

The International Framework of Copyright Law

[This document is an adaptation of a summary of international copyright law that was prepared by the Berkman Center for Internet and Society for EIFL, a consortium of libraries in developing countries. The original document, which contains many links to additional material, can be found at http://cyber.law.harvard.edu/copyrightforlibrarians/Module_2:_The_International_Framework.]

The Rationale for the International System

Each country in the world has its own set of copyright laws. However, the flexibility that most countries enjoy in adjusting and enforcing their own laws is limited by a set of international treaties. Why do we need any international management of this field? There are two traditional answers to this question.

First, without some international standardization, nations might enact legislation that protects their own citizens while leaving foreigners vulnerable. Such discrimination was common prior to international regulation. As copyright owners become increasingly interested in global protection for their creations, mutual recognition on fair terms of rights across borders becomes ever more important.

Second, some copyright holders believe that developing nations would not adopt adequate copyright protections unless forced to do so by treaty. Representatives of developing nations strongly dispute this argument.

International Instruments

The simplest way to achieve these goals would be a single treaty signed by all countries. Unfortunately, the current situation is more complex. Instead of one treaty, we now have six major multilateral agreements, each with a different set of member countries.

Each of the six agreements was negotiated within - and is now administered by - an international organization. Four of the six are managed by the World Intellectual Property Organization (WIPO); one by the United Nations Educational, Scientific and Cultural Organization (UNESCO); and one by the World Trade Organization (WTO).

The six agreements have been created and implemented in similar, though not identical, ways. Typically, the process begins when representatives of countries think that there should be international standards governing a set of issues. They enter into negotiations, which can last several years. During the negotiations, draft provisions are presented to the delegations of each country, which then discuss them and may propose amendments to their content in order to reach a consensus. This "consensus" may reflect genuine agreement among all of the participating countries that the proposed treaty is desirable, or it may result from pressure exerted by more powerful countries upon less powerful countries. Once consensus has been reached, the countries conclude the treaty by signing it. Thereafter, the governments of the participating countries ratify the treaty, whereupon it enters into force. Countries that did not sign the treaty when it was initially concluded may join the treaty later by accession.

In many countries -- especially those that follow the civil-law tradition -- treaties are regarded as "self-executing." In other words, once they are ratified, private parties can rely on them and, if necessary, bring lawsuits against other private parties for violations of the treaties' provisions. However, in other countries -- especially those influenced by the British or Scandinavian constitutional traditions -- treaties lack this self-executing authority. Instead, the national legislatures must adopt statutes implementing them, after which private parties rely on the terms of the implementing legislation, rather than on the terms of the treaties themselves.

None of the six treaties pertaining to copyright law contains a comprehensive set of rules or standards for a copyright system. Rather, each one requires member countries to deal with particular issues in particular ways, but leaves to the member countries considerable discretion in implementing its requirements.

Set forth below are brief descriptions of the six major treaties.

Berne Convention

In 1886 ten European states signed the Berne Convention for the Protection of Literary and Artistic Works (referred to hereafter as the "Berne Convention") in order to reduce confusion about international copyright law. Since then, a total of 164 countries have joined the Berne Convention. However, there have been several revisions of the Berne Convention, and not all countries have ratified the most recent version. Any nation is permitted to join.

The Berne Convention established three fundamental principles. The first and most famous is the principle of "national treatment," which requires member countries to give the residents of other member countries the same rights under the copyright laws that they give to their own residents. So, for example, a novel written in Bolivia by a Bolivian citizen enjoys the same protection in Ghana as a novel written in Ghana by a Ghanaian citizen.

The second is the principle of "independence" of protection. It provides that each member country must give foreign works the same protections they give domestic works, even when the foreign works would not be shielded under the copyright laws of the countries where they originated. For example, even if a novel written in Bolivia by a Bolivian national were not protected under Bolivian law, it would still be protected in Ghana if it fulfilled the requirements for protection under Ghanaian law.

The third is the principle of "automatic protection." This principle forbids member countries from requiring persons from other Berne Convention member countries to undergo legal formalities as a prerequisite for copyright protection. (They may impose such requirements on their own citizens, but usually do not.) The effect of this principle is that the Bolivian author of a novel doesn't have to register or declare her novel in Ghana, India, Indonesia or any other member state of the Berne Convention; her novel will be automatically protected in all of these countries from the moment it is written.

In addition to these basic principles, the Berne Convention also imposes on member countries a number of more specific requirements. For instance, they must enforce copyrights for a minimum period of time. The minimum copyright term for countries that

have ratified the most recent version of the Berne Convention is the life of the author plus 50 years for all works except photographs and cinema. The Berne Convention also requires its members to recognize and enforce a limited subset of "moral rights," a topic we'll take up later.

