand, data bases permit users of the Third World to have immediate on-line access to the latest information in most scientific fields...However, data bases are expensive, and they require support facilities to provide the information that the data bases present...Of course, all the data bases originate in the industrialized nations, and they require payment for use. Users must pay for the services and must have the infrastructures to permit the data bases to function...Third World countries and institutions that cannot afford the data bases or which do not have the infrastructures (such as reliable telephone system and consistent electrical power) cannot link up with the data bases, and as a result they may be more disadvantaged in terms of participation in the international knowledge network than was previously the case.138

137 See ibid. at 15; Philip G. Altbach, in Altbach, Arboleda, Gopinathan, eds., supra Chapter 1 note 74. 1 at 14.
138 Philip G. Altbach, ibid.
Other provisions of the Bill have also widened the rights of authors in literary works. With respect to economic rights, in addition to those under Law 110, the Bill provides that an author has the right to “authorise or prohibit the commercial rental to the public of originals or copies of works.”139 This provision goes beyond the TRIPS and WCT provisions on rental rights being provided at least with respect to computer programmes.140 The implication of this provision is that all authors of literary works have the right, for example, to decide that libraries should not lend their works to the public and to collect fees for this transaction. However, the Bill does not provide that the right to authorise commercial rentals of computer programmes does not apply in cases where the programme is not the main object of the rental, as provided by TRIPS and the WCT. An author’s moral rights in a work are also extended by the provision that a performer has a moral right to a live aural performance and to a performance fixed in a sound recording.141

Further, the Bill seeks to provide better protection of authors’ rights by widening the concept of an infringement of copyright. The innovations worthy of mention cover renting or lending a work to the public,142 removing or altering any “electronic rights management information”143 and doing specified acts with works “knowing that electronic right management information has been removed or altered without

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139 The Copyright Bill, supra note 123, at section 5(2).
140 See the discussion on TRIPS Article 11. and WCT Article 7, supra Chapter 2 at sections 2.2.1.2 and 2.2.2.1.
141 The Copyright Bill, supra note 123 at section 6(2).
142 Ibid. at section 49(1)(h).
143 Ibid. at Section 49(1)(f).
authority”\textsuperscript{144} if the person performing these acts “knew or had reasonable grounds to know” that these actions facilitate the concealment of an infringement of copyright. By recognizing the importance of electronic rights management information, the Bill can be regarded as taking a step in fulfilling the obligations Ghana will assume when the WCT comes into force.

These provisions on the removal or alteration of electronic rights management information are similar to those in the WCT. However, unlike the WCT, the Bill does not define “rights management information.” In view of the similarity between the Bill’s provision and that of the WCT, it is possible that “rights information management” in the Bill has the same meaning as that in Article 12(2) of the WCT.\textsuperscript{145} Thus the effect of this provision is to emphasise the protection of moral rights in Ghana and to ensure the application of these rights in electronic works. It is also worthy of mention that under Law 110, the knowledge of an infringer to the infringement is irrelevant in determining the liability of such a person. However, the provision on rights management information under the Bill makes the knowledge of the infringer an ingredient in establishing liability for an infringement of copyright, as is the case with the provision in the WCT.

One way of reducing piracy is by imposing strict penalties for the violation of an author’s right. In this respect, it is commendable that the Bill seeks to make the enforcement of copyright more effective in Ghana by imposing more severe penalties than are found under Law 110. The Bill provides for an increase in the term of imprisonment from the maximum of two years to a maximum of five years for copyright

\textsuperscript{144} \textit{Ibid.} at Section 49(1)(g).
and folklore offences.\textsuperscript{146} There is also a minimum of 1000% increase in the fines for offences relating to copyright and to folklore.\textsuperscript{147} Furthermore, there is a great difference between these penalties and those provided under Act 85. There the remedies available for an infringement of copyright were restricted to damages and injunctions. The stiffer penalties under the Bill should deter more people from infringing copyright.

The Bill again strengthens authors' rights by extending the duration of their economic rights to the life of the author and 70 years after his or her death.\textsuperscript{148} However, the Bill omits to state the duration of moral rights. It is probable that moral rights will exist in perpetuity, as is the case under Law 110. This is deduced from the Bill's provision that "The Copyright Office shall oversee the enforcement of any moral right of any protected copyright work after the expiration of a statutory period of protection under the Act."\textsuperscript{149}

\textsuperscript{145} See discussion \textit{supra} Chapter 2 section 2.2.2.1.
\textsuperscript{146} The Bill, \textit{supra} note 123 at sections 51 and 52.
\textsuperscript{147} The Bill, \textit{ibid.} provides at Section 51 (Offences Related to Copyright):

\begin{quote}
A person who infringes a copyright of another person under this Act commits an offence and is liable to a fine of not less than c [cedis] 1,000,000 and not more than c [cedis] 10,000,000 or to a term of imprisonment of not more than five years or to both; and in the case of a continuing offence to a further fine of not less than c [cedis] 50,000 and not more than c [cedis] 500,000 for each day during which the offence continues.
\end{quote}

Section 52(2) (Offences related to folklore) provides:

\begin{quote}
A person who contravenes this section commits an offence and is liable to a fine of not less than c [cedis] 1,000,000 and not more than c [cedis] 10,000,000 or to a term of imprisonment of not more than five years or to both; and in the case of a continuing offence to a further fine of not less than c [cedis] 500,000 for each day during which the offence continues.
\end{quote}

\textsuperscript{148} The Bill, \textit{ibid.}, at section 10. This marks a departure from the normal term of protection of copyright being the life of the author and a period of 50 years after the author's death. Information on the reason for this extension is not readily available.
\textsuperscript{149} \textit{Ibid.} at section 17.
Furthermore, the Bill provides for the establishment of copyright societies in respect of the works protected under the proposed Act.\textsuperscript{150} This is certainly a welcome provision for authors and should ensure that their rights are vigilantly protected. Another noteworthy innovation is the legislative provision for the establishment of a copyright monitoring team with the power to prosecute offenders of copyright.\textsuperscript{151} It would have been advisable if the Bill had outlined the relationship between this monitoring team and the monitoring teams set up to oversee the operation of the Banderole system. However, the establishment of the copyright monitoring teams should facilitate speedy conclusion of litigation in this area.

3.4: EVALUATION

As seen,\textsuperscript{152} Ghana is making efforts to fulfill its obligations under the international copyright treaties. Although these initiatives are commendable, further action must be taken in order for Ghana and its literary industry in particular, to reap the benefits expected from a stronger enforcement of intellectual property rights.

In terms of the international treaties, the preceding section shows that Ghana has largely complied with the specific TRIPS copyright provisions. What remains is to specify that rental rights in computer programmes do not cover rentals where the programme is not the main object of the rental. With respect to WCT obligations, though

\textsuperscript{150} Ibid. at sections 46 & 47.
\textsuperscript{151} Ibid. at section 54.
\textsuperscript{152} See above at Section 3. 3.
the WCT is not yet in force, a number of its requirements have also been complied with under the provisions of the Bill.

The preceding examination of the Copyright Bill reveals also that domestically, Ghana is making efforts to strengthen the protection of rights in literary works. Again, some more effort needs to be made. But some of the major landmarks of this improvement must be noted. First, the Bill’s provisions have partially met the concerns of the literary industry. Noticeable among these is the Bill’s provision on reproductive technologies in response to domestic concerns (and also in compliance with the WCT’s provision on the issue). Further, the implementation of TRIPS and the increase in penalties for the infringement of copyright as provided in the Bill, should minimise the problems of enforcing copyright in Ghana.

The increase in the duration of copyright from the life of the author plus 50 years after the author’s death, to the life of the author plus 70 years after the author’s death under the Bill is, as noted, a welcome extension of authors’ rights. Finally, respecting the provision for more collecting societies, it is to be expected that there shall be one for authors and publishers.

A number of problem areas remain, however. First is the requirement that a work be fixed to be eligible for copyright protection. A review of this is necessary to take into account the fact that Ghana is a society where a large portion of literary creations are oral, in the form of what is generally termed folklore. In respect of this, the Republic invests itself with the right to protector the copyright. But clearly, it is possible to establish a system under which the creators of oral works, whether literate or otherwise.
could be recognised and honoured. As well, their works, even if categorised as folklore, could still be protected under the copyright regime for their benefit, probably from the establishment of a fund to give them some economic benefit from their endowment of national culture.

Second, it is necessary that there be more education of the public and the law enforcement agencies on the importance and workings of the copyright system. Because of the prominence given to musical works in Ghana and in Law 110, there has been a misconception on the part of some of the public that copyright in Ghana relates to only musical works. Consequently, the public has to be made more aware not only of the importance of copyright but, more particularly, of the fact that copyright embraces other works such as literary works. The numerous seminars held from 1991 to present, in part with the assistance of WIPO, have helped to sharpen public awareness of these issues. As more of such educational programmes are undertaken, the problem of ignorance of copyright will be eliminated to the benefit of Ghanaian authors. This will be a step in ensuring that Ghanaians cultivate a 'copyright culture.'

Third, in order for Ghana's literary industry to gain more respect in the eyes of the general public, future copyright laws in Ghana must achieve a balance by providing for the protection of the rights of all its authors, irrespective of the copyright industry of which they form a part.

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Fourth, the law enforcement agencies, especially the police and the customs authorities, must be given more specialised training to enable them to enforce copyright properly. With special reference to computer software, they will need the skill and equipment to detect infringing software. With respect to the traditional forms of literary works, there should be co-operation between the law enforcement agencies and the Authors and Publishers Association to enable the former to detect pirated copies of books.

In this light, it is important that there be some way of identifying pirated copies of traditional literary works, especially books. This is a great problem due to the fact that digital technology enables perfect copies of works to be made. However, technology has been identified as a means of fighting piracy.\textsuperscript{154} Despite the presence of digital technology, the use of the banderole has facilitated the identification of pirated copies of musical works. Within five years of the operation of the Banderole system, there was a reduction in the rate of piracy of musical works in Ghana to about 15% and about 25% with respect to local and international works respectively.\textsuperscript{155} WIPO is encouraging the Banderole system as a "model system of fighting piracy in developing countries."\textsuperscript{156}


\textsuperscript{155} Betty Mould-Iddrisu, Development and Current Status, \textit{supra} note 2 at 11. For discussion on the banderole system, see \textit{supra} at section 3.2.4.

\textsuperscript{156} Bernard K. Bosumprah, \textit{The New Copyright Bill}, \textit{supra} note 153 at 12.
commendable that the Bill provides for the use of the banderole system.\textsuperscript{157} Despite the complexity of the issues, it is hoped that a similar identification system could be devised for literary works.\textsuperscript{158}

It has been suggested that legitimate identifying systems should have at least five characteristics:

i. they must be standardised in a particular market
ii. they must be cheap
iii. they must be simple to apply
iv. they must be as secure as possible from unauthorised replication
v. they must be easy to locate, read and understand.\textsuperscript{159}

These are factors to be considered in the manufacture of a device for identifying original as opposed to pirated literary works in Ghana.

