Copyright In Literary Works:
A Study On Its Relationship With Authorship And Book Publishing With Reference To Nepal

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In
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By
Pustun Pradhan
Tribhuvan University
Kathmandu
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LETTER OF RECOMMENDATION

We hereby recommend that this dissertation entitled "COPYRIGHT IN LITERARY WORKS: A STUDY ON ITS RELATIONSHIP WITH AUTHORSHIP AND BOOK PUBLISHING WITH REFERENCE TO NEPAL" prepared by Pustun Pradhan under our supervision be accepted by the Research Committee for the final examination in the fulfillment of the requirements for the degree of DOCTOR OF PHILOSOPHY in ENGLISH.

Dissertation Committee

Prof. Dr. Abhi Narayan Subedi

Supervisor

Prof. Dr. Sangita Rayamajhi

Expert

Date: June, 2009

APPROVAL LETTER

This dissertation entitled **COPYRIGHT IN LITERARY WORKS: A STUDY ON ITS RELATIONSHIP WITH AUTHORSHIP AND BOOK PUBLISHING WITH REFERENCE TO NEPAL** was submitted by **PUSTUN PRADHAN** for final evaluation by the Research Committee of the Faculty of Humanities and Social Sciences, Tribhuvan University, in fulfillments of the requirements for the Degree of DOCTOR OF PHILOSOPHY in ENGLISH. I hereby certify that the research committee of the Faculty has found the dissertation satisfactory in scope and quality and has therefore accepted in for the sought degree.

Prof.Nav Raj Kanel, Ph.D

Dean

Chairman, Research Committee

Faculty of Humanities and Social Sciences

Tribhuvan University, Nepal

Date:

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Pustun Pradhan

ABSTRACT

Copyright is an outgrowth of technology. The advent of printing press revolutionized the book trade but it also provided the means by which piracy became profitable. Copyright arose to control this piracy. Historically, it was publishers' invention to maintain order and control in the book trade. In its origin, copyright has nothing to do with authorship and the promotion of creativity. It has been shaped much by the economics of publishing than by the economics of authorship. It was only much later copyright was introduced as a law of authorship and as a means of 'encouraging learning'. By the Statute of Anne enacted in 1709 authorship came to be legally established as the source of copyright.

Copyright subsists only in original works of authorship. The notion of originality in copyright is derived from the Romantic formulation of authorship and the creative process. All that originality means is that work should originate with the author –it should be an independent creation, not copied from someone else's work.

Copyright involves the adjustment of two equally competing interests with each limiting the other: the private interests of copyright owners, that is authors and those engaged in the production and dissemination of creative works, to earn profit from the market exploitation of their works and the interest of the public to benefit from the free use and sharing of creative works. Thus, the major tension in copyright is to balance these two interests in a way both can be optimized. Copyright seeks to reconcile these twin objectives by securing incentives to the authors through the grant of exclusive rights in exchange for the creation and dissemination of works

Copyright in Nepal is a recent phenomenon. Despite a legal history of over 42 years behind it, copyright came to be implemented as late as 2002 when the new act replacing the 1965 act was enacted. This belated implementation of copyright, as the history of its development demonstrates, is primarily due to the non-existence of the condition precedent for the development of copyright. And this condition is the existence of market for books and other copyrightable products.

A sound copyright regime is needed to promote the development of national creativity and culture and to sustain the national cultural industries. Unfortunately, copyright in Nepal is yet to receive any priority in the national agenda. And, given the ongoing political transition in the country, it is most unlikely that any serious attention will be given in the foreseeable future to entrench the regime of copyright. As this transition prolongs, it is the local authors and culture that would sustain an irreparable casualty in want of adequate protection.

This study concludes that need for copyright protection arises with the growth and expansion of market for works of local authorship. It is critical to the promotion of local authors and local publishing industry. In short, it is an essential regulatory framework on which are based the whole edifice of modern literary and other cultural productions and their trade. The institution of copyright is therefore deeply rooted in modern economic system.

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CHAPTER ONE

Introduction

Intellectual property rights have different forms and copyright is one of the oldest of these forms. It developed with the publishers, the so-called stationers, in early Renaissance Europe to maintain order in the book trade. Copyright was then viewed as publishers' right. All that copyright entails was then the right to print, re-print and vend the copies. In its origin, it had nothing to do with the authors. Towards the early eighteenth century legislation on copyright was first introduced in England that transformed the so-called publishers' right into authors' right by vesting the initial ownership of copyright in the authors. With this transformation copyright over the time came to be recognized as being essentially author's right.

The primary concern of copyright is the protection of literary and artistic works for the benefit of their authors and of the society at large. It is basically guided by the need to promote the production and dissemination of literary or creative works of authorship. This in fact is the fundamental goal of copyright which it seeks to achieve by securing rewards to the authors for their labour. The underlying assumption of copyright is that without such reward authors are not motivated to devote their time and labour in the creative activities and this in turn will retard the production of creative works needed for the advancement of the society. This reward is guaranteed in the form of exclusive

rights granted to the authors. It is this exclusive right that enables the authors to control the use of their work without their permission or payment.

Copyright originated with the advent of printed words. Until the advent of radio and television during the early years of twentieth century, books were the main sources of knowledge and information. They were the only medium by which human knowledge can be preserved and transferred from one generation to other. Books have thus come to be identified as the most invaluable object for the promotion and dissemination of human knowledge which constitutes fundamental resources to the development and well being of the society in all spheres of life. In his famous *Areopagitica*, Milton describes the book as "the precious life-blood, the image of God." He writes:

> For books are not absolutely dead things, but do contain a potency of life in them to be as active as that soul was whose progeny they are; nay, they do preserve as in a vial the purest efficacy and extraction of that living intellect that bred them. I know they are as lively, and as vigorously productive, as those fabulous dragon's teeth; and being sown up and down, may chance to spring up armed men. And yet, on the other hand, unless wariness be used, as good almost kill a man as kill a good book. Who kills a man kills a reasonable creature, God's image; but he who destroys a good book, kills reason itself, kills the image of God, as it were in the eye. Many a man lives a burden to the earth; but a good book is the precious life-blood of a master spirit, embalmed and treasured up on

> purpose to a life beyond life. 'Tis true, no age can restore a life, whereof perhaps there is no great loss; and revolutions of ages do not oft recover the loss of a rejected truth, for the want of which whole nations fare the worse. (Milton's Areopagitica par. 8)

Books became an object of property rights after the invention of the printing press made it much easier and cheaper to reproduce them in quantities for circulation. While this new technology was a major breakthrough to the book industry, it also brought with it a new set of problems in the book trade: an increasing threat of piracy. Until the invention of the printing press piracy was not profitable as it involved the same costs for the pirates to reproduce the books which the original producer had to incur for their production. But the new technology enabled the pirates to avoid much of the costs which the initial producer had to bear in the form of fixed costs, making it difficult for the original producer to compete with the relatively cheaper, pirated copies of their books and to retain a reasonable share of profit to stay in the business. It was basically this situation that resulted in the development of copyright. It is a legal device by which property right in books came to be asserted.

1.1 Promotion of Creativity and Learning

Copyright has now come to be viewed as an integral component to the development and promotion of creativity and learning. Of various arguments in support of copyright protection the most prominent one is the plea that copyright fosters creativity and promotes investment in the production and dissemination of creative works. Central to this argument is economic incentive: copyright secures royalties to the

authors as remuneration or economic incentive for the use of their work by the public. The authors receive this incentive through the publishers to whom they assign their copyright for the exploitation of works. Without the prospect of this royalty, the authors could not devote themselves to creative works. Many useful and important works which would have been created if authors had pecuniary incentives to motivate them to engage in creative works may not see the light of day. The society would thus forgo the benefit of such useful creations. Likewise, copyright protection promotes the production and distribution of the works of authorship as it enables the publishers to earn a reasonable share of profit on their investment. In the absence of copyright protection, publishers will have no incentive for the production and circulation of creative works because once the books are published they can easily be reproduced by the competitors who have not shared the fixed cost of its production. If successful books can be easily reproduced by free riders, competition will drive prices down to a point where the original publisher receives no return on the fixed cost which he has to incur for such expenses as editing, type-setting, payment of royalties to the authors, marketing, promotion, and so on. As a result, the original publisher may be unable to recoup his investment. Thus production and dissemination of works of authorship may not be undertaken to the extent needed for the advancement of the society. This in short is the central thesis for copyright protection - books will not be produced in sufficient quantity if the authors and their publishers have no incentive to compensate their labor and investment. It is an economic incentive needed to induce the authors to indulge in their creative works. The exclusive rights granted to

the authors are the form of incentives that enable them to control the use of their works without their consent.

1.2 Economic Rationale of Copyright Protection

Books are costlier to produce in the first instance but much easier and cheaper to reproduce them after they have been published. Hence they are much vulnerable to the threat of piracy or counterfeiting. Out of this threat arose the need for protection. If books were not protected against their unauthorized reproduction the author may not be able to receive royalties from his work and the publisher will have no incentive to incur the cost of producing and bringing the book into the marketplace. This in turn will seriously handicap the creation and production of these works needed for the benefit of the society at large. It is this need to promote the creation and dissemination of knowledge in the larger interest of the society for which authors are vested with exclusive rights for a limited duration that enable them to charge remuneration for the use of their works. Copyright was therefore conceived as a stimulus to creativity to ensure the adequate supply of books to the general public. The authors were secured with financial rewards in the form of exclusive rights in exchange for the benefit which the society receives from the creation and dissemination of their works. The world's first legislation on copyright, known as the Statute of Anne, is thus entitled "An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors and Purchasers of such Copies, during the Times therein mentioned." Similarly, copyright in the United States is directed at promoting "the progress of science and art" by encouraging creators to produce works for the public welfare. The grant of exclusive rights for a limited period is

a means to that end. The goal of copyright, as explicitly stated in Article 1, Section 8, Clause 8 of the United States Constitution, is: ". . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings . . . ."

The primary purpose of copyright is to reward the author since he is the source of creation. However, this reward is given to the author, not that he deserves reward as such but that his contributions are important and valuable to the advancement of the society, or to use the expression of the US Constitution, "To promote the Progress of Science and useful Arts." It is to encourage the creation and learning for which copyright secures reward to the authors. The *raison d'etre* of copyright is therefore to reward creators for their creations as a means of promoting both the making of intellectual creations and access to such creations.

The legal instrument by which this reward is secured to the authors is the grant of exclusive rights that enable them to control the access and charge a price for the use of their works. The greater this control on access the greater is the economic reward the authors receive from the use of their works. While such economic incentives to the author would further the creation and dissemination of works of literature, knowledge and the arts, they would significantly restrict the free flow of information, limiting its use only to those who can afford to pay. The society would have thus less benefit from the creation of intellectual works if the use of such works is restricted to the monopoly control of their owners. This certainly is not the purpose of privilege which authors are granted in the

form of exclusive rights. These exclusive rights are essentially a statutory right granted to the authors by the state in exchange for the benefit which society would receive from their creations. As such, the exclusive rights the state confers on the authors are not primarily for their benefit, but primarily for the benefit of the public. These rights are justified on the ground that benefit accruing to the society from the grant of such exclusive rights outweighs the burden which it imposes on the society. In other words, the society should receive more benefit from the creation and dissemination of works of authorship than what it loses by rewarding monopoly rights to the authors for a limited duration.

In the parlance of economics, weak protection, or zero incentive, would generate maximum social welfare. But this would produce little creation since there is little incentive to create intellectual property. The economy would thus suffer from limited growth of cultural products. Hence, weak protection maximizes current social welfare but it must be paid by doing without the availability of new knowledge in the future. Conversely, excessive protection would produce more creation but this would restrict access to the users. Such restriction on access limits the circulation of new information and therefore creates less welfare. In short, the dilemma, as Cooter and Ulen succinctly capture it, is that “without a legal monopoly too little of the information will be produced but with the legal monopoly too little of the information will be used” (145). Put differently, absence of legal monopoly or exclusive rights would lead to over-utilization reducing incentives for the copyright owners while the presence of legal monopoly to under-utilization generating greater revenues or incentives to the copyright owners. The

task before the copyright is therefore twofold: on the one hand, it has to ensure that right owners have sufficient control over the use of their work to realize a reasonable share of benefit from the exploitation of their works. Without such control the authors and other right owners may not have sufficient incentives to induce them in the creation, production, and distribution of cultural assets. On the other, it has to ensure wider dissemination of cultural products for their greater access by the public. Such an access is crucial in the larger public interest for the advancement of knowledge and learning. Hence, the basic tension in copyright is the reconciliation between these two equally competing demands: the demand of the author, or the copyright owners, for their legitimate right to control over the use of their work and the demand of the copyright users, or the public, for their right to have a wider access to the works of culture.

The first objective sharply contrasts with the second in that the former requires stringent protection while the latter low level of protection. The fundamental challenge facing the copyright is therefore to strike a balance between access and incentives. Landes and Posner describe this balance as the central problem in copyright law: "Copyright protection – the right of the copyright's owner to prevent others from making copies – trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place. Striking the correct balance between access and incentives is the central problem in copyright law" (325-363).

Hence, from the economic point of view, control by right owners on access to their works, or legal monopoly, is essential if society is to secure the creation or supply of

new knowledge in the future. It is this creation of new knowledge that brings about greater social welfare in future. As such, intellectual property right protection would reduce current social welfare in return for providing adequate incentive to generate new works, which then raises future consumer welfare (Mascus 29).

1.3 Subject Matter of Copyright Protection

Copyright is as old as the history of printed words. It is inextricably entwined with the development of book trade. The history of its early days is largely a history of books and publishers, of the confluence between political (censorship) and mercantile (private profit) interests. As Wittenburgh writes:

> The seeds of law and its processes of germination lie old and deep in a matrix of use and custom. The law of literary property evolved not only from the creative impulse of man, but also from the inhibitions and prohibitions with which writing has ever been involved. From creation for pleasure and aesthetic enjoyment came the notion in acquisitive societies of payment and profit. From autocracy and despotism came prohibition and censorship. All of these commingled to give rise slowly to law governing literary property. (13)

It was originally conceived for the protection of literary works, particularly books. However, over the course of time, copyright, by analogy to literary works, was gradually extended to cover other expressions of art, such as design and architecture; paintings,

drawings, maps and photographs; musical compositions; dramatic works; engravings sculptor; and so on. Development of new technology, especially during the twentieth century, brought with it new methods of creation, reproduction, dissemination and exploitation of literary works. The advent of computer technology and digitization, for example, has drastically changed the way works are created, reproduced and disseminated in the traditional media, such as print media. Likewise, the development of communication technology, such as fibre optic cable and satellites, has dramatically revolutionized the way data, text, voice, sound and images can be transmitted in homes and businesses throughout the world. While these changes in technology offered enormous opportunities to the authors to earn revenues from different forms of exploitation of their works, much of these uses in the new medium, such as internet, CD, VCD, became difficult to control posing an imminent risk of unauthorized use of protected works. Copyright responded to these changes by accommodating new categories of works, such as computer programs and databases, and by extending the scope of right to cover new forms of exploitation, such as rental right and the right of communication to the public and the making available to the public of works on line.

The task before the copyright is to enable the copyright owners to exploit their works in the new media by assuring adequate protection to their legitimate rights and commercial expectations of earning royalty from the use of their works. This necessarily calls for the adjustment in the existing copyright rules that would embrace the new media within its regulatory framework. Rules governing copyright thus change in the face of new developments in the technology. At times, these rules will create new rights for the

author, at other times, they extend the existing right to cover the new uses of the work. In the same way, exemptions are redefined to take account of developments in the media. It all depends upon how technology brings about changes in the way cultural goods are produced, traded, and consumed.

Take for example the case of home videotaping of broadcast programs. Considered at one time to be a legitimate or fair use of copyright, video recording of broadcast programs for private use has over the course of time come to be regarded as being a threat to the market exploitation of copyrighted works. At the time home video cassette recorder (VCR) was introduced into the marketplace it was much costlier and beyond the reach of average consumers: only businesses and wealthy costumers could afford to possess it. The use of VCR was then made primarily for two purposes: one is for library copying of televised programs and the other for recording of television program for watching it at another time, an act that is commonly referred to as “time-shifting”. Beyond recording of television program for time-shifting, the utility of VCRs to the average home users is scant since the content to exploit this media commercially, such as video movies and video music, was yet to be fully developed. With limited market for, and use of, VCR home videotaping of broadcast programs for the private use was then viewed as being a fair use of copyright.

Market scenario, however, changed dramatically with the arrival of low-cost, easy-to-use, portable home video machine towards the second half of the nineteen seventies. Sony’s Betamax VCR, for example, released in 1975 and JVC’s VHS VCR

introduced a year later revolutionized the home video technology to become an object of popular consumer product (WIPO Magazine 8-11). In the meantime, consumers' attraction to VCR increased incredibly as video movies came into the market and soon became a popular source of home entertainment among the average consumers. The cost of VCR declined sharply over time leading to the mass use of VCR for private recording of protected broadcast and other audio visual works. As mass private use surged up the film studios in the United States were quick to realize an imminent threat to their copyright, since this would eliminate a large chunk of retail market revenues for the original audio-visual works, particularly movies. The subsequent legal action by the film studios against the manufacturer of Betamax video tape recorder brought to the fore the issue of copyright infringement and liability due to the use of the VCRs for the unauthorized mass private recording of the copyrighted broadcast programs. The case in point is *Universal City Studios Inc. v. Sony Corporation of America* in which the major issue facing the court was whether video taping of broadcast program for time-shifting constituted fair use. The District Court's ruling was affirmative. The court took the view that time-shifting is a non-commercial recording, and hence fair use, of copyrighted broadcast programs. The *ratio decidendi* for the court's decision was the absence of 'harm', either present or future, to the copyright owners from the use of video recording of broadcast programs for the purpose of later viewing. On appeal the Ninth Circuit Court of Appeals reversed the decision that gave a fatal blow to Sony which had invested a huge sum of money to develop a home video machine. The case went to the Supreme Court where, after a protracted deliberation, a divided 5-4 votes overturned the Court of

Appeal's decision. Endorsing the District Court's finding that time-shifting for private home use is a non-commercial use of copyright, the Supreme Court maintained that ". . . A challenge to a non-commercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work" (qtd. in Gorman and Ginsburg 670). As plaintiff-respondents failed to carry their burden on both counts, the Court concluded that harm from time-shifting in respect to present as well as future exploitation of copyrighted works is "speculative and, at best, minimal" (671).

With the arrival of new technology that facilitated the mass private reproduction of audiovisual works the access/incentive balance that thus existed before was upset: copyright owners receiving much less incentive against the widespread use of their works. The task before the copyright is to strike a new balance that would fairly compensate the copyright owners without interfering with the users' privacy and their right to reproduce a single copy for personal use. The point here is that reproduction of a single copy for personal use is exempted in the copyright law; but when such use takes an alarming toll to be "unreasonably prejudicial" to the "legitimate interest of the author", the use may be subjected to equitable remuneration. Imposition of certain amount in the form of levy on the recording mediums, such as blank audio and video cassettes, commonly referred to as blank-tape levy, is an example of such remuneration which is collected from the manufacturers and importers of such mediums. The amount thus collected is distributed according to certain standard criterion to the respective owners of

copyright. Hence, national legislation of many jurisdictions, such as Germany and France contains a provision to this effect.

1.4 Market Incentive

Copyright is essentially a market incentive. As such, the incentive or royalties copyright secures to the author and the publisher is largely governed by the market condition. The reason perhaps is clear: it is not the publishers who pay royalties to the authors for their works - the royalties are added to the costs of the book which are ultimately borne by the consumers or readers. The publishers, who are simply intermediaries or a link between the author and the reader, serve as a medium through which these royalties are transferred from the public to the authors. It is ultimately the market which is the source of revenue to both the authors and the publishers. Hence, copyright incentive does not carry much sense unless the market for the works of authorship develops and expands.

A book has a value not because an author created and published it but that consumers are willing to pay for it. The economic value for the book arises because of the existence of market for it. However, an author or publisher cannot capture the value of their creation or product if there is no system of rules by which he or she can prevent others from using his or her works. Copyright *per se* does not generate revenues. Nor does it guarantee the revenues. The price which a consumer pays for the work is what constitutes revenue or reward to the author. And this revenue must be secured to the author if creation is to take place. This is the fundamental assumption of copyright – an

author must benefit from his creation. The expectation of this benefit, among other reasons, is what urges him most to keep on pursuing his creative activities. This incentive or benefit to author is justified not on the ground that author as such deserves it but that it is needed to ensure that an author could dedicate his time and effort to creative activities so that creation and production of cultural products may not retard. Therefore, what copyright does is that it secures this incentive to the authors in the form of exclusive rights to their works. These rights are monopoly-like rights that enable them to prevent the use of their works without their consent. The use of these exclusive rights as a means to secure revenue to the author is relevant only where the prospect for the commercial exploitation of his or her works exists. The author cannot expect any revenue from his works if the market for their commercial exploitation does not exist. As such, where market is lacking copyright has little relevance. The importance of copyright grows with the growth and expansion of the market in which the commercial system of cultural products can take place. Copyright therefore presupposes the existence of a viable market for the books that can support and sustain a commercial system of production and distribution of books. This, according to Rose (*The Author as Proprietor* 56), is the first and foremost prerequisite for the system of copyright to be realized.

As the market for books grows and expands, publishers begin to appear onto the scene. They are the businessmen whose primary function is the commercial production and distribution of books. The greater the size of the market for cultural products the greater is the prospect of their commercial exploitation and of earning more revenues to the authors and the publishers. Such commercial exploitation, however, is not practically

viable if books can be freely reproduced in the marketplace by anyone other than its original creator and publisher. The need for copyright protection thus arises with the viability of exploiting the cultural products for economic gains. In the case of book it is the invention of printing press and the subsequent growth of literacy that created the market for the commercial exploitation of books. It is at this level of development a system of rules that would recognize the property in literary works and thus enable their owners to prevent others from the use of their work becomes essential if both the authors and the publishers are to realize a fair share of their return from the exploitation of their works in the marketplace. As such, commercial exploitation of cultural products can only take place in the situation where a system of rules regulating the market exists. Copyright in essence is this system of rules designed to regulate the book market. It is a trading system or what Patterson calls a "trade regulation" (14). In the absence of such regulation the free market does not provide any incentives to the authors and the publishers for the simple reason that the original production of book is expensive while its reproduction cost is negligible or almost zero. Leaving the market to operate under perfect competition gives rise to the situation where the initial publishers would have no incentives to produce since they are not in the position to compete with the second comers who can free–ride without any obligation to share the fixed cost borne by the former. This inevitably would lead to market failure – a situation in which private investors would refrain from investing their resources in the production of books.

Copyright is a legal innovation designed to correct this situation. It does so by establishing property right in literary and artistic works. The initial right is vested in the

author or creator who can assign this right to the publisher for the exploitation of the work. The right in the work however extends only to its form and expression, and not to the underlying ideas. This idea/expression dichotomy inherent in copyright law is premised on the notion that ideas are the building blocks for the generation of creative works, and extending restriction or monopoly over the use of ideas would stifle new creations that build on the works of others. Anyone can thus freely use the idea from the protected work to generate a new work which then is eligible for a separate copyright. Unlike the rights in physical property which last as long as the object in which it is vested, copyright does not last in perpetuity. It is limited to the fixed duration set by the law.

Copyright is a bundle of rights in the form of exclusive rights. These exclusive rights are the means that enable the authors and the publishers to control, or demand payment for, the use of their works in the marketplace. As such, these exclusive rights are often referred to as monopoly rights. But the extent to which these rights can be used to gain monopoly is largely governed by the availability of the substitutable works. Since it is only form and expression to which protection is granted, anyone can freely borrow the idea and compete with the original works so long as the original expression is not copied. The market value of copyright works, particularly literary works, is therefore attached not so much to the ideas as to the form and expression in which they are embodied (Gallagher 86-87). Ideas as such have no value unless they are translated into meaningful expression. They assume value the moment they take the form of expression. The extent to which an author can reap reward for his work is therefore largely determined by the

consumers' preference – their willingness to pay "for the expression of the ideas in one form rather than in another" (Govaere par. 2.17).

1.5 Public versus Private Interest

With the use of copyright as an instrument to facilitate trade in cultural outputs protection of private interest received greater prominence in the past few decades. As such, copyright is being increasingly criticized for promoting and protecting the private interest at the expense of public interest. Reconciliation between private and public interests is the basic tension in copyright. Private interest demands that access to works should be subject to the control of the right owners so that profit can be maximized. In contrast, the proponents of public interest regard such control on the access to be deleterious for social and cultural development and stresses on the free flow of information. The reality today is however not soothing to those who advocate for the free flow of information. The increasing dominance of private interest to maximize profit from the commercial exploitation of cultural outputs has over the past few years led to the considerable expansion in the length and breadth of copyright protection. Economic rights were extended to cover any activities that would dilute the right owners' prospect of earning profit from the use of their works. Acts in violation of these rights were condemned as being infringement of rights in the work and were made liable to civil and penal action. To further consolidate the private interest of companies and the investors copyright was grafted with a life that would block access for a way beyond three generations before a work is available for free use. Copyright began with the Statute of Anne in the early eighteenth century that provided a 14-year protection which could be

extended for the second term of another 14 years if the author is alive. By the end of the twentieth century it has stretched to life plus seventy years. Such expansion in duration and scope has resulted in the greater restriction of public access while enormously increasing the power of copyright owners to control the market according to their terms and conditions.

Increasing trend of using the copyright to serve the commercial interest of right owners at the expense of public interest has upset the copyright balance in favor of the commodification of cultural objects. Knowledge came to be viewed as a commodity and books and music embodying such knowledge became an article of trade. The fact that knowledge builds on prior knowledge and that it is not created out of vacuum is being increasingly ignored as market for cultural outputs vastly expanded and the expectation of profit became the primary concern for the production and dissemination of these objects. Copyright was increasingly used as a legal instrument to insulate this profit by extending its breadth to cover every corner where consumers place value on literary and artistic works. In so using, the exceptions and exemptions provided for in the copyright law as a means of increasing the flow of information and ideas came to be construed by the court in a manner that tended to dilute the intention of these provisions which was to maintain balance between societal need for access to cultural products and the right owners' need to benefit from the creation and dissemination of their work. Narrow construction by the courts of the free use provision and the statutory provision of exceptions and exemptions has impeded the free exchange of ideas which is one of the basic conditions for the cultural development. In many instances these exceptions and

exemptions are allowed by the courts only under such conditions where transaction cost is high or licensing by the right owners is not possible. This has further restricted the application of these provisions in the interest of the public while intensifying the process of commodification of cultural objects. Trend over the past few years indicates that courts in the countries having strong intellectual property regime have been increasingly zealous in defending and protecting the prerogatives of the right owners by extending protection beyond the specified use of their materials to which they are allowed to control by the law. Case examples abound where courts are reluctant to grant privileges for making multiple copies for classroom use despite the fact that use of copyright materials for such purpose is exempted in the statute. In a U.S. case, for example, the court in *Princeton University Press v. Michigan Document* held the reproduction of substantial segments of copyrighted works of scholarship by the defendant Michigan Document Service, Inc., for use in fulfilling reading assignments given by professors at the University of Michigan to be an infringement of copyright (Gorman and Ginsburg 676). In another case, *American Geophysical Union v. Texaco, Inc*., the court ruled against the fair use defense saying where institutional mechanisms for licensing through the use of a collecting society could be brought into existence it was not fair use, even for research purposes, to make individual file copies from plaintiff's journals (Gorman and Ginsburg 694-700). Such decisions by the courts clearly lend support to what Radin calls "the commodified argument" which holds that "a court should refuse to judge a use fair, no matter what kind of use it is, if the use could have been licensed" (10). Fair use defense has therefore

no place in the context where the individual right owner can exploit such use through an efficient licensing market such as a Copyright Clearance Centre in the United States.