The Berne Convention sets forth a framework for member countries to adopt exceptions to the mandated copyright protections. The so-called "three-step test" contained in Article 9(2) (discussed in more detail below) defines the freedom of member countries to create exceptions or limitations to authors' rights to control reproductions of their works. Other provisions of the Berne Convention give member countries discretion to create more specific exceptions.

When the Berne Convention was revised most recently in Paris in 1971, the signatory countries added an [Appendix](#), which contains special provisions concerning developing countries. In particular, developing countries may, for certain works and under certain conditions, depart from the minimum standards of protection with regard to the right of translation and the right of reproduction of copyrighted works. More specifically, the Appendix permits developing countries to grant non-exclusive and non-transferable compulsory licenses to translate works for the purpose of teaching, scholarship or research, and to reproduce works for use in connection with systematic instructional activities.

While the Berne Convention outlines broad standards for copyright protection, it mandates few specific rules. As a result, the legislature in each member country enjoys considerable flexibility in implementing its requirements. For example, in the Berne Convention Implementation Act of 1988, the U.S. Congress adopted a "minimalist" approach to implementation, making only those changes to copyright law that were essential to qualify for membership.

The Berne Convention does not contain an effective enforcement mechanism. This means that member states have little power to punish another state that does not comply with the Berne Convention's guidelines. As we will see later, this situation partially changed for the members of the Berne Convention that also joined the WTO.

Universal Copyright Convention

The Universal Copyright Convention (or UCC) was developed by UNESCO and adopted in 1952. It was created as an alternative to the Berne Convention. The UCC addressed the desire of several countries (including the United States and the Soviet Union) to enjoy some multilateral copyright protection without joining the Berne Convention.

The UCC's provisions are more flexible than those of the Berne Convention. This increased flexibility was intended to accommodate countries at different stages of development and countries with different economic and social systems. Like the Berne Convention, the UCC incorporates the principle of national treatment and prohibits any discrimination against foreign authors, but it contains fewer requirements that member countries must comply with.

The UCC has decreased in importance as most countries are now party to the Berne Convention or are members of the WTO (or both). The copyright obligations of members

of the WTO are governed by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), discussed below.

Rome Convention (1961)

By 1961, technology had progressed significantly since the Berne Convention had been signed. Some inventions, such as tape recorders, had made it easier to copy recorded works. The Berne Convention only applied to printed works and thus did not help copyright holders defend against the new technologies. To address the perceived need for strong legislative protection for recorded works, members of WIPO concluded the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations on October 26, 1961. It extended copyright protection from the author of a work to the creators and producers of particular, physical embodiments of the work. These "fixations" include media such as audiocassettes, CDs, and DVDs.

The Rome Convention requires member countries to grant protection to the works of performers, producers of phonographs, and broadcasting organizations. However, it also permits member countries to create exceptions to that protection -- for example, to permit unauthorized uses of a recording for the purpose of teaching or scientific research.

[Ninety-one countries have signed the Rome Convention.](#) Membership in the Rome Convention is open only to countries that are already parties to the Berne Convention or to the Universal Copyright Convention. Like many international treaties, joining the Rome Convention has an uncertain effect on domestic law. Countries that join the convention may "reserve" their rights with regards to certain provisions of the treaty. In practice, this has enabled countries to avoid the application of rules that would require important changes to their national laws.

WIPO Copyright Treaty (WCT)

The way that copyright owners reproduce, distribute, and market their works has changed in the digital age. Sound recordings, articles, photographs, and books are commonly stored in electronic formats, circulated via the Internet, and compiled in databases. Unfortunately, the same technologies that enable more efficient storage and distribution have also facilitated widespread copying of copyrighted works. Concerned about the effects of these new technologies, the governments of developed countries advocated for and ultimately secured two treaties: the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty.

The WIPO Copyright Treaty (WCT) is a special agreement under the Berne Convention that entered into force on March 6, 2002. It is the first international treaty that requires countries to provide copyright protection to computer programs and to databases (compilations of data or other material).

The WCT also requires members to prohibit the circumvention of technologies set by rightsholders to prevent the copying and distribution of their works. These technologies include encryption or "rights management information" (data that identify works or their authors and are necessary for the management of their rights).

WIPO Performances and Phonograms Treaty (WPPT)

The WIPO Performances and Phonograms Treaty (WPPT) was signed by the member states of WIPO on December 20, 1996. The WPPT enhances the intellectual property rights of performers and of producers of phonograms. Phonograms include vinyl records, tapes, compact discs, digital audiotapes, MP3s, and other media for storing sound recordings.