A fifth area in need of review is that, as under Law 110, the Bill does not expressly provide for courts to order the destruction of infringing materials. However, since it gives them the power to order the disposal of infringing materials and equipment,\textsuperscript{160} it is to be expected that they would order the destruction of such materials when necessary. For this reason the Bill can be regarded as meeting the TRIPS provisions on destroying infringing materials.\textsuperscript{161}

Another issue requiring serious consideration relates to Ghana's position as a net importer of copyright materials. The question that arises in light of this status, is how suitable the extension of copyright protection to more works will be for Ghana. As

\textsuperscript{157} The Bill, supra note 123 at Section 23.
\textsuperscript{158} Cf. Betty Mould-Iddrisu, Development and Current Status, supra note 2 at 12.
\textsuperscript{159} Mike Edwards, supra note 154 at 16.
\textsuperscript{160} The Bill, supra note 123 at section 55.
\textsuperscript{161} See TRIPS, at Section 61 and above discussion at Chapter 2 section 2.2.1.2.
discussed, it is only likely to increase the amount of royalty Ghana has to pay out. In this regard, the costs might outweigh the benefits expected to accrue to Ghana from implementing the international copyright agreements. Consequently, this new framework may in the short run and possibly in the long run, not be in the overall interests of Ghana, (and of course, other developing countries).

Ghana’s response to this probability must be to make efforts to develop its export potential with respect to copyright materials. Although, it may remain a net importer of copyright materials for a long time to come, this should not detract from the fact that it should strive to exploit its cultural industries. Thus Ghana should determine the areas in which it has comparative advantage and some export potential and concentrate on encouraging those. Once this is done, the inflow of royalties could, to some extent, neutralise the effect of the high royalties presently being paid to foreign rights holders.

The minimisation of Ghana’s copyright problems will aid the development of Ghana’s literary industry. As has been observed with respect to India over the last four decades, “a strong publishing industry can be built only on respect for copyright.”162 Ghana’s ability to encourage the growth of its literary industry will depend on whether it can solve the other problems facing its literary industry. It has been suggested that regional co-operation by African countries with respect to publishing would facilitate the

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162 Gordon Graham, “Multinationals and Third World Publishing” in Philip G. Altbach ed., supra Chapter 1 note 74 at 34. India possesses a large market for English and local works and this has contributed to the growth of its publishing industry. However, the point being made here is that notwithstanding the large size of its market, respect for copyright has also been a contributory factor in the strength of its publishing industry.
development of indigenous publishing.\textsuperscript{163} "In West Africa, regional publishing on the basis of Anglophone or Francophone usage would make sense. In East Africa, cooperation based on the common use of Swahili or even English could strengthen publishing."\textsuperscript{164} Since some indigenous languages spoken in Ghana are spoken in other African countries,\textsuperscript{165} this is an area that should be reconsidered. With careful implementation, regional co-operation would aid the growth of the literary trade in Africa and in other developing countries. There is the need for more professionals in this field and thus, there should be more efforts to develop manpower. Further, there is the need for the establishment of paper mills to cut down on paper imports, thus conserving Ghana’s foreign currency. However, a full consideration of these issues does not fall within the purview of this work.

Finally, it can be said that the level of a country’s development has several effects on copyright. First, the more developed a country becomes, the greater the tendency to protect copyright. The following quotation rightly sums up this observation:

\begin{quote}
In Ghana as in many parts of Africa, the advent of industrialisation is economically extending the nature of property. The once overwhelming importance of landed property is gradually being eclipsed by the growth of new forms of wealth, not least is what is called in some circles “intellectual” property. With the advent of broadcasting, television and other mass media of communication, the person with an ability and skill to compose musical works has a valuable source of wealth. Is this to be restricted to only the literate among the population? I think not.\textsuperscript{166}
\end{quote}

\textsuperscript{163} See Philip G. Altbach, in Philip G. Altbach, ed., \textit{supra} Chapter 1 note 74 at 19.
\textsuperscript{164} \textit{Ibid.} There have been some largely unsuccessful attempts at this in East Africa. \textit{Ibid.}
\textsuperscript{165} For example, the Ewe tribe in Ghana is also found in Togo.
\textsuperscript{166} Hayfron Benjamin J. in \textit{Archibald v. C.F.A.O. supra} note 104 at 86.
Further, at the initial stages of copyright protection, the concern is with authors’ rights. However, with greater development, there is the tendency to look upon authors’ rights as a country’s rights. Ghana can be said to be at the basic, rather than at the high level of this progression. Thus, copyright protection in Ghana is still very much for the author, rather than the country.

As discussed, it would seem that it is the level of economic development that facilitates the progression for authors’ rights to become a country’s rights. In Ghana’s case however, this may be years away from becoming a reality. Presently, Ghana is not able to bear the high administrative costs of implementing TRIPS on its own. The country would require assistance from WIPO and the WTO. In this light, it is welcome that the WIPO and WTO have embarked on a joint co-operation venture aimed at enabling developing countries to meet their TRIPS obligations at the specified time.167

3.5: CONCLUSION

Of the three challenges confronting copyright,168 probably, the one that Ghana has experienced the most is that relating to technology. However, since events in one part of the world send ripples to other parts, and to the extent that Ghana is a member of the WTO and bound to implement TRIPS, Ghana is also being affected by the increasing significance of intellectual property to trade as well as by globalization. Additionally, Ghana’s steps to fulfill some of the WCT’s provisions bears evidence of the effect of technology on copyright worldwide.
Ghana's ability to experience the benefits from increasing the scope of literary works as well as from having a more efficient copyright regime, will depend on whether it is able to meet its TRIPS obligations and whether the advantages of such compliance outweigh the costs of doing so. Additionally, Ghana’s literary industry faces problems other than that of copyright. Merely solving Ghana’s copyright problems will not ensure the growth of its literary industry. Consequently, the non-copyright issues must also be addressed to enable the literary industry to develop.

Further, Ghana’s ability to meet its obligations depends to a great extent on its priorities at a given point in time. Ghana faces the traditional problems of developing countries and has other sectors requiring urgent attention. Nevertheless, Ghana has embarked on the journey to meet its TRIPS obligations, as evidenced by the provisions of the proposed Bill. It is hoped that assistance from WIPO and the WTO will help it to successfully carry out these reforms.

The recommendations contained in the evaluation above are suggested ways by which Ghana can increase the level of protection for its literary industry and comply with TRIPS. Only time will tell whether by implementing TRIPS Ghana will experience the expected benefits of doing so. The effects of the WCT can only be measured after it comes into force.

167 See supra Chapter 2 at Section 2.2.2.2.
168 See above, Chapter 2 at Section 2.1.
CHAPTER 4

4: THE RECENT DEVELOPMENTS FROM A DEVELOPED COUNTRY’S PERSPECTIVE: THE CASE OF CANADA

As noted in Chapters 2 & 3, the TRIPS Agreement has created copyright obligations for member countries of the WTO. The WIPO Copyright Treaty (WCT) is not yet in force. The discussion in chapter 3 assessed the impact of these agreements on the protection of literary works in a developing country, Ghana. It established that the combined effect of the TRIPS Agreement, the WCT and Ghana’s proposed Copyright Act would be to largely address the copyright concerns of Ghana’s literary industry. though the benefits accruing to the industry would depend on how effectively the Copyright Act is enforced. In general, several changes need to be made to Ghana’s copyright legislation and environment in order to meet its new international copyright obligations. These changes include providing a stricter enforcement of rights in literary works in order that the law may be more capable of meeting the challenges created by computer and communication technologies. For instance, I suggested that provision must be made for the protection of computer programmes as literary works. I pointed out also that in view of Ghana’s position as a net importer of copyright materials, strengthening the protection of copyright in literary works could result in an increase in royalty payments to foreigners. As well, Ghana’s economy is presently not strong enough to support the demanding copyright structure the TRIPS Agreement seeks to establish in WTO member countries.
The aim of this chapter is to examine the environment for the protection of literary works in developed countries, using Canada as the developed country example. As a developed country, Canada was bound to have implemented the TRIPS Agreement by 1 January, 1996. The discussion of Canada’s obligations is centred on the TRIPS Agreement, although minor comments are made on the WCT.

Against the background of the discussion on Ghana in chapter 3, the treatment of Canada in this chapter presents a basis for analysing the differences in the copyright environments of developing and developed countries and for ascertaining how capable the economies of these categories of countries are to support a stronger copyright regime. Additionally, it examines how these agreements would help solve the problems facing Canada’s domestic copyright regime. For indeed, although Canada’s copyright regime is more advanced than Ghana’s, they both face common problems with respect to the protection of rights in literary works. These include the challenge technology poses to copyright protection in both regimes, and their common status, overall, as net importers of literary works.

Part I of this chapter traces the origins of literary activities in Canada. The use of the term ‘literary activities’ covers written and printed works as well as computer programmes. The usage of ‘literary’ here is different from that under Canada’s legislation since the former covers the ordinary meaning of literature (with the exception of computer programmes) without examining the criteria it must meet to qualify as a ‘literary work’ under Canada’s legislation. Further, in view of the variety of works that are included under the definition of literary works in Canadian copyright law and the lack
of adequate data on each of them, the statistics concerning literary activities in this Part cover mainly books, magazines, newspapers and computer programmes.

In Part II, I give an overview of Canada’s national and international copyright obligations before and after confederation. Following that, I discuss the copyright concerns of Canada’s literary industry, including the impact of technology and the protection of Canadian culture. I also present the basic features of copyright protection in Canada and examine the administration of copyright in Canada.

Part III assesses the implications of the recent international copyright agreements on the protection of literary works in Canada. I consider Canada’s copyright legislation with respect to any changes Canada was obliged to make to its copyright legislation in order to meet its new obligations. The discussion focuses mainly on Canada’s obligations under the TRIPS Agreement, though it comments on the extent to which the provisions of the WCT are reflected in Canadian copyright law.

In Part IV, I evaluate Canada’s efforts to meet these new obligations and the extent to which these efforts address its copyright concerns.

4.1: OVERVIEW OF LITERARY ACTIVITIES IN CANADA

4.1.1: WRITTEN/PRINTED WORKS

The nature of Canadian society has had an influence on its literary history. Canada is largely a multi-cultural and bilingual country having English and French as its
national languages. Canada has had a long record of having its own literature as well its literacy in these national languages. The development of its literary industry is a combination of that of English and French Canada. This split of the literary industry into that of English and French Canada originates from Canada's colonial links with France and England.

As is the case with other countries, the development of the Canadian book trade is linked to the activities of printers. The first printing press was set up in Halifax in 1751 and its establishment encouraged the growth of literary activities that were already in existence in Canada. By 1850 Toronto established itself as the centre of publishing in English Canada, while publishing activities in French Canada were based in Quebec. Until the Second World War, Quebec had dual printing activities, with missionaries publishing religious books whilst the secular ones were left to other book publishers.