With control by the right owners over the access to their works ever tightening, a declaration of Human Rights that "everyone has the right …to enjoy the arts and to share in scientific advancement and its benefits" now appears more like a myth than a reality. The juxtaposition of this right with the right of the author in Article 27 of the UN Declaration of Human Rights clearly indicates that both these rights, although competing and conflicting to one another, are equally important from their respective position. But over the past few years the legal texts of national legislation and international conventions have taken the approach that accords less prominence to the right of the public to the free sharing of knowledge when it conflicts with the interests or the exploitation rights of the author. The glaring example is the 1971 Paris text of the Berne Convention for the Protection of Literary and Artistic Works wherein Article 9(2) explicitly forbids any reproduction of literary and artistic works that would conflict with a normal exploitation of the work and would unreasonable prejudice the legitimate interests of the author. Generally referred to as a three-step test, the provision accords foremost preference to the interest of the authors and other copyright owners by strictly maintaining that right of the copyright owner would prevail where any use of the work would "unreasonably prejudice the legitimate interest of the authors." Clearly, the intention is to plug every possible means to the access to the extent that is possible for the right owners to charge royalty payment for the use of the protected work. Where such 'plugging' is not feasible due to the availability of technological means such as copy

machines or blank-recording tapes for effectuating mass private copying of protected works, several countries on the Continent have introduced a blank-tape levy to compensate the losses to the copyright owners. Arguments justifying levies hold mass private copying, or home taping, of protected entertainment materials to be incompatible with Article 9(2) of the Berne Conventions since it does unreasonably prejudice the legitimate interest of the author. Hence, such private uses cannot be justified unless the prejudice is substantially reduced or compensated by the imposition of levies on the recording equipment or tapes or both (Visser 50-51). The dilemma before the copyright is that allowing uncompensated mass private uses of protected works would undermine the profitability of the copyright owners, and hence prejudice the legitimate interest of the authors; extending copyright into such spheres would undermine the right to privacy and freedom of expression. Hence for practical reasons, levy was considered to be a best solution to compensate the copyright owners where copyright fails to secure payoff to the copyright owners. By virtue of the treaty obligation, national legislation of member countries is bound to ensure that any exemptions and exceptions provided in the law, other than those explicitly allowed by the Convention, fully comply with the conditions prescribed in Article 9(2) of the Convention. Adhering to these conditions, however, would virtually 'enclose' any space that is available for the free use of the protected works.

1.6 Technological Protection and Free Use of Copyright

The advent of digital technology during the last quarter of the twentieth century gave rise to new forms of media that has dramatically revolutionized the way contents are

produced and exploited in the market. Digital technology, in essence, means the storage, reproduction, and transmission of materials, whatever its forms of expression (text, words, sounds, art works, still or moving images), in the form of digits: in binary code consisting of zeroes and ones. In numeric form, digital information is generally only machine-readable and must be converted by the machine into forms of expression accessible to human senses (Koskinen 179, Kerever 4-24). One of the basic characteristics of this technology is data compression that allows a large volume of works to be stored in a selectively small space, providing greater portability. A 12cm CD-ROM, for example, has a capacity of up to 650 megabytes of data, equivalent to 250,000 A4 pages of text, 7,000 photographs, 72 minutes of animated pictures or two and a half hours of recorded stereophonic sound (Tournier 154). It allows the perfect reproduction of the originals as well as the copies made from copies to an unlimited extent without any loss of quality. Works stored in digital format have the characteristics of plasticity and require no hard copy to 'deliver' to the public. They can be transmitted anywhere in the world with remarkable ease and speed. The Internet, for example, together with personal computer communicates works of the mind world wide at the speed of light. Any works in the digital format can be combined easily with other works on a single medium, such as a CD-ROM, creating multimedia work that causes a blurring of the boundaries between different types of works.

With these characteristics the use to which a work on the digital media can be put is almost unimaginable. The upshot of this digital revolution was that the scope of the existing exclusive rights was vastly extended to cover the new uses of work which was

not possible with the analog technology. Despite such extension in the scope copyright owners increasingly felt unsafe and vulnerable to the immense possibilities of unauthorized technical manipulation and modification of their works which they cannot control only through the legal means. One such example of possible manipulation is digital sampling of the sounds. Digital sampling is a "reproduction used to appropriate sounds that are part of a protected work". The 'sampled' sound can be manipulated to produce new sounds or new notes or sequence of notes within the range of the keyboard. In other words, the qualities of the sound (such as, resonance, vibrato, timbre, pitch, attack and decay of a sound) can be entirely modified to one's wish. Such use and manipulation of sound from the original works are hard to detect and identify and thus difficult for the copyright owners to prove infringement in their works.

The need was thus felt for the development of a technological control system that would effectively shield any unauthorized tampering with the protected material on the digital media. At present various technological devices preventing access and the unlawful copying of protected material exist. Anti-copying systems such as smart cards, the dongle, and the Serial Copy Management System are used to control the unauthorized reproduction while the encryptions systems like cryptography, passwords, black boxes, digital signatures, digital envelope, and many others are employed to prevent access. The international treaties on copyright and related rights, such as the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty prohibit any act designed to circumvent these anti-copy devices.

As each and every small use of copyrighted material in the digital network environment can be monitored and administered by the right holders themselves through technological devices, most of the information and protected works that flow on the electronic networks may not be freely available in the future. The American case law discussed above indicates that where licensing is possible users cannot escape from liability on the ground of fair use defense. What is yet alarming is the possibility of indiscriminate application of technological control systems in relation to the public domain works. This would empower the right owners to exercise absolute control over the information products which are not protected by the law and which must be freely available to the benefit of community at large. Such potential abuses of technological control measures may prolong copyright into perpetuity if legal correctives safeguarding the public interest are not in place.

Another important issue that has arisen from the technological control of copyrighted material relates to the status of copyright exceptions and exemptions. Enjoyment of these exceptions and exemptions requires that users have access to information and public domain works. Blocking such access by technological measures would therefore make it impossible for the users to exercise the privileges granted by the law in the form of exceptions. The point is well illustrated in a seminal article by Dusollier, Poullet, and Buydens: “Technology is indeed blind, and reacts only to the demands of technological acts such as copying, printing, sending, reading or access. It cannot recognize the framework within which these acts are performed. The often

subjective terms imposed for the exercise of an exception cannot be analysed or recognized by such technological measures" (4-36).

Hence, the use of technological control systems without any controlling mechanism to check their abusive applications would upset the trade off between control and access in favor of the right owner who then would be able to exercise an absolute monopoly not only in relation to the use of their works but also to the use of the information in the public domain. Such monopoly if it was ever allowed to happen would be an end of the copyright system itself the viability of which hinges on its ability to maintain balance between the two conflicting interests: the interest of the copyright owners for greater control of the work and the interests of the public for greater access to the work. Once this balance is stretched out to one or the other extreme the whole edifice of copyright may crumble down.

1.7 Compulsory Licenses and Copyright Balancing

The available ways and means to facilitate the access to the protected works for creative purposes of generating derivative works are also being narrowed down by subjecting their application to stringent conditions. The case in point is compulsory licensing. It allows the use of protected works without the consent of the copyright owner and upon payment of a stipulated fee. There are mainly two reasons for which this licensing system is introduced: one is to facilitate the access for the productive or transformative use of protected works and the other is to secure incentives for copyright owners from such uses of their works where it is difficult for them to exercise their

exclusive rights. The purpose in the first case is to prevent under-utilization of protected works and in the second case, to prevent under-production of creative works. Refusal to license exclusive rights by the copyright owners for the secondary, creative use of the protected work leads to the under-utilization of works, as it stifles the production of cumulative creation. Similarly, mass private use of the protected works, which is difficult for the copyright owners to control, tends to promote free riding. This eliminates incentives for the copyright owners, leading to the under-production of the works of literature. Photocopying and home taping are instances of such use where for reason of privacy and freedom of expression it is practically difficult for the copyright owners to exercise their rights. Widespread use of these copying devices enhances the existing access that significantly reduces the retail market for the protected works and, hence diminishes the copyright owners' prospect of earning royalties from the exploitation of their works. Thus where copyright fails to secure protection compulsory licensing is used to offer compensation for uncompensated use of protected works. A blank-tape levy, as discussed earlier, is an instance where the loss of revenue to the copyright owners due to home taping is compensated by imposing levies on the recording medium. Most national laws on copyright contain provision for compulsory licensing system to contend with this situation.

The possibility of withholding license by the copyright owners for the secondary, creative use of the protected works exists where they are in a position of market power due to the non-existence of substitutable works or the economic arrangement for exploiting copyright works. Compulsory licensing is a safety valve designed to mitigate

such practices. It defuses this market power to a significant level by enabling the users to gain access to the protected works on the payment of a reasonable fee without requiring any permission from the copyright owners. Such intervention in the form of compulsory licensing corrects imbalances resulting from the expansion in the breadth and length of copyright protection as well as the imbalances resulting from the free access to the protected works due to the advancement of inexpensive copying technologies. Thus it can be used to level the balance that is either "user-biased" resulting from free access or an "owner-biased" resulting from the continual expansion in the breadth and length of copyright protection.

As it does in almost all issues about copyright, the two rival interests take different views of compulsory licensing. Copyright users would cheer any step that would broaden the access; copyright owners on the other side would frown upon any such concession that would curtail their exclusive rights. But that which ultimately prevails in most cases is the interest of the copyright owners. One reason is that copyright owners are people who represent copyright industry; they possess money and power, knowledge and sophistication to pursue their interests. The pressure and lobbying from this interest group is therefore too strong for the government or the legislators to ignore it. As Kastenmeier (x) has aptly noted, it is in fact these people, "lobbyists and lawyers" that in reality shape the language of the copyright bills.

What is true about national context equally applies to international context. The same element that influences the enactment of national legislation is actively involved in

the formulation of rules and regulations that govern the international copyright. Given this situation, it is less surprising to see the emphasis by the industrialized countries on the high standard of protection. They represent the multinational companies and other large firms that dominate the world market in the production and dissemination of goods containing intellectual property rights. As such, in no way are they willing to compromise with the level of standard that would affect the commercial interest of these firms and their dominant position in the world market of intellectual property goods. Debate on compulsory licensing is a reflection of this attitude on the part of developed countries.

With compulsory licensing system exclusive right no longer retains its exclusivity. It reduces the exclusive right to a mere right to remuneration where copyright owner has no control over the dissemination of his works. He cannot deny the access to his work. Nor is he in the position to set the terms and conditions for economic exploitation of his works. He has to content himself with the remuneration fixed by the competent legal authority. In the international context, the introduction of compulsory licensing into the multilateral convention such as the Berne Convention, would mean that any country can reproduce or translate the books published in another country without the permission from its author or publisher. The right owner cannot stop such reproduction or translation of his work. He is simply entitled to claim the remuneration which is fixed by the competent body as determined by the law. Such remuneration, however, may not be commensurate with the market value of his work. Hence the subject of compulsory licensing was the major issue that sparked bitter contention between the developed and developing nations during the 1967 Stockholm Revision of the Berne Convention.

From the very beginning the copyright owners in the developed countries were strongly opposed to the adoption of this system since this would considerably weaken their legal right – the basis to exact monopoly rent from the use and reuse of their works. The solution that was reached during the 1971 Paris Convention for the revision of the Berne Convention predicated the availability of compulsory licensing for translation and reproduction of literary, scientific and artistic works on the compliance of such conditions which, for the practical reason, was extremely difficult for the developing countries to comply with. The privilege was thus a mere consolation, not a concession to meet their dire need for education, teaching and development of scientific research (Altbach 7-14).

The case of compulsory licensing system is a glaring example of the importance attached to the protection of the interest of copyright owners and, by extension, to the interest of the developed countries. The right of the public to the free access of work is thus treated as being not at par with but subordinate to the right of the author. Viewed from this light, author's right to benefit from his creation is a superior right while that of the right of the public to benefit from the free access to the work is an inferior right. Where the two conflicts exist, it is always the former, except otherwise in the specified cases, that prevails.

1.8 Chafee's Six Ideals of Copyright

In his seminal article, *Reflections on the Law of Copyright*, published in 1945 Professor Zechariah Chafee explored the general principles underlying the functions of

copyright (503-529). One of the fundamental questions which he posed in this article was: What is it that the law of copyright is really trying to accomplish? An inquiry into this question led him to postulate the general principles which he describes as being the six ideals of copyright law. These six ideals are: (1) Complete coverage, (2) A single monopoly, (3) Protection should be international, (4) Protection should not go substantially beyond the purpose of protection, (5) The protection given the copyright-owner should not stifle independent creation by others, and (6) The legal rules should be convenient to handle.

First three of the six ideals were affirmative in that they favored protection to the copyright owner while the other three were negative because they tended to limit the scope of protection.

The first ideal, *complete coverage*, requires that "if a person has invented some new collocation of visible or audible points, - of lines, colors, sounds, or words", the law should protect this new collocation. The second ideal, *a single monopoly*, requires copyright to be the sole right of the author to produce or reproduce the work or any substantial part thereof in any material form whatever. This in essence means that the author should have a right to control all the channels through which his work or any fragments of his work reach the market. While the first ideal relates to what is protected, the second ideal concerns what it is protected against, what an imitator or appropriator must not do. The third ideal requires that *protection should be international*. The reason, as Chafee puts it, is that:

> . . . art and literature have always been international in spirit. The law has sometimes tried to keep out books made abroad, but it could not keep out the thoughts in those books. Roman poetry was revolutionized by the study of Greek. Dante was influenced by Mohammedan philosophers. Shakespeare got his plots from Italian novels. English writers borrowed from French in the seventeenth century, and French writers from English in the eighteenth. British drama since Shaw is the child of Ibsen. Numberless American novels are indebted to either Proust or Freud. (505-6)

Copyright law should therefore facilitate the free flow of ideas and imaginative creations across national boundaries by giving the same protection to every author, wherever he lives or creates. No discrimination should be made against the foreign authors.

Chafee's other three ideals tended to limit protection. The fourth ideal that *protection should not go substantially beyond the purposes of protection* requires that the society must receive greater advantage than the burden which it has incurred by the grant of monopoly to the authors. Copyright is open to objections because it is a monopoly which burdens competitors and the public. It is permitted and encouraged because of its 'peculiar great advantages' to the society. Despite this advantage, the fact that it is still a monopoly requires that the burdens of this monopoly do not outweigh the benefit. It is therefore important to examine who is benefited and how much and at whose expense.

For Chafee the burdens of copyright monopoly should be offset against the following benefits:

> The burden which the monopoly imposes on readers and competing publishers should be roughly limited to what will produce the following benefits: (a) for the author, to supply a direct or indirect pecuniary return as an incentive to creation and to confer upon him control over the marketing of his creation; (b) for the surviving family, to give a pecuniary return which will save them from destitution and impel the author to create, without allowing the family to abuse a prolonged monopoly; (c) for the publisher, to give a continued pecuniary return which will indirectly benefit the author and yield to the publisher an equitable return on his investment, but which will not prevent the public from getting easy access to the creation after the author's death. (510)

The fifth ideal, *the protection given the copyright owner should not stifle independent creation by others*, requires that protection should encourage, not stifle, independent creation. People should be able to use the author's book for their independent creation. For Chafee, the world may not progress if such use is restricted:

> Nobody else should market the author's book, but we refuse to say nobody else should use it. The world goes ahead because each of us builds on the work of our predecessors. "A dwarf standing on the shoulders of a giant can see farther than the giant himself." Progress would be stifled if the

> author had a complete monopoly of everything in his book for fifty-six years or any other long period. Some use of its contents must be permitted in connection with the independent creation of other authors. The very policy which leads the law to encourage his creativeness also justifies it in facilitating the creativeness of others. (511)

Chafee's sixth ideal, *the legal rules should be convenient to handle*, requires that legal rules should be "certain, readily understood, not unduly complicated, as easy as possible to apply." This is vital to facilitate the avoidance of litigation:

> The lawyers who advise authors, publishers, and other business men in drafting contracts and other transactions should be able to ascertain the rights of the parties and protect those rights with assurance. To require officials, judges and lawyers to work with a statute which is intricate and leaves many important points unsettled is like asking an engineer to do his calculation with a warped and illegible slide-rule. (514)

Chafee's six ideals capture the basic functions of copyright law. They are the basic principles of copyright in that "the whole history of copyright law shows a somewhat jerky progress toward realization of the six ideals" (Chafee 520).

1.9 Commodification of Copyright

Of the several important issues that have dominated discussions in international trade and law during the last quarter of the twentieth century, intellectual property rights is one of them. As the goods and services in which the primary value is information and

expression have come to occupy burgeoning share in domestic and world trade, the industrialized countries, who are the major producer and exporter of intellectual property, came to defend intellectual property rights as the most valuable economic assets. As such, they looked for tighter control over important technology and creativity components of their exports and investment by strongly advocating for high levels of intellectual property rights protection. On the other side, the Third World countries, who are the net importers of goods and services protected by intellectual property rights, perceived such protection to be extremely detrimental to their economic development since this would require them to pay large sums in the form of royalties to foreign right-holders for the use of protected works which they desperately needed. Hence, intellectual property rights became the major issue during the GATT Uruguay Round of multilateral trade negotiations which ultimately culminated in the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) as an integral part of the Marrakesh Agreement Establishing the World Trade Organization (WTO).

With the growing commercial orientation of the modern society cultural goods came to be valued not so much for their aesthetic creations than for their commercial potentiality. The valuable writings, what were at one time considered 'the artistic,' have now become the 'commercial' (Charlow 146-202). This commercialization of cultural objects grew more extensive and pervasive as the possibility of their uses for various purposes immensely increased with the astounding developments in the frontiers of information and communication technologies, particularly during the second half of the twentieth century. As cultural objects have come to occupy a significant economic value

in the marketplace production and distribution of these objects in various forms of media emerged as a major economic activity where the chief concern is profit. This profit, however, may not be assured without sufficient control over the production and dissemination of cultural outputs. What then became more important is not the question 'who creates?' but 'who controls the creative outputs?' As a rule it is the publishers or legal entities that control the market for cultural outputs by virtue of the fact that authors are obliged to assign their copyright to these entities for the exploitation of the works. Copyright, as a means of this control, provided a basis for the commercialization of cultural objects. And to facilitate this commercialization of culture, in the views of Niva Elkin-Koren, has now become the overriding concern of copyright:

> The legal regime [copyright] is . . . ransformed from a relatively narrow set of rights necessary to guarantee incentives to create new works, into a *claim for the protection of owners' expectations to maximize their profits and utilize every economic potential related to their work.* If copyright law had once created islands of information, which are subject to the sovereign control of copyright owners, these islands are now turning into a continent leaving little available space in between. *Copyright law thus becomes a very powerful means for accumulating control*. (83-4)

As economic interest came to dominate other interests copyright was used as an instrument for promoting trade in cultural output. The increasing importance attached to the commercial exploitation of cultural outputs and to the use of copyright as a means to

facilitate this exploitation has overshadowed the fundamental role of copyright which is to encourage creativity and to protect that creative output.

Free exchange of information, which is one of the two primary objectives of copyright, was being increasingly sidelined as private interest of maximizing the profit from the exploitation of works of culture came to dominate the public interest of maximizing social welfare from the free availability of cultural products. As profit became the major concern for the production and dissemination works of culture came to be viewed as an object of commerce. Commercial transaction of these objects requires that owners of intellectual property are capable of charging the price for the use of their products. As such any activity that would undermine the ability of the copyright owners to benefit from the commercial transaction of their works was rejected as being barrier to the investment required for the production and dissemination of the works of cultural artifacts. Rules limiting the access to the works of cultural artifacts were formulated with much precision and deftness to ensure the proprietary interest of the right-holders to earn profit from the exploitation of their works in the marketplace. As such free exchange of information necessary for the cultural development of the society was given less prominence in favor of proprietary interests of the right owners of earning profit from every single use of their works. Increasing use of copyright to protect the profit interest of the right owners has immensely facilitated the commercialization of culture. An imminent risk with this commercialization is the fact that cost of creating intellectual property would be much higher than before due to the increasing access cost which equally applies for the creator of the work. Still worrisome is the attempt in the recent

years by the copyright owners to displace copyright law by other common law doctrines, such as the contract law, to secure more control over the access than what is provided in the copyright law.

Much of the intellectual property rights commanding immense economic value is held by the multinational companies in the industrialized countries. The growth and expansion of world market for cultural goods has led these companies to the increasing drive for propertization and commodification of such objects by intellectual property rights protection. As intellectual property right came to be increasingly linked to the trade, copyright is now guided by trade more than any other interests. Whatever may be the justification for, or philosophical underlyings of, copyright, the trend now appears to be directed at exercising copyright as a means of gaining control over the information market. The case in point is the rapid expansion in scope and duration of copyright and other intellectual property right that gave "content providers unprecedented proprietary control over expression and information" (Netanel and Elkin-Koren viii). The threat of unilateral trade sanction by the United States and the European Union for failure to protect their intellectual property rights and the need to comply with the obligations of the WTO/TRIPS Agreement have obliged most Third World countries to strengthen and update their copyright legislation and its implementation. Over the past few years, many newly industrialized Third World countries, such as China, India, Brazil, Korea, Taiwan, Thailand, Singapore and Malaysia where the level of piracy is suspected to be high by the West, have adopted copyright legislation that is at par with the international standard.

1.10 Need of the Study

The need for present study arises primarily for two reasons: The first concerns the basic assumption of copyright that it promotes creativity and learning. This has been a declared objective of copyright since the time the world's first copyright law, the Statute of Anne, was enacted in England. The extent to which copyright promotes creativity is a subjective question, and is therefore open to debate. Literature on copyright abounds in examples that point to the elements other than copyright incentives which could have been the source of inspiration to the authors for their engagement in creative activities: the hope of earning public recognition, fame and social status, of winning lucrative position in government services, and so on. However, it is widely recognized on the economic ground that reward or incentives copyright secures to the authors motivates them to commit themselves to creative activities. This hypothesis, if not wholly true, is but hard to refute. The second concerns the existence of book market which is the basic source of pecuniary incentive to the authors. In the Nepalese context, market appears to be one of the most critical constraints for the early development of copyright regime.

Copyright has less relevance where the size of the market is extremely limited. The size of the market affects the production of creative works because large market allows a profitable exploitation of works to their authors and publishers. Greater the size of the market greater is the prospect of reward. The extent to which copyright secures reward to the author depends on the marketability of a given work - willingness of the consumers to pay for his work. Works which are successful in the market earn to its author and publisher substantial amount of revenues while those that turn out to be

unsuccessful does not yield adequate payoff to be any incentive either to its author or publisher. This perhaps is the reason for a criticism that is frequently labeled at copyright that it promotes only popular works at the expense of more serious, classical works. This, in fact, is true, for copyright *per se* is not a source of reward, but only a means to secure this reward. The source is the market that governs the royalties or revenue an author can earn from the sale or use of his work. As such, an author cannot benefit from copyright protection until his work is valued in the market. A work may be a kind of higher academic distinction but its author may not receive adequate reward if it fails to sale in the market. In contrast a work as banal as a compilation of the lyrics of popular pop songs may sale millions of copies fetching to its author a huge sum of money in the form of royalty. For copyright, what matters is not the quality of the work as such but the value it receives in the market. And to enable the author to capture this market value of his work is the prime function of copyright.

What constitutes market for the book is basically the size of the educated populace. It is assumed that the more people are educated the more they look for reading materials of various descriptions. Demand for books is therefore very much linear to the level of education than to other factors. It is a condition precedent for the existence and the growth of book market. Level of income is also other important variable affecting the growth of demand for books. However, a mere increase in the level of income without corresponding growth and expansion in the level of education does not necessarily lead to the rise in the demand for books. This may be illustrated by a simple fact that a book is something which anyone cannot enjoy and appreciate reading it unless he or she has

acquired a required skill. A person may have sufficient money but he would not spend it on books if he has no required skill to enjoy reading it. Since education is the only means to cultivate this skill, the extent to which a person would spend his money on books is relative to his level of education and reading habit. This perhaps is the reason why demand for books is not the same thing as demand for, say, a piece of music. Enjoying a book is different from enjoying a piece of music. The former demands skill on the part of the readers while in the case of latter no such skill is required on the part of listeners. Anyone who has money and leisure time to spare can entertain by listening to music. Demand for music is therefore elastic to the level of income and the price of the music hardware, such as tape recorders, CD players, and amplifiers. This however is not the case for book where a consumer's ability to pay, or his income, matters only if he has the ability to enjoy from reading a book. And unless he has acquired this ability, he is less likely to spend his money on book. Education is therefore a primary element for the existence and the growth of book market besides any other factors.

Given the primary place of education in the development of book market, Nepal has still long way to go before the emergence of a viable book market that can sustain local publishing industry. Copyright becomes all too important as local publishing industry develops. Without the existence of copyright to safeguard the commercial interest of the publishers and the authors, publishing industry cannot develop and flourish. It is noted that it is for the interest of the publishers that copyright came into existence. In Nepal market for publishing industry could not develop due to the lack of readership. Till the 1970s publishing in Nepal is virtually non-existent, except for school

textbooks. A look at the size of the educated populace would reveal why market for books remained virtually constrained in Nepal. In 1971 Nepal had a literate population of 13.89 percent. It rose to 23.25 percent in 1981 and to 39.33 percent in 1991. The 2001 Census Report recorded this literate population at 54.1 percent of the total population of 20.3 million. By the level of education, the bulk of this literate population consists of those who have attained the primary level (22.65 percent) and the secondary level (16.54 percent) of education. Only 7.65 percent of the literates have the level of SLC/Intermediate education while the graduate/post-graduate literates are as low as 1.84 percent (CBS, Population Monograph 254).

With small or almost negligible domestic market for books the need for copyright compliance did not arise in Nepal till late in the 1990's when widespread piracy in the music and audio-visual sector triggered a campaign by some prominent artistes and music publishers for copyright protection. The new Act replacing the 1965 law was enacted in 2002 and since then copyright came into implementation in Nepal. As regards the protection of other forms of intellectual property rights, such as patent and trade marks, the story is almost similar to that of copyright. As such, Nepal's status in the world with respect to intellectual property protection ranks 121 out of 131 countries (World Economic Forum 265).

1.11 Objectives

The main objectives of this study are as follows:

1. To review the basic concept of copyright and the rights which it encompasses,

2. To explore the development of copyright in Nepal,

3. To analyse the provisions of the newly enacted Copyright Act, 2002,

4. To explore the development of Nepalese book market, publishing and authorship, and its implication to copyright compliance, and

5. To suggest measures for the use of copyright as a means to promote local authorship and book market in Nepal.

1.12 Methodology

It is a descriptive study that heavily relies on the secondary information. The sources of this information are mainly published articles on law journals, legal documents and treatises, UNESCO and WIPO publications on copyright, study reports, seminar proceedings and relevant texts on the subject of copyright. Much of the information on book development in Nepal draws on the publications of the National Booksellers and Publishers Association of Nepal and the discussion held with the office bearers of the Association. In a few instances, personal inquiry with the concerned publishers has been made to obtain market information on the sales performance of the books of local authorship. The study extensively draws on the origin and development of copyright in England since it is the mother country of copyright.

The *raison d'etre* for the existence of copyright is market. As market for protected works grows so does the problem of free riding that substantially undercuts the incentives for the producers and creators of these works. With the emergence of book market and the cheaper means of reproduction, it became necessary to safeguard the interests of the publishers and authors against the increasing threat of piracy. Copyright that evolved was a response to this need. It is inseparably linked to the development of book market. Any analysis of copyright therefore presupposes the existence of the market for books. The present study is basically an inquiry into this aspect. Such an inquiry necessarily requires a critical review of the growth of Nepalese book market.

Precisely this is what the present study does. First, it goes into the history of book development in Nepal dating from the early Rana period. Second, it traces out the reasons for the slow growth of market for books.

A simple logic of copyright tells that foreign works would substantially cut the market for the works of local authorship when protection is denied to the former. This is because in want of protection cheaper, pirated editions of foreign works will dominate the market making it more difficult for the works of domestic authors to compete with them. Stated simply, denying protection to foreign works would encourage the unauthorized reprints of these works. Such pirated copies being much cheaper in price would undermine the commercial viability of the works of national authors. This in fact was the case in the United States during the nineteenth century. But the case in Nepal is not so where both domestic and foreign works do not enjoy copyright protection till the year

2002 since the 1965 Copyright Act did not come into implementation. The new Copyright Act came into force from August 2002. In line with this Act copyright rules were formulated and implemented from August, 2004. Initially the new act did not extend protection to foreign authors. By the amendment to the act in September, 2005, foreign authors were offered protection in Nepal. Copyright therefore has yet to play its role in the Nepalese book market. Is this belated development of copyright tradition in Nepal due to the fact that the market for the books of local authorship has not yet sufficiently developed? Why publishers in Nepal still tend to look at copyright with apprehension despite the fact that copyright is the publishers' own invention for the protection of their commercial interests? Is this because they see more profit in dealing with foreign books which are not protected until recently, and hence cheaper, in Nepal? These are some of the fundamental questions to which the present study is directed.