The WPPT grants performers economic rights in their performances that have been fixed in phonograms. It also grants performers moral rights over these performances. By contrast, the producers of phonograms are only granted economic rights in them.

[Eighty-six countries are parties to the WPPT.](#)

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)

The TRIPS is an international agreement administered by the WTO that was negotiated and concluded in 1994. TRIPS establishes minimum standards for many forms of intellectual property protection in member countries of the WTO, including copyright.

The substantive provisions of TRIPS do not differ drastically from the Berne Convention. The major difference is that TRIPS requires member countries to grant copyright protection to computer programs and data compilations. However, TRIPS does not require the protection of authors' moral rights, which the Berne Convention requires.

The most important innovations of TRIPS are the remedies it requires. Unlike the Berne Convention, TRIPS requires member countries to provide effective sanctions for violations of copyrights. In addition, it creates a dispute resolution mechanism by which WTO member countries can force other members to comply with their treaty obligations. It is sometimes said that, unlike the Berne convention, TRIPS has "teeth."

TRIPS allows for some flexibility in its implementation. This flexibility is intended to permit developing nations to balance the incorporation of the general principles of TRIPS with development concerns.

Regional Agreements

The multilateral agreements we have just described contain the primary provisions that limit the freedom of each country in shaping its own copyright laws. But some countries also belong to regional organizations that have the power to influence the copyright laws of their members.

The most important such regional organization is the European Union, commonly known as the EU. Beginning in 1991, the EU has adopted several directives relating to copyright law. (A directive obliges the member countries to bring their laws into conformity with its requirements by a particular date, but leaves to each country's discretion some flexibility in achieving that goal.) For example, the Software Directive required member countries to grant copyright protection to the authors of software programs, regardless of how creative those programs are. The [Rental Rights Directive](#)

required member countries to recognize "a right to authorize or prohibit the rental and lending of originals and copies of copyright works...." The [Copyright Duration Directive](#) required member countries to extend copyright protection to the life of the author plus 70 years (20 years more than the term required by the Berne Convention). The controversial [Information Society Directive](#) (also sometimes known as the Copyright Directive) was adopted in 2001 to implement the WCT, discussed above. Finally, the [Resale Rights Directive](#) obliges member countries to grant the creators of original works of art a right to remuneration when those works are resold.

Equally important for many African countries is the revised [Bangui Agreement](#) (executed in 1999; effective in 2002), which governs the member countries of the [African Intellectual Property Organization \(OAPI\)](#) (Benin, Burkina Faso, Cameroon, Central Africa, Congo, Cote d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Mauritania, Niger, Senegal, Chad, and Togo). Articles 8 and 10 of Annex VII of the Agreement set forth an especially generous list of moral rights (reflecting its origins in French copyright law), while Article 9 sets forth a similarly generous list of economic rights, including the rental right. Articles 11 through 21 then carve out of those rights a long list of exceptions and limitations.

The North American Free Trade Agreement (NAFTA), which was entered into by Canada, the United States, and Mexico in 1994, limits the discretion of those three countries in defining their intellectual-property laws. However, with respect to copyright laws in particular, NAFTA closely parallels the TRIPS Agreement, discussed above, and thus has relatively little independent significance.

Other regional organizations that could influence their member countries' copyright systems -- but that have not yet, for the most part, done so -- include [The Andean Community](#) (Bolivia, Colombia, Ecuador, and Peru), [Mercosur](#) (Argentina, Brazil, Paraguay, Uruguay, and (perhaps soon) Venezuela), and the [African Regional Intellectual Property Organization \(ARIPO\)](#) (Botswana, the Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Namibia, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe).

Free Trade Agreements and Bilateral Investment Treaties

Multilateral treaties such as TRIPS can provide powerful global protection for copyright holders because they establish minimum standards for protection of copyrights that are binding on large numbers of countries. However, copyright holders sometimes try to obtain even stronger protections through bilateral treaties between countries or organizations of countries. Bilateral treaties on copyright law often address specific issues between the the two parties. Such agreements are commonly known as free trade agreements (FTAs) or Bilateral Investment Treaties (BITs).

Typically, such bilateral agreements either narrow the flexibilities that a developing country would enjoy under TRIPS or impose more stringent standards for copyright protection. For example, the U.S. government has included anti-circumvention obligations in its bilateral FTAs with Jordan, Singapore, Chile, Morocco, Bahrain and Oman. Similarly, the European Union has recently negotiated FTAs with developing countries that significantly limit the discretion of those countries in adjusting their

copyright laws.