The development of the book trade in Canada has not been a smooth one. Its initial problems included the operation of copyright in Canada. For example, the Colonial Copyright Act passed in 1847, had the effect of enabling the US to flood Canadian

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2 See ibid. at 108.
3 See George L. Parker, The Beginnings of the Book Trade in Canada (Toronto: University of Toronto Press, 1985) at 13. See also Toivo Roht and J.Z. Leon Patenaude, ibid. at 94. For further information on the origins of Canada’s literary activities, see H. Pearson Gundy, Book Publishing and Publishers in Canada before 1900 (Toronto: The Bibliographical Society of Canada, 1965).
4 For the literary activities in Canada before the establishment of the first printing press at Halifax, see George L. Parker, ibid. at 3.
5 See Toivo Roht and J.Z. Leon Patenaude, supra note 1 at 95. For further information on publishing in French Canada, see Georges Laberge and André Vachon, "Book Publishing in Quebec" in Royal Commission on Book Publishing: Background Papers (Toronto: The Queen’s printer and Publisher, 1972)
markets with cheap books whilst Canadians could not flood American markets with their books. Canada also engaged in the pirating of US works. However, this century, especially the second half of the century, has been one of growth for Canadian literary activities. The centenary of Canadian Confederation, in 1967, is regarded as one of the factors responsible for this growth because it may have increased nationalist feelings and national awareness.

As a result of that:

Canadian publishing experienced a renaissance, through the expansion of the paperback New Canadian Library and the new eighteen-volume history, The Canadian Century Series, as well as through best-selling authors like Pierre Berton, Farley Mowat, Irving Layton, Mordecai Richler, and through the emergence of several new publishers.

Presently, Canada is a net importer of books and other printed materials. This position originates from the fact that as a colony, Canada started relying on marketing imported materials and did not concentrate on developing its export sector. In 1969 imports and exports of books were valued at $144.8 million and $5.5 million respectively, whilst in 1977 they were valued at $414.2 million and $56.5 million respectively. In 1985. Statistics Canada estimated that the total wholesale domestic market was in the amount of $1.4 billion. 75% of which represented the total value of

\[\text{Value of Domestic Sales} + \text{Value of Imports} - \text{Value of Exports}\]


8 See Toivo Roht and J.Z. Leon Patenaude, supra note 1 at 94.

7 See ibid. at 108. See also, Jonathan L. Faber, "Culture in the Balance: Why Canada's Copyright Amendments Will Backfire on Canadian Culture by Paralyzing the Private Radio Industry" (1998) 8 Ind. Int'l & Comp. L. Rev. 431 at 438.

8 Jonathan L. Faber, ibid.

9 See Toivo Roht and J.Z. Leon Patenaude, supra note 1 at 115.


11 "The total wholesale value of the Canadian market for books is made of the domestic sales of own titles and of titles imported by publishers and exclusive agents established in Canada. to which is added the value
direct and indirect imports. In 1992-93, foreign sales by 243 firms (223 Canadian-controlled firms) involved in exports was valued at $274 million. Although figures are not readily available on the total value of imports in this decade, Industry Canada estimated that direct imports into Canada in 1993-94 were in the total amount of $435 million. This shows that there is a wide margin between imports and exports.

There is a large amount of foreign control of publishing in Canada. As compared with periodicals and books, Canadian newspapers are regarded as a "success story," a model which other cultural industries must emulate. This view is due in part to the fact that newspapers are patronised more than other aspects of Canadian culture and have more Canadian ownership. However, there is a general impression that Canadian publishing is largely dependent on government support and is not doing as well as it should.

Canada’s book publishing and manufacturing industries have expressed concerns similar to those of their counterparts in Ghana and in other countries. These include the cost and quality of paper. Canada’s position as a net importer of literary material, the
relatively small size of the Canadian market, the need for more government support and for the effective protection of their rights under Canada’s copyright regime. Further, the distribution of print materials is another issue of concern. In addition, the fact that Canada has two distinct book publishing and manufacturing industries, namely those of English and French Canada, has in some respects, impeded the emergence of a unified Canadian book industry. With the exception of the copyright concerns, which are dealt with in a later section of this chapter, a thorough discussion of the other issues does not fall within the purview of this work.

4.1.2: COMPUTER SOFTWARE

Computer technology is important to Canada’s development. In the 1980s, the industry was described as comprising several small and large firms and establishments engaged in “chaotic competition.” This description was based on the number of entrants to and exits from the industry, which between 1972 and 1977 was 266 and 108 respectively. In 1995, there were 5,330 software products firms in Canada. The

20 These are some of the concerns voiced by those engaged in the Canadian English and French book manufacturing industry. See Ernst & Ernst, supra note 5. Although this study was done in 1970, these concerns are still relevant. See also, Michael Dorland, ed., supra Chapter 1 note 172; Andrea Sheridan, “Fulfillment and Operating Practices in the European Book Industry – Executive Summary,” (Publication Date – 1996 – 10 – 03) [hereinafter Executive Summary], available at <http://strategis.ic.gc.ca/cgi-bin ...%20(product%20CONTAINS%20'115')%20> (date accessed: 19 November, 1998).
21 See Andrea Sheridan, ibid at 2 & 3.
22 See Ernst & Ernst, supra note 5. at 67 and 68; Andrea Sheridan, ibid; Andrea Sheridan, Annex B, supra note 11.
23 John Palmer and Raymond Resendes, Copyright and the Computer (Ottawa: Consumer and Corporate Affairs Canada, 1982) at 19.
24 Ibid. at 29.
Canadian products industry is a rapidly growing one. Total revenues from this industry in 1995 were estimated to be $2.7 billion, while Gross Domestic Product (GDP) at factor cost was estimated to be over $1.1 billion (in 1986 dollars). In 1995, this industry spent over $260 million on Research and Development (R & D), approximately 3.4% of the total Canadian R & D. In 1995, the majority of these firms had Internet homepages whilst more than two-thirds of their employees had Internet accounts.

The Canadian software and computer services industry is approximately 5% of the US market. However, software products companies in Canada derive a substantial amount of their revenue from export earnings, with the US being Canada’s largest supplier and market for these products, followed by Europe and the Asia-Pacific Region. In 1995, the Canadian market for software and computer services represented between 2-3% of the total estimated worldwide value of $US 322.5 billion. Canada’s imports of software products in 1994 were valued at $1.12 billion, representing 12.0% of total revenue and an increase in percentage from the estimated 10.6% in 1993.

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27 Ibid. at 3.

28 Ibid. at 2.

29 Ibid. In 1995, a total of 26,415 were employed in this industry. Ibid. at 4.

30 Ibid. at 4. This is an under-representation, as stated earlier.
Regarding exports, reliable data is not readily available.\textsuperscript{35} In any case, as compared to Ghana, Canada has a much more advanced and sophisticated computer software industry.

\textbf{4.2: THE COPYRIGHT REGIME}

\textbf{4.2.1: BACKGROUND TO CANADA'S NATIONAL AND INTERNATIONAL COPYRIGHT OBLIGATIONS}

There have been three main influences on Canada's domestic copyright legislation: the British, American and the French influence.\textsuperscript{36} Of these, the imperial influences originate from Canada's colonial links with England and France. Canada's economic ties and its geographical proximity to the US have also influenced copyright law in Canada.

Like most developed countries, Canada has had a long tradition of copyright protection dating back to the early nineteenth century. As was the case with British colonies like Ghana, Canada's introduction to copyright law came from the British. The Statute of Anne was extended to cover British Dominions, including Canada, in 1814.\textsuperscript{37} Canada's first domestic copyright legislation was a statute enacted by the Legislature of Lower Canada in 1832. This statute was based on the US' copyright legislation.\textsuperscript{38} The

\textsuperscript{35} Ibid.


\textsuperscript{37} See W.L. Hayhurst, \textit{ibid.}

\textsuperscript{38} \textit{Ibid.} at 281. For further discussion on Canada's copyright history, see Harold G. Fox, \textit{supra} Chapter 3 note 40; Simon Nowell-Smith, \textit{supra} Chapter 1 note 23 at 87; A. A. Keyes and C. Brunet, \textit{supra} Chapter 1 note 164 at 5.
British North America Act of 1867, which made Canada a self-governing dominion in the British Empire, gave the Federal Government exclusive jurisdiction in copyright issues. Canada subsequently enacted several Acts, which culminated in Canada’s Copyright Act of 1921.39 This Act was based on the 1911 Imperial Copyright Act, which was not applicable to Canada. In addition, the Copyright Act of 1921 “ended the reliance on US statutory precedent, save for occasional recent influences.”40 There have since been several amendments41 to this Act, the most recent major revision being in 1997.42

As is the case with Ghana, Canada’s international copyright obligations date back to Canada’s colonial era. In 1887, Canada became bound by the Berne Convention of 1886 as a British colony.43 Canada continued to adhere to the relevant versions of the Berne Convention 1886 in its 1921 and subsequent Acts. It recently ratified the Berne Convention 1971.44 Thus, Canada, like Ghana, is bound by the Berne Convention, 1971. However, prior to this ratification and due to the effects of TRIPS and NAFTA, Canada had to protect copyright at the Berne 1971 level.45 In the meantime, Canada had become

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39 Copyright Act, 1921, 11-12 Geo. 5, c. 24. It came into force in 1924. The Copyright Act of 1921 “superceded all previously applicable Imperial legislation and, with the exception of transitional provisions regarding existing rights, repealed all prior legislation.” A. A. Keyes and C. Brunet. ibid. at 5.
40 W. L. Hayhurst, supra note 36 at 287.
41 There were major amendments in 1931, 1988, 1993 and 1994. For further details, see David Vaver, supra Chapter 1 note 167 at 21.
43 See Harold G. Fox, supra Chapter 3 note 40 at 37. See also, W.L. Hayhurst, supra note 36 at 285. For general information on colonial copyright in the British Dominions, see William Briggs, supra Chapter 1 note 3, at 476-570.
44 This was done on 26 June, 1998. See WIPO homepage <http://www.wipo.org/eng/ratific/e-berne.htm> (date accessed: October 18, 1998).
45 See David Vaver, Chapter 1 note 167 at 3 note 2.
a party to the Universal Copyright Convention as from August 22, 1962.\textsuperscript{46} This move was also a result of the influence of Canada's relations with the US. It is said that:

The most important incentive for Canada to become a member of UCC was the fact that Canadian authors publishing in Canada would automatically obtain copyright protection in the United States without being required to have their works manufactured there, provided they had affixed to all published copies the UCC copyright notice.\textsuperscript{47}

Canada became a member of the WTO on 1 January, 1995 and became bound to implement the TRIPS Agreement from 1 January, 1996. Canada has signed the WCT, but has yet to ratify it.