Answer to these questions necessarily requires an analysis of the way book market developed in Nepal. Greater the size of the book market greater is the need for the protection of authors because of increasing vulnerability of their works to piracy. Put it in other way round whether or not copyright is needed is a question not so much related to the law as to the need of the market. The economics of copyright is guided by the dynamics of market forces in which the major actors are technology and market. Development in the technology of communication gave rise to new forms of media for the production and exploitation of copyrighted works. As market for these media vastly expands over time protection becomes necessary for the producers to ward off the imminent threat of piracy and other forms of unauthorized uses of protected works

embodied in various forms of tangible media, such as CD-ROMs VCDs and DVDs. Take for example the case of books. At one time books were the most expensive media access to which is strictly confined to few people belonging to highly privileged class. There was no need to protect this media as anyone wishing to reproduce the book has to incur the same marginal cost that is borne by the original producers. In short, incentives or profit for the pirates, if any, was almost zero. The invention of printing press towards the mid-fifteen century changed the chemistry of book publishing. Prices of books sharply declined due to their mass production and the economies of scale. The market for books dramatically expanded as they become more affordable to the masses. With this cheaper and easier means of reproduction the pirates were able to undercut the prices of original editions by avoiding the high fixed cost which the later have to incur in the form of royalty payments to the authors, type-setting, editing, proof reading, lay-out designing and promotional advertisements. As the pirates start appearing in the marketplace need for legal regulation or protection of the market becomes most critical to safeguard the profit interest of the original producers. Viewed from this premise, copyright is entirely targeted at curbing piracy.

Is it the absence of market for indigenous books that publishers in Nepal did not give any importance to copyright? And is this the reason that the government of Nepal did not take any interest to implement the law despite its existence since 1965? As such the study explores the growth of Nepalese book market as a starting point for the development of copyright protection. In other words it seeks to explain the need for copyright compliance from the market perspective. The basic economic rationale for

copyright protection is that of the market failure where lack of adequate incentives to the producers and creators of intellectual products results in the underproduction of these goods. Since these goods are important for the economic, scientific, and cultural advancement of the society, protection securing limited monopoly to the authors and producers is needed to ensure the sufficient production of these goods.

1.13 Limitation

This study is solely concerned with copyright in literary works. The term 'literary work' is used in this study to include only books. As such it is beyond the scope of this study to deal with other subject matter of copyright, such as music, film, artistic works, and so on.

1.14 Organization of the Study

This study is organized into six chapters. The structure of this organization is guided by two basic considerations. The first is that copyright law has several important aspects a good understanding of which is essential before analyzing the cultural and economic significance of the law within a given context. The first three chapters are thus intended to serve this purpose. Chapter one presents the need and objective of the study. Basic tension that characterizes copyright is also discussed in this chapter. Several themes that are linked to the development of copyright are discussed here. Chapter two reviews various components of copyright. It explores the history of copyright as it developed in England, the country where copyright was born. It discusses how copyright which was originally designed by the publishers to protect and promote their commercial

interest turned into authors' right. Basic rights of the authors are also elaborated in this chapter.

This aside, it also looks into international conventions and agreements on copyright, particularly, the Berne Convention and the TRIPS Agreement. Copyright was territorial in scope in the early days of its beginning. This means rights granted by a sovereign state do not extend beyond its territory. As such, these rights are not recognized or protected in another state except under the condition of the existence of the bilateral agreement between the two states. The copyright owners have thus no control over the use of their works that takes place beyond their national territory. This gave rise to the problem of free riding where the works of foreign authors were pirated without any compensation to its authors and right owners. As a result, the countries that were importers of intellectual property benefited from this 'positive externality' while the countries that were exporters of intellectual property suffered from the loss of royalties. Given the increasing use and demand of literary and artistic works in the international marketplace cross border protection of these works became much important if authors and the copyright owners in the exporting countries are to receive their fare share of revenues from the use of their works abroad. International protection of literary and artistic works is a response to this need.

Chapter three presents the concept of property in literary creations. In doing so it reviews the literary property debate that took place in England during the mid-eighteenth century. Extensive discussion of the Romantic literary criticism and its influence on

shaping the basic notions of copyright - work, author, and originality - are presented in this chapter.

Having dealt with these fundamental aspects of copyright, chapter four chronicles the development of authorship and copyright in Nepal. It analyses the substantial aspects of the newly enacted copyright law of Nepal, 2002 and its shortcomings.

The second consideration has to do with the basic question: when does copyright become important or relevant? To put it squarely, when does the need for copyright protection arise? An answer to this question is the key to analyzing why for a long time copyright in Nepal failed to attract the attention of the academics, legislators and the industry. As pointed out in the preceding section, copyright is historically associated with piracy. Books became cheaper and affordable with the invention of the printing press. This has led to the rapid growth in the size of the literate population creating a huge market for the books. As reproduction of books became much easier and cheaper and market for books vastly expanded piracy became most profitable. Proliferation of pirated editions of successful books deprived the authors and the legitimate producers of these books of the return on their investment. Copyright was originally conceived to respond to this challenge. The primary concern of copyright is therefore to shield the piracy by outlawing any unauthorized use or reproduction of copyrighted works. This would enable the authors and their publishers to secure the profit which they needed for the production and circulation of creative works. It thus follows from the argument above that copyright

is the upshot of market imperatives and this is one of the fundamental propositions of this study.

Chapter five which surveys the growth of publishing in Nepal carries this theme in the context of book market. It argues the existence of a viable book market for the works of local authorship as a precondition for the system of copyright to develop. The absence of such a market in Nepal largely explains the reason for publishers' indifference to copyright. They are yet to realize the fact that copyright is a system of rules that is meant to protect their own commercial interest. This would be at once clear to them once the market for books expands and the piracy become rampant. It is at this level of development that copyright become an essential legal instrument for the publishers to protect their investment. The case in point is the Nepalese music market where the phenomenal growth of this market towards the 1990s saw a widespread piracy of popular music cassettes and CDs depriving its legitimate producers and creators from earning a reasonable share of the profit. Never before this growth has any music publisher ever called for the enforcement of copyright law. But now they needed it desperately because they would not be in the position to grab dominant chunks of emerging market as long as the pirates who do not have to incur the fixed cost and the payment of royalties to the creators are free to operate in the market. These pirates need to be eliminated from the market if publishers are to stay in the business and the creators are to receive remuneration for their works. Copyright thus becomes all too important as piracy starts pervading the market. Viewed from this perspective, the book publishers in Nepal appear quite comfortable without copyright protection because they face no imminent threat of

large scale piracy. Barring a few cases of exception, the domestic market for the works of local authorship is still too small to be lucrative for the pirates.

This theme is further taken in the international context where the major tension between the developed and developing countries is discussed. A brief note on relative advantage and disadvantage to Nepal from accession to international convention, such as the Berne Convention, is also presented in this chapter. It concludes that until the indigenous copyright industry, especially the publishing sector, grows competitive, the copyright balance sheet of Nepal will remain largely overshadowed by the import bill for foreign publications. Chapter six presents the summary and recommendation.

CHAPTER TWO

An Overview of Copyright

2.1 The Battle of the Booksellers

The most crucial moment in the development of copyright is the debate over the origin and nature of literary property that took place in England during the second half of the eighteenth century. This debate, often referred to as "The Question of Literary Property", or "The Battle of the Booksellers" which was fought out in the Courts turned on the status and nature of common law literary property. It was a "costly, prodigious, and protracted" debate that was confined not only within the corridors of the court: "The question of literary property was discussed everywhere and by everybody" (Birrell 121-22). The debate generated a wide range of discussion on which the central question in issue was whether authors, and through them booksellers, had a perpetual common law copyright in their works or whether their rights were confined to the statutory period provided under the Statute of Anne (Sherman and Bently 13). The fundamental question inherent in this issue was: whether copyright is a natural right of property that is governed by the same general principles which underlie all property, or whether it is an artificial right of fixed duration created by the legislature. This was the subject matter of two historical cases of this battle - *Millar v Taylor* and *Donaldson v Beckett* – which mark the culmination of the eighteenth century literary property debate. They came to be regarded as the hallmark of Anglo-American copyright jurisprudence

2.1.1 Millar v. Taylor

The *Millar* court found the common law right of an author as a natural right that cannot be taken away by the Statute of Anne. A few years later in 1774 the court in *Donaldson v Beckett* overturned the *Millar* decision. In its holding, the House of Lords declared copyright a deliberate creation of the Statute of Anne. As such, there are no perpetual common law rights in published books except that secured by the Statute or what the legislature may choose to give. The *Donaldson* court saw the common law copyright in the published works to be a major impediment in the implementation of the Statute of Anne, and hence its decision that copyright is a deliberate creation of the Statute of Anne was aimed at putting an end to the common law copyright in published work. This paved the way for the implementation of the Statute of Anne.

The debate which lasted for forty years began with the Stationers' Company in 1731 when the twenty-one-year period of grace provided by the Statute of Anne for the stationer's copyright in works that had first been published before the Statute came into force expired. The expiration of this term meant that the stationers' monopoly over formerly profitable works which they had been acquiring over centuries by outright purchase from the authors had begun to lapse. As a result, printers in Scotland and in the provinces began to issue new editions of old books depriving the stationers of their property in copy which they claimed to hold in perpetuity. This instigated the London booksellers to take action to restore the control they had once exercised over the book trade. After their attempt to prolong the length of protection from Parliament failed in 1735, the stationers turned to the courts in their endeavor "to obtain the judicial creation

of a substitute for the stationers' copyright – a perpetual common law copyright for the author" (Patterson and Lindberg 33). They argued that authors had a perpetual copyright in their work at common law and since this common-law copyright existed independently of the statutory copyright authors could assign it to the bookseller. The strategy of this argument, as noted by Patterson, is obvious: "Since the custom was for the author always to assign his rights to the bookseller, their [booksellers] strategy was obvious. Once the courts accepted the author's common law-copyright in perpetuity, the booksellers would have succeeded in receiving the stationer's copyright under a different name, and their monopoly would be safe, despite the limitations imposed by the Statute of Anne" (Copyright in Historical Perspective 15).

The issue which they raised soon became a subject matter of wide public discussion which "generated a large body of literature both in support of and against the legal recognition of perpetual common law literary property"(Sherman and Bently 13). While it was generally accepted that author has a property right in the manuscript of a work and that his right to it could exist indefinitely prior to its publication, the central question in issue was whether or not a perpetual right existed at common law. If the author had common law right in perpetuity, did the Statute of Anne take it away upon his publishing the work? The fundamental question, as Kaplan put it, was: "Did the copyright in published works cease at the expiration of the limited periods specified in the statute, or was there a non-statutory, common law copyright of perpetual duration, with the Statute merely furnishing accumulative special remedies during the limited periods?" (12).

The stationers succeeded in their initial actions to obtain injunctions from the lower courts which took the position that there had been a perpetual copyright at common law. The first lawsuit that arose in 1735 was that of *Eyre vs. Walker* in which the court granted injunction restraining the publication of *The Whole Duty of Man* which had been first published in 1657. In 1739 the court granted injunction against the publication of *Paradise Lost* the title of which was originally conveyed by Milton in 1667. In those and several other cases the court granted injunction on the belief of perpetual common-law right of the authors.

In 1769 the famous case of *Millar vs. Taylor* brought directly before the Court of King's Bench the question of whether or not authors or their assigns retained a perpetual right at common law in their literary creation after publication. The action was brought in 1766 and was decided by the Court of King's Bench in 1769. This litigation involved the copyright of a popular epic poem by James Thomson's *The Seasons* which a London bookseller, Andrew Millar, had purchased the rights in 1729 for £242. By the time the defendant Robert Taylor, a bookseller outside the Stationers' Company, issued a cheap rival edition of the work in 1763, thirty-two years later, the statutory rights in the *The Seasons* had elapsed. Thus if Millar was to sustain this case it was necessary for him to establish that he had a common law right in the work. After a long debate, the Court of King's Bench, by a majority of three to one, ruled in favor of the plaintiff stating that an author had, at common law, the natural right to print, publish and vend his work and that this right, independent of statute, was in perpetuity and could be conveyed to the bookseller. Lord Mansfield, who was then regarded as the most brilliant legal mind, gave

his opinion in defense of the perpetual common law rights of the authors. The reasons he cited for the protection of copy before publication were based on the principle of natural rights.

> It is just that an author should reap the pecuniary profits of his own ingenuity and labor. It is just that another should not use his name without his consent. It is fit that he should judge when to publish, or whether he will ever publish. It is fit he should not only choose the time, but the manner, of publication, how many, what volume, what print. It is fit he should choose to whose care he will trust the accuracy and correctness of the impression, in whose honesty he will confide, not to foist in additions with other reasoning of the same effect. (qtd. in Drone 30)

In Mansfield's opinion it is this same reason that applies with equal force to published works and hence he dismissed the argument that the Statute of Anne had supplanted the common law. This was the judgment which the London stationers had long awaited for and which they desperately needed to maintain their status quo. One dissenting justice, Yates J, held that there was no such property at common law. Common law rights, he argued, can only attach to the ownership of physical object which has a form and substance, and which can be distinctly identified and are capable of separate possession. In contrast, property in intellectual productions does not exhibit any such characteristics to be regarded as a form of property. Further, Yates declared that property in copies was unknown before the Statute of Anne was passed because in framing the Statute, "the legislature had no notion of any such things as copyrights as existing for

ever at common law; but that, on the contrary, they understood that authors could have no right in their copies after they had made their works public, and meant to give them a security which they supposed them not to have had before" (qtd. in Drone 35).

It is both to encourage the authors to produce their works and guard against the evils of perpetual rights to which legislatures have intended in the statute:

> The legislatures have provided the proper encouragements for authors; and, at the same time, have guarded against all these mischief. To give that legislative encouragement a liberal construction, is my duty as a judge; and will ever be my own most willing inclination. But it is equally my duty, not only as a judge, but as a member of society, and even as a friend to the cause of learning, to support the limitations of the statute. (Davies par. 4-003)

Millar vs. Taylor was one of the historic cases in which the origin and nature of literary property were extensively discussed by the judges "in the most elaborate opinions that have ever been pronounced on the subject" (Drone 28). The major questions that came into consideration in the case were: (1) Whether intellectual productions have the attributes of property; (2) whether the exclusive right of an author to multiply copies of his book existed by the common law, and had been recognized prior to the Statute of Anne; (3) whether this right is lost by publication and (4) whether it had been taken away or abridged by the Statute of Anne (Drone 28).

2.1.2 Donaldson v. Becket

In 1774, shortly after the decision of *Millar v. Taylor*, the same issue – whether there was a perpetual common law copyright - came before the House of Lords in *Donaldson v. Becket*. It involved the same work *The Seasons* of which Thomas Becket was now its authorized publisher. Millar who had previously owned the copyright in *The Seasons* died in 1768, shortly before his case was decided by the court in his favour in 1769. Subsequent to the court decision that granted perpetual copyright to the *The Seasons*, the executors of Millar's estate sold his copies at auction in June 1769. Thomas Becket and fourteen partners purchased in shares for £505 the copyrights of works by James Thompson which also included the newly established perpetual right in *The Seasons*. Alexander Donaldson was a prosperous Scottish bookseller who was famous for having been the pioneer in selling cheap books. He published an unauthorized edition of *The Seasons* against which Becket brought an action in Chancery for infringement of copyright. The court granted an injunction on the authority of the *Millar* case that had established five years ago the existence of perpetual common law copyright. Donaldson appealed to the House of Lords.

Before settling the question, the House of Lords sought advice of the judges relating to the origin and nature of literary property. The Lords propounded five questions to the judges, one of which was central: whether the common law right in a published book had been destroyed by the Statute of Anne (Bowker 413-14). A majority of them, six to five, found that there had been a common law copyright but that it had been taken away by the Statute of Anne "to which alone the author must look for protection" (qtd. in

Drone 38). The other five maintained that the author had the exclusive right of publishing his work at the common law and that this right was not, by virtue of the common law, lost or prejudiced by publication. These opinions of the judges were however not binding to the Lords since they were only advisory. When the full House of Lords came to decide the matter it voted twenty-two to eleven in Donaldson's favor, against the existence of common law perpetual copyright (Davies 32). The Lords decision that there was perpetual copyright at common law, which was not lost by publication, but that the Statute of Anne took away that right and confined remedies to the statutory provisions, reversed the earlier decision in *Millar v. Taylor*. The Lords' decision clearly recognized two rights of the author in his work: the rights that belong to the authors by virtue of being the creator of the work and the rights that emanate from the first publication of the work. The former is referred to as the natural rights of the author and includes the right to decide whether or not to publish his work, to alter the work before publication, and to maintain the integrity of the work by preventing others from altering it without his permission. The latter, the rights arising from publication, are statutory rights that mainly concern with the exploitation of work. With this judgment of the House of Lords copyright came to be regarded as the deliberate creation of the Statute of Anne and it was thus treated as a statutory property. This construction by the Lords of the Statute of Anne, according to Bowker, "has practically "laid down the law" for England and America ever since" (414).

The decision in *Donaldson v. Becket* that common law copyright in published works was taken away by the Statute of Anne is an implementation of the Statute of

Anne. It put an end to the stationers' claim of perpetual monopoly which the Statute has set to destroy it 65 years ago. In his speech, Lord Camden who was one of the strongest opponents of the authors' common-law copyright brought into sharp focus the virulent effects of perpetual copyright whereby the public interests would greatly suffer "in the hands of the Tonsons and the Lintons":

> Knowledge has no value or use for the solitary owner: to be enjoyed it must be communicated . . . Glory is the reward of science, and those who deserve it scorn all meaner views. I speak not of scribblers for bread, who tease the press with their wretched productions: fourteen years is too long a privilege for their perishable trash. It was not for gain that Bacon, Newton, Milton, Locke, instructed and delighted the world: it would be unworthy such men to traffic with a dirty bookseller for so much a sheet of letter-press. When the booksellers offered Milton five pounds for his Paradise Lost, he did not reject it, and commit his poem to the flames; nor did he accept the miserable pittance as the reward of his labor. He knew that the real price of his work was immortality, and that posterity would pay it. Some authors are as careless about profit as others are rapacious of it; and what a situation would the public be in, with regard to literature, if there were no means of compelling a second impression of a useful work to be put forth, or wait till a wife and children are to be provided for by the sale of an edition! All our learning will be locked up in the hands of the Tonsons and the Lintons of the age, who will set what price upon it their

> avarice chooses to demand, till the public become as much their slaves as their own hackney compilers are. (qtd. in Drone 39)

Lord Camden's speech was not simply a tirade against the tyranny of 'the Tonsons and the Lintons.' The most illuminating aspect about this speech is the hint which he has made at the need to protect public interest: "what a situation would the public be in . . . if there were no means of compelling a second impression of a useful work." This public interest in his opinion should be guarded against the monopoly interest of the London booksellers for whom "fourteen years is too long a privilege for their perishable trash." What was most revealing from the arguments in both *Millar v. Taylor* and *Donaldson v. Becket*, is the idea that copyright entails a delicate balance between two equally competing claims of private and public interests (Davies par.4-004). The *Donaldson* decision rejecting the perpetual common law copyright in published works is in fact a reflection of this need. It sought to balance the exclusive right of the author in his work against the public interest in the free dissemination of all works by restricting these rights to statutory limitation of fixed terms.

Despite the fact that the issue in question in both cases was one and the same – whether there was a perpetual common law copyright - the mode of argument in each case, however, was different. The mode of argument in the Donaldson case, as Sherman Brad and Lionel Bently have argued, was *forward looking* or *consequentialist*: the inquiry was primarily directed to the *effect* that the grant of perpetual monopoly to the London booksellers would have on the interests of society. This was in sharp contrast to

the *a priori* mode of argument employed in the *Millar* case. This perhaps was the reason the court in *Donaldson* came to the conclusion opposite to the *Millar* holding.

The argument in the *Millar* case, for example, proceeded to the inquiry into the nature and basis of literary property protection. The basic thrust of this inquiry was directed to what the law *is*, the very rationale for the existence of common law right. What then came to be more prominently highlighted were natural right, moral justice and fitness. It is these considerations that prompted Lord Mansfield, one of the distinguished judges of the time, who was also Chief Justice in *Millar v Taylor*, to decide in favor of perpetual copyright. These considerations were, however, sidelined as the Lords came to examine the issue in the *Donaldson* case. The focus in the *Donaldson* case turned squarely on the *dire consequences* that the grant of perpetual copyright would have on the book trade - on the price of books and their availability.

The *Millar* decision was doubtless based on sound principles of law, but it failed to take account of the consequences that flow from its decision to grant perpetual monopoly to the authors. While defending the private interests of the authors, the advocates of natural right missed the point that copyright involves a delicate balance between private and public interest: it is as much the right of the authors to benefit from their entitlement as the right of the public to benefit from the access to their works for the advancement of learning and knowledge. If the law were to grant perpetual monopoly, it would impose undue restriction on the access and suppress the advancement of learning needed for the enlightenment and well being of the society. This was the point that Lords

in the *Donaldson* case came to emphasize, the point that is well captured in Lord Camden's speech.

It was not, as in the *Millar* case, what the law *is* by reason of natural right, but what the law *ought to be* by reason of expediency that came to determine the law in the *Donaldson* case. The objection by the Lords to the perpetual monopoly was entirely based on matters of expediency, the need to safeguard the public interest from the private monopoly interest of the authors. The only way out for the Lords to protect the interest of the public to cheaper access to books was to break this perpetual monopoly by restricting it to a fixed statutory term of protection. This is precisely what the Lord did when they declared that the common law right in published works had been taken away or superseded by the Statute of Anne. Inherent to this decision was the recognition of fundamental tension underlying copyright - private interest of authors and booksellers for maximizing the profit against the public interest of getting free access to the works of mental productions. Striking the delicate balance between the two is all that was essential for copyright to function properly. This was the fallacy that judges in the King's Bench committed as they came to base their decision in the *Millar* case on the hard core natural right principle of property and moral justice.

In 1785, eleven years after the holding on *Donaldson v. Becket*, Lord Mansfield, who had so ardently defended the natural rights of authors in *Millar v. Taylor*, came to acknowledge the fundamental tension in the copyright law – private claims for exclusive rights and the public claims for greater access to the works of authorship. Since both these claims are equally important the objective of copyright, as expressly implied in the

title of the Statute of Anne, is to stimulate the creation and dissemination of works and to give their authors adequate reward for their labour and contribution to society. Striking a proper balance between these two apparently conflicting objectives has ever since remained a major challenge to the legislators. And it is this need which any judges has ever before stated it as clearly and precisely as Mansfield in *Sayre v. Moore*: “We must take care to guard against two extremes equally prejudicial; the one that men of ability, who have employed their time for the service of the community may not be deprived of their just merits and reward for their ingenuity and labour; the other that the world may not be deprived of improvements nor the progress of the arts be retarded” (qtd. in Nimmer, Inroads on Copyright 6).

Immediately after the Lords’ decision in the *Donaldson* case the booksellers came up with the petition in their desperate attempt to seek relief from Parliament. Publishers, they contended, had invested large sums in the purchase of old copyrights not protected by statute in the belief of perpetuity of copyright. The bill for their relief was however rejected by the House of Lords, and with this ended the Battle of the Booksellers. And it is at this time of the history copyright changed from a publisher’s right to an author’s right. But this change had little to do with the interests of the author, for it was brought about by publishers in an effort to perpetuate their monopoly. The booksellers succeeded in their maneuvering in the *Millar* case which established copyright as the natural right of the authors. In its turn, the *Donaldson* holding reaffirmed the common law rights of the author but it strictly limited these rights to first publication. By reducing the scope of common law copyright only to unpublished works, the Lords destroyed the booksellers’

perpetual common law copyright which they claimed to hold by virtue of the existence of such rights in the authors who have assigned these rights to them. Having thus constructed by the court, copyright subsequently came to be viewed as the author's right as opposed to the publisher's rights. But despite this change copyright in Anglo-American jurisprudence basically remained a publisher's right. A glance back to the copyright's history reveals why this is so.

2.2 Publishers' Right

Copyright originally developed with the stationers whose sole interest was profit. The function of copyright, as it evolved, has nothing to do with the creative interest of the authors. The major concern of copyright is to protect the business interest, or investment, of the booksellers: all that copyright involved was "the manufacture and sale of books, not the creation of authors" (Patterson and Lindberg 22). The author, the focal point of copyright, was out of the scene. Copyright was then limited to the right to print and publish, for the stationer's copyright was literally a right to copy, and this right was strictly confined to the members of the Stationers' Company in order to maintain their monopoly in the book trade. As a rule, a stationer would outright purchase the manuscript from the authors. Upon the entry of manuscript into the Stationers' Registry, a stationer would acquire the right to copy which lasts in perpetuity. The author retains no right whatsoever in relation to his manuscript once he disposes it to the stationer. However, as it appears from the stationers' practice, it is only the author who can change or alter his work even after the sale of his manuscript. This recognition on the part of the stationers was prompted by their own self-interest to maintain the integrity of copyright. From the

stationers' point of view this integrity of the work was essential to avoid the consequences wherein any stationer other than the initial owner of the copyright in the work may claim separate copyright on the same work with minor modification or alteration to the original work. It thus appears that stationers' recognition of the authors' right to alter or change their work was in essence to avoid the claims of multiple copyright on the same work which may arise from the minor alteration of the original work. Such recognition, however, did not interfere with their monopoly interest which was the primary concern of the stationers.

Authors' rights did not emerge until the promulgation of Statute of Anne in 1709 which in principle changed the publishers' copyright into the authors' copyright. The Statute of Anne was virtually a copy of the stationer's copyright except in two instances where it differed from the latter. First, the statute established the authors as a primary beneficiary of copyright. It vested copyright in the authors while relegating the publishers to own copyright only as an assignee. However, the important point here is that this reallocation of position did not in reality displace the dominant position which the publishers were enjoying long before. In fact, it did not much change the relative position of the authors because copyright was originally the publishers' right and author has nothing to do with its development. It developed with the publishers to protect their private interest which was confined to print and publish the books. It was basically conceived as a trade regulation the sole objective of which was to secure profit by establishing monopoly over the business. As such, the basic structure of the book trade remained the same as it was there before – the author would assign his rights to the

booksellers who then become the owner of copyright. An author by himself was not in a position to exploit the economic benefit of his works without assigning copyright – a series of economic rights – to the publishers who solely function as an outlet to book marketing. As a matter of fact, economic exploitation of a work presupposes the assignment of copyright to the publishers. But copyright would have little significance if it had not been to the benefit of authors for their labor, and this benefit being subordinate to the condition that they assign their rights to the publishers to be paid for their works, the authors' relative bargaining position vis-à-vis publishers is very weak. It therefore carries little significance to say that the authors are the initial owners of copyright when their rights do not have any economic significance unless they assign these rights to the publisher. Publishers by law lost their place to the author as primary beneficiary of copyright but it is still the publishers who control the market and enjoy all the benefits of exclusive rights granted to the authors. The authors thus held copyright only in theory but when it comes to practice it is ultimately the publishers who always are the owners of copyright by virtue of transfer. This in fact is tantamount to say that an author holds copyright in his work till it is published but as soon as he decides to publish his work he is obliged to assign his rights to his publisher who then becomes the virtual owner of copyright. This enabled the publishers to retain their monopoly position under a veil of the authors' statutory rights. And the broader the scope of this statutory rights the more favorable it is to the booksellers to maintain and promote their interest all in the name of the author.

Second, the statute set a definite term of protection limiting to 28 years: the original term of 14 years which can be renewed, if the author is living, for the term of next 14 years. But in case the author is not living by the termination of first 14 years, the right does not pass to his heir but falls instead into the ‘public domain’. While this provision was clearly aimed at breaking the stationers’ perpetual monopoly, it gave rise to much of the confusion that culminated in two major cases: *Millar v. Taylor* and *Donaldson v. Beckett*. In both cases courts failed to identify the source of confusion which, as Patterson and Lindberg argue, resulted from failure to distinguish between the ownership of the work and the ownership of the copyright (113-17). This perhaps is the reason why copyright in the Anglo-American jurisprudence came to be viewed as a natural law right of the author as well as the statutory grant of a limited monopoly. According to Patterson: “. . . the idea of copyright as a monopoly of the work itself together with the idea that copyright is a natural right of the author remained to create the conceptual dilemma of modern copyright. This dilemma is the idea that an author has a natural right in his work, combined with the idea that after publication he possesses only a monopoly conferred by statute” (Copyright in Historical Perspective 17).