FTAs and BITs are highly controversial. Many scholars and representatives of developing countries regard them as abuses of the power of developed countries. Opponents of proposed FTAs or BITs have sometimes been able to prevent their adoption or modify them.

The Three-Step Test

Most of the major multilateral, regional, and bilateral agreements use a tool that has come to be known as the “three-step test” to define the freedom of member countries to create “exceptions and limitations” to copyrights. The three-step test was first created in the 1967 revision of the Berne Convention. It provides:

"It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works [a] in certain special cases, provided that [b] such reproduction does not conflict with a normal exploitation of the work and [c] does not unreasonably prejudice the legitimate interests of the author."

Most international copyright agreements since then have incorporated versions of this test. For example, versions of the test may be found in the TRIPS Agreement (Article 13), the WCT (Article 10), several of the EU copyright directives, and several bilateral agreements. Indeed, three-step tests may now be found in the national legislation of many countries, including France, Portugal, China, and Australia. Even when national legislation does not explicitly incorporate the test, judges sometimes rely upon it when construing and applying their nation's copyright laws.

The coverage of the different versions of the test varies somewhat. For example, whereas the Berne Convention three-step test only applies to exceptions and limitations to the right of reproduction, the three-step test contained in Article 13 of the TRIPS Agreement applies to exceptions and limitations to any of the “exclusive rights” associated with copyright. In addition, the language used in the different versions varies. For example, whereas the third step of the Berne Convention test (quoted above) requires that an exception or limitation “not unreasonably prejudice the legitimate interests of the author,” the third step of the TRIPS test requires that an exception or limitation “not unreasonably prejudice the legitimate interests of the right holder” – a change that shifts attention away from the interests of creators toward the economic interests of the companies that acquire copyrights from the original creators.

Given the prevalence of the three-step test and the long period of time in which it has existed, you might expect that the meaning of the test would by now be clear. Not so. The version of the test contained in the Berne Convention has never been interpreted officially. The version contained in Article 13 of the TRIPS Agreement has only been officially interpreted once by a dispute resolution panel, and how far that interpretation should control other countries in the future is not clear. Moreover, the courts in different European countries have construed the test in inconsistent ways in functionally identical cases.

Commentators and lobbyists disagree sharply about how restrictive the three-step test really is. At one extreme, some claim that the fair use doctrine in the United States

violates the test -- and thus that the United States should repeal the fair use doctrine and that developing countries may not adopt similar doctrines. As [William Patry has demonstrated](#), this interpretation is implausible -- as shown most clearly by the failure of any of the countries involved in the negotiation of the TRIPS Agreement or the accession by the United States to the Berne Convention to object to the fair use doctrine in the United States.

At the opposite extreme, a group of prominent and influential copyright scholars have recently proposed "[A Balanced Interpretation of the Three-Step Test in Copyright Law](#)". They argue that an exception or limitation that fails to satisfy one of the three steps should not necessarily be deemed to violate the test. Rather, all three components of the test should be considered together in a "comprehensive overall assessment" that takes into account the threats that excessive levels of copyright protection pose to "human rights and fundamental freedoms," "interests in competition," and "other public interests, notably in scientific progress and cultural, social, or economic development" -- in addition to the important interests of copyright holders in fair compensation. This proposal has two strengths. First, it fits well the underlying purpose of the copyright system as a whole, which, as we have seen, seeks to balance the interests of creators with the interests of society at large in maximizing access to ideas and information. Second, it derives support from the reference in all versions of the test to the "legitimate" interests of either authors or right holders. It does, however, have one serious weakness: virtually all courts and tribunals that have considered the test to date have concluded that all three of its "steps" must be satisfied.

Another interpretation that does not suffer from this weakness but that preserves the strengths of the proposed "Balanced Interpretation" has been offered recently by [Professors Hugenholtz and Okediji](#): "*Limitations and exceptions that (1) are not overly broad, (2) do not rob right holders of a real or potential source of income that is substantive, and (3) do not do disproportional harm to the right holders, will pass the test.*" This proposal is grounded in a long and detailed discussion of the evolution of the three-step test and deserves careful consideration.

An important general lesson may be derived from this situation: The meaning of copyright laws of all sorts -- including international copyright agreements -- is often less clear than first appears. Many rules have not yet been interpreted authoritatively. This creates opportunities for librarians or other representatives of developing countries to argue for and act upon interpretations that give them more freedom when shaping their own laws.