\textbf{4.2.2: LITERARY INDUSTRY COPYRIGHT CONCERNS}

In comparison to Ghana, Canada has already experienced and dealt with most of the concerns of its literary industry regarding copyright. In Chapter 3, it was noted that there is no collecting society dedicated to administering rights solely in literary works in Ghana. Other issues confronting Ghana's literary industry, as discussed there, are the reproduction of works by reprography, the lack of awareness of copyright and high piracy levels. The protection of computer software, apart from as provided under the new international agreements, has not been a priority in Ghana. This can be attributed to the fact that Ghana does not produce computer software on a scale anywhere near that of any industrialised country. Chapter 3 also showed that the protection of electronic rights, such as database rights and multimedia or new media rights has also not been a matter of

\footnotesize{\textsuperscript{46} See Arpad Bogsch, \textit{supra} Chapter 1 note 62 at 251.}
concern in Ghana. In short, Ghana is now getting to the stage where the protection of digital rights will soon be a matter of concern.

The foregoing Ghanaian concerns are similar to those that Canada had dealt with in the 1970s. A study in that era revealed that the copyright concerns of Canadian authors and publishers included the following: privacy rights in unpublished works, and the rights and liabilities of libraries with respect to such works; the impact of new technologies such as photocopying,\(^4^8\) computers, long-distance machine copying, satellites, typographical or format copyright; the competition Canada’s print industries were experiencing from their US and British counterparts (the cultural issue), and the implications of Canada’s overall position as a net importer of copyright materials.\(^4^9\)

These problems were sought to be dealt with, inter alia, through the formation of a royalty collecting society by authors and publishers to administer their rights, especially with respect to collecting royalties for the reprographic reproduction of their works, and through the institution of a public lending right.\(^5^0\) It was also suggested that there be caution with respect to the use of compulsory licences.\(^5^1\)

In the 1980s, Canadian authors and publishers were faced with problems related to the inadequate protection offered by the Copyright Act against imports of illegal foreign editions of books, and against the unauthorised duplication of their works through

\(^{47}\) Roy C. Sharp, “Some Copyright Concerns of Canadian Authors and Publishers” in Royal Commission on Book Publishing: Background Papers, supra note 5, 111 at 126.

\(^{48}\) Canadian authors have in the past expressed concerns that the use of photocopiers was so widespread that it was decreasing the costs from sales of their copyright materials. See ibid. at 118.

\(^{49}\) For further details, see ibid.

\(^{50}\) Ibid. at 132 & 133.
photocopying. Most importantly, the Copyright Act was not adequately enforced.\textsuperscript{52} Again the solutions proposed consisted in the enforcement of importation provisions, and the removal of provisions in the Copyright Act exempting Berne Convention countries from the import restriction provisions in the Copyright Act.\textsuperscript{53}

Although some of the solutions proposed for the problems outlined above were put into effect,\textsuperscript{54} some of the same concerns are in existence today. First, Canada is currently concerned about competition from the print industries in other countries and about the pressures exerted by its overall position as a net importer of copyright materials. Second, just as the development of technology continues to challenge the international protection of copyright in literary works, and remains an issue that developing countries like Ghana are constantly challenged by, so is it an issue that Canada continues to be challenged by. Specifically for Canada, reproduction technologies such as reprography are still creating concerns for the protection of rights in print, as evidenced by an ongoing lawsuit between legal publishers and the Law Society of Upper Canada, in respect of an alleged infringement of the former's reproduction rights by the latter.\textsuperscript{55} Additional concerns relate to the protection of electronic rights, compilations, and works made available on the Internet.\textsuperscript{56} The Canadian case of Tele-Direct (Publications)

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\textsuperscript{51}Ibid. at 129-130.
\textsuperscript{53}Ibid.
\textsuperscript{54}For instance, there has since been the formation of CANCOPY to administer the rights of authors and publishers. See infra section 4.2.4.
\textsuperscript{56}On these points, see NGL Report, supra Chapter 2 note 9: Information Highway Advisory Council, (IHAC) Copyright and the Information Highway-Final Report of the Copyright SubCommittee (Ottawa: 1995); Organisation for Economic Co-operation and Development (OECD) Committee for Information,
Inc. v. American Business Information, Inc. shows that Canada has adopted the US position in the Feist case, by protecting the selection and arrangement of data as opposed to the data. Thus, in Canada the issue now is not so much what to protect but how to ensure that these works are effectively protected. Similarly, the protection of computer software is an ongoing, rather than a new concern. The challenge is therefore, how to effectively protect these works, and to handle the developments in this area.

As compared to the 1970s, in this decade the protection of Canada's print industries as a cultural policy has gained increasing significance. The preservation of Canadian culture with respect to the print industries include the promotion of indigenous publishing, authorship, and the patronisation of Canadian materials by Canadians. Authors and publishers in French and English Canada face stiff competition from their counterparts, especially from those in Britain, France and the US; hence the call for more Canadians to become authors. Canadian publishing is also in a fragile situation. With the exception of the newspaper sector, which faces little foreign competition and is performing successfully, the book and periodical sector are being threatened by

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58 For the Feist case, see supra Chapter 2 at section 2.1.1. For further details on some Canadian views on this issue, see Barry B. Sookman, "Copyright and Technology" in Gordon Henderson, et al., eds., Copyright and Confidential Information of Canada (Scarborough: Carswell Thomson Professional Publishing, 1994), 283 at 289; Norman Siebrasse, "Copyright in Facts and Information: Feist Publications is not, and should not be, the Law in Canada" (1994-1995) 11 C.I.P.R. 191.
59 For example, a study done in 1995 stated that works communicated electronically, or digital works, fitted into the definitions of literary, artistic, dramatic and musical works as provided under the Copyright Act. Thus, there was no need to give digitized works a separate legal protection. See IHAC, supra note 56, at 6 & 7. It was also determined that for the purposes of copyright protection, multimedia works could be regarded as compilations. Ibid. at 8.
competition; Canada's book publishing industry has been referred to as "vibrant but threatened,"\(^6\) and periodical publishing in Canada has been described as "diverse. eclectic, invaluable culturally but fragile financially."\(^6\)

The origins of this cultural threat are linked to Canada's historic and geographical ties with the US, the U.K. and to a lesser extent with France. As a former British colony, Canada has retained some its ties with the U.K. These include the fact that English is one of Canada's national languages and the majority of Canadians use English as their working language. The French links with Canada, which originated from parts of Canada such as Quebec and Nova Scotia having been under French rule, also exert some pressure on Canada's literary industry and on Canadian culture. The culmination of these historic ties is that Canada's literary industry experiences cultural pressures and faces competition from its counterparts in these countries.

However, the greatest threat to Canada comes from the US. The US's proximity to Canada, the fact that they share a common language, English, and the relative ease of mobility across the borders of these two countries are key to this issue. The US holds a prominent position in Canada's international trading relations. It is Canada's biggest trading partner and in 1988, 69% of Canada's total trade was with the US whilst 90% of Canada finished goods were marketed in the US.\(^6\) "Canada does twice as much business

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\(^6\) This situation is caused by a variety of factors including the fact that, as compared to other countries, few Canadians are involved in the profession on a full-time basis. Further, in the past many Canadians were lured away by the attractions of the US book publishing industry. See Roy C. Sharp, supra note 47 at 125.

\(^6\) Rowland Lorimer, in Michael Dorland, ed., supra Chapter 1 note 172, 1 at 3.


with the United States...as [the United States'] next biggest trading partner. Japan." 64

Canadians greatly patronise US materials, especially those of its entertainment industry. It is estimated that approximately 82% of periodicals at Canadian newstands originate from foreign countries, mainly the US. 65 The great quantity of US materials in Canada heightens the need to preserve Canada's culture.

With Canada being a multicultural society, there have been concerns as to whether there is a Canadian culture and, if so, what exactly this culture is. It has been observed that "there is not one Canadian culture, but many." 66 Although this captures the complexities of defining Canadian culture, Canada's government views its protection as a priority, and sees copyright as a way of promoting, protecting and encouraging cultural growth. This is seen, for example, in the objectives of the recent amendments to its Copyright Act.

"The first objective is "to strengthen Canada's cultural industries"; the second is "to 'modernize' Canada's copyright legislation by bringing it into line with fifty other countries... and to achieve 'a level of fairness' by acknowledging the rights of creators to receive recognition and remuneration for the use of their works." 67

Thus, in Canada, literary industry concerns are cultural concerns, as well as copyright concerns.

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64 Quoted in Jonathan L. Faber, supra note 7 at 431.
65 Ibid. at 445. But see, Lon Dubinsky supra note 62 at 43 & 44 (commenting that Canadian periodicals are faring well and control a substantial part of the Canadian market).
66 Quoted in Jonathan L. Faber, ibid. at 439.
67 Quoted in ibid. at 449.
4.2.3: BASIC PRINCIPLES OF THE COPYRIGHT PROTECTION OF LITERARY WORKS IN CANADA

4.2.3.1: CATEGORIES OF LITERARY WORKS

Under Canada’s Copyright Act (the Copyright Act), copyright protection is granted to “every original literary, dramatic, musical and artistic work,” subject to the requirements for a work to be eligible for copyright protection being met. The use of the word “literary” under the Copyright Act does not refer to a particular literary merit in a written work. Rather, it refers to original works which qualify as “literary works” under the Copyright Act. Further, a “work” under the Copyright Act includes its distinctive and original titles. An examination of the Copyright Act reveals that there are two broad categories of literary works in Canada: writings, and works which are not fixed. This is due to the fact that fixation is not a prerequisite for a work to qualify as a literary work in Canada.

The Copyright Act defines a literary work to include “tables, computer programs, and compilations of literary works.” The use of the term ‘compilation’ in the Copyright Act refers to “a work resulting from the selection or arrangement of literary, dramatic.
musical or artistic works or of parts thereof, or a work resulting from the selection or arrangement of data." The Copyright Act covers "a set of instructions or statements, expressed, fixed, embodied or stored in any manner, that is to be used directly or indirectly in a computer in order to bring about a specific result." The Copyright Act does not provide a definition of a table.

The definition of "every original literary, dramatic, musical and artistic work" provides more works that qualify as literary works in Canada. Thus, "literary works" include "books, pamphlets and other writings, lectures ... [and] translations." From the wording of the Copyright Act, it is clear that the list of literary works is not exhaustive. Judicial decisions have helped to provide examples of the types of works that fall within the ambit of literary works in Canada. These include the following:

1. A list of employees, stored in a computer program;
2. A novel published in a newspaper;
3. Accounting Forms;
4. A television schedule;
5. A catalogue;

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72 ibid.
73 ibid. at section 2. 1(1).
74 ibid. at section 2.
75 The full list with the relevant cases is available on pages 85 - 86 of Normand Tamaro, The 1998 Annotated Copyright Act (Scarborough: Carswell Thomson Professional Publishing, 1998).
77 Zamacois v. Douville (1943), 3 Fox Pat. C. 44 (Ex.Ct.).
6. Telephone directories;\textsuperscript{81} and

7. Envelopes with a distinctive arrangement of colours and written characters.\textsuperscript{82}

The Canadian Copyright Act also protects literary works in digital form.\textsuperscript{83} The Canadian Act further recognises copyright in published and unpublished works.\textsuperscript{84} In all the foregoing, it protects the original expression of an idea rather than the idea itself.