2.3 Ownership of the Work

The ownership of the copyright is distinct and separate from the ownership of the work. Copyright is essentially a statutory grant of rights to which a given work is subject. It is a bundle of rights entitling its owner the right to print, reprint, publish and vend but “the right to vend is not the right to sell the *work*, only to sell a copy of the work (Patterson and Lindberg 117). These rights are in essence exploitation rights which are

concerned with the pecuniary interests of the author and are therefore created to enable the author, or his assignee, to exploit the work at the marketplace. Since the copyright is a multiple right which is divisible, the author may transfer or assign these rights together or separately. However, the assignment of copyright, or any individual right thereof, does not constitute an assignment of the work itself. It is simply an authorization to do certain acts in relation to the work. Thus ownership of the work essentially remains in the author, subject to the various rights comprising copyright that the author assigns.

In contrast the ownership of work involves what, in the civil law countries, has come to be designated as the moral rights of the author. These are the fundamental rights that protect the creative interest of the author. These rights emanate from the fact that the author has created it. Ownership of work is therefore based on the natural rights of the author which last in perpetuity. The work which he creates is the expression of his personality. It is the impression of his personality on the thing he creates that links him to his creation. What truly belongs to him is this element of his work, the impression of his personality; however he may dispose of the physical embodiment of his ideas. Ownership of work is therefore attached to the expression of his personality which solely remains to him despite the assignment of copyright or any individual right thereof. It is essentially a personality right which implies "a right to protect the work itself against mutilation and to protect the creator's reputation in conjunction with the use of the work (Patterson and Lindberg 171). It is independent of copyright, and is not lost by the assignment of copyright. This personality interest of the author which arises from the very act of creation has been recognized at the common law long before the promulgation of the

Statute of Anne. The stationers' respect for the integrity of the work by forbidding any alteration or modification to the work without the consent of its author is an example of the recognition of such rights. In *Millar*, Lord Mansfield defined the common law copyright to include two basic rights of the author - a right to the rewards of his labor and a right to protect his fame. The former has come to be known by the economic rights and the latter by the moral rights of the author. These two rights in his opinion embrace the author's entire property interest in his work. Absence these common law rights, he maintained,

> The author may not only be deprived of any profit, but lose the expense he has been at. He is no more master of the use of his own name. He has no control over the correctness of his own work. He cannot prevent additions. He cannot retract errors. He cannot amend; or cancel a faulty edition. Any one may print, pirate and perpetuate the imperfections, to the disgrace and against the will of the author; may propagate sentiments under his name, which he disapproves, repents and is ashamed of. He can exercise no discretion as to the manner in which, or the persons by whom his work shall be published. (qtd. in Drone 44)

Germane to this argument for perpetual common law copyright is the natural rights, or moral rights in modern terminology, of the author which emanate from the fact that he is the creator of the work. But he missed the basic point that moral rights are different in nature from those of economic rights. Since moral rights protect the personality of the author, these rights are not, like copyright, assignable. The author

retains these rights even after the sale of the copies. These rights are inalienable and non-transferable. Mansfield, on the other hand, treated these rights as assignable to a publisher, and such an assignment defeats the protection that the moral right provides the author. So the major fallacy in his argument, as Patterson and Lindberg point out, was that "it ignored the crucial fact that when an author assigned the copyright to a publisher, as was usually the case, he signed away those very rights that Mansfield said compelled a recognition of his perpetual right" (35).

The point here is that the court in *Millar* failed to make any distinction between the ownership of the work and the ownership of the copyright. It treated the ownership of the copyright as the ownership of the work. Since it was the practice for the author to convey his rights to the publisher, this obscured the basic fact that the right of the author as the creator of the work is different from the copyright that developed with the publishers (stationers) to serve their monopoly interests. Failure to make this distinction by the court in the *Millar* case led to the belief that authors while conveying their rights have transferred not only the copyright in the work but also those very natural rights which only the authors, as the creator of the work, can exercise it. This meant that if the author has the perpetual common law copyright he conveyed this right while assigning the copyright to a publisher. It provided the basis for the bookseller's claim to perpetual copyright right in the work. The *Millar* holding that authors have perpetual common law copyright and that it had not been taken away by the Statute of Anne, thus confirmed the publishers' perpetual copyright. But this was not the intent and the purpose of the Statute of Anne which was solely directed at destroying the perpetual monopoly of the

publishers. The *Millar* decision could not sustain long. In less than five years the House of Lords in *Donaldson v. Beckett*, overturned the *Millar* decision stating that the statutory right supplanted the common law natural right after the publication of the work. Since this decision the common law copyright came to mean the rights in the works which have not been published. When a work is published, the owner's common law rights are lost.

The *Donaldson* court also failed to distinguish between the work and the copyright. The Lords in the *Donaldson* case treated the common law natural rights of the authors as a means to perpetuate monopoly on the belief that rights of the publisher conferred by copyright are derived from the author. This led the Lords to limit the common law perpetual rights of the author to unpublished works thereby restraining the booksellers from exercising perpetual monopoly which they claimed on the basis of the existence of common law natural rights of the author. But in doing so, as Patterson noted, the Lords only limited the rights of the author without leaving any basis for distinguishing between the interest of the author and that of the publisher:

> The booksellers in eighteenth-century England prevailed upon the courts to accept the idea that all rights of copyright are derived from the author. The courts, however, upon accepting the idea that the rights of the publisher conferred by copyright were derived from the author, limited the rights to those defined by statute. In so doing, they only limited the rights of the author – they left no basis for distinguishing between the interest of the author and that of the publisher. The judges did not suggest what more careful analysis might have made apparent: to recognize common-law

> rights of the author would not necessarily have been inconsistent with the limitation of the rights of publishers.
>
> If the author invariably retained the copyright, there would be fewer problems, for copyright gives the owner complete protection. But the author does not, invariably – indeed, he seldom retains the copyright. And the subtle irony is that the scope of copyright, supposedly broadened in the author's interest, may very well serve to defeat that interest. Yet, the courts have here overlooked a basic point. Since the statutes have dealt with the economic aspect of copyright, they have left to the courts the power, as yet unused, to deal with the creative interest as justice requires. (Copyright in Historical Perspective 226)

The *Donaldson* court did not give consideration to the fact that these common law rights which protect the creative interests of the author are entirely different from statutory copyright that mainly concerns with the protection of the pecuniary interests of the author. Had the Lords been able to make a subtle distinction between the creative interest of the author protected by the common law and the pecuniary or commercial interest of the booksellers protected by the copyright it would not have been necessary for them to limit the common law natural rights of the authors to unpublished works in order to destroy the monopoly position of the booksellers. The recognition of the creative interest of the author as a distinct and separate right that is unassignable and independent of copyright would eliminate the ground for perpetual monopoly of the booksellers while protecting at the same time the entire property interest of the author – creative as well as

economic - without creating any inconsistency. These rights, usually referred to as personality rights or moral rights, in fact have nothing to do with the interest of the publishers whose sole concern is to secure the profit. The only interest which the authors and booksellers share in common is the desire to receive economic benefit from the exploitation of the work. What the booksellers needed was therefore the right that would secure their profit or investment. Since this protection of investment is the primary concern of copyright all that is vital for the booksellers is the ownership of copyright, not the ownership of the work. The problem arose when this ownership of copyright was taken as the ownership of the work in the *Millar* case. As a consequence the booksellers, who usually own copyright by assignment, were deemed to hold the copyright as well as the perpetual common law rights of the author. This in turn defeated the very objective of the Statute of Anne which was to break the monopoly of the booksellers.

This was a fatal flaw that the court in the *Donaldson* case failed to rectify it. In its bid to implement the Statute of Anne, the *Donaldson* court limited the common law natural rights of the author to unpublished work which in fact was not necessary had the court, as discussed above, been able to appreciate that the creative interest of the author is different from the commercial interest of the booksellers protected by the copyright. As it turned out, the Lords simply looked at the common law natural rights of the authors as the source of perpetual monopoly for the booksellers. They failed to see that the source of monopoly is rooted not in the common law natural rights of the author but in the treatment of these rights as the copyright. The nature of these rights was in fact entirely different from copyright: the former is the right to the work itself – the right of the author

to maintain the integrity of the work and to protect his personality and reputation - whereas the latter is simply the right to obtain economic benefit from the exploitation of the work, the right to make and sell copies. And the right to print and vend the copies is entirely different from the natural rights of the author to protect the integrity of his work or the right to protect his reputation.

2.4 Fundamental Aspects of Copyright

Copyright is not just the domain of the law: it is as much of technology as of economics, as much of literature and art as of commerce; and as much of philosophy as of human right. In short, the subject of copyright is interlinked with different branches of knowledge. At times, economic rationales are used to justify copyright; at other times, philosophical arguments. Economic or utilitarian argument dominates the discussion in Anglo-American jurisprudence of copyright; in contrast, the Continental system of *droit de auteur* is much affected by philosophical reasoning. The former is instrumentalist or consequentialist in approach where analyses focus on consequences flowing from a particular choice of intellectual property (IP) scheme or a particular mode of interpretation. The latter in its turn is deontic in approach where analyses focus on fundamental relations entailed by the act of creation itself. Natural right theories, such as Lockean labour theory and Hegelian personality theory of property, dominate deontic discussion. These theories are discussed in this paper in their relevant context.

Copyright is essentially a property right in the work which is vested solely to its creator or owner. The subject matter of the property is incorporeal because it is a property in the works of the mind or in the fruits of intellectual creation. It is, as Drone put it, "in

an invisible, intangible creation of the mind, fixed in form and communicated to others by language. Incorporeal itself, it is generally attached to corporeal" (6). But it is not in the material that gives definite shape and form to intellectual production which gives rise to literary property, but in the very intellectual creation, in the arrangement of ideas, conceptions, sentiments, thoughts wherein lies the literary property. "It is in what is conveyed by the words of the manuscript or the printed page, and not in the paper or parchment" (Drone 6). The property in the work is justified by the fact that the right owner has created or made it.

Copyright is the exclusive right to multiply and to dispose of copies of an intellectual production. However, such rights do not make much sense if the right owners have no legal rights to stop others from using their works without their authorization. The exclusive right which copyright confers on the right owners is therefore purely a negative right – to prevent others from copying or using the work. But it is not a positive right, a right to exploit the work by oneself to the exclusion of others. The value of copyright, however, lies not in its negative aspect - the right to prevent others – but in its positive aspects, in assigning and licensing the right to the publishers by which the right-owners can exploit the economic value of their works.

Unlike patent which gives its owners a monopoly right, copyright gives merely a prohibition against copying. As such, copyright does not confer on its owners a monopoly right. The point is well illustrated by Stewart:

> If someone writes an article or a book about that chair he will be the owner of the work; that is, the thoughts that come to his mind when contemplating the chair and its uses, the way he expresses them, the choice of words he uses in describing its appearance and its uses. When he writes it down or types it he will own the manuscript. But anyone can write an article about chairs in general or about this particular chair and compete with him. He has no monopoly in writing articles on chairs or even on this chair. If anyone else writes an article about chairs or about this particular chair which is similar in kind to the original one he will probably acquire himself a copyright in his own article about the chair. The only thing he is prevented from doing is attempting to avoid the intellectual effort of writing the article and instead copying the author's article or substantial parts of it and then publishing it in his own name. That would be the equivalent of stealing the chair. (par. 1.08)

Thus copyright does in no way confer monopoly right because it simply restricts the form of expression from being copied while leaving anyone free to use the idea and create a new work, which is then copyrightable. The basic proposition of copyright that idea belongs to public domain, or that the work to be qualified for protection must be original with the author but it need not be original to the world suggests, as pointed out by Umbreit, the possibility of the existence at the same time of two valid titles to the same piece of property (932-33). Thus, according to the example he cited, it may be inferred by analogy that the validity of a copyright to a photograph may not be impaired

merely because the same photograph is to be found in an earlier copyrighted work; unless it appears that that the author of the later work copied it from the first (932).

Copyright endures for only a fixed period of time as specified in the statute. This is one of the important distinctions between intangible and tangible property which lasts as long as the object in which it is vested. On expiration of the stated duration the work passes into the 'public domain': anyone can then freely use the work for which no authorization from the author or the right owner is required. Copyright is therefore as much a private property as it is public: it is private for a specific duration fixed by the law. After the expiration of this duration, it is a public property to which anyone has a free access without requiring any permission for its use.

The term granted to the works and the method of calculation of the duration vary according to the categories of works to which they belong. As for example the works covered by neighboring rights such as sound recordings, cinematograph films, broadcasts are granted the term of 50 years from the date of their publication whereas the works belonging to traditional categories such as literary and artistic works receive protection for the term of life plus 50 years *post mortem auctoris* (pma).

Copyright is not simply a right to multiply or right to make copies as it is often understood. It is a multiple right, often referred to as a 'bundle of rights' in one work. Reproduction, distribution and adaptation are considered to be most important rights. These rights are portable rights that can be sold and resold in whole or part either by assignment or by granting license. Copyright is a divisible right; each separate

components of right can be sold for a specific territory and for a specific duration. It is this feature of copyright that makes it one of the valuable economic assets in the modern world. It has a greater commercial value where the work in question has greater prospect of success in the marketplace

Over the past few years rapid development in technology, especially in the field of information and communication, has brought with it new mode of creation and exploitation of copyrighted works to which copyright responded with gradual extension of protection to new categories of works and the creation of new rights. The scope of copyright is thus ever broadening with developments in technology. The significance of the copyright system to the fast development in technology is its ability to adapt to novel situation (McFarlane 5).

Copyright is by law an authors' right. The moment the work comes into existence copyright vests in its author. But this right is not absolute; inherent to this right is users' right which is implicit in the restrictions and exemptions imposed on the copyright. Copyright is therefore not just a law about authorship; it is at the same time a law representing the interest of the users – a law dealing with the flow of information which is a lifeline of a modern society. The idea/expression dichotomy, exclusion of certain factual elements from protection, and delimitations on the rights of authors are some of the means by which copyright law seeks to reconcile the free flow of information needed for the advancement of the society with the rights of the authors to control the use of their works.

Next to the authors and the users copyright involves the interest of the publishers. Copyright, as discussed elsewhere, evolved with the publishers to serve their monopoly interest in book trade. The Statute of Anne which was virtually the codification of the rules and principles the Stationers (London booksellers) developed during the sixteenth and the seventeenth centuries replaced them as an assignee of the author who by law became the initial owner of copyright in books. As a rule, it is the publishers who often retain with them the copyright in the book by virtue of the fact that authors are obliged to assign their copyright to the publishers before they could get their works published. Copyright is the only legal means by which publishers can expect return on their investment. It is a trading system that enables them to carry out their business. Since the publishers have greater stakes in the production and distribution of books, copyright is obviously a subject of primary concern to them.

Copyright is therefore a body of law representing the interest of three groups: authors, publishers, and consumers. The interest of the persons in these three groups is conflicting to one another in that the purpose for which copyrighted materials are used by the person in one group is prone to undermine the interest of the other. The basic tension in copyright law therefore arises from the fact that the use of copyright material by the person in one group comes into conflict with the interest of the person in another. The author, for example, makes a creative use, the publishers, commercial use and the consumers, private use of protected materials. The creative use of protected works by the author may come into conflict with the commercial interests of the publishers since this use would undermine their market for original copyrighted works; a free use by

publishers of certain portion of the protected works would conflict with the interest of the author to receive compensation; the personal use by consumers of protected materials, which in principle are exempted from copyright liability in the interest of the free flow of information, would prejudice the pecuniary interest of the authors and the publishers, particularly when such uses turn into mass uses. This however is not the end of the story. The matter is further complicated by the fact that individual's perception of copyright changes as he or she comes to assume different position at different times. The author, for example, is at the same time a user. As a user, the author would wish that he could freely borrow the materials from others; as the author of copyrighted work, he would come to view such borrowing as the infringement of his copyright, of his right to be compensated. The point is well illustrated by Kastenmeier (ix-xiii).

2.5 The Principles of Copyright

There are two important but equally conflicting aspects to copyright protection: the interest of the organized society for access to knowledge and interest of the authors or copyright owners to receive due share of benefit from the use of their work. Of fundamental importance to any copyright system is therefore to strike a balance between these two interests which are well set out in Article 27 of the Declaration of Human Rights: the rights of organized society in paragraph (1) and the right of the copyright owner in paragraph (2):

> (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

The limitations which copyright impose on the rights of its owners is basically directed by the need to achieve the balance between the rights of the copyright owner and that of the general public. This reflects the tension which underpins the copyright law. As stated by Wegman "it is the interplay between these two rights which determines what measures of protection the author is granted and what measures is reserved for the general public"(17). According to Stewart (par. 1-11), these limitations are of three kinds:

(a) Duration of copyright is limited by a statutory term. After the stated term the work falls into the 'public domain', that is, anyone can freely use the work without requiring any authorization from the right owner.

(b) Some uses of protected works do not require authorization from their owners. Such uses are usually referred to in general terms as 'fair use' or 'fair dealing' in the common law jurisdiction. Countries with the civil law jurisdiction employ the term 'exceptions' or 'exemption' where the use of copyright works is free, specifically in the statute.

(c) In some cases the right owner may not withhold the use of his work for which he is simply entitled to equitable remuneration. This is known as a 'compulsory licence'.

2.6 Authors and Copyright

Prior to the invention of the printing press by Gutenberg, books were manufactured by making copies of manuscripts through the use of trained slaves, or scribers, as they were called. Books were then very scarce and costlier, and their market was limited to few wealthier households who could afford to purchase them. Of chief concern to the authors at this time was the exactness of the copies made of their originals. Many Latin poets and dramatists have vehemently protested over the blunders of the copyists. The idea that authors have a right to receive a share in the proceeds from the sales of their writings was yet to take its root. More than anything else it was the thought of the honor of a wide circulation of the writing that was the main gratification to the writer. The context changed with the invention of the printing press that was to revolutionize the book trade. The new printing technology, which soon proliferated around the major European capitals, transformed the economics of book trade from its limited edition and circulation to economies of scale whereby books became increasingly cheaper and accessible to the burgeoning middle class of people. With the expansion of market books came to be perceived as an object of commerce. But trade in books was not commercially viable for reasons of piracy unless property right in books is recognized and guaranteed by adequate protection. Hence the concept of property in books developed as a device to regulate the trade. The first record of the recognition of property in literature appears in 1558 when the earliest entry of titles was made on the register of the Company of Stationers in London (Putnam 368).

And it is at this moment of the history that an author has come to realize the economic value of his writing and had an "awakened sense of the injury done to him in depriving him of the profit of vending his own writings" (Matthews 328-29). Before the invention of printing press in the middle ages, an author had felt no sense of wrong or injustice, for it was then fortunate for him if, without a ruinous expenditure, he could succeed in getting his production before the public:

> The difficulty and expense attending the reproduction of manuscripts was in every case considerable (much greater than in the early days of the Roman Empire), and when, therefore, an author desired to secure a wide circulation for his work, he came to regard the reproduction of copies not as a reserved right and source of income, but as a service to himself, which he was very ready to facilitate, and even to compensate. (Putnam 358-59)

The printing press brought with it the possibility of a compensation for literary labor. This profit became more apparent with the progressive expansion of book market since then. Once "the author saw this profit diminished by an unauthorized reprint, he was conscious of injury, and he protested with all the strength that in him lay" (Matthews 328-29). It was this sense of injury which he felt from an unauthorized appropriation of his labor for the commercial gain of the booksellers that over time slowly led to the growth of the modern idea of the author – the idea that he was not the recipient of alms but a creative artist and independent being with legal and proprietary rights in and to his work.

The case of John Milton's contract with his publisher is an indication of the gradual realization on the part of the authors that they have property right in what they have created and they have therefore the right to demand payment for the work. This right of the author to be paid for his work has been recognized by the stationers in inchoate form long before the statutory copyright came into existence. Milton's publishing contract is a confirmation to this recognition.

Milton entered into a formal contract with printer Samuel Simmons for the publication of *Paradise Lost* in April 1667. This was the most elaborate and evidently the earliest known literary agreements calling for the direct payment for the publication of the original work. The contract provides that John Milton agrees to "give, grant, and assigne, unto the said Sam II. Symons, his executors and assignes, All that Booke, Copy or Manuscript of a Poem intituled Paradise Lost, . . . now lately Licensed to be printed . . . " (qtd. in Patterson 74). In consideration of "All that Booke Copy or Manuscript" which he has given to Simmons, Milton was to receive a sum of £20: five pounds immediately upon entering the contract, an additional five pound after the sale of the first edition and the further promise of five more pounds after the sale of two more editions. The impression of each edition was deemed to be completed on the sales of 1300 copies and none of them must run over 1500 copies. By the provision in the contract the publisher was required to provide the accounting of sales to the author failing which he "was obligated to pay the £5 for the whole impression as if it were new" (Lindenbaum 176-77). The stipulation of this provision at a time when copyright is granted only to stationers through entry into the Stationers' Company Register was, according to

Lindenbaum, the acknowledgement by the author of the condition of authorship, "viewing himself as the possessor of property that gives him definite right" (177). The contract therefore might be viewed as being germane to the material interests of authorship which in time came to be established as the inherent right of the authors.

Another important aspect about this contract which Patterson has pointed out is that it is essentially a promise on the part of Milton that he would not interfere with the publishing of his poem:

> And the said John Milton . . . doth covenant with the said Sam Symons, . . . that hee . . . shall at all tymes hereafter have, hold, and enjoy the same, and all Impressions thereof accordingly, without lett or hinderance of him, the said John Milton, . . . And that the said Jo. Milton, . . . shall not print or cause to be printed, or sell, dispose, or publish, the said Booke or Manuscript, or any other Booke or Manuscript of the same tenor or subject, without the consent of the said Sam. Symons . . . . (qtd. in Patterson, Copyright in Historical Perspective 74)

Such promise on the part of Milton, according to Patterson, "would hardly have been necessary if copyright had been deemed to give the copyright owner all rights in connection with the copyrighted work" (Copyright in Historical Perspective 74). The contract ostensibly suggests that Milton has given over complete ownership of the poem to Simmons, but in reality this is not the case. There are certain rights which author retains in connection with his work even after the execution of the contract conveying the

copyright. These rights are personal or creative rights that enable the author to preserve the integrity of the work he has created by preventing its distortion by others. Since these rights are inherent in the person of the creator, the author retains them in connection with his work despite the conveyance of the ownership of its copyright. This in fact is the case with the Milton's contract where it only conveys the ownership of copyright, not the ownership of the poem which retains to the author. Hence, the contract is essentially a covenant on the part of Milton that only allows his publisher, Simmons, to enjoy rights to the copy or manuscript and all impressions without let or hindrance from the author. This in effect means Simmons has no right to tamper with the poems unless the author gives explicit consent to do so.

Milton is known in the publishing history for yet another important episode which marks the publication of famous *Areopagitica*; *a Speech of John Milton's for the Liberty of Unlicensed Printing To the Parliament of England.* It was published on November 25, 1644, and was issued unlicensed and unregistered in the register of the Stationers' Company. It was the most eloquent defense of freedom and the press directed against the Ordinance of 1643 that sought to control the press through censorship. For Milton knowledge is created by "much arguing, much writing, many opinions; for opinion in good men is but knowledge in the making" (Miltons's Areopagitica par. 73). And this knowledge, he pleaded, must be promoted, not restricted, for: "Truth and understanding are not such wares as to be monopoliz'd and traded in by tickets and statutes, and standards. We must not think to make a staple commodity of all the knowledge in the Land, to mark and licence it like our broad cloth, and our wooll packs" (par. 53).

What Milton protested was that part of the Ordinance which restricted the free flow of information. As to other part of the Ordinance which concerns copyright, "which preserves justly every man's Copy to himselfe"(par. 7), Milton approves it as he refrains from making any critiques to give his approval to it: ". . . I touch not, only wish they be not made pretense to abuse and persecute honest and painfull men" (par. 7). But it was not authors' right that Milton was defending, for right to copy at this time is solely confined to the stationers (Kaplan 5). As Wittenberg pointed out it was such references as these from which there was to grow belief in the notion that there was a property at common law in literature (35).

2.7 Privileges and the Stationers' Copyright

Historically, piracy is the prime concern of copyright. The invention of printing press towards the mid-fifteenth century put an end to the constraints of manual, or hand, reproduction of books. The new technology made it much easier and cheaper to reproduce books leading to their mass reproduction that was hitherto inconceivable. With the growth in literacy and development in transport network, trade in books flourished in England and the continental Europe during the sixteenth and seventeenth centuries. The expansion of book market and the availability of cheaper means of reproduction made the piracy a profitable enterprise, posing a serious threat to the legitimate producers of books. The copyright that evolved is a response to this need. It developed with the system of 'privileges' or printing patents, as they were called. The 'privilege' is a right to publish a specific work granted by the sovereign. It prohibits anyone other than the grantee printing or selling the privileged work. The granting of privileges was the royal prerogative.

Ostensibly designed to protect the printers against piracy, the system of privilege was in the main directed at controlling the printing of books. Hence, no privilege was granted to publisher or to author if the royal censors did not approve of the book (Matthews 328-29). Most recipients of the privileges were publishers. Only in few cases were such privileges granted to the authors. These privileges, according to Rose, should be thought of as forms of patronage, rather than private property rights, granted as rewards for notable service rendered (213n5). The first printing patent in England was granted in 1518, for a Latin sermon by Richard Pace.

The system of privilege was one of two copyrights that had existed before the enactment of statutory copyright in England in 1709. The other, and perhaps the most important in laying the foundation to the development of the basic concept of copyright, is the stationer's copyright, the name which comes from its progenitor, Stationers' Company, the London Company to which members of the book trade belonged. Hence, the copyright granted by the Stationers' Company to its members came to be known by the stationer's copyright. It developed with the single objective of maintaining order in the book trade and protecting the property of the members of the Stationers' company (Patterson, The Statute of Anne 225).

The history of the stationer's copyright is confounded in the details of complexities and intricacies. The Stationers' Company originated as early as the beginning of the fifteenth century as a craft guild consisting members of the book trade – printers, bookbinders and booksellers. Over the years, the guild emerged as a closely knit, powerful cartel to receive a royal charter in 1557 that established it as a Stationers'

Company. The charter granted it a virtual monopoly over printing and bookselling in London and throughout the Kingdom. The royal interest in granting this charter was "no mere benevolence" (Feather 195) but to check "the spread of the Protestant Reformation by concentrating the whole printing business in the hands of the members of that Company" (Gorman 1). It was basically aimed at controlling the press of which the Stationers' Company was an instrument to this end. It received legal sanction from the various acts of censorship. The government had no interest in the private ownership of copies while the Stationers' Company had no interest in censorship, except as a means of protecting their own self-interest. The stationers' copyright lasted for close to two centuries until the statutory copyright created by the Statute of Anne in 1709 replaced it. It provided the basic legal structure that its successor, the statutory copyright, inherited and carried forward (Patterson and Lindberg 21).

The stationers' copyright was designed to regulate the trade within the members of the Company by protecting works published by one member from piracy by another. It is essentially a publisher's right – a right to print and publish the 'copies.' The right to print was literally the right to copy. The right is protected by an entry of the title of the work in the Company's register or entry book. The entry was the basic requirement entitling the owner of its title the right to print and publish which lasts in perpetuity. The right to enter the title of the work in the Company's register is strictly restricted to its members in order to maintain the monopoly of its members in the book trade. As such, authors had no place in the company. As a rule, a stationer would outright purchase from the author for a lump sum the right to print and publish a text.

2.8 Copyright and Censorship

In about 1440 John Gutenberg of Mainz in Germany first introduced printing from blocks to the western world. In 1451 he began printing from movable type that was to revolutionize the book trade. The art of printing soon spread from Mainz to major cities of the Continent before it arrived in England in 1476. With the printing press the ideas of the Renaissance began to circulate that in time destroyed the monopoly of learning so long possessed by the Mediaeval Church. The invention of printing came almost at a time when Europe was on the verge of the Reformation and the growing dissatisfaction of people with the power and wealth of the Roman Catholic Church was leading to the rise of the Protestants. Books began to appear that challenged the authority of the Church and the King and his lords. With the intellectual growing more hostile to the abuses of the Church and advocating for reform, the governments of the time soon realized the harm which printing press could inflict on the religious faith and the political stability of their regime. The printing presses which were ardently encouraged at the beginning then became a subject of control to suppress what was considered to be heretical and seditious. In less than a century after Gutenberg has cast the first type, the privileges granted for the encouragement and reward of the printer publisher and of the author were used as an instrument to control the publication of such works as they might choose to consider treasonable or heretical.

In England this new art of printing was eagerly received and encouraged at the beginning when there were few books and printers. In 1484 the statute enacted by Richard III for regulating and restricting the conditions under which foreigners might

carry on trade in England excepted printing and bookselling. The restrictions on aliens were thus made inapplicable to “any artificer, or merchant stranger, of what nations or country he be, for bringing into this realm, or selling by retail or otherwise, any books written or printed, or for inhabiting within this said realm for the same intent, or any scrivener, alluminor, reader, or printer of such books” (qtd. in Wittenberg 23).