The Perspectives of Developing Countries

Some observers believe that governments should upgrade and harmonize copyright law globally because it promotes the arts and rewards creators. They argue that granting an exclusive right in creative expression provides a necessary incentive for copyright holders to invest in the creation and distribution of expressive works. This stimulates cultural expression and benefits citizens. Suppression of competition from "pirates," they argue, is necessary to allow local creative industries to flourish.

However, others argue that implementing the same copyright law in all countries has a disproportionate and negative effect on developing countries. Most developed nations have powerful and lucrative entertainment, educational, and research industries that export copyrighted works, and thus benefit from strong copyright law. Developing countries, on the other hand, typically import copyrighted works. Thus, it is argued, the residents of developing countries have to pay more royalties and fees as a result of enhanced copyright protection. It is also argued that restrictive copyright laws prevent many governments from addressing important social needs -- such as providing their citizens with good educations -- because critical information is locked up by the law.

The latter set of arguments have prompted a growing number of groups in developing countries to resist the imposition of the minimum standards of copyright protection set by the TRIPS Agreement and the even harsher duties that are imposed on developing countries by FTAs. They call for a better balance between, on one hand, providing incentives to creators and rewarding their creative activities and, on the other hand, promoting access to knowledge and research in order to spur economic growth and foster innovation in the developing countries.

Additional Resources

A thorough discussion of international copyright law may be found in Paul Edward Geller, ed., *International Copyright Law and Practice* (2 volumes, Matthew Bender), although its coverage of developing and transitional countries is thin. (It is also [prohibitively expensive](#)). Other useful paper treatises include Paul Goldstein, *International Copyright: Principles, Law, and Practice* (Oxford University Press) and Silke von Lewinski, *International Copyright Law and Policy* (Oxford University Press 2008).

An excellent compendium of the copyright laws in over 100 countries has been assembled by [UNESCO: Collection of National Copyright Laws](#).

As indicated above, an especially important component of most international copyright agreements is the three-step test. The most comprehensive and accessible examination of the history and meaning of that test may be found in [P. Bernt Hugenholtz & Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright: Final Report, March 06, 2008*](#). Other good analyses of the three-step test available in print but not online include Martin Senftleben, *Copyright, Limitations and the Three-Step Test* (Kluwer Law Int'l 2004); and Jane C. Ginsburg, "Toward Supranational Copyright Law? The WTO Panel Decision and the "Three Step Test" for Copyright Exemptions," 187 *Revue internationale Du Droit D'Auteur* 3, 49 (2001).

A thorough review of the principal exceptions and limitations to copyrights recognized by the main multilateral agreements -- combined with a argument for the clarification and expansion of those exceptions and limitations, emphasizing "the importance of access to creative works for developing countries" -- may be found in [Ruth L. Okediji, "The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries, International Centre for Trade and Sustainable Development and United Nations Conference on Trade and Development," Issue Paper](#)

No. 15 (2006). Included in Okediji's essay is an excellent discussion of the Berne Convention Appendix.

For a WIPO study more skeptical of the value of those exceptions and limitations, see [WIPO Standing Committee on Copyright and Related Rights, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, 9th Session, June 23-27, 2003, WIPO Doc. SCCR/9/7 \(April 5, 2003\)](#).

An excellent study of the process of implementing the TRIPS Agreement (including a detailed discussion of the complex processes that led to the revised Bangui Agreement among the OAPI countries) can be found in Carolyn Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford UP 2009). The Introduction, which sketches the argument of the book, is available online [here](#).

For up-to-date information concerning the implementation of the EU Information Society Directive by individual countries, including a good bibliography of scholarly studies of the implementation process, see Instituut voor Infomatierecht (IVIR), [Report on the Implementation of the Information Society Directive](#) (2008).

Cases

The following judicial opinion and summaries of rulings issued in WTO dispute resolution proceedings explore and apply some of the principles discussed in this module:

[Joined Cases C-92/92 and C-326/92, Phil Collins v Imtrat Handelsgesellschaft mbH; Patricia Im-und Export Verwaltungsgesellschaft mbH and Another v EMI Electrola GmbH \(1993\) \(Applicability of the EEC Treaty to IP rights\)](#)

[Sarah E. Henry, "The First International Challenge to U.S. Copyright Law: What Does the WTO Analysis of 17 U.S.C. § 110\(5\) Mean to the Future of International Harmonization of Copyright Laws Under the TRIPS Agreement?," 20 Penn State International Law Review 301 \(2001\). \(EU vs. US\)](#)

[Jan Bohanes & Adrian Emch, "WTO Panel Report on China IPR: A Mixed Result," China Law & Practice, pp. 19-20, March 2009 \(US vs. China\)](#)