The registration of a work is not a prerequisite for copyright protection. Additionally, copyright protection is granted to works of citizens, subjects or persons ordinarily resident in countries whose works Canada has a treaty obligation to protect and, to works published in countries prior to those countries becoming members of the WTO or party to the Berne Convention.\textsuperscript{85} Finally, the Minister has the authority to extend copyright protection to non-treaty countries.\textsuperscript{86}

The foregoing review of the types of literary works in Canada shows that there are similarities and differences between "literary works" in Canada and in Ghana. As noted, whilst literary works under the Copyright Act cover both fixed and non-fixed works, Ghanaian copyright requires that works be fixed before being eligible for copyright protection.\textsuperscript{87} Unlike in Ghana, tables and computer programmes are protected as literary works in Canada. Again, unlike Canada, Ghana has not had much litigation in the area of the protection of literary works. For that reason, there has hardly been an opportunity for

\textsuperscript{81} T.J. Moore Co. v. Accessoires de bureau de Québec Inc. (1973), 14 C.P.R. (2d) 113 (Fed. T.D.).
\textsuperscript{82} Milionis v. Petropoulos (1988), 23 C.P.R. (3d) 52 (Ont. H.C.).
\textsuperscript{83} Cardwell v. Leduc (1962), 23 Fox Pat. 99 (Ex.Ct).
\textsuperscript{84} See supra section 4.2.2 and supra note 59.
\textsuperscript{85} The Copyright Act, supra note 68 at sections 5 and 2.2(1).
\textsuperscript{86} Ibid. at section 5(1.01).
\textsuperscript{87} Ibid. at section 5(2).
\textsuperscript{88} See supra Chapter 3 at section 3.2.2 on the applicability of this fixation requirement to works of Ghanaian folklore.
judicial decisions to expand the scope of literary works in Ghana, as they have done in Canada.

4.2.3.2: PROTECTION OF LITERARY WORKS: ECONOMIC AND MORAL RIGHTS

There is no single definition of copyright in Canada since the Copyright Act relates copyright to the rights the Act grants in respect of different works.\textsuperscript{88} However, copyright (economic rights) in literary works:

means the sole right to produce or reproduce the work, or any substantial part thereof, in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right:

(a) to produce, reproduce, perform or publish any translation of the work,

(c) in the case of a novel or other non-dramatic work ... to convert it into a dramatic work, by way of performance in public or otherwise.

(d) ... to make any sound recording, cinematographic film or other contrivance by means of which the work may be mechanically performed, or

(e) ... to reproduce, adapt and publicly present the work as a cinematographic work,

(f) ... to communicate the work to the public by telecommunication.

...

(h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program, and

\textsuperscript{88} The Copyright Act, supra note 68, at section 2 provides that copyright "means the rights described in (a) section 3, in the case of a work, (b) sections 15 and 26, in the case of a performers performance, (c) section 18, in the case of a sound recording, or (d) section 21, in the case of a communication signal..."
to authorise any such acts. 89

Thus, economic rights in Canada broadly cover the reproduction or transformation of a work, the communication of a work to the public, and the rental of a computer programme. Although the provisions for economic rights in Canada are more detailed than in Ghana, they cover roughly the same activities. The exception is that computer programmes are not protected under Ghanaian copyright law.

An author has several moral rights in his or her work. The first of these is the right of integrity, which entitles an author to prevent any distortion, mutilation or other modification of his or her work, and the right to restrain the use of the literary work "in association with a product, service, cause or institution" if such a use would be prejudicial to the author's honour or reputation.90 Second is the paternity right. This covers the right of an author to be associated with his or her work by his or her own name. It also entitles the author to use a pseudonym, or to remain an anonymous author.91

Respecting the foregoing moral rights, the main difference between the Canadian provisions and the Ghanaian ones is that Ghana's Law 110 does not give an author the right to restrain the association of his or her work for a particular cause, product or service.

In addition to these moral rights and economic rights, the copyright owner has the right to assign or license his or her right in the work subject to some conditions.92

89 Ibid. at section 3(1).
90 Ibid. at section 28.2(1).
91 Ibid. at section 14.1(1).
92 Ibid. at sections 13(5)-14(2).
Generally, the first owner of copyright is the author of the work. With respect to works made by an employee in the course of employment, the employer is the owner of the copyright in the work, in the absence of any agreement to the contrary. The exception to this employment scenario is that in respect of an article or a contribution to a magazine, newspaper or similar publication and in the absence of any agreement to the contrary, the employee shall have the right to object to any publication of the work other than in the relevant periodical.

The duration of the copyright in a work varies, depending on the type of work. Generally, the duration of copyright (economic right in a literary work) is “the life of the author, the remainder of the calendar year in which the author dies, and a period of fifty years following the end of that calendar year.” Unlike Ghana’s Law 110, moral rights in Canada do not exist in perpetuity. They exist for the same length of time as do economic rights in a literary work.

4.2.3.3: INFRINGEMENT AND REMEDIES

Basically, copyright is infringed where a person deals with a copyright holder’s work, without the latter’s consent, in a manner legally conferred only on the copyright holder. The Copyright Act provides for general and secondary infringements of

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93 Ibid. at section 13(1).
94 Ibid. at section 13(3).
95 Ibid.
96 Ibid. at sections 6-12.
97 Ibid. at section 6.
98 Ibid. at section 14.2(1).
With respect to secondary infringement, it is irrelevant if an importer was unaware that the importation of a work was an infringement of copyright. The Copyright Act also provides for infringements with respect to book imports. A person becomes liable if he or she made copies of the book with the consent of the copyright holder, in the country where these copies were made, and imports the copies into Canada without the copyright holder’s consent, if the “person knows or should have known that the book would infringe copyright if it were made in Canada by the importer.” There are also secondary infringements with respect to book imports. However, the specific infringement provisions regarding books only apply where there is a distributor of such books in Canada, and, the infringements apply to the area the distributor services. Under Ghana’s Law 110, it is a violation of a person’s right to import a work into Ghana, other than for the person’s private use, the knowledge of the importer being irrelevant in the determination of the infringement of copyright. Further, Ghana’s copyright law does not give book imports the special treatment accorded in Canada.

More generally, the Copyright Act provides expressly that a person who without an author’s consent, does or omits to do an act that violates an author’s moral right in a

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99 Subject to the exceptions to an infringement of copyright in sections 29-33 of the Copyright Act, there is deemed to be a general infringement of copyright if a person does anything that only the owner of copyright has the right to do, without the consent of the owner. Ibid. at section 27(1). Secondary infringements include selling or renting out [a work], ibid. at section 27(2)(a); distributing a work in a manner that prejudicially affects the right of the owner of the copyright, ibid. at section 27(2)(b); distributing a work for the purposes of trade, ibid. at section 27(2)(c); possessing a work for any of these purposes, ibid. at section 27(2)(d); and importing a copy of a work into Canada for these purposes, irrespective of whether the offender knew that he or she was infringing copyright, ibid. at sections 27(2)(e) and 27(3). The Copyright Act also recognises offences with respect to the parallel importation of books. Ibid. at section 27.1.

100 Ibid. at section 27(3).

101 Ibid. at section 27.1(1).

102 Ibid. at section 27.1(2).
work infringes that right. The situation is the same in Ghana, so that to both Ghana and Canada, the protection of moral rights is integral to their respective copyright regimes.

The Canadian defence to an infringement of copyright is generally known as fair dealing.\textsuperscript{104} On the whole Canadian courts have construed the fair dealing defence narrowly and been unwilling to "make law."\textsuperscript{105} The Copyright Act also specifically provides for legitimate uses of computer programmes.\textsuperscript{106}

The Copyright Act has extensive provisions on the remedies for an infringement of copyright.\textsuperscript{107} As in Ghana, an injured author has civil or criminal remedies available to him or her for the infringement of his or her rights. A copyright holder is entitled to civil remedies such as "injunction, damages, accounts, delivery up," and other such rights "that are or may be conferred by law" in respect of copyright (economic rights) and moral rights infringements.\textsuperscript{108} The injured party may recover possession of infringing copies of a works, as well as of any plates used or to be used in the production of

\begin{footnotes}
\textsuperscript{102} Ibid. at section 27.1(3).
\textsuperscript{103} Ibid. at section 29. Canadian courts have held that the following do not constitute fair dealing. In Cie Générale Des Etablissements Michelin v. C.A.W.-Canada (1997), 71 C.P.R. (3d) 348 (Fed. T.D.) it was held that parody does not fall under fair dealing for the purpose of criticism. In R. v James Lorimer & Co., (1984) 1F. C. 1065 (C.A.) it was held not to be fair dealing for the purposes of review for a person to do no more than condense the Crown's work into an abridged version and reproduce it under the author's name. This case was based on the Copyright Act, R.S.C. 1970, c. C-30. Further, in Allen v. Toronto Star Newspapers Ltd. (1995), 63 C.P.R. (3d) 517 (Ont. Gen. Div.), it was held not to be fair dealing for the purpose of news reporting for a newspaper to publish the cover of a magazine on which a photograph was prominently displayed.
\textsuperscript{104} Ibid. at section 29.
\textsuperscript{105} On this point, see Normand Tamaro, supra note 75 at 355 - 356.
\textsuperscript{106} The Copyright Act, supra note 68 at section 30.6.
\textsuperscript{107} It has been observed that the remedies introduced by the 1997 amendments to the Copyright Act were long overdue. See David Vaver, "The Copyright Amendments of 1997: An Overview" (December 1997) 12 I.P.J. 53 [hereinafter The 1997 Copyright Amendments] at 69 - 71.
\end{footnotes}
infringing copies. Further, the court has the power to order the destruction of infringing copies and plates.

But an injunction is the only remedy available where a defendant proves that at the date of the infringement, the defendant did not know and had no reasonable ground to suspect that copyright subsisted in the work. This provision is confined to cases where copyright in the work had not been duly registered under the Copyright Act. Ghanaian copyright law makes no distinction in this matter between infringers who were or were not aware that they were infringing copyright. Under the Copyright Act, the limitation period for instituting an action is three years from the date of the infringement, or three years from the date when the plaintiff could reasonably be expected to have been aware of the infringement. However, a defendant has to plead the limitation period before the court applies it. Under the Ghanaian Law 110, no period of limitation is specified.