This privilege to foreign printers and booksellers lasted for fifty years. Native workers by this time had fully acquired the craft of printing but they were unable to secure enough jobs due to severe competition from the foreign craftsmen. Ostensibly to protect the domestic craftsmen, Henry VIII enacted the Act of 1533 that abolished the privileges provided to the aliens and also forbade the importation of books for reselling and the purchase at retail of any books imported. In 1538, five years after the 1533 statute, books became subject to censorship by the proclamation of Henry VIII which established the first licensing system. Since then the system of censorship was applied in England in varying forms that lasted until 1694. It was a censorship directed to various phases of the religious conflict and principally aimed at suppressing what it stigmatized as heretical and seditious opinion.

Copyright in the beginning has nothing to do with censorship the prime concern of which was to control the production and distribution of such printed materials. The history of copyright in almost all instances is preceded by censorship which over the time was fused with copyright as the most convenient instrument for the sovereigns to control the press. In France, for example, the edict of Moulins, in 1566, forbade printing of any book without permission of the king, and letters of privileges. Granting of such privileges

was subject to the approval of the book by the royal censors. Censorship in England began without any reference to copyright. But the attempt to exercise this censorship through the Stationers' Company and by the decrees of Star Chamber, made it a part and parcel of the stationers' copyright which was solely concerned with the private ownership of copies. The censorship gave the stationers a government sanction to the enforcement of their rights thereby strengthening their monopoly over the publishing trade. As Patterson writes:

> Censorship was a government policy unrelated to property concepts. The governing officials remained wholly indifferent to the ownership of copy, as copyright was then called, but their use of members of the book trade as policemen of the press gave the printers and publishers a national monopoly of printing and freedom to create rights involving ownership of copy which developed into copyright.
>
> In short, copyright was not created because of censorship, nor would the absence of censorship have prevented its creation, but censorship did aid private persons, publishers and printers, in developing copyright in their own interest with no interferences from the courts and little from the government. The early censorship regulations thus serve as a prelude to the development of copyright. (Copyright in Historical Perspective 21)

2.9 Technology and Copyright

Copyright is an elastic concept characterized by constant adaptations and adjustments. This is one of the remarkable features of copyright reflecting an inextricable relationship between copyright and media technology. Changes in the mode of production and dissemination of cultural goods tend to bring about distortion in the fundamental balance inherent in copyright laws. This is simply because changes in the mode of production and dissemination imply change in the technology and such change in the technology permits easy access to inexpensive equipment facilitating not only creative applications but also free and unauthorized use of the protected materials. As such, these changes are prone to upset the ability of the copyright owners to control the use of their works. Uncompensated use of the protected works generates greater social welfare; but the ultimate cost which it imposes on the society is much higher since it leads to under-production of cultural goods. In other words, changes in the media technologies tend to reduce the incentives for the copyright owners to the extent such technologies allow free access to the protected works.

The function of copyright is to correct this distortion and maintain a balance by adjusting and adapting to the changes resulting from the emergence of new technologies. The central tension in copyright law is to calibrate the required level of incentives: the extent to which legal monopoly should be granted to ensure adequate creation and dissemination of cultural works and the extent to which restrictions on such monopolies should be imposed to secure and preserve the right of the users to information. As technology keeps on changing, maintaining an ideal balance between incentives and

access, if it could ever be realized, is indeed a difficult proposition requiring constant fine tuning in copyright law. Adjustments and adaptations are therefore an ever-going process as copyright has to move hand in hand with the technology. This is precisely what copyright has done since its advent. And this perhaps explains why copyright could sustain and survive to this day.

Historically copyright is a law that owes its existence to the invention of printed words around the mid-fifteenth century. Since then there has been a plenty of new inventions in the technology of reproduction, such as facsimile, photographs, sound recording, motion pictures, home audiotape and videotape machine, and so on. All these inventions were successfully assimilated into the framework of copyright that was originally created to exploit the print market. The last quarter of the twentieth century saw the invention that was to set a radical change in the ways in which information is created and disseminated. It was the arrival of digital technology, an event which, in the views of Prof. Jaszi, was "as significant as the rise of print" (Authorship 62). No invention since the advent of print could match the sheer range and scale of the impact that digital technology had on every aspect of society – cultural, social, economic, and political. It revolutionized the cultural industry in the same way as did the print for the book industry. The inherent qualities that characterize this technology make it "as different from print as print was from manuscript copying" (qtd. in Jaszi, Authorship 62). It put paid to the traditional notion of 'work' as something stable, fixed entity.

The rise of digital technology led to the explosion of new innovations and inventions that brought with it new methods of reproduction and dissemination creating

an enormous opportunities, hitherto unknown, for the novel and efficient ways of exploiting the cultural works. They gave rise to new industries and new market, new mode of transaction and new market relationship, new values and new culture. Authors at their own computers can now exploit their works in the ways that are inconceivable with the traditional media. They no longer have the need to rely on publishers for the production and circulation of their works; they can directly reach the readers via electronic networks without the aid of any intermediaries. This has led to dramatic change in the market relationship between author and publisher. Likewise, readers can elect to become authors with the application of interactive hypertext.

The new media are however not without considerable strains to copyright. The new opportunities and new outlets which they offer equally pose new risks to the copyright owners for the work in the new media can be put to variety of uses that are difficult to control. Hence, they may not be safe for the exploitation unless the work used in the new media is adequately protected to safeguard the legitimate interests of copyright owners.

Consider the shift from hard to virtual copies. Previously, goods containing intellectual property were traded solely on hard copies, such as book, phonogram, and so on. Now, trade in cultural goods is not simply confined to physical world, to the production and distribution of material copies. They now increasingly take place in the virtual world, or cyberspace as some would prefer to call it, where it is incredibly much easier, faster and economical to produce and distribute the goods protected by intellectual property rights. The plasticity of new technology such as computer and the Internet and

their increasing dominance in the communication system is fast displacing the hard copies by virtual copies. However, the full potentiality of this medium cannot be commercially exploited unless the legitimate interests of the content providers, such as authors and publishers, are not adequately protected.

Trade in virtual copies is different from trade in hard copies. They pose a different set of problems peculiar to their characteristics. Application of rules governing traditional media may not be fully compatible with the environment where works are produced, disseminated, and consumed in their malleable, volatile form. Once the works are exposed in this malleable form, or what may be called virtual copies, users have greater freedom to appropriate and manipulate the works for a variety of uses that are difficult for the copyright owner to locate and control. At stakes are both the pecuniary and moral interests of the author. Users, for example, may rework the content transmitted via electronic networks and then post it on his web site without any express approval from the right holder. Or, he may edit the content as he wishes and then e-mail it to his friends. In both instances, the act involves the infringement of economic as well as moral rights of the author. As long as it imposes greater risks on the economic and moral interests of the author, the use of virtual media for the market exploitation of protected works may not be commercially viable. Such risks must be eliminated or substantially reduced for the information to be traded on the virtual media.

Looking at the history of copyright there is enough room to believe in its ability to cope with the invasion of new technologies. It has been tested time and again. Several new media technologies have appeared at different times of history since the advent of

printing press, and their successful assimilation into the framework of copyright testifies to this fact. Examples by way of illustration are photography, the cinema, sound recording, radio, and television. By the time these new media technologies came into being, particularly during the mid-nineteenth to mid-twentieth century, copyright had come through much of the confusion that manifested in the conceptualization of its various notions.

2.10 Author's Exclusive Rights

Rights of the author are defined under two categories: economic or exploitation rights and moral rights. Economic rights refer to those rights that enable the authors or the owners of the rights to obtain compensation for the use of their works by third parties. The objective of economic rights is essentially to protect the material or pecuniary interests of the right owners. They include a number of specific rights which constitute a bundle of rights in one work. Moral rights are primarily concerned with the protection of immaterial interests of authors. Its main objective, according to Stewart, is to "safeguard the author's reputation, what Shakespeare called 'that immortal part of myself'" (par. 4.16).

2.10.1 The Economic Rights

The enumeration of economic rights differs across national legislations in respect to terminology and the precise scope of each right. However, the following rights constitute the basic rights:

(a) the reproduction right;

(b) the adaptation right;

(c) the distribution right;

(d) the public performance right;

(e) the broadcasting right;

(f) the cablecasting right;

(g) the rental right;

(h) the public lending right; and

(i) the droit de suite.

2.10.1.1 The Reproduction Right

It is the most fundamental of all the economic rights which is accorded to authors in every national copyright law. The importance of this right is evident from the fact that copyright is essentially the right to prevent others from making copies, and this right to control the act of reproduction is the legal basis for further acts of exploitation of protected works, such as distribution (World Intellectual Property Organization, World Intellectual Property Handbook, par. 2.183; Abeyesekere 96).

The right of reproduction is the prerogative of exploiting the work in its original or modified form by its material fixation on any medium whatsoever and by any

procedure which permits its communication and the obtaining of one or more copies of all or part of it (Lipszyc 184). The term 'reproduction' is understood to mean the making of one or more copies of a work or of a substantial part thereof in any material form whatsoever, including sound and visual recording.

The coverage of the right of reproduction under the Berne Convention (Paris Act, 1971) is absolute; it extends to reproduction "in any manner or form," covering both the present and future processes of reproduction (Ficsor, Guide to the Copyright 55). As such, the right embraces every means whatsoever by which a work of authorship may be reproduced – from traditional methods of printing such as engraving, lithography, typography, offset to the modern methods of photocopying, the mechanical and magnetic reproduction of works in the form of sound recordings (phonograms) and audiovisual fixations produced by mechanical means.

2.10.1.2 The Adaptation Right

It is the right to control or authorize the abridgement, adaptation, arrangement, translation, revision or other transformation of a work. Adaptation is generally understood to mean the modification of a pre-existing work from one medium or genre to another, such as cinematographic adaptations of novels or musical works. It may also involve alteration to a work in the same medium to make it suitable for different conditions of exploitation, such as rewriting a novel for a juvenile edition (World Intellectual Organization, WIPO Glossary 3). New editions of existing works may enjoy a separate copyright independently of the copyright in the first edition if it contains

significant alterations. The adaptation right does not extend to mere ideas taken from the source work. It applies only where the source work is changed in some order.

Adaptations are protected independently of the original works from which they are derived. However, the act of adapting a protected work requires the authorization of the copyright owner. Copyright in an adaptation, as maintained in Article 2(3) of the Berne Convention, is without prejudice to the copyright in the original work. This means any reproduction from an adopted work requires authorization from both the owner of the copyright in the original work as well as of the owner of copyright in the adaptation. Hence, in the case of translation, copyright subsists both in the translation and the original work of which it is the translation; anyone who wishes to copy the translation must acquire authorization from the translator and the author of the translated work.

Of various forms of adaptation, translation carries special significance since it is the only medium that gives literary works their international dimension. The economic value of translations is obvious from the ever-increasing demand for such works for the educational activities in the developing countries (Stewart par. 5.40). This was the first right recognized in the Berne Convention in 1886 (Ricketson par. 8.24). Although translation is just another form of adaptation, and is treated as such in many national laws it is separately enumerated in both the Berne and the Universal Copyright Convention. This reflects the importance accorded to this right in both the Conventions.

2.10.1.3 The Distribution Right

The right of distribution is the right to distribute copies of the work to the public by sale, lease, or rental, lending or any other procedure such as transfer of ownership or possession of copies of the work. It is the author's exclusive prerogative to bring into circulation the original or copies of his work.

This right to authorize distribution of copies of works is limited by 'first sale' or 'exhaustion' doctrine. It is confined to the first sale of any one copy and exerts no restriction on the future sale of that copy (Gorman and Ginsburg 547). According to this 'first sale' or 'exhaustion' doctrine, the distribution right of the copyright owner is deemed to be exhausted after he has sold or otherwise transferred ownership of a particular copy of a work; the subsequent owner of that copy is free to dispose it any way – for example, by selling it, leasing it or giving it away for which he does not need copyright owner's further permission. The copyright owner has only the right to authorize or prohibit the initial distribution of a particular lawful copy of a copyrighted work. But once the copyright owner transfers ownership of a particular copy (a material object) embodying a copyrighted work, the copyright owner's exclusive right to distribute copies of the work is 'extinguished' with respect only to that particular copy (Lehman 90). The distribution of an unlawfully made copy will subject any distributor to liability for infringement.

2.10.1.4 The Public Performance Right

The public performance right is the right to authorize or prohibit the performance of a work in public. The right applies to all types of works that are capable of being performed – literary, musical, dramatic, dramatico-musical, choreographic works, pantomimes, motion pictures, and other audiovisual works. Sound recordings, however, are not covered by this right. The performance right is covered under Berne article 11(1) which states that authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing "the public performance of their works . . . by any means or process and "any communication to the public of the performance of their work".

The public performance right covers both direct and indirect communication of the work to the public. The former is referred to as live and the latter as recorded performance fixed in such medium as phonographic records, magnetic tapes, films, videocopies, and so on. A performance is live when it is performed by actors, singers or musicians on the spot and it is recorded when it is transmitted through mechanical means, such as by radio, record player or television.

2.10.1.5 The Broadcasting Right

Broadcasting right is regarded as one of the most important rights in view of the important place now taken by this medium in the world of information and entertainment (Claude 66). The social and political importance of this medium is apparent from the impact which it can exert on the decision and perception of the people. Development of

broadcasting technology during the first half of the nineteenth century brought an entirely new dimension into the way protected works could be communicated to the public. With the advent of space satellite, diffusion of programs from one continent to another became possible with the result that national boundaries are now of little relevance (Ricketson 436). As such, in a very short span of time broadcasting has come to assume the most influential medium of communication not only in the world of information and entertainment but equally so in the field of trade and commerce, diplomacy and defense. The rise of this medium had profound impact on the authors' rights as significant portion of the programs transmitted over this communication network comprises literary and artistic works protected by copyright. Most notably, copyright issues related to the use of satellite broadcasting involve the legality of the transnational distribution of protected works; the condition under which these acts of public communication are made; the payment of the remuneration generated by successive exploitation and the distribution of program-carrying signals by an organization or distributor for whom the signal is not intended. The need for broadcasting right thus arose in order to safeguard the interests of the copyright owners against the unauthorized exploitation of their works in the broadcast programs.

The broadcasting right is the right to authorize the transmission of a work by any wireless means for public reception of sounds or of images and sounds. It is primarily concerned with the transmission of work by radio and television. Broadcasting rights of the authors are recognized under Article 11*bis* of the Berne Convention which provides:

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds and images;

(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;

(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

2.10.1.6 The Cablecasting Right

There are two forms of cable transmissions: simultaneous and unchanged retransmission of broadcast, and transmission of cable-originated programs. The former is commonly known by cable retransmission and the latter by cable origination. Copyright owner's consent in any work included in the cable signal is needed for both forms of cable transmission. A retransmission by cable of broadcast works applies to such cases where the "transmission is simultaneous with the original broadcasting, and where no change is made in the stage of retransmission to what is broadcast by the originating organization" (Ficsor, Guide to the Copyright par. BC-11bis.17). It is,

however, not retransmission of the original program, “if the broadcast work is recorded and transmitted by wire (cable) at a later time, or, if changes are made” (*ibid*). In such cases, according to Ficsor, it would be considered a completely new communication by cable in a cable-originated progam (*ibid*). Cable retransmission is included in the Berne Convention under Article 11 bis (1)(ii) as one of the secondary rights under the broadcasting right. In some jurisdiction this right is treated as a form of public performance right.

Cable origination involves the transmission by cable of an original signal. It is included in Article 11 (1) (ii) of the Berne Convention as part of the public performance right. By this article “any communication to the pubic of the performance of their [authors’] work” in respect of dramatic, dramatico-musical and musical works requires the consent of the copyright owner. The question that arises here is the precise meaning of the expression “any communication to the pubic.” The meaning, however, becomes clear when this provision is read in conjunction with Article 11 bis (1) (ii) which covers communication to the public by cable of broadcast works. As such, the expression communication to the public as employed in Article 11 (1) (ii) is intended to cover communication to the public by wire where the program is not already a broadcast program. According to Ficsor, the expression “any communication to the pubic” should be understood to mean any kind of communication other than broadcasting since the latter is separately covered by Article 11bis (*ibid.*, par. BC-11.8).

2.10.1.7 The Rental Right

The rental right is expressly recognized under Article 11 and 14(4) of the TRIPS Agreement which explicitly forbids the commercial rental to the public of originals or copies of computer programs and phonograms for commercial purposes without the authorization from the copyright owner. By Article 11, it is obligatory for the member countries to provide exclusive rental right in relation to computer programs and cinematographic works while Article 14(4) requires this right to be extended to the producer of phonograms and ‘any other right holders in phonograms.’ The rental right with respect to cinematographic works needs to be provided only if the commercial rental has led to a widespread unauthorized copying of such works materially impairing the exclusive right of reproduction. But in respect to computer programs to which it is obligatory to provide exclusive right of rental to its authors, exception is permitted only “where the program itself is not the essential object of the rental.” This means, for example, the exclusive right of rental does not apply to computer programs included in such mechanical devices as cars or aircraft in which it is the cars or aircraft, not the computer program as such, which is the essential object of the rental. This, however, does not apply to the rental of computer where computer programs have been uploaded since the latter is an essential component to the operation of computer (Ficsor, Guide to the Copyright par. CT-7.4).

2.10.1.8 The Public Lending Right

The public lending right refers to the transfer of the possession of a copy of a work or an object of related rights for a limited period of time for non-profit-making

purposes. More specifically, the public lending right is defined as making available of the original or copies of a work for use for a limited period of time, but not for direct or indirect economic or commercial advantage. It was originally conceived for books with a view to provide some pecuniary benefit on the lending of copies by the public libraries to their authors (Cornish, Intellectual Property par. 13-66). It is the entitlement to receive the payment of remuneration from a government fund in respect of the author's books which are lent by public libraries to the public. The entitlement depends upon the number of occasions upon which books are lent out by particular libraries. The term of this right, according to E.C. Directives on Lending and Duration, lasts from the date of first publication until 70 years after the author's death.

Similar to the concept of rental right, the public lending right is based on the premise that organised borrowing from public libraries would significantly reduce the sales of books as substantial proportion of potential readers would borrow a book rather than buy it. This means the author or the copyright owner would receive a royalty of one book from the sale of that copy to the library in return for the use of his book by the large number of people who have borrowed it from the library (Stewart par. 4.38).

The public lending right is not included in any international convention. It is available mostly in countries where the system of public libraries is well developed and the ratio of borrowing is very high. Provision of this right is mostly found in the copyright laws of the European countries, such as the United Kingdom, Germany, the Netherlands, the Scandanavian countries and some other countries in other continent such as Australia and New Zealand.

2.10.1.9 *The Droit de Suite* (Artists' Resale Right)

The *droit de suite*, or the artists' resale right in English, refers to an interest in any sale of the work subsequent to its first sale. Also known by the "the right of participation", it is the right of the authors with respect to artistic works to obtain a share of the proceeds of the successive sales of the originals of these works. The right applies only to graphic or three dimensional works of art such as drawings, paintings, statues, engravings and lithographs, but not to works of applied art where the work involved is rarely the original, but generally a replica (UNESCO/WIPO par.30). Also excluded from this right are works of architecture. However, the right may be invoked with respect to the manuscripts of writers and composers, where such works and manuscripts are sold either by public auction or through a dealer. The *droit de suite* is restricted to the originals of such works. To be 'original', the work must be considered to have been made by the artist himself or following his instructions so that the material copy can be said to reflect the author's personality.

The *droit de suite*, according to Stewart, arises on every sale after the first. As such this right, like the rental right, may be regarded as a limited exception to the first sale or exhaustion doctrine (Stewart par. 4.37).

The *droit de suite* basically arises from the nature of artistic works where the value lies in the uniqueness of the original. Unlike a book or a piece of music where the basis of economic exploitation is their reproduction, the commercial exploitation of these works is restricted to the act of selling the original copy of the work. Once the author disposes his work he has no further share in the subsequent acts of exploitation which

generally takes place when the creation has acquired a resale value and has become a source of profit for those engaged in sales. More often such works are bought as a lucrative future investment. In justification of this right, it is argued that authors of artistic works are generally obliged to sell their works at a throw-away price to meet their needs at the beginning of their career when they are little known. As the author begins acquiring recognition and fame, these works over the course of time assume considerable value and becomes a source of revenue for those engaged in sales. Hence the idea underlying the *droit de suite* is that the author of artistic works such as painters and sculptors should have the right to profit from the increase in its value each time it changes hands

2.10.2 The Moral Rights

The concept of moral right developed in the continental Europe during the nineteenth century. It first appeared in French law. France is therefore known as the mother country of moral right from whence it spread to all continental European and Latin American laws and into the Berne Convention. Moral rights as such are not recognized in the common law countries except in the United Kingdom where it was introduced as late as 1988. What is denominated as moral right is protected in these countries by such laws as the torts of passing off, injurious falsehood, defamation, unfair competition laws, and so on. Since moral right is essentially a product of European countries, particularly France, Germany, and Italy, it can be better understood and appreciated in all its aspects only with reference to the laws of these countries.

Moral rights "stem from the fact that the work is a reflection of the personality of the creator, just as much as the economic rights reflect the author's need to keep body

and soul together" (Masouye par. 6bis.1). They are invariably tied to the person of the creator of a work. There are three basic moral rights:

(a) the right of publication

(b) the right of paternity

(c) the right of integrity

2.10.2.1 The Right of Publication

The right of publication, or the divulgation right, is the most basic right. It is the right of the author to decide whether the work is to be made public. It consists of two rights: (i) the right of the author to decide whether and when his work is to be published, and (ii) the right to withdraw the work after publication if the author wishes to do so. In the continental Europe, such as France which is the mother country of *droit moral*, the right of divulgation is considered the most basic moral right of the author "since it reserves to the author the fundamental decision whether at all and when and how to release his work from the private sphere and to expose it to the public" (Dietz, Legal Principles 58). This decision is an absolutely personal and discretionary act of the author. It determines the moment when the work enters the financial or commercial sphere.

2.10.2.2 The Right of Paternity

The right of paternity, or the right of attribution, includes three rights: (i) the right to claim authorship of the work, or the right to be identified with the work. (ii) the right to prevent others from claiming authorship of the work; and (iii) the right to prevent others

from using his name in connection with the work of another (right against false attribution of authorship). The first requires the name of the author to appear on all copies of the work. The second protects the author from plagiarism of his work, and the third provides protection against false attribution of authorship.

2.10.2.3 The Right of Integrity

The right of integrity is the right of the author to have the integrity of his work respected. It is the right to object to any distortion, mutilation or other modification of the author's work. The basic objective of this right is to protect the honor or reputation of the author. By virtue of this right the author can authorize or prohibit any modification of his work. In the same way he has the right to prevent any distortion of his work that may be prejudicial to his honor or reputation.

2.11 Moral Rights Under the Berne Convention

The Berne Convention under Article 6*bis* recognizes only the last two rights: the right to claim authorship of the work (paternity right or right of attribution) and the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the work, which would be prejudicial to the author's honor or reputation (integrity right). From the viewpoint of civil law countries where the moral right is especially developed, the Berne provision represents only a minimalist approach.

The right of integrity under the Berne Convention is not absolute and unconditional: it does not extend to all kinds of modifications of a work but only to those that are likely to be prejudicial to the honor or reputation of the author (Ficsor, Guide to

the Copyright par. BC-6bis.4). This means unless the modification of the work is prejudicial to his honor or reputation, the author cannot exercise the right of integrity. The integrity right arises only where modification is "prejudicial to his honor or reputation."

The concepts of honor and reputation as embodied in the right of integrity under Article 6*bis* (1) are employed to cover any action that would be liable to harm *the person* through distortion of his work. As such, the protection of the honor and reputation extends "not only to the honor and reputation of the author as an author (in close relationship with the quality of his work as such) but also to his honor and reputation as a person or human being (which may also concern as the context – for example, a politically charged context – in which the work is used" (Ficsor, Guide to the Copyright par.BC-6bis.5). It is this later aspect of the honor and reputation of the author to which the use of the phrase 'or other derogatory action in relation to" is primarily intended to cover (ibid). It is submitted that in most legislations, such as Germany and France, modifications of the work that are solely dictated by artistic and aesthetic convictions and concepts of those using the work in the process of exploitation are not permitted whereas those dictated by the concrete technical, financial and circumstantial condition of the exploitation of the work may be exempted (Dietz, Legal Principles 75).

Moral rights as distinguished from economic rights are not transferable. They exist independently of the author's economic rights. These two principles, the independence and non-transferability of moral rights, are two basic principles which are clearly articulated at the very beginning of paragraph (1) of Article 6*bis* of the Berne

Convention: "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 . . . ."

The Berne Convention under Article 6*bis*(2) extends moral rights "at least until the expiry of the economic rights." The use of the phrase "at least" signifies that it is a minimum obligation and national laws are free to provide perpetual protection (Masouye par. 6bis.8). However, there is an exception to this requirement that applies to the countries whose legislation at the moment of ratification does not provide for the protection after the death of the author of all moral rights. These countries may provide that some of rights comprising moral rights after the death of the author cease to be maintained. This exception reflects a compromise between the copyright laws of civil and common law jurisdictions. As regards the exercise of moral rights after the death of the author or the end of the economic rights, it is governed by the law of the country where the protection is claimed.

2.12 The Dualistic and the Monistic Theories

Distinction between moral right and economic right has its root in the development of two important theories: the dualist theory and the monistic theory. The former was developed in France and the latter in Germany. The dualist theory holds that an author's moral right is rooted in his personality quite independently of his proprietary interests. As such, the dualist theory divides the whole set of prerogatives arising from copyright into two categories of rights –the moral right and the economic right. This separation is based on the fact that they serve different interest and objective which can

be separately identified. The *droit moral* or moral faculties are perpetual, inalienable and imprescriptible whereas the economic faculties are limited in time, alienable and submitted to prescription. According to this theory, moral rights are chronologically and systematically primordial: they precede the real existence of economic rights and also last longer than the latter. If the economic prerogatives secure the authors a share in the income from work exploitation, *droit moral* and its prerogatives secure protection for the personal, intellectual and spiritual interests of authors. In view of their importance in modern society, moral rights cannot be signed away. Dietz summarizes the main arguments of the dualist theory for the separation of copyright into two distinct faculties as follows:

> Moral right, in short, guarantees that it is the author and only the author who decides on the moment, place, extent, destination, and time of dissemination of his work, on the concrete configuration, form and content of his work and on the question under what name – his true name or a pseudonym, the name of another person (perhaps also a ghostwriter) or else, in anonymous form – the work shall enter the public scene. Since a right – namely copyright as a whole – cannot be, at the same time, alienable and inalienable, limited in time and not limited in time and so forth, simple legal logic forces us to treat the two groups of faculties differently; mixing them up as the proponents of monistic interpretation seemingly do can only lead to confusion. (Legal Principles 61-62)

In contrast, the monistic, or unitary, theory holds copyright itself to include an inalienable moral aspect. Hence, it regards all the prerogatives belonging to the author, both personal and pecuniary, as expression of a unitary right which guarantees, as a whole, both the intellectual and economic interest of the author. In short, it is copyright as a whole which serves to protect intellectual and moral as well as economic interests of authors. This is most vividly illustrated in Prof. Ulmer's 'copyright tree' where the roots of the tree represent moral and economic interests of the author, and the stem represents the unitary and integrated copyright as a whole. The branches and shoots growing from the stem represent the different faculties (legal prerogatives) which, like the branches on the stem, at times derive their force from both roots – the personal and the economic – and at others, draw more heavily on one of them (Lipszyc 156; Dietz, Legal Principles 65).

Accordingly, the proponents of monistic theory hold that the exercise of moral rights can serve financial interests while the exercise of pecuniary rights can serve personal and intellectual interests. For example, the exercise of the right of attribution has important economic dimension in that it is only when his name is correlated with his work, his talent comes to be known in the market. Attribution of his name in this case serves to procure new business to him (Dietz, Legal Principles 65). Similarly, the exercise of integrity right may also serve the material interest of the author particularly under such circumstances where distortion or mutilation of the work damages its potential market.