As with Ghana, the Copyright Act provides remedies for criminal infringement of copyright. Unlike the position in Ghana, in Canada the infringing acts with respect to literary works must be committed knowingly by the infringer for that person to be criminally liable. The infringing acts include selling, renting out, or importing into Canada for sale or rental, an infringing copy of a work. These acts are punishable by fine

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108 The Copyright Act, supra note 68 at section 34(1) and 34(2) on copyright (economic) and moral rights respectively.
109 Ibid. at section 38.
110 Ibid. at section 38(2).
111 Ibid. at section 39(1).
112 Ibid. at section 39(2).
113 Ibid. at section 41.
114 Ibid. at section 41(2).
115 Ibid. at section 42.
or imprisonment.\textsuperscript{116} As noted with the civil remedies, the court has the power to order the destruction of infringing copies or plates.\textsuperscript{117}

A third category of remedies is with respect to border measures. A copyright holder has the right to prevent the importation into Canada of copies of a work that would infringe copyright if made in Canada. The copyright holder may obtain an order from the court to authorise the detention of the copies. This should follow an application on notice by the copyright holder to the Department of National Revenue and a subsequent determination by the court to effect the detention.\textsuperscript{118}

\textbf{4.2.4: ADMINISTRATION OF RIGHTS}

The Canadian government strongly supports the encouragement of intellectual property rights in Canada, recognising that the development of intellectual property will make a positive contribution to the growth of the Canadian economy. It has been observed that intellectual property "plays a strong role in achieving Canada’s public policy objectives in the areas of economic and cultural development."\textsuperscript{119}

There are three main bodies overseeing the administration of copyright. First is Industry Canada, formerly Consumer and Corporate Affairs Canada, a government department responsible for the administration of the Copyright Act. Second, the Copyright Office registers works that are eligible for copyright protection. This office is directed by the Registrar of Copyright and forms a part of the Canadian Intellectual

\textsuperscript{116} Ibid. at section 42(1)(a)(e)(f) and (g).
\textsuperscript{117} Ibid. at section 42(3).
\textsuperscript{118} Ibid. at section 44.
\textsuperscript{119} IPCCl Report, at 2.
Property Office (CIPO), which is under the jurisdiction of Industry Canada. Third is Canadian Heritage, formerly Communications Canada, a government department that, jointly with Industry Canada, has the duty of developing policy for revisions to the Copyright Act.

Canada operates a system of collective administration of rights. As is the case in Ghana, the operation of this system is not a recent development in Canada. It has been practised with respect to musical works for over 60 years. The earliest forms of these collective societies were the Performing Rights Societies. The impetus for the creation of more copyright collectives came from technological developments which, in lowering the cost of reproducing copyright protected works and making it easier to reproduce such works on a large scale, created the need for increased protection of authors’ rights.

The Copyright Act provides for the collective administration of copyright by collective societies and for the administration of performing rights and communication rights. Unlike the position in Ghana, there are presently many copyright collectives in Canada. These include the Canadian Copyright Licensing Agency (CANCOPY), Union des ecrivaines et ecrivains Quebecois (UneQ), the Canadian Retransmission Collective (CRC), and the Society of Composers, Authors and Music Publishers of Canada

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120 See Lesley E. Harris, supra note Chapter 1 note 134 at 191.
121 For the history of the Canadian Performing Rights Society, see Roy C. Sharp, supra note 47 at 128.
122 See Douglas A. Smith, Collective Agencies For the Administration of Copyright (Ottawa: Consumer and Corporate Affairs Canada, 1983) at 3; A. A. Keyes and C. Brunet, supra Chapter 1 note 164 at 209.
123 See The Copyright Act, supra note 68 at section 70.1.
124 See ibid. at sections 67 and 68.
Of these collecting societies CANCOPY and UNeQ play an important role for Canadian authors and publishing.

CANCOPY is a non-profit organization established in 1988 by Canadian writers and publishers. It administers their reproduction rights, including photocopying rights, issues licences such as transactional and comprehensive licences, and collects and distributes royalties on their behalf. It performs these functions for authors and publishers in Canada, excluding those in Quebec. UneQ performs these functions in Quebec. The federal government has a joint photocopying licence with these two bodies in respect of works copied by its employees. CANCOPY has agreements with its counterparts in other countries and is a member of the International Federation of Reproduction Rights Organisations (IFRRO). The member organisations of CANCOPY include the Canadian Authors' Association (CAA) and the Canadian Publishers' Council.

The Copyright Act has also established the Copyright Board with authority concerning these collecting bodies. This Board is an independent tribunal whose duties include determining the amount of royalties to be charged for the use of certain copyright works. The Copyright Board was set up to replace the Copyright Appeal Board as a result of the 1988 amendments to the Copyright Act.

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125 Transactional licences are licences granted for photocopying a work once whilst comprehensive licences are given to institutions that reproduce works on a large scale. For further information on CANCOPY, see CANCOPY homepage <http://cancopy.com/cclink.html> (date accessed: October 1, 1998).
126 See ibid.
127 The Copyright Act, supra note 68 at section 66.
128 For further details on the history of the Copyright Board and on collective administration in Canada, see J. Fraser Mann, “Acquisition, Ownership, and Collective Administration of Copyright,” in Gordon Henderson, et al., eds., supra note 58 at 99; Normand Tamaro supra note 75 at 544; Douglas A. Smith, supra note 122; and Canadian Intellectual Property Office, “Copyright Circulars: Performing Rights Societies and Other Copyright Collectives” (Circular No. 4, October 1, 1997) available at <http://strategis.ic.gc.ca/sc_mrksv/cipo/prod_ser/cp/cp_circ_4-e.html> (date accessed: October 1, 1998).
4.2.5: OVERVIEW

Despite Canada's position as a developed country, it is a net importer of intellectual property materials,129 of most copyright-protected materials,130 and of information from the US.131 Its position as a net importer of copyright materials attests to the diversity within the developed-country category in relation to a country's status as a net importer or net exporter of copyright materials. This shows that net importer status is not dependent on the classification of countries as developed or developing ones. Thus, although Canada is far more developed than Ghana, they both fall within the importer-country class.

These facts notwithstanding, Canada's intellectual property industries and framework are in a better condition than those of other net importers, particularly those of developing countries. Its industries dependent on intellectual property have contributed as much as 10% to its gross domestic product and this figure is expected to increase.132 Canada has achieved a high level of technological development due, in part, to the fact that it has relative ease in gaining access to foreign technology.133

With particular reference to copyright, Canada exhibits the features of a strong copyright system. It has in place a good copyright infrastructure. Additionally, due to its long tradition of copyright protection, there is a general knowledge, respect for, and

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129 See IPCCI Report at ii.
130 Ibid, at 8.
132 See IPCCI Report at 2.
133 Ibid. at 6.
observance of copyright in Canada. It experiences a lower level of piracy than the US and the European market. 134

These positive and strong features of the Canadian copyright system are, of course, not true of the Ghanaian one. Therein lies the main difference between the status of these two countries as developed and developing.

4.3: EVALUATION OF THE COPYRIGHT ACT IN THE LIGHT OF THE TRIPS AGREEMENT, AND THE WCT

4.3.1: IN RELATION TO THE TRIPS AGREEMENT

Canada has long recognised the importance of having a strong copyright system. Despite its overall position as a net importer of both copyright and intellectual property materials, the fact that it is a party to the international copyright conventions is evidence of its belief in the international copyright regime. The view was expressed that for Canada to pull out of these agreements and freely copy the works of foreign authors "would ... be a special form of genocide so far as Canadian authors are concerned." 135

Canada has progressed from the stage where she once pirated copyright works from the US to the stage of having an efficient intellectual property system.

Domestically, Canada should derive the expected benefits from an increased level of intellectual property protection. Accordingly, there should be an increase in creativity, the encouragement of domestic industries, an increase in direct foreign investment as well as the promotion of technology transfer. Although TRIPS appears to be aimed at

134 Ibid. at 13.
135 Roy C. Sharp, supra note 47 at 127.
developing countries and countries with a poor record of protecting intellectual property rights. the expected benefits of increased levels of property protection apply to all countries, developing or otherwise. Even before the conclusion of TRIPS, Canadian companies and governments had recognized “the value of providing high levels of IPR [intellectual property rights] protection in order to generate domestic technology and other creative products and to secure technology transfer and investment.”

A reduction in the infringements of intellectual property rights overseas has been recognised as being “important to Canada’s long-term economic interests.” Canada has sustained fewer losses with respect to exports than have other industrialised countries because most of its trade is with countries that have strong intellectual property regimes. However, an increase in the observance of intellectual property rights abroad could encourage Canadian authors to export intellectual property works to countries with which they have hitherto not had much trade.

Canada took several measures in order to meet its TRIPS obligations. First was the passage of the World Trade Implementation Act, which came into force on January 1, 1996. Canada’s recent ratification of the Berne Convention 1971 can also be regarded as a fulfillment of its TRIPS obligations since TRIPS obliges WTO Members to comply with specified provisions of the Berne Convention 1971. However, although this ratification came later than the deadline of 1 January 1996, for the implementation of

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136 IPCCI Report at 18.
137 Ibid. at 21.
138 Ibid. at 15.
140 As discussed in Chapter 2, WTO Members are to comply with Articles 1-21, excluding Article 6 bis, and the Appendix of the Berne Convention 1971.
TRIPS by developed nations, it will not require a revision of Canada's Copyright Act since, as noted, Canada was bound by NAFTA to protect copyright to the level of the Berne Convention 1971. With respect to the more general TRIPS provisions, Canada has extended copyright protection to WTO Members. As noted, the Copyright Act has provisions on criminal penalties, and civil remedies for infringement of copyright, and procedures with respect to border measures as prescribed by TRIPS. An examination of Canada's Copyright Act shows that Canada has fulfilled its TRIPS obligations with respect to the various types of literary works, having extended protection to computer programs and compilations as literary works.

However, Canada's protection of these forms of works and rights is not due only to TRIPS. Canada protected computer programmes and compilations before 1 January, 1996. The 1988 amendments to the Canadian Copyright Act defined computer programmes as literary works. Although before the 1980s, Canadian courts had not handled copyright cases involving computer software, before the conclusion of TRIPS there had been Canadian cases on this area such as Apple Computer v. Macintosh Computers. The 1988 amendments to the Act were made to clarify that both source and object code of computer programs are protected by copyright. The amendments as far as the protection for source and object code were concerned largely confirmed what

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131 See above at section 4.2.3.3.
132 The Copyright Act, supra note 68 at section 2. See TRIPS Article 10 on this issue and above discussion at Chapter 2 section 2.2.1.2.
133 For example, the 1994 Amendments to Canada's Copyright Act introduced a definition of compilation for the first time. See Barry B. Sookman, supra note 58 at 290.
135 See Chapter 2 section 2.1. For details of other Canadian cases in this area, see ibid. at 678.
the courts had already previously decided." Further, Canada already had a history of protecting computer programmes under other areas of Canadian law such as patents, trade secret, fiduciary duty law and under Canada’s Criminal Code.147

Additionally, Canada’s obligation to protect computer programmes and compilations under its copyright legislation was reinforced by NAFTA.148 Canada implemented NAFTA by passing the North American Free Trade Implementation Act of 1993.149 The NAFTA obligations have substantial similarity to the TRIPS provisions. The main NAFTA provisions on the protection of computer programmes and compilations under copyright laws were as follows:

1. Computer programs were to be regarded as literary works and protected as such.150
2. A rental right was to be included in copyright legislation.151 “NAFTA did not give the copyright owner control over all lending practices - only “commercial” rentals.”152
3. Protection was also granted to compilations of data or other material in machine readable or other from which qualified as intellectual creation due to the arrangement or selection of the material.153