In contrast, when a successful entrepreneur would write and publish his biography or business success story profit motive will probably be only of secondary importance. In this case he exercises his economic right primarily to serve his moral interest: "to fulfill his personal interests of self-realization and perhaps also of vanity" (Dietz, Legal Principles 65). These examples clearly illustrate that "what is commonly called moral right or moral rights, on the one hand, and pecuniary right or pecuniary rights, on the other hand, is not so unequivocally moral or economic as it would generally appear"(*ibid*). These designations, according to Dietz, are "rather based on terminologic convenience; only taken together all these faculties (legal prerogatives) cover the whole spectrum of interests protected by copyright as a whole" (*ibid*). He maintains that the so-called dualistic interpretation of copyright in French theory is not as dualistic as one would have thought. This is so because *droit moral* is understood more in the sense of a bundle of special faculties within the unitary copyright than as a compact and separated concept of copyright (*ibid.,* 56).

2.13 Limitations on Copyright

Exceptions to the exclusive rights granted to the owners of copyright constitute one the major instruments by which copyright law seeks to shield public interests from total and absolute control of access by the copyright owners to their works. They set a boundary line beyond which the use of the work in the larger societal interest, such as education, research, news reporting and access to information, does not require any authorization of its owner. These restrictions are therefore basically dictated by the need to strike a balance between two competing public interests: the need to secure adequate

incentives to the creators and the need to ensure widest dissemination of their work for greater public access. Hence the exclusive rights granted to the owners of copyright are not absolute; they are curtailed to take care of equally important aspect which is the protection of public interest.

As a rule, limits to the rights of authors are set in such instances "where it is considered that the 'public interest' should prevail against the private interests of authors" (Ricketson par. 9.1). The complex task of balancing the private and public benefit is one of the major tensions in copyright law. In common law countries where copyright is regarded as the grant of a limited statutory monopoly for achieving the advancement of learning, for example in the United Kingdom, or the progress of science, for example in the United States, limitations or exceptions are directed to ensure that public interests are not over-raided by the private interest of the copyright owners. These countries approach author's rights from the instrumentalist point of view as a "means of advancing and achieving certain desired and desirable social and economic goals" (Ricketson, The Boundaries of Copyright 57). The primary objective of limitations or exceptions in these countries is to balance the private and public benefit. In the House of Representative Report on the Copyright Act of 1909, the goal of copyright protection in the United States was stated as follows:

> The enactment of copyright legislation by congress under the terms of the Constitution is not based upon any natural right that the author has in his writing, for the Supreme Court has held that such rights as he has are purely statutory rights, but upon the ground that the welfare of the public

> will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings. The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best. *Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given.* Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention to give some bonus to authors and inventors.
>
> In enacting a copyright law, Congress must consider…two questions: First, how much will the legislation stimulate the producer and so benefit the public, and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly. (qtd. in Davies par. 5-041)

By contrast with the positivist notion of common law system, the rights of authors in the civil law tradition of European countries are considered as stemming from natural law. In the naturalist approach, author's rights are viewed as personal and inalienable rights, belonging to the actual physical person who creates a work. As opposed to the importance accorded to the pubic interest in the common law system, the naturalist approach gives foremost prominence to the rights of the authors. Personal and

inalienable, these rights, at least in theory, are viewed to be absolute. As such, limitations or exceptions to these rights are provided to the limited number of specific situations. They are as a rule provided only to the extent required by the social obligation of the authors to the general public (Davies par. 7-039). This perhaps is the reason why the exceptions and limitations to the exercise of rights in the civil law countries are formulated in closed provisions defining every specific situation where it applies. Precisely because of their exceptional nature, these limitations or exceptions in civil law countries have to be interpreted strictly and can normally not be applied by analogy (Dietz, Germany 266-67). This sharply contrasts with the open-ended provision in common law countries where exceptions or limitations are usually defined under the general term such as 'fair use' in the United States and 'fair dealing' in the U.K. The concept of fair use is still a subject of much debate as there are no hard and fast rules by which it can be precisely defined. According to McFarlane, "the very concept of 'fair dealing' itself is as long as a piece of string, and it is scarcely surprising that little case law exists on the topic" (McFarlane 7).

Limitations and exceptions imposed by provisions in the national copyright laws and international instruments may be distinguished from the restrictions on the exercise of an established right imposed by the application of legal or other principles which are outside the copyright law. The former may be described as the "internal restrictions" as they originate from the prescriptions in the copyright law itself and the latter may be termed "external restriction" as they arise from the application of legal provisions that exist outside the copyright law (Sterling par.10.01). Examples of external restrictions are

constitutional provisions on freedom of speech, or international instruments concerning human rights, under which entitlement to use protected material without the permission of the right owner may be claimed. Similarly, the rules on competition may apply in various situations where the exercise of rights may be restricted or curtailed if it constitutes an abuse of rights. Such rules on competition are applied in the context of intellectual property rights in order to safeguard competition in the market (Govaere par.5.01-02).

Limitations or exceptions to the exclusive rights are basically of two types: one is known by free use exemption in which no authorization from the right owner is required for the use of the work. Anyone can use the work without paying any remuneration to the right owner. Free uses, however, do not mean free in an absolute sense. They may be subject to such conditions as precise quantitative restrictions, careful limitations as to purpose, requirements of sufficient acknowledgement, and so on. Such uses may be described as "exceptions" to copyright, rather than limitations (Ricketson, The Boundaries 59). The other is commonly referred to as non-voluntary licences in which the use of the work requires no prior authorization from the right owner but is subject to the payment of equitable remuneration. Under such scheme, the right in question losses its exclusive character, and becomes limited to a right to remuneration. Such non-voluntary licences might be termed "limitations" to copyright (Ricketson, The Boundaries 59). It is, however, submitted that the difference between a "limitation" and an "exception" is not defined in any international instruments, and what is sometimes

described as a limitation in one law is called an exception in another (Sterling par. 10-01).

2.13.1 Free Use

As noted above the terminology designating free uses in civil law countries differs from those used in the common law countries. The former employs the term ‘exceptions’ or ‘restrictions’ whereas the latter uses the term ‘fair dealing’ or ‘fair use’. The term ‘fair dealing’ is used in the UK and its kindred laws and the term ‘fair use’ in the United States.

Free uses are permitted for special purposes such as reporting of current events, some religious and educational purposes, personal or private use. These uses, as stated above, are not without some limitations. By contrast, there are certain specific categories of works use of which is not subject to any quantitative or other restrictions that apply in relation to free uses of works. These are works which, under the Berne Convention, may be excluded from protection. Such works include “official texts of a legislative, administrative and legal nature, and official translations of these texts” [Article 2(4)]; “news of the day” or “miscellaneous facts having the character of mere items of press information [Article 2(8)]; and “political speeches and speeches delivered in the course of the legal proceedings” [Article 2*bis*(1)]. These categories of works in most national laws are expressly excluded from protection regardless of originality or creativity because the free availability of such works is considered to be more important for the public purpose which they serve, and hence they should remain outside the scope of exclusivity.

As regards the news of the day and miscellaneous facts, what is excluded from protection is not the writings of journalists and reporters but only those aspects of the writing that relate to conveying the facts or items of news. This in essence “is no more than a restatement of the basic proposition that copyright does not extend to the protection of ideas and information *per se*” (Ricketson, The Boundaries 63). In other words, the work must contain a sufficient element of intellectual creation for it to be qualified for protection.

2.13.2 Quotation

Article 10(1) of the Berne Convention allows for the making of quotations from a work which has been lawfully made available to the public. What is remarkable about this article is the use of the concept ‘making available to the public’ in place of ‘publication.’ The former is much broader than the latter in that it covers both the lawfully published works as well as those made available to the public in non-copy related forms, such as through public performance or recitation (Ficsor, Guide to the Copyright par.BC-10.5). Quotations from such works made available to the public are allowed to be used for scientific, critical, informatory or educational purposes. They can also be used for judicial, political, and illustration, and entertainment purposes. Use of quotation for artistic effect or for defending some proposition is also allowed. Such quotations, however, are subject to three conditions: (a) they must be from a work which has been lawfully made available to the public; (b) they must be compatible with the fair practice; (c) they must not exceed that justified by the purpose; and (d) they must be accompanied by due acknowledgement of the source and name of the author, if it appears

on the work. The use of quotation is not confined to a particular genre or category of literary works; but generally applies to ‘works’: it may be from a book, a newspaper, a review, a cinematographic film, and so on.

What amounts to ‘fair practice’ is not explained in the provision. Since it is a matter that depends on a particular case, it appears that it is a matter to be decided by the court on a case by case basis. However, as pointed out by Ricketson, the provision in Article 9(2) may be equally applicable in this case, namely that the quotation will be deemed fair if it does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the owners of rights (The Boundaries 65). Likewise, the condition that the quotation must ‘not exceed the extent justified by the purpose’ is also unclear and hence appears to be a matter to be determined by the court in a given circumstance. According to Ficsor, these two conditions are interrelated in that quotation that does not come within the fair practice may not be justified by the purpose, and the quotation that goes beyond its purpose is not compatible with fair practice (Ficsor, Guide to the Copyright par. BC-10.7).

The provision does not set any limitation to the amount that may be taken for the use of quotation. However, it is obvious that the amount of such quotation is restricted by the principle of fair practice and the extent justified by the purpose.

2.13.3. Teaching Purposes

Free use of copyrighted materials for educational purposes is justified on the ground of societal need for the promotion of education and knowledge. Such uses were

considered to be of value that far outweighs the social cost of granting protection to the private interests of copyright owners. Almost all national legislation on copyright contains exceptions for the educational use of copyrighted materials.

The justification for such uses, however, has been questioned particularly in relation to those cases where the work has been written with an educational purpose. In such cases the free usage of works may have profound impact on the owner's pecuniary interest as it would significantly reduce the sales of the copies affecting the interest of both the publishers and the authors. The problem became more acute with the availability of photocopying, tape duplication, digital reproduction, as well as the storing of educational materials on databases for access by teachers and students. Such cheap and efficient means of reproduction have significantly increased the free uses of copyright works over which right owners have little control. As such, the extent to which the right owners should have control over those means of reproduction has been a subject of intense debate and discussion in the international forum.

Article 10(2) of the Berne Convention provides for the free utilization of copyright materials for teaching purposes. Such utilization can only be made 'by way of illustration' subject to two conditions: fair practice and no greater use (to the extent) than justified by the purpose. The free usage in this case is limited to the utilization of the work by way of illustration which means utilization "must be organically built into a teaching program and illustrate something in harmony with, and for the purpose of, such a program". The word, 'illustration,' carries two basic meanings: first, explaining something by offering examples, pictures, etc; and, second, supplying a book, lectures,

etc, with pictures, diagrams, etc. This also means that there should be an appropriate proportionality between what is supposed to be illustrated and the illustration (Ficsor, Guide to the Copyright par.BC-10.18).

The provision allows the free utilization of not only publications but also broadcasts and sound or visual recordings. The word 'teaching' is intended to include teaching at all levels – in educational institutions and universities, municipal and State schools, and private schools. It does not include use of works in adult education. The word teaching extends beyond the actual classroom instruction to 'correspondence courses' to the emerging methods of 'distance education' where students receive no face to face instruction from a teacher (Ficsor, Guide to the Copyright par. BC-10.16). However, teaching as defined in this provision is restrictive and does not extend to the utilization of the work in adult education.

2.13.4. Exceptions for the Use by the Press

Exception for the press usage has been justified on the ground that the free flow of information is in the public interest. The relevant provisions dealing with exceptions for press usage are contained in Articles 2(8), 10bis(1), 2bis(1), and 10bis(2). Article 2(8) of the Convention is important in that it excludes protection for 'news of the day and miscellaneous facts having the character of mere items of press information' on the ground that such material does not possess the attributes needed to constitute a work. However, the words used by reporters and other journalists reporting or commenting on the news are protected to the extent that they are literary or artistic works (Masouye

par.2.26). Article 10bis(1) of the Berne Convention contains provision allowing ". . . the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication is not expressly reserved."

The provision provides exception to only those articles that are related to current economic, political or religious topics. Accordingly, newspaper articles or broadcast works other than those specified in the provision may not be subject to free reproduction. Hence, newspaper articles or broadcast works containing literary and artistic reviews, sports reports, articles on scientific and technical matters, falls outside the scope of exception. Articles of a historical or perspective character may also be excluded from the exception since the purpose behind the exception is to expedite the free flow of information relating to current events (Ricketson, The Boundaries of Copyright 67). The exception to the reproduction of works applies not only to print media such as newspapers and periodicals but also to reproduction by broadcasting and cable diffusion. The provision does not say anything about the number of copies that can be made by way of reproduction or the size of the audience to which the broadcast or cable communication is restricted.

The most important aspect about this provision is the condition that articles and broadcast works mentioned therein may not be reproduced if the copyright owner has expressly reserved the right to control the reproduction, broadcasting or communication

of the articles. This, according to Ricketson, may mean that the scope for such an exception is extremely limited or non-existent (The Boundaries of Copyright 68).

Article 10bis(2) deals with the use of protected works in the course of reporting current events by means of photography, film, broadcast or cable diffusion. Free use of works for such purposes was allowed in recognition of the need for respecting a fundamental freedom (Ficsor, Guide to the Copyright par.BC-10bis.9). This exception deals with the situation where, in the course of reporting current events, protected works are fortuitously seen or heard in the background. The exception therefore applies to the reproduction and making available of protected works 'seen or heard in the course of the event.' Examples of work seen in the course of an event are 'a statute unveiled' or paintings shown at the opening of an art exhibition, 'while music performed during a ceremony would be an example of a work heard'(Masouye par.10bis.6). The use of such works must be justified by the informatory purpose. This means that reproduction must be essentially for the informatory purpose and not a mere cover for reproducing, broadcasting, etc., the work. Reproduction, for example, of all the music played during the inaugural ceremony of a sporting event is not needed for the purpose of reporting current events. Such reproductions beyond what is required for reporting current events are prohibited since they cannot be justified by the informatory purpose. It is submitted that it is the same limitation that has been applied for the reproduction by the press, broadcasting, communication to the public by wire of publicly delivered lectures, addresses and other works of the same nature in Article 2*bis*.(2) that deals with the use of lectures and addresses. Under Article 2bis.(1), political speeches and those made in

courts of law by judges and counsel may be excluded from protection on the ground of freedom of information.

2.13.5 General Exception to Reproduction Right

The Berne Convention under Article 9(1) maintains that authors shall have the exclusive right of authorizing the reproduction of their works, in any manner or form. The provision envisages all methods of reproduction and processes now known or yet to be discovered. However, this exclusive right of reproduction is restricted by Article 9(2) of the Convention which contains a provision allowing exception in certain special cases provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. According to Ricketson, "this is the only instance of a "principled" exception under the Convention, in the sense that it embodies more wide-reaching and general criteria for its application" (The Boundaries of Copyright 69). The rationale for adopting such a generalized formula is that it is impossible and unwise to list all possible exceptions that might be made under national legislation. As Ricketson has pointed out exceptions for judicial and administrative use, private study, use for scientific and research purposes, use for religious purposes, and use by handicapped readers, which is found in almost all national law, are capable of falling within Article 9(2) (The Boundaries of Copyright 71).

The exceptions, as laid down in the provision, can be justified only when they satisfy three distinct conditions. These three conditions are: (a) the reproduction must be for a specific purpose, that is, it applies only in certain special cases; (b) the reproduction

must not conflict with a normal exploitation of the work, and (c) the use must not unreasonably prejudice the legitimate interests of the author. All these three conditions are cumulative. Any exception to reproduction must satisfy all these conditions before they are allowed under national laws.

The application of these conditions to which exceptions must satisfy to be justified under national laws has come to be known by the “three-step test.” The way these conditions should be applied is described in the Main Committee 1 of the Stockholm revision conference as follows:

> If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment. (qtd. in Ficsor, Guide to the Copyright par. BC-9.12)

First step requires the exception to be applied only in “certain special cases”. By special cases it includes two aspects: “First, the use must be for a specific, designated purpose: a broadly framed exemption, for example, for private or personal use generally, would not be justified here. Secondly, there must be something “special” about this

purpose, “special” here meaning that the use is justified by some clear reason of public policy or other exceptional circumstances” (Ricketson, The Boundaries of Copyright 69).

Second step requires that reproduction should not conflict with a normal exploitation of the work. By normal exploitation it covers such uses which are usually within the control of copyright owners, and the use of which would damage the interest of the copyright owners. Example of such uses is the photocopying of a very large number of copies for a particular purpose. But, making of copies for the purpose of private study or research or for the purpose of judicial proceedings would not conflict with a normal exploitation (Ricketson, The Boundaries of Copyright 70).

The third step requires that the limitation or exception must not unreasonably prejudice the legitimate interests of the author. It is submitted that even where a special case is established as required by first step, Article 9(2) will not permit any exception if the reproduction would be such as to conflict with a normal exploitation of the work (second step). Failure to comply with the second test would mean that the proposed exception does not merit for further consideration. This is an end of the matter. But where there is no conflict, the next and the last step would be to consider whether there is unreasonable prejudice to the legitimate interests of the author. This condition, according to Ricketson, is premised on the assumption that any exception to the reproduction right would inevitably prejudice the author’s interest. Hence, the word ‘unreasonable’ was introduced to qualify the requirement ‘prejudice’ meaning that the legitimate interests of the author to their entitlement would be considered prejudicial only where such prejudice is unreasonable (Ricketson, The Boundaries of Copyright 70). The requirement that no

prejudice must be unreasonable means that it must be duly justified by appropriate public policy consideration (Ficsor, Guide to the Copyright par.BC-9.27).

2.14 Non-Voluntary Licensing System

Non-voluntary licenses refer to the system where a work may be used without the authorization of the author subject to certain conditions including the payment of equitable remuneration. The difference between the free use of works and non-voluntary licences lies in the fact that the former are exempt from the requirement of any authorization from the authors and the payment of remuneration while the latter permit the uses of the work without authorization from the author but restrict such uses to the payment of remuneration to the owners of copyright. The effect of the non-voluntary licence is that "the absolute right of the copyright owner is reduced to a right to equitable remuneration" (Stewart par. 4.55). Non-voluntary licences are therefore non-exclusive rights which are simply a mere right to remuneration. They are not assignable and must respect the moral rights of the authors. The scope of these licences does not extend beyond the country where it is granted.

Non-voluntary licences may take the form of statutory or compulsory licences. Statutory licences are licences "under which the protected works can be freely used on condition that the user paid a fee, fixed by the competent authority, to the body designated by that authority and distributed in accordance with the rules established by the latter" (Stewart par. 4.55).

Compulsory licences are licences "requiring the copyright owner to grant the necessary authorization without, however, depriving him of his right to negotiate the terms of the authorization, with the proviso that the administrative or judicial authorities (civil courts or special jurisdictions) would fix the amount of remuneration if no amicable agreement can be reached between the parties" (Stewart par. 4.55).

The difference between the statutory and the compulsory licence lies in the application of equitable remuneration which in the case of the former is prescribed by the law itself whereas such remuneration in the case of the latter has to be settled through the negotiation between the user and the right owner or the collecting society representing him. Hence the former is more restrictive while the latter allows the freedom of negotiation.

Non-voluntary licences apply only in the situation where the initial dissemination of the work has already been made with the authorization of the author. As a rule, resorts to non-voluntary licences are made only when it is essential to preserve access to works and their appropriate dissemination. They are permitted solely in respect of certain specific uses such as the mechanical reproduction of non-dramatic musical works and in cases of massive and uncontrollable use, such as private copying. As regards the mechanical reproduction of works, the main reason for allowing non-voluntary licence is to avoid the creation of monopoly arising from the grant of a licence to one record manufacturer. Thus, while the law grants the author of musical works the right to authorize the making of sound recordings of his work, it may also provide at the same

time that such recordings can be reproduced without the consent of the author provided that the user pays the remuneration prescribed by law.

The Berne Convention allows national laws to provide for compulsory licences in relation to the recording of musical works (Article 13), and broadcasting, communication to the public by wire, rebroadcasting and other public communications of works (Article 11bis(2). Apart from these two specific provisions, the Convention contains special provisions designed to meet the special needs of the developing countries, particularly in the educational area. Included in the Appendix containing 6 articles, these compulsory licences are confined to translation and reproduction licences. Non-exclusive and non-transferable, these licences can be invoked only by developing countries. According to Ricketson: "The limitations to protection embodied in these detailed and complex provisions are still favourable to copyright owners in developed countries, and it does not seem that the licences have been widely invoked by developing countries" (The Boundaries of Copyright 80).

2.15 Implied Exceptions

Implied exceptions, as the word suggests, refer to those exceptions to the right which is not expressly mentioned in the provisions of the Berne Convention but are to be implied. The inclusion of such exceptions in the national law will not be in conflict with the Convention. These implied exceptions, commonly known as "minor reservations", are acceptable only with respect to certain specific rights provided under the Berne Convention although the relevant provision contains no express reference to permissible exceptions. They relate to exceptions in respect of performing (Article 11), recitation,

(Article 11ter) broadcasting (Article 11bis), recording (Article 13), and cinematographic rights (Article 14). These kinds of exceptions should have a restricted character. They are allowed only where the use of the work is insignificant or of a *de minimis* kind. The scope of such implied exceptions is thus quite narrow extending only to uses that are of minimal, or no significance to the author. It is, for example, not sufficient that the performance, representation or recitation is without the aim of profit for these exceptions to be justified. As Ricketson has pointed out, "the particular public interest that might justify the making of a specific exception under the Convention is not relevant to the general principle of construction embodied in the *de minimis* exception" (The Berne Convention par. 9.63).

Implied exception also applies in the case of uses of translations of works although Berne Article 8 which deals with the translation right contains no express exception to the exclusive right of translation. Possibility of such exception is clearly recognized in the statement which was inserted in the Report of Main Committee I. According to this agreed statement, use of the work not only in original form but also in translation may be used in relation to Articles 2bis(2), 9(2), 10(1)and (2), and 10bis(1) and (2), subject to the condition that use is in conformity with fair practice (Ricketson, The Boundaries of Copyright 73).

2.16 Collective Management Society

Collective management organizations are generally a non-profit making private bodies established on the voluntary initiative of copyright owners to administer or enforce certain of their rights. The need for such organization arises when the copyright

owners, due to mass use of their works for various purposes, find it difficult, or practically impossible, to enforce their rights on individual basis.

By definition, the term 'collective administration of copyright' denotes a system under which right-owners entrust collective administration organizations authority to administer their rights. Hence, the fundamental objective of collective administration organizations is the administration of rights delegated to it by right-owners with authority to: (a) monitor the use of their works; (b) negotiate the conditions with the prospective users for the utilization of their works; (c) give them licence (authorization) against appropriate fees; and (d) under appropriate conditions, collect such fees and distribute them among the right owners.

In the early days of copyright history, it was fairly possible for individual authors to ensure their rights themselves and enjoy a fair share of return for the use of their works. Copyright was then basically confined to printed books, and the authors could individually control and exploit the use of their works by entering into a contract agreement with their publishers. Copying technology was then just beginning to make its appearance with the invention of printing in 1440, and the other forms of reproduction and dissemination were yet to develop posing thus less threat to the authors of misappropriation of their entitlements.

The concept of collective administration of rights evolved in France towards the late eighteenth century. However, it was only in 1851 when Bourget with some of his colleagues founded *Societe des Auteurs, Compositeurs et Editeurs de Musique* (SACEM),

a copyright collecting society for musical works, that the idea of collective administration organization took a momentum that soon spread all over the world. Initially confined to musical works administering rights only in respect of certain specific categories of musical works, particularly "small rights" musical works, or the so-called "performing rights", it was gradually extended to the administration of rights in other fields of copyright rights and related rights. Hence, there are now various types of collective administration organizations dealing with specific rights, such as mechanical rights, reprography reproduction right, rights of performers and phonogram producers, and many others.

2.16.1 Reprographic Reproduction Organisations (RROs)

The collective organizations which administer the reprographic reproduction right are called reprographic reproduction organization (RROs). They arose to enable the author to receive compensation from the reprographic reproduction of their works. Printed materials became much easier to copy with the development in copying technology, particularly reprography (photocopying) which was invented in the United States towards the 1940s. These machines produce better quality, and at the same time they are quicker and cheaper. The use of photocopying machine, particularly for copying of materials needed for education, research and library services in educational institutions became widespread after the1970s. Such uses were virtually impossible for authors to control and hence it was not practicable for them to exercise the reprographic reproduction of their works on individual basis. It is noted that the right of reproduction is the fundamental right of the author. It is explicitly recognized under Article 9 of the

Berne Convention which reads: “Authors of literary and artistic works . . .shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.”

As a rule, copyright law in almost all countries allows exemption to reproduction right of the author for the use of some limited portion of the protected materials for purposes, such as teaching, scholarship or research. However, such exemptions, under Article 9(2) of the Berne Convention, are permitted only in “certain special cases provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonable prejudice the legitimate interests of the author.” Given these conditions for the application of exemption to reprographic reproduction right of the author, most uses of photocopying tend to interfere with a normal exploitation of the work. Hence in many countries, such uses are subject to licensing by the Reprographic Reproduction Organization. In the United States, the Copyright Clearance Center (CCR) has been set up to manage this right.

2.17 International Protection

Copyright has different aspects to its development. They involve issues which are at once territorial and international, narrow and broad, simple and complex. Copyright was territorial at the beginning confining to national laws that protected the works of national authors within the national boundaries. By the late nineteenth century copyright arose to become international as trans-border transaction in protected goods came to assume increasing economic significance and the absence of their protection across the national borders led to their widespread piracy making it virtually impossible for

copyright owners in the exporting countries to obtain royalties from the market exploitation of their works in the importing countries. In its early development, international protection took the form of bilateral copyright agreements between individual nations. These bilateral arrangements were based on the principle of reciprocity and offered only limited protection to authors in countries other than their own. They involved much complexity for the government to administer them due to the existence of a large number of separate agreements with each individual nation on varying terms and conditions. The need was thus soon felt for a multilateral negotiation based on common minimum standard of protection. This over the course of time led to the conclusion of the Berne Convention for the Protection of Literary and Artistic Works in Berne, Switzerland, in 1886.

2.17.1. The Multilateral Conventions

There are two major international copyright treaties: The Berne Convention for the Protection of Literary and Artistic Works (hereinafter referred to as the Berne) and the Universal Copyright Convention (hereinafter referred to as the UCC). The Berne, adopted on September 9, 1986, is the oldest of international copyright treaties. By contrast, the UCC was adopted as late as September 6, 1952.

The Berne Convention was initiated by European countries. At its beginning, only European countries - with the exception of few countries such as Haiti, Brasil and Canada - and their Asian and African colonies and the Commonwealth nations were its members. It was therefore viewed as essentially a European treaty designed to protect European works. A few years since the establishment of the Berne, American countries across the

Atlantic came up with a number of copyright conventions, generally known by the Conventions of the Inter-American system, which were basically confined to the countries in American continents. These conventions include: The Montevideo Treaty on Literary and Artistic Property (1889); The Mexico City Copyright Convention (1902); The Rio de Janerio Copyright Convention (1906); The Buenos Aires Copyright Convention (1910); The Caracas Copyright Agreement (1911); The Havana Copyright Convention (1928); The Second Montevideo Treaty (1939); and the Washington Copyright Convention (1946).

With the coexistence of these two systems neither the Berne nor the Inter-American could acquire universal validity. The two major superpowers, the United States and the then Union of the Soviet Socialist Republics, had ratified neither of these conventions. This significantly reduced the effectiveness of both the conventions. The scope of the Berne Convention came to be further reduced by the liberation of European colonies in Asia and Africa as these newly emerging independent countries who refused to be bound by the treaties in which they had been involved by virtue of colonial clause made the applicability of such treaties conditional on a subsequent act of confirmation and termination (Lipszyc 604).

It is against this backdrop, efforts to integrate these two systems into a single universal system began under the initiation of UNESCO in 1947. Since many developing countries were reluctant to join the Berne Convention because of its high standard of protection the idea that ultimately prevailed was the negotiation of “a third intermediate convention which would only embody certain principles shared by both systems”

(Lipszyc 604). The result was the adoption of the Universal Copyright Convention in September 1952 under the aegis of UNESCO. The UCC took place mainly under the initiative of the United States of America which, due to its certain rigid requirements of its legislation such as the compliance of formalities as a condition of protection, was unable to join the Berne Convention. Unlike the previous conventions which were aimed at establishing International Copyright Code, the UCC sought to provide a common basis that can accommodate all the countries with differing culture, legislation and administrative practice, and sometimes having conflicting interests. In line with this goal the UCC pursued the aim of harmonizing existing legislation, regardless of its level by setting a low standard of protection that would enable all the countries to join it thus leaving no country outside the international system of copyright. On that basis, it implemented one of the historical principles, namely that of a universal system. The UCC was thus basically designed to serve as a first step for the countries that found hard to comply with the Berne standard. The subsequent development saw a greater tilt towards the Berne Convention. With the accession of the United States to the Berne Convention in March, 1989 and the conclusion of the TRIPS Agreement in 1994 the relevance of the Universal Copyright Convention has become almost redundant.

2.17.2 The Basic Principles of the Berne Convention

The Berne Convention is based on four basic principles. They are incorporated in Article 5 of the Convention.

2.17.2.1 The Principle of National Treatment

The Berne Article 5(1) incorporates the principle of national treatment by which a country is obliged to accord the same protection to foreign works as it does to the works of its nationals without any requirement of material reciprocity. However, the Berne provides for exception to this rule in certain cases where the adoption of this principle may produce unfair results.

Exception is provided for the works of applied art whereby the country in which the protection is claimed may refuse to extend copyright protection to such works other than the special protection which it gives to industrial designs and models if these works are protected in their country of origin solely as industrial designs or models subject to their registration. But the country where these works of applied art are not accorded special protection by registration is required to protect it by copyright law. This is explicitly stated in Berne Article 2(7).

By Article 6(1), a Berne country may deny national treatment to the works of the nationals of any country outside the Union which are eligible for protection by virtue of simultaneous publication in one of the Union countries if the later does not accord equal protection to the works of its nationals. The provision further stipulates that if the country of first publication avails itself of this right, the other countries of the Union may accord to works thus subjected to special treatment the same protection as it is accorded to them in the country of first publication. This provision is specifically intended to check the use of 'backdoor protection' by the non-Union countries whose nationals could benefit from the protection on the basis of the criterion of the first publication and which themselves

do not afford adequate protection to the nationals of the Union countries. With the increasing number of countries acceding to the Berne Convention and the conclusion of the TRIPS Agreement which embodies the substantial part of the Berne Convention, the relevance of this provision is now almost insignificant.

Similar exception applies to the duration of copyright wherein the country that grants protection longer than the minimum term prescribed by the Convention need not extend beyond the term fixed in the country of origin of the work [Article 7(8)].

Exception is also provided for the authors' resale right which is generally known by its French name, *droit de suite* since it first originated in France. It is the right of the author to receive certain percentage of profits from each successive transaction of his or her works. The right applies only in relation to original works of art made by the artist himself, such as drawings, paintings, statues, engravings, and lithography. This right, as laid down in Berne Article 14ter, paragraph 2, can only be asserted if, and to the extent that, it is recognized in the country where the protection is claimed.

2.17.2.2 The Minimum Protection

Inextricably related to the principle of national treatment is the minimum level of protection since the application of the principle of national treatment presupposes a minimum level of uniformity between the national laws. In the absence of this uniformity the adoption of national treatment may create an unbalanced relation in which countries with extensive and higher level of protection will stand to lose from the countries which accord lower level of protection. In order to eliminate this situation and ensure the

effectiveness of protection the Convention provides for a minimum level of harmonization among the countries of the Union. Where domestic law fails to provide the minimum rights guaranteed *jure conventionis* they shall be supplemented by the latter. This is codified in Berne Article 5(1): “Authors shall enjoy [. . .] in countries of the Union [. . .] the rights which their respective law do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.”

The minimum level of protection under the Convention should be provided for (a) all literary, scientific and artistic works as enumerated in Article 2; (b) the moral rights of paternity and integrity (Article 6bis); (c) the economic rights of reproduction including the right to record musical works (Article 9), of translation (Article 8), adaptation, arrangements and other alterations of their works (Article 12), presentation and public performance (Article 11), public recitation (Article 11ter), broadcasting (Article 11bis), rights in cinematographic works (Articles 14 and 14bis) and the *droit de suite* (Article 14ter); and (d) minimum duration of the rights which generally is the life of the author and fifty years after his or her death (Articles 6bis, para. 2, Article 7). The Convention also sets out the permitted limitations (Article 2, para. 8, Article 2bis; Article 9, para.2; Articles 10 and 10bis; Article 11bis, paras. 2 and 3; Article 13, para. 1; Article 16 and Article 30, para. 2(b)).

2.17.2.3 The Principle of Formality-free Protection

The principle of formality-free protection is laid down in Berne Article 5(2): “The enjoyment and the exercise of these rights shall not be subject to any formality[. . .].” Formalities are conditions national legislation may establish for securing copyright

protection. Examples of such formalities are registration of the work with a government authority, deposit of the originals or a copy, and attaching a 'copyright notice' to published copies. These formalities are independent from the substantive condition that requires the creation to be original works of authorship and fixation thereof in tangible form for works to be eligible for protection. The Convention prohibits the application of these formalities as a condition of protection or exercise of rights. This means protection must be automatic – the very creation of a work would automatically bring copyright into existence. It must be granted without requiring compliance to any formalities that may be established by national legislation with respect to the domestic works as a condition for the existence or exercise of rights.

2.17.2.4 The Principle of Independence of Protection

Closely related to the principle of formality-free protection is the principle of independence of protection which is basically aimed at eliminating the conditions of formality which the national legislation may prescribe for its domestic works. By independence of protection, the country where protection is claimed must grant protection regardless of the extent of the protection granted under the law of the country of the origin except under certain specific circumstances as discussed above. A country, for example, may prescribe formalities to the protection of its domestic works but when it comes to the foreign works it cannot apply these formalities by virtue of the Convention regulation prohibiting formalities as a condition of protection. This in essence means the country where protection is claimed must grant the protection independent of any formalities under the law of the country of origin of the work. Put simply, the rule is that

when it involves foreign works it is governed by the Convention regulation to the extent it is laid out in such regulation and absence such regulation it is governed by national legislation. This is so because the Convention regulates obligations in international relations, not within a given country (Ficsor, Guide to the Copyright par.BC-5.12).

2.18 From the Berne to the TRIPS Agreement

As copyright progressed from national to international protection, the mercantile interest of copyright owners in the industrialized countries came to dominate its contents. Rules were systematically codified narrowing the access to provide greater leverage for the copyright owners to exact monopoly price from the exploitation of their works in the international market. This is clearly reflected by the progress of the Berne Convention which through its successive revisions steadily moved towards higher level of protection enabling the industrialized countries to strengthen their competitive advantage and hence retain their dominant position in the international market of knowledge.

Despite its stringent provisions, the Berne lacked mechanism for enforcement by which member countries are obliged to provide effective protection to foreign right holders. Countries whose intellectual property rights were freely violated had no legal remedies under the Convention to inflict penalty on the infringing country. In short, the Berne provides no practical means for resolving disputes since there is no way by which one government can seek redress if another failed to live up to its commitments, except by unilateral action outside the convention. As a result, the lax implementation by the majority of developing countries became a major source of frustration to the expectation of the industrialized countries who claimed a substantial loss of their royalties due to

weak protection of their intellectual property rights in the importing countries. On several occasions, the United States, for example, imposed a unilateral trade sanction under Section 301 of its Trade Act against a number of developing countries thereby obliging them to reform their intellectual property laws and provide effective protection to the US imports containing intellectual property rights.

Being a net importer of materials protected by copyright, most developing countries on the other side came to see themselves as a major loser from the Berne provisions that would frustrate their aspiration for development. The Berne, they maintained, provided them little incentives in return for extending higher level of protection that would practically oblige them to remit a large sum of their revenues to the foreign right holders in the form of royalties. This is something they contend that would further push their economy backward leading to economic colonization by the West. Hence the developing countries tended to respond with lackluster implementation paying less attention to reform and implement their respective intellectual property regime in the same level as demanded by the West. This attitude of the developing countries fueled greater irritation in their Western counterparts as they slowly came to lose their competitive strength in the manufacturing sector to the newly industrialized countries towards the last quarter of the twentieth century and started concentrating on the development and production of intellectual property (IP) intensive products which now occupy a major share of their exports in the international market. Since trade in IP goods is much riskier due to the involvement of high fixed cost in their development but relatively much easier and cheaper, in most cases, to reproduce and imitate them, demand

for strengthened protection of these goods arose to become the foremost economic agenda in the international economic relation. From the perspective of industrialized countries, the existing international norms on intellectual property rights lack any mechanism guaranteeing the effective enforcement of these rights.

This perhaps was the reason why these countries pressed hard to introduce the subject of intellectual property rights for negotiation under the GATT forum other than WIPO, a specialized UN agency that had been solely created to deal with the subject matter involving various forms of intellectual property.

Multilateral negotiation on intellectual property rights under the aegis of the General Agreement on Tariffs and Trade (GATT) started from September, 1986 at Punta del Este, Uruguay. Despite the initial resistance by the developing countries to negotiate intellectual property rights under the auspices of the organization other than the World Intellectual Property Organization (WIPO) which they maintained is an appropriate forum to deal with this subject, the negotiation nevertheless slowly moved ahead amidst many twists and turns. The negotiation went for seven years before the final draft was eventually agreed in December, 1993. It was formally concluded at Marrakesh, Morocco, in April, 1994 with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The Agreement forms an integral part of the Uruguay Round of Multilateral Trade Negotiations of the GATT which, along with the other negotiations on various subjects related to trade, concluded with the Agreement establishing the World Trade Organization (WTO) signed in Marrakech on April 15, 1994. The WTO came into existence on January 1, 1995. The TRIPS came into force on the same date.

The TRIPS is the most comprehensive international instrument ever negotiated to-date on intellectual property rights. It incorporates seven types of intellectual property rights including copyright and related rights. It establishes minimum standards of protection for each category of these property rights. These standards, which must be provided on the basis of the principle of the most-favored nation treatment (MFN) and the principle of national treatment, must be guaranteed under the national law of each WTO member. By MFN treatment, the member country is obliged to extend benefits of the provisions of the Agreement to all Members in a non-discriminating manner. This in essence means if a WTO member has given certain rights of privileges to another, these must be extended to all other WTO members without discrimination. By national treatment, the foreign right holders must be accorded the same treatment or protection as it is accorded to domestic right holders. There must be no discrimination between the foreign and the domestic works. National treatment thus prohibits a member country to give any special protection to its domestic right holders which it does not give to foreign right holders.

The TRIPS Agreement has adopted substantial norms of the pre-existing conventions in their respective field while supplementing at the same time some new features to them. As regards copyright, it embodies Articles 1 through 21 of the Paris Act of Berne Convention (1971) and the Appendix thereto, excepting Article 6bis which provides for moral rights. The TRIPS is thus regarded as Berne-plus and Berne-minus agreement. It is Berne-plus in the sense that it has added to the list of protected works under the Berne Convention two new subjects, namely, computer programs and

compilations of data (Article 10). It has introduced a new right in the form of rental rights (Article 11) for certain categories of works, namely, for computer programs and audiovisual works under copyright and for phonograms under related rights. The TRIPS is Berne-minus in that it does not recognize moral rights which by Berne standard fall under the minimum level of protection. As regards related rights, the TRIPS builds on Rome Convention by reference to its provisions which it applies *mutatis mutandis* in several instances. It has extended a minimum term of protection provided under the Rome Convention for the rights of performers and producers of phonograms from 20 to 50 years.

2.18.1 Enforcement Provisions

The most important innovations of the TRIPS Agreement are incorporated in its Part III (Articles 41 to 61) containing detailed norms on enforcement of intellectual property rights and its Part V which extends WTO dispute settlement system to intellectual property rights. This is a key feature of the TRIPS Agreement that distinguishes it from the pre-existing international conventions on intellectual property rights.

The provisions on enforcement prescribe judicial and administrative procedures and remedies as well as criminal procedures and penalties. The TRIPS requires these procedures and remedies to be available under the domestic law of member countries for ensuring the effective enforcement of the rights of intellectual property holders.

2.18.2 Criminal Proceedings

By TRIPS Article 61, member countries of the WTO must provide criminal procedures and penalties to be applied in the case of "wilful trademark counterfeiting or copyright piracy on a commercial scale." Remedies must include "imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity." These remedies are basically intended to ensure that the award of damages to compensate the right holder for proven infringement is commensurate with the profit obtained from counterfeiting and piracy which may be very high. The provision further provides that judicial authorities must have the authority, in appropriate cases, to order the seizure, forfeiture and destruction of the infringing goods. TRIPS rules on criminal remedies are obligatory only in the case of wilful trademark counterfeiting or copyright piracy on a commercial scale. They do not extend to other forms of intellectual property rights in which cases member countries of the WTO are free to determine the application of such remedies provided infringement is committed wilfully and on a commercial scale. The text of Article 61 is self-explanatory in this respect: ". . . Member may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale."

2.18.3 Border Enforcement Measures

Part III, Section 4 of the TTIPS Agreement containing ten articles (51 through 60) sets out the measures to be adopted of border enforcement of intellectual property rights.

The incorporation of these measures under the TRIPS Agreement is the recognition of the fact that the most effective way to deal with piracy or counterfeiting goods is not when they are in the stores, but at their very point of manufacture or point of importation. TRIPS, however, does not require special border measures for the intellectual property rights other than trademark and copyright. Furthermore, the application of these measures is obligatory only with respect to the importation of allegedly infringing goods. This means member countries of the WTO are free to determine the extension of these measures with respect to the exportation of these goods.

2.18.4 Dispute Settlement

Each member country under the WTO TRIPS Agreement has to abide by the rights and obligations laid down by the Agreement. Non-compliance with its rules would give rise to dispute settlement procedure in which the member country whose national are affected by such non-compliance may take retaliatory commercial measure in any field covered by the WTO agreements. It is noted that the TRIPS Agreement is not a self-executing instrument. This means individuals and firms other than their respective government cannot bring action for non-compliance with its rules.

The TRIPS Agreement adopts the WTO "Understanding on Rules and Procedures Governing the Settlement of Disputes" (hereinafter referred to as 'DSU'). The DSU is a common system of rules and procedures that is applicable to disputes arising under any of the legal instruments covered by the WTO. The General Council which administers these rules and procedures acts as the Dispute Settlement Body (hereinafter referred to as 'DSB'). The Council is composed of all WTO members.

Dispute settlement under the WTO is time-bound, automatic, and binding, and therefore more effective than what it existed under GATT, 1947. With the adoption of the DSU, no member countries of the WTO is allowed to take unilateral action before the DSB has verified the existence of a case of non-compliance and authorized retaliatory action. Any unilateral action taken before or outside such a procedure would be illegal under the WTO Agreement.

2.19 WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty

By the time the TRIPS negotiation was concluded in December 1992, digital media, particularly the Internet, came to dominate the market. The rise of the Internet as a real market for cultural and information products brought with it the problem of widespread unauthorized distribution of these products by the pirated channels. Since it was not possible to reopen the TRIPS negotiation just concluded to cover these new issues, the WIPO took initiatives to update and adapt the existing international norm on copyright and related rights to the digital environment (Ficsor, Guide to the Copyright par. 29). This led to the adoption of two treaties by the WIPO Diplomatic Conference in December, 1996: The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The four basic issues which these treaties sought to cover under digital environment were: (a) clarification on the concept of digital reproduction and the application of the right of reproduction in the digital environment; (b) the applicable right for interactive digital transmission, such as right of communication to the public, distribution and commercial rental, and making available to the public of works on line; (c) the application of exceptions and limitations in the digital environment; and

(iv) provisions against technological measures (such as the fraudulent circumvention of anti-copy devices) and rights management information (prohibiting, for example, the removal of electronic information attached to works exploited in digital networks).

Since these treaties were designed as a response to the challenges put to copyright and related right by the digital age, they are often referred to as the "Internet treaties". The WCT updates the last Berne Convention of 1971 to cover digitization and the WPPT further broadens the scope of protection to performers and producers of phonograms than it is provided in the Rome Convention of 1961. Both these treaties incorporate the minimum standard of the TRIPS, except its detailed enforcement provisions. The WTO dispute settlement mechanism is not applicable to these treaties. These treaties thus complement both the Berne and the TRIPS and are therefore characterized as Berne/Rome plus and the TRIPS plus.

CHAPTER THREE

Property in Literary Creations and the Basic Notions of Copyright

3.1 Property in Literary Creations

Copyright as it developed during the sixteenth and seventeenth century has little to do with the authors except as the initial owners of their manuscript. All that authors own in their work is their manuscript which they sell to the booksellers. It is the only right – author's initial property right in his work – that has been recognized by the booksellers. As an acknowledgement to this right, the booksellers would pay to the authors for their manuscript and obtain their permission before acquiring a copyright. But, once this physical copy is disposed off the authors had no control or right whatsoever over it. They become the sole property of the booksellers. The only property right the author had in his work, in the words of Prof. Goldstein, "was in the physical manuscript, the paper and ink in which he had expressed himself. He had no right to exploit the value of the text themselves" (Goldstein 41). The idea that it is not the ink and paper but the composition or text in which lies the literary property came to be appreciated only towards the second half of the eighteenth century. Prior to this what authors are supposed to own is only the manuscript, the physical copy, but not the 'work'. This is because, as Rose illustrates it, the text during these times is regarded not as a thing but as an action to be valued for what they could do:

> Prior to the passage of the statute, authors could not be said to 'own' their works. Indeed the very notion of owning a text as property does not quite fit the conception of literature in the early modern period in which it was common to think of a text as an action rather than as a thing. Texts might serve to ennoble or

> immortalize worthy patrons, and in the process perhaps to win office or other favors for their authors; they might move audiences to laughter or tears; they might expose corruptions or confirm the just rule of the monarch or assist in the embracing of true religion, in which case their authors were worthy of reward. Alternatively, they might move men to sedition or heresy, in which case their authors were worthy of punishment. Thinking of texts in this way, valuing them for what they could do, was commensurate with the traditional society of the sixteenth and seventeenth centuries dominated by patronage structures, just as, later, treating texts as aesthetic objects was commensurate with the advanced marketplace society, founded on the notion of private property, as it developed in the eighteenth century. (213)

In England the abolition of the Court of Star Chamber in 1641 brought with it a phenomenal increase in the anonymous publication of what was considered to be seditious and heretical to the government. This in turn led the Long Parliament to proclaim the edict that required the printers or booksellers to ensure that all books identified the name of the author on the title page and that no book was published without the author's consent. Any printer who failed to secure the author's consent would be treated as if he were the author himself:

> It is ordered that the Master and the Wardens of the Company of Stationers shall be required to take especiall Order, that the Printers doe neither print, nor reprint anything without the name and consent of the Author: And that if any Printer shall notwithstanding print or reprint any thing without the consent and name of the

> Author, that he shall then be proceeded against, as both Printer and Author thereof, and their names to be certified to this House. (Wittenberg 31)

It was perhaps the first edict that established a right in the author by law – “the only state affirmation of any kind of authorial right in England earlier than the Statute of Anne” (Rose 215). It was essentially a criminal edict obviously intended not for the protection of authors but for the purposes of identifying them for punishment. While this edict facilitated to bring action against the authors for anything which the government considered to be seditious and heretical, the authors had no clear legal basis to take action against a bookseller. The authors therefore had no place in court “except as a criminal defendant charged with libel, blasphemy, or sedition” (Rose 215). The situation however slowly changed with the enactment of the Statute of Anne that established the author as the first and foremost owner of his work. This opened the way for the author to appear in court in the novel role of plaintiff in a civil action. However, it was only after a long time that any author invoked the statute to bring action against a bookseller. And this person was no other than a renowned literary figure, Alexander Pope.

At issue was the copyrightability of letters. Edmund Curll, a bookseller, published a volume of letters entitled *Dean Swift’s Literary Correspondence* containing letters to and from Pope and Jonathan Swift. The volume also contained letters from Dr. John Arbuthnot, Lord Bolingbroke, John Gay, and others. On 4 June 1741, five days after the publication, Pope filed a complaint against Curll invoking the Statute of Anne and its provisions for authors. In his complaint Pope maintained that he alone has the sole right to print and sell the letters that he wrote to and received from Swift and therefore asked for the injunction to prevent Curll from selling any further copies of the book. The Chancery granted the injunction which was later

sustained by Lord Chancellor Hardwicke. The injunction, however, was granted only in respect to those letters which Pope had written, not for those which he had received from Swift.

Pope v. Curll is one of the first cases in which a major English author went to court in his own name to defend his literary interests (Rose 212). It is regarded as a landmark case in English and American copyright law since it established for the first time a rule that copyright in a letter belongs to the writer, not to its recipient. But what is still more remarkable about this case is not so much the ruling that letters are protectable under the Statute as was the distinction which Hardwick drew between the receiver's tangible property in the physical letter (paper) and the writer's intangible property in the words. This distinction marks a crucial innovation in the development of copyright for it is at this moment of abstraction that, according to Rose, "the concept of literary property as a wholly immaterial property in a text might be said to have been born" (229). Prior to this decision, it was all confusion, for no one knows for certain what it is precisely protected –book or text, or material or immaterial object. Answer to such metaphysical question about the nature of literary property was not to be found in the provisions of the Statute of Anne, for it could have never occurred to the mind of the legislators at the time of its enactment. In all likelihood, as noted by Benjamin Kaplan, the draftsman of the statute was "thinking as a printer would - of a book as a physical entity; of rights in it and offenses against it as related to "printing and reprinting" the thing itself" (Kaplan 9). Never before the case of *Pope v. Curll* the court had the occasion to inquire into the nature of literary property and when this arose the court settled it once and forever that literary property lies not in its physical entity in which it is clothed but in the very text. Since then it has been a fundamental principle of copyright which is valid to this day.

3.2 Literary Property Debate

Two episodes in English copyright history were particularly eventful in the crystallization of various notions underlying copyright. First was an eighteenth century literary property debate which culminated in two historical cases of this episode - *Millar v Taylor* and *Donaldson v Beckett*. Arguments in the courts unfolded many important, unresolved, intricate issues on the nature of literary property which became the subject of intense debate, both in and outside the courts, for the lawyers and non-lawyers as well. Of particular relevance to this context is not the issue involved in these two cases which is but one and the same - whether statutory copyright of fixed period supplanted the common law copyright of perpetual duration; rather it is the enquiry which they led on the nature of intangible property that is of primary importance to the form and shape that came to be assumed by the law. This was the question of property in the intangible.

Despite the legal recognition the Statute of Anne gave to the property in literary composition in 1709, precisely what kind of property – tangible or intangible – the law protected was unclear. This gave rise to much of the confusion in the determination of property in literary works. According to Rose, the case of *Pope v. Curll* decided in 1742 marks a turning point in the determination of property in literary composition. The case related to an unauthorized publication of a collection of letters consisting of those written by Alexander Pope to Jonathan Swift and those written by Swift to Pope. Lord Chancellor Hardwicke ruled in favor of Pope stating that letters are subject to copyright and that their publication requires explicit authorization from their author. At the core of this ruling was the distinction he made between the receiver's tangible property in the physical paper and the writer's intangible property in the words suggesting for the first time that literary property is a wholly immaterial property in the text.

Having established that property in literary works is wholly immaterial property in a text, the next set of problems that arose with it was how the law was to define such property for it to be able to comfortably deal with it. In short, the very immaterial nature of the property in literary composition gave rise to a number of problems for literary property to be treated as a form of property. Arguments in and outside the courts during the course of literary property debate were firmly divided on the question of granting property status to literary productions. Many of the lawyers were opposed to consider literary property as a species of property for a number of reasons. The chief among the opponents of literary property was Justice Joseph Yates. In his dissenting opinion in *Millar v Taylor*, Yates, for example, raised several objections against the recognition by law of property in intellectual productions. First, he categorically denied the existence of property in literary production because nothing in his opinion can be the object of property which has not a material or corporeal substance. He maintained that property in literary composition

> . . . is all ideal: a set of ideas which have no bounds or marks whatsoever, nothing that is capable of a visible possession, nothing that can sustain any one of the qualities or incidents of property. Their whole existence is in the mind alone; incapable of any other mode of acquisition or enjoyment than by mental possession or apprehension; save and invulnerable from their own immateriality; no trespass can reach them; no tort affect them; no fraud or violence, diminish or damage them. Yet these are the phantoms which the author would grasp and confine to himself; and these are what the defendant is charged with having robbed the plaintiff off. (qtd. in Drone 32n1)

Second, Yates asserted that intellectual production to be treated as a form of property must be identifiable with distinguishing marks because “nothing can be the object of property that is not capable of distinguishable proprietary marks. . . . Now, where are the indicia or distinguishing marks of ideas? What distinguishing marks can a man fix upon a set of intellectual ideas, so as to call himself the proprietor of them? They have no ear-marks upon them; no tokens of a particular proprietor” (qtd. in Drone 32n2).

Third, Yates maintained that intellectual productions must be capable of separate possession for them to be legitimately considered as a species of property because

> [A] potential possession, a power of confining it to his own enjoyment, and excluding all others from partaking with him, is an object or accident of property. But how can an author, after publishing a work, confine it to himself? If he had kept the manuscript from publication, he might have excluded all the world from participating with him, or knowing the sentiments it contained. But by publishing the work the whole was laid open; every sentiment in it made public for ever; and the author can never recall them to himself, never more confine them to himself and keep them subject to his own dominion. (qtd. in Drone 33n2)

Yates’ objections were basically premised on the fundamental traits of property. For him, property in literary production is subject to the same rule of law that governs the property in tangible objects. It is the same characteristics by virtue of which an object is considered as a property that are essential for literary works to take the form of property. This means that a claim to literary property can be established only if it can be shown that it has ‘ear-marks’ or ‘tokens’ to identify its owner, that it is capable of separate possession and enjoyment to the exclusion of

others, and that it has ‘bounds’ or ‘marks’ to define and distinguish it. For Yates, they are the essential conditions, the prerequisites, to establish legitimate claim to property; and hence any object devoid of the presence of these attributes does not qualify to be treated as a species of property. It was this reasoning that led Yates to conclude that author has a property not in his intellectual production, but in the physical manuscript which alone is the fruit of his labor. Thoughts or sentiments expressed in the manuscript cannot be the subject of property, for they lack corporeal substance. Since these thoughts and sentiments are not confined to any material substance, so the argument goes, the author cannot control or possess them once the work is made public. It is only ‘the ink and paper’, the physical manuscript, to which the author has a title to property and to “extend this argument, beyond the manuscript, to the very ideas themselves was . . . very difficult, or rather quite wild.” The author can therefore claim exclusive right to his work so long as it is in the form of manuscript. But Yates denied the existence of any such right after the work is published, for once the author decides to publish it, he has no dominion over his work; he cannot control the thoughts or sentiments contained in the manuscript to his exclusive possession –they become as free as air.

The issues that Yates raised have an important bearing on law, for they exposed the problems to which the law must respond as it comes to deal with intangible form of property. Although these problems posed greater difficulty in defending and legitimizing literary property, the way they were navigated by the proponent of literary property has enabled them to argue that literary property, although incorporeal, can be identified, distinguished and appropriated. In answering the problems raised against literary property, the advocates of literary property came with different proposition and arguments that not only made the case for the recognition of literary property more cogent and stronger than ever before but also led to a greater extent to

demystify the conceptual confusion surrounding the nature of literary property. This in a way provided a stable foundation to those arguing in favor of literary property.

To the argument that ideas, sentiments and doctrine, the so-called literary property, lack requisite ‘marks and bounds’ for its owner to be identified and its boundary to be drawn to distinguish the right of one person from another, and hence they cannot be the subject of property, the proponents of literary property came to maintain that ideas and sentiments may be incorporeal and ideal but once they are impressed in visible and known characters on paper, they come to take corporeal form with distinct ‘marks and bounds’. This view of literary property was well articulated by Aston J. when the Court of King’s Bench affirmed the perpetuity of literary property in *Millar v Taylor*: “. . . though the sentiments and doctrine may be called ideal, yet, when the same are communicated to the sight and understanding of every man, by the medium of printing, the work becomes a distinguishable subject of property, and not totally destitute of corporeal qualities” (Drone 14n1).

By thus objectifying the ideas and sentiments, the fruits of the author’s labor, as being those represented by ‘visible and known characters expressed on paper’, the literary property advocates were able to show that literary property exhibited the requisite characteristics for it to be legitimately considered as a species of property (Sherman and Bently 27). However persuasive, the argument that thoughts or sentiments by their manifestation in visible characters on paper are corporeal and can therefore be identified and distinguished gave rise to other problems. The opponents argued how one can claim ownership of something – a thought or sentiment – which on publication cannot be confined to oneself and therefore free for all. Fundamental to this objection was the argument by Yates J. in *Millar v Taylor* that once

communicated ideas, sentiments or doctrine cannot be possessed to the exclusion of others, and hence by publication literary property becomes ‘common’, ‘a gift to the public.’