As discussed above, the Copyright Act defines a computer programme as:

... a set of instructions or statements, expressed, fixed, embodied or stored in any manner, that is to be used directly or indirectly in a computer in order to bring about a specific result.154

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146 Barry B. Sookman supra note 58, at 292.
147 See supra note 144 at 673. For some background information on this issue, see Andrea Friedman Rush, Legal Protection of Computer Software in Canada (L.L.M., School of Graduate Studies, University of Ottawa, April, 1985) [unpublished].
148 Chapter 17 of NAFTA is devoted to Intellectual property, mainly copyright.
150 NAFTA, article 1705, paragraph 1, l(a).
151 The NAFTA provisions concerning rentals of computer programmes are in Article 1705(2).
152 David Vaver, “Record and Software Rentals: The Copyright Spin” (1995-1996) 10 I.P.J. 109 at 122. See also Barry B. Sookman, supra note 58, 283 at 301. For a discussion on the NAFTA rental provisions, see David Vaver, ibid.
153 NAFTA, article 1705, paragraph 1(b).
154 The Copyright Act, supra note 68 at section 2.
TRIPS obliges WTO Members to protect computer software "whether in source or object code" as literary works. Although the definition of computer programme in the Copyright Act does not mention the words "source or object code," the Copyright Act can be said to have met TRIPS' standards. This is because the Copyright Act does not state that the "set or instructions or statements" should be machine readable or human readable.\(^{155}\) The definition of computer programmes in the Copyright Act is thus wide enough to cover the source or object code.

The following points are worthy of mention with respect to compilations. The definition of compilation in the Copyright Act is sufficiently broad to cover those in "machine readable or other forms."\(^ {156}\) This is because the Copyright Act makes no distinction between the forms in which the work is expressed. This is further strengthened by the fact that as a result of its NAFTA obligations, Canada was obliged to protect compilations in machine readable or other form.

Canada's protection of rental rights in computer programmes is a result of its NAFTA obligations. The Copyright Act provides for rental rights in respect of computer programs in section 3(1):

For the purposes of this Act, "copyright," in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right...

(h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its

\(^ {155}\) See the discussion on computer programmes in Chapter 2 at section 2.1.

\(^ {156}\) See TRIPS, at Art. 10(2).
execution in conjunction with a machine, device or computer, to rent out the computer program.\textsuperscript{157}

In order to fulfill its obligations under NAFTA, Canada “created a limited rental right for computer programs and sound recordings.”\textsuperscript{158} This was not a new concept since the idea that copyright should include a rental right had already been proposed.\textsuperscript{159} Thus, unlike Ghana, Canada’s compliance with TRIPS results not so much from TRIPS as from Canada’s internal copyright policies and its economic relations with the US. Consequently, TRIPS has not expanded the scope of literary works in Canada to the extent that it would do in Ghana.

Finally, from an evaluation of the Copyright Act, it is clear that in implementing TRIPS, Canada did not repeal its moral rights provisions. It can be implied that Canada’s interpretation of TRIPS Article 9 is that although TRIPS does not provide for moral rights, it does not abolish them either. Thus, a WTO Member who is a party to the Berne Convention, 1971, can provide for moral rights in its copyright legislation.\textsuperscript{160}

One issue that remains for the future is the effect that the elements of a global economy, as reflected in the preamble to TRIPS, will have on the protection of Canadian

\textsuperscript{157}The wording in TRIPS Article 11 differs slightly: “In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. A Member shall be excepted from this obligation in respect of cinematographic works 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, this obligation does not apply to rentals where the program itself is not the essential object of the rental.”

\textsuperscript{158}Barry B. Sookman, \textit{supra} note 58 at 301.

\textsuperscript{159}See David Vaver, \textit{supra} note 107 at 110 & 111. See generally, Roy C. Sharp, \textit{supra} note 5.

\textsuperscript{160}TRIPS Article 2(2) provides as follows: “Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Berne Convention.” By reading this Article in connection with Article 9, it is possible to argue that if a country has an obligation under the Berne Convention to protect moral rights, then TRIPS’ intention is not to do away with that obligation. The only problem here is that Article 2(2) mentions “existing obligations” rather than “post TRIPS obligations.” However, it is this author’s view that TRIPS has not abolished moral rights.
culture in general and on Canada's literary industry in particular. What effect will the reduction in trade barriers have on Canada's literary industry? Basically, the answer centres on what is seen as being a barrier to trade. Presently, inefficient intellectual property regimes are the main barriers in this area. However, it is possible that with time there will be additions to this view. In its relations with the US, Canada has sought to protect its cultural industries by obtaining some exemptions in their favour in Free Trade Agreements with the US, such as the cultural exemptions under NAFTA. The NAFTA exemptions, and Canadian government efforts to protect Canadian culture have, however, been regarded as discriminatory by the US. If, in the future, cultural protection policies are added to this list, then this would, possibly, adversely affect the growth of the Canadian literary industry. This is because, without such policies, Canada's print industries may face greater levels of competition, especially from their US counterparts.

4.3.2: IN RELATION TO THE WCT

Canada has implemented the relevant TRIPS obligations respecting the protection of computer programmes and compilations of data as literary works, and respecting rental rights in computer programmes. In the process, it has thereby fulfilled the relevant WCT provisions on these types of literary works. (As noted in Chapter 3, Ghana proposes to do the same under its Copyright Bill). Beyond this, the other significant WCT provisions which Canada would have to institute if the WCT comes into force, are those on the

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161 See Jonathan L. Faber, supra note 7 at 446-447.
Right of Distribution, the Obligations Concerning Technological Measures, and those on Rights Management Information. Canada, unlike Ghana, has not provided for Rights Management Information. The Right of Distribution is particularly important to Canada because there have been discussions on whether to provide for a right of distribution in Canadian copyright legislation and on the impact of such a provision.

Article 6 of the WCT provides for the Right of Distribution as follows:

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.

(2) Nothing in this Treaty shall affect the freedom of the Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.

This provision applies to fixed works which can be circulated as tangible copies and excludes the public lending of a work since that does not involve a transfer of ownership.

The Copyright Act does not have an express provision on the right of distribution. However, as noted, authors of literary works have the sole right to reproduce their works, including the right to communicate the work to the public by telecommunications.
Telecommunication is defined as meaning “any transmission of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system.” This provision appears to be more in the nature of an electronic transmission right than of a distribution right for fixed works as provided for by the WCT. Although the Copyright Act gives a book distributor, who has exclusive distribution agreements, the right to prevent the parallel importation and the unauthorised distribution of books that would adversely affect his or her sales, this is not the distribution right provided in the WCT.

The Copyright Act has few provisions dealing expressly with digital technology. Canada’s policy with respect to digital works has been to fit them within the categories of works in its Copyright Act, rather than to provide expressly for them. So far as the Copyright Act can be interpreted to include such works, there is no reason why express provisions should be made with respect to digital works. It has been admitted that the “Canadian government hasn’t yet explicitly looked at [copyright] in the context of digital technology, and “that the next round of amendments will deal with digital technology.” For that reason it has been suggested that the 1997 amendments “should have been more carefully drafted.” This suggestion appears to be made in the light of the fact that the

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168 For further details, see Memorandum on WIPO, supra Chapter 2 note 191. Notes on Article 8 at note 8.04.
169 See the Copyright Act, supra note 68 section 3(1). See also supra at section 4.2.3.2.
170 The Copyright Act, ibid. at section 2.
171 Cf. IHAC, supra note 56 at 10 & 25.
172 See the Copyright Act, supra note 68 at sections 27, 44.2 and 2 (the definition of an exclusive distributor). See also David Vaver, supra note 107 at 62.
173 Quoted in Jonathan L. Faber, supra note 7 at 459.
174 Ibid.
WIPO Treaties, such as the WCT, could either contravene Canadian law or at the least, contain provisions which are presently absent from Canadian copyright law. Against the background of the discussion in this section, it is clear that there is some merit in this observation. As noted, Canada’s Copyright Act must be amended in order to comply with the WCT in this respect.

Thus, the main effect of the WCT on the protection of literary works is that, as with Ghana, it will take Canada more into the digital environment. The result will be a greater protection of rights in literary works.

4.4: FINAL OBSERVATIONS AND CONCLUSION

Canada would stand to benefit more from the new international copyright environment if it developed the export of intellectual property goods. The ideal situation would be for Canada’s literary industry to be nurtured, encouraged and developed to the extent that Canada becomes a net exporter of literary materials. Even if this ideal situation is not attained and Canada remains a net importer of copyright materials, the promotion of the export of literary materials would reduce its balance of payments deficit with respect to intellectual property goods. Only time will tell whether a phase of globalization would be a reduction or even an elimination of measures that countries like Canada have put in place to protect their cultural industries. It is therefore necessary that Canada’s cultural industries attain an appreciable level of development and competitiveness before any other barriers and impediments to legitimate trade come under the scrutiny of the ‘globalization microscope.’
It would also be useful if Canada adopts a policy of making future international copyright agreements achieve a balance between countries that are net importers and net exporters of copyright materials. Presently and due in part to the national treatment principle, the international copyright agreements promote the trade of net exporters of copyright goods. An examination of Canada's copyright policy reveals that it supports the international copyright framework, but also aims to promote its cultural industries. It appears that in supporting the former Canada has not been able to promote the latter to the extent that would have been expected. Reports on Canada's copyright position brought out the disadvantages of Canada acceding to subsequent versions of the Berne Convention and of remaining in the Berne Union.175 Another study proposed that a distinction be made in applying the national treatment principle to convention as opposed to non-convention material.176 For a net-importer country, the combination of granting protection to more works and the operation of the national treatment principle results in a higher net outflow of royalties as well as an increase in that country's balance of payments deficit in the copyright area. 177 It is therefore important that Canada and other net importing countries adopt international copyright policies distinct from those of net exporters. This will contribute towards ensuring that the net importers do not continue to be at a disadvantage on the international copyright plane.

Canada's international copyright policy has been influenced by domestic pressures, technology, international events, and largely by the policy of the US. Although

176 See ibid. at 302-303.
177 Cf. ibid. at 300.
the US holds an important position as one of Canada's closest neighbours as well as Canada's main trading partner, the US's position as a net exporter of copyright materials means that it benefits more from an extension of international copyright to cover more works than does Canada. Thus, what is in the best interests of US authors may not necessarily be in the interests of Canadian authors. Consequently it is advised that in its relations with the US, Canada continues to adopt measures to ensure that its literary industry and Canadian society in general is not further disadvantaged. In view of the US's position as a world leader in the copyright area, and of its influence on the development of international copyright, Canada's ability to achieve some success in ensuring that its net importer status is taken into consideration in agreements it negotiates with the US may contribute to ensuring a similar treatment for other net importer countries in the arena of international copyright.

From the foregoing it is seen that, as is the case with Ghana, Canada supports the new international copyright regime. This is evident from Canada being a signatory to both TRIPS and the WCT. Further, Canada is serious about fulfilling its international copyright obligations. The above discussion established that Canada has fulfilled its TRIPS obligations with respect to the scope of literary works. However, this compliance originates from Canada's obligations under the NAFTA and from its domestic copyright policy. This is unlike the position in Ghana where provision has to be made in its copyright legislation for the protection of compilations of data and computer programmes. Concerning the general TRIPS obligations, it is up to Canada to ensure that
it maintains and improves upon the existing law enforcement framework. Canada will have to make some changes to its Copyright Act in order to comply with the WCT. Since the WCT has not yet come into force, this is not a pressing concern. However, it is hoped that in future Canada’s copyright legislation will pay more attention to the digital environment.

Where Canada's international copyright policy is concerned, it is possible that supporting the international copyright regime will not fulfill Canada’s goals of effectively protecting and promoting the interests of its literary industry. In view of the fact that, presently, net exporters of copyright materials stand to benefit more from the international copyright system than would net importers. Canada should adopt a policy which will minimise the adverse effects flowing from being a party to these international agreements.
CHAPTER 5

5: CONCLUSION

This work set out to assess the impact of recent international developments on the protection of copyright in literary works in Ghana and Canada. In the process of achieving this goal, the work traced the development of copyright from the period of its introduction into these two countries to the present era, examined the recent international developments and, discussed the copyright regimes in Ghana and Canada.

Chapter One was devoted to tracing the origins of copyright. It was seen that copyright originated from the west and that the concept of national copyright resulted from the need to control the large-scale copying of works made possible by the use of typographical processes. At its inception, copyright was aimed at copies of works made by print technology. With time and partly as a result of technological developments, the concept of copyright expanded to cover new reproduction technologies, other forms of works and new rights in works.

Apart from technology, there were other factors that contributed to the evolution of copyright. The rise of multilateralism, with respect to the birth of international copyright, was a result of technological developments, increased trade among nations and the need for uniformity in the form and application of copyright laws. The negotiation of the Berne Convention 1886 brought into being an 'international copyright family,' the Berne Union, and set into progress the trend of national copyright laws having to conform to an international agreement. Later, with the negotiation of the UCC, UNESCO
became involved in international copyright relations. Until the 1990s, WIPO and UNESCO were the main bodies administering international copyright agreements.

Another factor was the spread of copyright from developed to developing countries. With this spread came the distinction between the copyright needs of developed and developing countries respectively. It became evident that these peculiar needs had to be given some recognition in international copyright agreements, in order for the continued existence of an international copyright regime. This resulted in special provisions for developing countries in the WIPO and UNESCO copyright agreements in the 1970s. In Chapter One it was established that “literary works” by the end of 1971 covered original oral and written works, whether published, unpublished or in the form of collections of literary works. However, this list was not exhaustive, thus creating room for the expansion of the scope of literary works.

Chapter Two examined the recent international developments which have influenced intellectual property in general and copyright in particular. It discussed three factors: the increasing significance of intellectual property to trade, technological developments with respect to the creation of new works requiring some protection under the ‘intellectual property umbrella’ and with respect to reproduction technologies and, globalization. One effect of these influences was to make developed nations strive to eliminate barriers to legitimate trade in intellectual property goods, chief among these barriers were piracy and the inefficient intellectual property laws of the Third World.

These developments brought several changes to the then established international copyright framework. First, they resulted in the birth of the WTO as another body in the
international copyright framework. Additionally, the negotiation of TRIPS signaled a break from the old system of international copyright agreements providing mainly the substantive framework for national copyright systems. Further, TRIPS’ concerns with substance and procedure and the emphasis it lays on the elimination of impediments to legitimate trade and on the effective enforcement of intellectual property rights, have introduced a new phase in international copyright relations. In addition, the drafting of the WCT, an agreement committed to tackling the challenge of technology, attests to the fact that technology is an issue that must be given even greater consideration, in order for authors to enjoy the benefits of copyright protection.

These developments brought other issues for consideration. These included the relative copyright jurisdictions of WIPO, UNESCO and the WTO, and the future of copyright under the WTO whose predecessor, GATT, was based on free trade as opposed to WIPO, whose focus has been more on the protection of intellectual property rights. For developed and developing countries, TRIPS imposed more obligations for compliance at specified periods.

Chapter Three analysed these developments with respect to Ghana’s literary industry. It tracked the history of the development of copyright in Ghana, starting from colonialism through to the present. It also discussed the nature of Ghana’s literary industry and commented on the copyright issues facing this industry. Although the concept of copyright is alien to Ghana, it being a western concept, it is gaining gradual acceptance.
However, Ghana’s copyright regime and copyright environment must undergo some changes in order to comply with TRIPS. For example, its copyright law must be amended to include computer programmes as literary works. Additionally, in view of the fact that Ghana is relatively inexperienced in copyright litigation, there is the need for the judiciary and the law enforcement agencies to be given the requisite training in this area.

Concerning the benefits of complying with TRIPS, it was shown that the Ghanaian literary industry could expect greater protection for its works both at home and abroad. On a general level, it is hoped that a strong copyright regime would increase local creativity, access to FDI and promote technology transfer. However, the cost of complying with TRIPS coupled with Ghana’s position as a net importer of copyright materials could mean that in the short run, Ghana would not reap all the benefits expected from affording a greater level of protection to copyright materials. Nevertheless, the current joint venture between WIPO and the WTO aimed at helping developing countries to fulfill their TRIPS obligations at the specified time is most welcome. It is hoped that this would minimise the costs Ghana would incur in complying with TRIPS.

The Chapter on Canada also examined the effects of these developments on copyright in literary works. It was seen that Canada’s copyright legislation contained most of the TRIPS provisions before the negotiation of the latter. This was partly as a result of NAFTA. Consequently, Canada had to effect few changes to its copyright legislation, in order to fulfill its TRIPS obligations.

As a developed country with a good copyright infrastructure, a general respect for copyright and low levels of piracy, Canada is already experiencing the benefits flowing
from a strong copyright regime. The fact that Canada had few changes to make to her copyright legislation, in order to comply with TRIPS, attests to its efforts to keep abreast of technological developments.

However, in view of its position as a net importer of copyright materials, it has concerns similar to those of Ghana. By increasing the scope of copyright-protected works, Canada would also experience a greater outflow of royalty payments in the short run. It was recommended, inter alia, that by improving on its exports of literary materials, Canada would stand to benefit even more than at present from the international copyright regime. However, it would be advisable for future international agreements to give more recognition to the problems of net importer countries.

On the whole the work established that the main impact of these developments on a country depends on whether the country is a net-importer or a net-exporter of copyright materials. Net exporters stand to gain the most from an expansion of the scope of copyright to cover the 'new works' they produce. Net-importer status cuts across the boundaries of developed and developing country classifications, since some developed countries like Canada are net importers. In this regard, both developed and developing net-importer countries should adopt similar methods to minimise the cost of implementing these agreements.

However, even within this net-importer class the cost of implementing these agreements may not be the same. From this work, it is clear that developing countries like Ghana would incur greater costs in implementing these agreements than would their developed-nation counterparts. This is because, generally, the former would adopt more
measures to comply with the agreements than would the latter. These measures include major revisions to their copyright legislation, setting in place the required administrative procedures and intensifying public education campaigns, in order to raise the level of public observance of copyright.

Generally, authors stand to gain from the rigorous enforcement mechanisms TRIPS obliges WTO Members to establish. An efficient domestic copyright system would be a step in ensuring that creativity is encouraged and culture protected. Additionally, strong copyright regimes in foreign countries would promote trade in literary works, since piracy would no longer be a barrier to legitimate trade.

Whilst Ghana and Canada’s literary industries will benefit from greater enforcement mechanisms, these countries’ overall copyright positions may be adversely affected in the short run by the outflows of royalties resulting from the combined effect of the expansion of the scope of literary works and the operation of the national treatment principle. Since the international copyright policy of these countries is one of support for the international copyright system, rather than of withdrawal therefrom, then they should devise strategies to ensure that in the long run they obtain the expected benefits from increased levels of copyright protection. These measures would include encouraging the export of their respective literary materials and/or increasing local consumption of their respective works, thereby reducing their present reliance on imported materials.

The treatment of Ghana and Canada revealed some of the differences that exist in the operation of copyright in countries that are net importers of copyright materials. Although they are both former colonies of Britain and their introduction to copyright was
from Britain, their development over the years has resulted in the present disparities in the operation of their respective copyright regimes. For example, Canada has had more experience with and litigation in copyright than has Ghana. Additionally, Canada has more of a ‘copyright culture’ than has Ghana. This establishes in part that local beliefs and traditions contribute to the support or lack of observance of copyright laws. Yes, culture can change, but as the experience of Ghana shows, culture can change slowly and even then, it might not be possible to get all the members of a society to willingly accept new traditions.

The lessons that stand out from the examination of these two countries are, first, that periodic revisions of a country’s copyright law are the key to keeping it abreast of international and local developments and, to some extent, to minimising changes to be made to its copyright legislation, in accordance with new international obligations. Periodic revisions are not only a way of taking past developments into account, but of anticipating future ones. This is an issue to which Ghana and Canada should continue to give serious consideration.

Further, it must be borne in mind that international copyright law is, at best, a way of providing for minimum standards for the protection of intellectual property rights and of harmonising national copyright laws. Although international copyright has tried to cater for the respective needs of developed and developing countries, these efforts have not been wholly successful. Thus, it becomes clear that national copyright must find ways to eliminate the deficiencies of the international copyright system. Therefore, nations have to have clear international as well as local copyright policies. They should
determine how best to promote their local copyright industries if international agreements fail to adequately consider this issue. After all, international law and national law are, in certain respects, distinct.

From an examination of copyright's history, it is possible to anticipate what the future will bring. From the inception of copyright to the present, the trend has been to expand the list of copyright-protected works and the rights of authors in these works. Further, it has also been to harmonise national copyright laws. It can be expected that this trend will continue and that with technological and other developments, the present concept of literary works might expand to embrace new works and, possibly, new rights in those works. In addition, the ongoing harmonisation process will result in even fewer differences between national copyright laws.1 Discussions on culture can be expected to assume greater dimensions due to the effect of globalization. These discussions would centre on whether there is the need to promote local culture or even have cultural goals and, if so, then whether the copyright system should uniformly protect the different local cultures of the world. Further, the three challenges of the increasing importance of copyright to trade, globalization with its doctrines of free trade and the resultant infiltration of one culture into another, and technological developments can be expected to continue to push copyright issues to even greater heights.

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1 "One feature of Canadian copyright law in the new millennium may be that there will be no Canadian copyright law. I do not mean the debate over Quebec's future, nor do I mean that the law will disappear. Rather, Canadian copyright law may come to look even more like the laws of other countries." David Vaver, "Copyright in Canada: The New Millennium" (December 1997) 12 I. P. J. 117 at 120.
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