To this the proponents of literary property initially argued that property in literary composition is not a claim to the ideas and sentiments expressed in the text; on the contrary, it is a claim to the right of printing and re-printing the work. By thus restricting literary property to the sole right of multiplying printed copies for sale, they were able to argue that on publication ideas and sentiments expressed in the text would remain free for use by the public. The focus on print was basically aimed at meeting the demand that the protected subject matter must be susceptible to reproduction and repetition. The underlying rationale for this requirement was that the value of the protected subject matter lies in the reproduction of its copies, and the very *raison d’etre* of the law is to protect this value. The law has therefore no real meaning in the situation where reproduction of the intangible is not possible and for this reason the notion that “the property right in the intangible must extend beyond its first embodiment to cover the production of replicas and equivalents” (Sherman and Bently 51).

As soon as it appeared that the protected property could be copied beyond its immediate form, beyond its literal inscription, the argument for property in printed words which severely restricted the scope of literary property to the reproduction of identical copies became untenable. The print-base approach offered little guidance in tracing the protected property as it is recast into different formats. This was the case with such forms of non-literal copying as abridgments, compilations and translations. Hence the proponents of literary property realized that for literary property to have any real value protection must extend beyond the right to print and re-print to include such forms of copying which is non-identical in form but somewhat similar in respect to

the content. In short it was felt that owners of literary property need protection as much against copying that is identical as against copying in which the protected subject matter is transformed into different formats.

Confronted with this problem, the proponents of literary property shifted their focus from printed words to the expression of the creator to assert that literary property claimed by the author is not to the ideas and knowledge embodied in the work but to the form of language, the mode of expression, employed to express them. The basis for their claim to expression was to argue that the protected property is both replicable and identifiable. Expression is reproducible and repeatable for its inherent characteristics of plasticity, openness and flexibility. As such it posed no problem to the requirement that the protected property must be reproducible. But when it came to the need of being susceptible to identification the proponents came to argue that the expressive contribution of the author is always unique suggesting that the protected property can be traced as it moves from one format to another. The view that expression is unique to its creator was based on the belief that author always leaves an indelible mark on their works and that this mark is unique and individual. The belief that author always leaves behind his work the traces of himself led the proponents to assert that the protected subject matter can be located, no matter in whatsoever format the work is transformed. Expression was thus assumed to be the identity of literary property. Hence Justice Erle declared in *Jefferys v Boosey*: ". . .the claim is not to ideas, but to the order of words; and that this order has a marked identity and a permanent endurance. . . .The order of each man's words is as singular as his countenance" (qtd. in Drone 8n1).

Most of the objections raised by the opponents were founded on the belief that "the exclusive right claimed for an author is to the ideas and knowledge communicated in the literary composition" (qtd. in Sherman and Bently 15n86). This in fact led the opponents to believe that the exclusive right which the authors were claiming for is too broad and monopolistic and hence "unreasonable and ridiculous." They did not dispute on the basic right of the authors to their entitlement but what they objected was the claim of perpetual common law copyright for authors in their works. In his dissenting opinion in *Millar v. Taylor* Yates J. argued that "[t]he labors of an author have certainly a right to a reward; but it does not from thence follow, that his reward is to be infinite, and never to have an end" (qtd. in Goldstein 48; Drone 36). While rejecting the claim for perpetual common law copyright, he declared that the existence of such right for authors is an encroachment on the natural right of the public: "It is every man's natural right, to follow a lawful employment for the support of himself and his family. Printing and bookselling are lawful employments. And therefore every monopoly that would entrench upon these lawful employments is a strain upon the liberty of the subject" (qtd. in Goldstein 48).

If authors were to hold perpetual copyright, Yates contended, it would stop, not lead, "the advancement and the propagation of literature". Such perpetual rights, he maintained, can bring many evils to the public: it may lead to uncertainty and litigation if the author abandoned his copy; it may lead to the fixing of such an exorbitant price upon a book as to 'lock it up' from the general bulk of mankind, and it may create restraint on trade (Davies par. 4-003).

Given this context, it was a matter of course for the opponents of literary property to argue that granting perpetual monopoly right in ideas and knowledge post publication would seriously undermine the use and circulation of literary works, and therefore the advancement of

learning and knowledge. More specifically they came to oppose the perpetual monopoly on the ground of public benefit rationale. While acknowledging the potential benefit that the grant of perpetual monopoly would give to the authors, they argued that the harm which this monopoly would cause to the larger public interest far exceeds the benefit which it yields to the authors. This was the crucial objection raised by the opponents to the grant of perpetual monopoly in *Donaldson v Beckett.*

The notion that the essence of literary property lies not in the right to ideas and knowledge but to their form of expression has enabled the proponents of literary property to remove much of the confusion facing the law in dealing with intangible property and consequently to avoid various objections arising thereof. By defining and restricting the scope of literary property to the sole expression used by the author, the proponents came to distinguish between those that on publication would be given to the common good and those that the author would retain, even after the publication, to his exclusive right. On publication, they contended, ideas and knowledge embodied in the expression become free for all – they fall into public domain. But what remains, even after the publication of a work, in the private domain, to the exclusive right of the author, is the style or the form of expression. With this line of argument, a book came to be viewed as being both public and private: public in the sense that ideas and knowledge contained in the book are common stock and private in the sense that the form of expression used to communicate these ideas and knowledge is the subject matter of private ownership – a subject to which authors have exclusive right (Sherman and Bently 33-34).

Hence once the work is published there is no property in ideas and knowledge to which an individual can assert ownership. Literary property that belongs exclusively to one is a

property in the ‘expression’, in the ‘order of words’ or cast of language in which thoughts are embodied. Implicit to this division between idea and its expression, between what can and cannot be exclusively owned, is the idea/expression dichotomy which over the course of time developed as a basic rule to copyright.

As right to ideas and knowledge contained in the work would cease on publication of a work, the proponents of literary property were able to rebut the objection that granting perpetual monopoly to the author would stifle the free spread of knowledge and hence damage the public interest. Far from restraining the spread and advancement of knowledge, they argued that perpetual monopoly of literary property would contribute to enrich the stock of knowledge as anyone can freely use the ideas and knowledge contained in the pre-existing works to produce new creations. The crux of the argument was that perpetual monopoly claimed by the author is a monopoly that is restricted only to the form of expression or language used to communicate ideas. The monopoly is in no way a monopoly in ideas, and for this reason it is unreasonable and fallacious to believe that perpetual monopoly would restrict the spread and advancement of knowledge to the detriment of public interest.

3.3 Debate on the Extension of Copyright Duration

Second was the famous debate at the English Parliament on the bill for an 1842 Copyright Act. At issue in the debate was the proposed extension of the length of copyright to the term beyond the life of the author (to the post mortem period of 60 years). Two leading protagonists at opposite ends of the debate were Sergeant Talfourd, a barrister who had led the movement in Parliament in 1837 for the extension of copyright term, and Lord Thomas Babington Macaulay, who was the chief among the opponents to the bill. Talfourd premised his

defence on the argument that author would have little or no inducement to engage in creative works if his children did not receive any benefit from his works. The crux of his argument was that it is a desire to see his children would benefit from his works that motivates the author to engage in creative works. A copyright term exceeding the life of the author is needed to "enable him, . . . to contemplate that he shall leave in his works themselves some legacy to those for whom a nearer, if not a higher, duty requires him to provide, and which shall make 'death less terrible' "(qtd. in Drone 74n2).

At the time Parliament was debating on the bill, the most distinguished English authors of the time - William Wordsworth, Thomas Carlyle, Sir Walter Scott, Archibald Alison, Thomas Campbell, Charles Dickens, Robert Browning, Leigh Hunt, and many others – came up with petitions for the extension of copyright term. This gave more strength to the case for the extension which Talfourd had initiated for the cause of letters. One of the points the advocates of copyright extension made was that the existing law was "curiously adapted to encourage the lightest works, and to leave the noblest unprotected." More specifically, they pointed out the case in which best works of literature requiring years of toil to produce them are left unprotected just when they become the most valuable, thus depriving its author and his children of their property:". . . when . . . his [author's] works assume their place among the classics of his country – your law declares that his works shall become your property, and you requite him by seizing the patrimony of his children" (qtd. in Davies par. 4-005).

Lord Macaulay on his part clung to the view just opposite. He dismissed Talfourd's argument, citing the example of Samuel Johnson:

> . . . Dr Johnson died fifty-years ago. If the law were what my honorable and learned friend wishes to make it, somebody would now have the monopoly of Dr. Johnson's works . . . Now would the knowledge that this copyright would exist in 1841 have been a source of gratification to Johnson? Would it have stimulated his exertions? Would it have once drawn him out of his bed before noon? Would it have once cheered him under a fit of the spleen? Would it have induced him to give us one more allegory, one more life of a poet, one more imitation of Juvenal? I firmly believe not. (qtd. in Drone 81; Goldstein, Copyright, Patent, Trademark 9)

Besides being a politician, Macaulay was a great essayist and historian. Yet, surprisingly, he did not take sides with the proposed extension of copyright term that was ostensibly made in favor of the author. Instead, he pleaded for the other side as he saw more 'harm' than good to the readers in prolonging the monopoly any more than it is absolutely necessary to reward the author: ". . . It is good that authors should be remunerated; and the least exceptionable way of remunerating them is by a monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good" (qtd. in Goldstein, Copyright, Patent, Trademark 9).

Macaulay did not dispute the fundamental rationale for the existence of copyright as a means to secure reward to the author for the promotion of creativity. He was ready to 'submit to the evil', to the evils of monopoly, only to the extent that is 'necessary for the purpose of securing the good'. What he objected to is the extension of this monopoly to the term beyond the life of the author. He justified this objection on the economic reasoning of cost and benefit. In his

argument, the monopoly cost which copyright imposes on the readers must be limited to the extent necessary to reward the authors for their creation. Granting copyright monopoly for a longer period would only add cost to the readers without "any perceptible addition to the bounty":

> The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures; and never let us forget, that a tax on innocent pleasure is a premium on vicious pleasures. I admit, however, the necessity of giving a bounty to geniuses and learning. In order to give such a bounty, I willingly submit even to this severe and burdensome tax. Nay, I am ready to increase the tax, if it can be shown that by so doing I should proportionally increase the bounty. My complaint is that my honourable and learned friend [Talfourd] doubles, triples, quadruples the tax and makes scarcely any perceptible addition to the bounty. (qtd. in Hadfield 29-30)

Macaulay's Parliamentary speech was perhaps one of the earliest pieces of document to hint at the fundamental trade off that is inherent in copyright: the cost of limiting access against the benefit to be obtained from the production of creative works. Since copyright is a monopoly, Macaulay reasoned his arguments on the cost that readers would have to incur from the extension of copyright duration to the term beyond the life of the author. The essence of his argument is that the burden that copyright imposes on the readers must not outweigh the benefit for which the society has conferred monopoly right on the author.

3.4 Author as a Source of Literary Property

The end of literary property debate saw the rise of two important concepts that were to play a critical role in the development of copyright law. One is that literary property as a wholly immaterial property in a text came to be generally recognized as a ‘given’. What led to this recognition was something for which not any element can be specifically attributed. It was perhaps the result of the influence that came to be exerted by the prolonged and extensive discussion to which the subject of literary property had never been subject to before. Sherman and Bently conclude that “the mere fact that literary property was discussed so widely and in so much detail had the effect that its normative status was effectively rendered incontestable” (40). In their view the literary property debate “indirectly confirmed and reinforced” the literary property which was recognized in the 1710 Statute of Anne (*ibid*).

The other, perhaps more important, was the concept of authorship that came to represent the author as the sole creator and therefore the ultimate source of property in the literary text. Until the Renaissance text generally circulated without the name of its author affixed to it because it was not possible to attribute the authorship except in certain cases (Dreier 53). The literary writings from the Middle Ages down through the Renaissance were governed by the scholarship of the ancient texts. They acquired, as Woodmansee has noted, their value and authority from their affiliation with the texts that preceded them (On the Author Effect 17). Writing of this period was therefore more of a collective and collaborative nature where the writers are free to appropriate the works of their predecessors. The invention of printing press and the subsequent rise of the concept of book as a property during the sixteenth century led over time to the recognition by the stationers of authorship in works (Feather 191). As a rule the stationers would pay the author certain amount before they acquire the rights in copies and this

indicates the recognition of authorship long before the legal recognition of authorship. Towards the late seventeenth century Locke's desert theory justifying reward for the author in the form of copyright further came to reinforce the authorship in the literary text.

Authorship first entered the domain of law in 1710 when the Statute of Anne established the author as the first proprietor of his work. In so doing, it enabled the author to appear in a "novel role of plaintiff" and to defend his literary property by bringing action against any unauthorized appropriation of his work (Rose 215). Prior to the enactment of the Statute, the author had no place in court "except as a criminal defendant charged with libel, blasphemy, or sedition" (Rose 215). This legal empowerment, however, did not much encourage the author to assert their rights as it was deemed not befitting to the prevailing notion of respectable authorship that sustained on the values of the patronage culture of early modern England. Considered as a learned and polite activity, literary writing was then valued by its authors not so much for the profit as for the reward and honor which it brings to them from their worthy patrons. The author then looked not to the public but to "someone eminent in Church or State who would support him directly or appoint him to civil or ecclesiastical office" (Humphreys 4: 55). It is therefore unsurprising to see that much of the literature that was produced under this social framework reflected the taste that was appealing and acceptable to those in the prominent hierarchy of the society. The writings of the early Augustan period are strewn with such instances of literary pieces which are primarily motivated by a desire to serve the interest of their patrons in the hope of winning some lucrative rewards.

In England, during the early eighteenth century educational institutions such as Sunday schools, charitable foundations and circulating libraries started rising and the development of

better transport facilities helped the distribution of books much easier and faster. Over the time the literate population grew in size, and with this the taste for reading spread wide across the country. Sales of literary periodicals and popular sermons and pamphlets surged up to an unprecedented scale indicating the rise of a vibrant new market for literary works. Publishing successes of several new titles, of which the most famous were Pope's translation of *Illiad* and *Odyssey*, brought with it a new prospect for the Augustan authors of earning their living (Humphreys 4: 18). As a result, the authors slowly came to fix their eyes away from their noble patrons on the general public for their sustenance. Much of the Augustan literature, for example, that was written towards the later part of this period illustrates a departure from its preceding trend in which the taste and the prescriptions of the worthy patrons predominated the substance of the text.

A move away from noble patrons to the general public gave the authors greater autonomy in the choice and treatment of their subject matter. A variety of literature thus sprang up. However, in the framework of emerging marketplace development for literary works, what ultimately would prevail is the taste and interest of the general public which must find their articulation in literary works if the authors were to succeed and pursue their professional career. This slowly came to reveal itself as public interest came to determine the circulation of titles and hence the success of its authors. A glaring example of this transformation from traditional patron-oriented system to modern market-based incentive system is the concentration of the Augustan writers on the theme of social aspects of life. The simple reason is that the public preferred it but why they did is not a subject relevant to the point here. The most important development that appeared with the rise of the literary market was the rise of the professional writing which perhaps was not possible under the patron system. The fact that authors could now

make their living professionally by their own books gave them greater economic independence, and this was the most crucial element that slowly helped establish the authorship as a profession.

The eighteenth century was the age of reason. Newton and Locke dominated English thought almost throughout this century. In art and literature as it was in almost every faculty, fact and reason became a dominant cult; fancy and imagination were discarded (Bowra 1). The precept "Follow Nature", meaning in essence the true representation of nature in all its aspects came to inscribe the guiding principle of literary criticism. Social aspects of life dominated the subject matter of literature because for the Augustan the basic quest of literature was the truth of human nature. The familiar and the traditional became their favourite province because they believed "the truth of human nature lies not in idiosyncrasies but in common humanity" (Humphreys 4: 55). If the goal of Augustan literature is to reproduce the tradition in its minutest form all the subtleties and realities of human nature, what is original about it? Augustan criticism believes that originality lies in discovering the truth about nature hitherto unknown to the readers. This means what is original about their writing is in essence the fact or truth which the readers have not realized or experienced before. As such originality was accredited to the ability of unveiling such aspects of human nature that could extend the horizon of true experience "either by revivifying the old or by profitably widening our view of life" (Humphreys 4: 56). Originality thus came to be seen as the essence of literary excellence.

With this notion in literary writing of originality emphasizing on the individuality of its creator, which came to its fruition during the Romantic movement, the role of the individual as a creator or originator of the text came to be more prominently highlighted. In the past, especially during the Middle Ages and the Renaissance, the author was seen as a mere reproducer of

tradition. He was conceived by no means to be an originator of the text because it was believed that the mind of the author merely functions as "a reflector of the external world and the resulting work was itself comparable to a mirror presenting a selected and ordered image of life" (Sherman and Bently 35). The change that occurred during the eighteenth century is that individual or author came to be seen as a source of creation.

Towards the late seventeenth century Locke's desert theory justifying reward for the author in the form of copyright further came to reinforce the authorship in the literary text. However, despite the growing individualization of authorship, the notion of property in the literary text was yet to receive a wider public recognition (Jaszi, The Author Effect II 32). During the literary property debate, for example, the opponents of literary property raised objection in the *Millar* case against the authorship in published work on the ground that ownership in a work cannot attach to something so "fugitive" and "airy" as literary text. To this the proponent of literary property came to defend their position on the natural right theory of which the most eloquent was Lord Mansfield's argument that right in the published work derives from the same source or principle which gave rise to common law right in unpublished works. With this line of argument author came to be seen as the originator of the literary text, and this eventually gave rise to the individualistic model of creation that was to dominate the concept of author in copyright law.

3.5 The Rise of an Individualistic Author: The Romantic Literary Criticism

The rise of the Romantic movement subsequent to the end of literary property debate exerted a profound influence in shaping the modern, individualized concept of authorship in English copyright law. With the Romantics, mind of the author came to be viewed as something

that is endowed with such organic qualities as genius, taste, imagination, and judgment. The exercise of these faculties is what they believed would make the experience or work of the author different from that manifested in the visible world. The Lockean proposition that in perception the mind is wholly passive, a mere recorder of impression from without, came to be rejected by the Romantics for whom the mind is the nexus of different faculties of which the central element is the imagination. For them the imagination was the source of spiritual energy and this led them to believe that it is divine, and that "when they exercise it, they in some way partake of the activity of God" (Bowra 3). Creation, they believed, is essentially an act of the imagination and it is divine because, for them, the imagination is divine.

The ordinary and the familiar were the subject matter of the Romantics because in them they found the symbols of greater realities, the inspiration of their poetry. The world of spirit, an unseen world, was the search of their poetry because in it, they believed, lies the ulterior reality, the truth of the universe. The means they employed to discover this ulterior reality, the highest form of awareness, were something they claimed the poets are gifted with – the visionary power, the special insight into the nature of thing. And through individual manifestation in single concrete examples they conveyed the exalted moments of their numinous experience when they believed they found the mystery of the universe. With their divine power of vision and peculiar insight, the Romantics claimed that in exercising these divine intellectual faculties they partake of the creative activities of God.

This idealistic formulation of the Romantic literary criticism came to bear a tremendous influence in shaping the idea of 'author' in English copyright law during the eighteenth century. It came at the most critical time when both Anglo-American 'copyright' and Continental

‘authors’ rights’ took their modern form. The most prominent figure among the Romantics who played the most powerful and influential role in fixing the Romantic attributes of the idea of authorship in English copyright law was William Wordsworth. For him the creative process was essentially an act of solitary, individual origination and that it must introduce “a new element into the intellectual universe.” It is this idea of creative writing – a solitary, individual act with distinct or identifiable marks of originality – that copyright law came to embrace in determining whether or not a given work is qualified for legal protection. Hence the requirement in the law, that the work must be an original work of authorship to be qualified for protection. This authorship or individual in the copyright law came to be overtly emphasized in the law because creation was taken as essentially a solitary individual origination. As such the rule that copyright initially vests in an individual creator of the work came to be inscribed as the gospel of copyright law.

It is submitted that very notion of creation and creativity presupposes its creator. Creations and creators are two sides of the same coin; they co-exist with each implying the other. In its literal meaning the word ‘creator’ designates either one of two: individual or God. In most cases other than natural phenomena creation originates with an individual. But this creation does not take place in vacuum. Without being much entangled into the philosophical reasoning, it can be safely assumed that the starting point for the origination of creation, or knowledge, to use the modern terminology, is Nature. The farmer, for example, works with the land to grow fruit; however, his labour by itself cannot produce the fruit if there is in the first instance no land to work with; land in this sense is an essential precondition before his labour can assume any value. By the same analogy, man is endowed with brain to think but this brain, his rational faculty, by itself cannot produce any knowledge; it cannot think or function in vacuum without reference to

any object; the brain needs something to think with. This is to say man thinks with the object which he sees in the Nature. And in so thinking he comes to acquire new knowledge which in turn opens new insight to gain further knowledge. Stated simply, the object in the nature charges him to think, which ultimately results in the revelation of new knowledge, so to say, a creation. This is how the creation takes place in the beginning. As this knowledge accumulates over the course of time, it comes to serve as a building block to the generation or creation of successive knowledge. The old stock of knowledge, which in the patent terminology is known by 'prior art', is the foundation on which builds a new knowledge. Knowledge in this way keeps on accumulating generation by generation where each new addition instead of being an entirely a different work adds some value to the works of its predecessors. Without reference to the works of its predecessors, much of the new knowledge would not have come into being.

Knowledge is essentially a dynamic concept. Every work draws on innumerable sources of knowledge which have their origin in different points of history, in different cultural, political, economic, and social context. In doing so, past works are constantly modified which in turn is re-modified in the successive generation in the light of changing political, cultural, and social context. And this process of modification continues *ad infinitum*. The authority or validity of a given knowledge is therefore for the most part relative to the prevailing cultural, political, and social context in which it came into existence. This is to say that the prevalence of a particular mode of thinking at a definite period of history is the matter or function of context. This context changes with time giving rise to new mode of thinking. What is therefore taken as a truth in the given context may not be regarded so over the course of time because its validity, and hence its relevance, is largely determined by the context in which it appeared. Except in few cases, a truth remains truth only in relation to a particular context, and for that reason it is not universal.

Having thus posited that creation is essentially the process of relating and modifying the pre-existing body of knowledge in reference to a particular context, the process which in turn is subject to modification, it is submitted that the Romantic re-conceptualization of creative process is but one such process. It is a cultural construct, a specific mode of thinking arising in a specific context, which grew with the individualization and propertization of ideas. This individualization which took its root during the eighteenth century began with the idea that author is the sole creator of literary text over which he is entitled to property right by virtue of being its creator. In their turn, the Romantics went further ahead to reinforce this individualism by reconceptualizing the creative process as being a solitary and originary activity: solitary because it originates with an individual and originary because it has distinct and indelible marks of originality which makes the works of authorship a unique, inspired work of art. Originality is something they contend only men of genius are gifted with. Poets, and for that matter author in general, are for them men of genius because they are gifted with peculiar insight by which they are able to transcend from the visible to the invisible wherein they claimed lies the eternal truth. This peculiar insight, which they call imagination, is the very source and the *rasion d'etre* of their poetry. And it is this belief in their peculiarly individual gift, in their own self, on which they relied more than anything else, which led them to vigorously pursue and defend their individualistic notion of authorship. Not surprisingly, the Romantics succeeded to inculcate their individualistic attributes of authorship in copyright law because it developed in the context in which contemporary society had come to believe in individual self, and this gave credence to their postulation.

Over the last two centuries since the ascent of Romanticism, creative process has no longer remained the same as the Romantics conceptualized it. This process is showing a remarkable change in the changing context of new school of thought in contemporary literary

criticism questioning the very existence of the so-called author, of new developments in communication technologies, and of modern process by which literary texts are produced and disseminated in the marketplace.

3.6 The Basic Notions of Copyright

The fundamental notions of copyright are encapsulated in the concept of author, work and originality. These notions, as discussed above, are largely derived from the Romantic formulation of authorship and the creative process. These three concepts are so closely interlinked and dependent upon one another that it is not possible to correctly define one without the reference of other. They are in fact all part of the same problem.

3.6.1 The Author

Of utmost significance in the development of modern notion of copyright is the concept of authorship that developed during the nineteenth century. The meaning which this ‘authorship’ came to assume during this century under the influence of the Romantics has played a central role in shaping the copyright and other intellectual property laws to their modern form.

An ‘author,’ in the modern sense, is an individual who is the sole creator of unique ‘works.’ These are works the originality of which warrants their protection under laws of intellectual property known as ‘copyright’ or ‘authors’ rights’ This notion of the “author” is rooted in the Romantic conception of the “author” “as sole creator of unique, inspired works of art, marked in their expression by the singular personalities of their makers” (Jaszi, Authorship and New Technologies 62). With the Romantic poets, the author came to be seen as the originator of the literary text rather than as a mere reproducer of tradition. Originality and inspiration were regarded as the essential attributes of authorship.

This conception of author, however, is in sharp contrast to the status of authors before the end of the eighteenth century when the author was not regarded as having any rights in the product of his labor. Writing was then considered "a mere vehicle of received ideas which were already in the public domain, and, as such a vehicle, it too, by extension or by analogy, was considered part of the public domain" (qtd. in Davies par. 7-002). As late as the 1750s the writers in Germany, for example, were simply treated as one of the numerous craftsmen involved in the production of a book (Woodmansee 15). The contribution of the writer was not viewed different from those of the other participants, such as the papermaker, the type founder, the typesetter and the printer, the proofreader, the publisher, the book binder, who are responsible for the production of the finished book. The idea that the writer is a special participant in the production process and that he is the only one worthy of attention for the 'genius' he possesses was first emphasized by Edward Young in "Conjectures on Original Composition" (Woodmansee 16). This re-conceptualization of the creative process received prominence with William Wordsworth and his contemporaries, the Romantic poets who passionately developed and elaborated the vision of creative genius. To these poets, creative process is essentially a 'solitary originary' activity which means the process ought to be solitary, or individual, and introduce 'a new element into the intellectual universe' (originary). They thus hailed the 'author' as "a solitary secular prophet with privileged access to experience of the numinous and a unique ability to translate that experience for the masses of less gifted consumers"(Jaszi, Authorship and New Technologies 65). Wordsworth, for example, wrote in his Essay, Supplementary to the Preface:

> Of genius the only proof is, the act of doing well what is worthy to be done, and what was never done before: Of genius in the fine arts, the only infallible sign is the widening the sphere of human sensibility, for the delight, honor and benefit of

> human nature. Genius is the introduction of a new element into the intellectual universe: or, if that be not allowed, it is the application of powers to objects on which they had not before been exercised, or the employment of them in such a manner as to produce efforts hitherto unknown. (qtd. in Woodmansee 16)

The Romantic re-conceptualization of creative process had profound influence on the content of English copyright and the concept of the author in the early nineteenth century. Wordsworth was unhappy with the term of protection offered to the authors. By the time Wordsworth began his career Queen Anne's Statute, the first English legislation on copyright enacted in 1709, had been on the books for some eighty years. The Statute provided 14 years of protection against unauthorized printing to the author of a new book. The term could be extended to next 14 years if the author was living by the expiry of the original term. The statute was revised in 1814 extending the duration of protection to 28 years or the life of the author. This extension, however, was not comforting to Wordsworth, for it was still too short in his opinion to be any relief to works of true genius which in his word is obliged to "creat[e] the taste by which [it] is to be enjoyed'"(qtd. in Jaszi and Woodmansee 4). Such "original" writing, according to Wordsworth, "forced its author to look to posterity for recognition while that of the "useful drudges," being "upon a level with the taste and knowledge of the age," turned over rapidly (qtd in Jaszi and Woodmansee 4). The latter could thus recover their investment within the allotted twenty-eight years (*Ibid*).

Wordsworth's obsession with 'solitary origination' and his exalted understanding of the author's calling led him to advocate an expansive view of copyright protection (Jaszi, Authorship and New Technologies 65). For him the object of copyright protection should be to promote the

"good books…the authors of which look beyond the passing day" and such books may not be created if they were not accorded a longer term of protection. During a debate on the bill which proposed a greater term of protection and which was to become a law in 1842 the publishers made their objection on the ground that the bill 'would tend to check the circulation of literature, and by so doing would prove injurious to the public.' To this Wordsworth responded:

> [W]hat we want in these times, and are likely to want still more, is not the circulation of books, but of good books, and above all, the production of works, the authors of which look beyond the passing day, and are desirous of pleasing and instructing future generations. . . . .A conscientious author, who had a family to maintain, and a prospect of descendants, would regard the additional labour bestowed upon any considerable work he might have in hand, in the light of an insurance of money upon his own life for the benefit of his issue. . . . .Deny to him, and you unfeelingly leave a weight upon his spirits, which must deaden his exertions; or you force him to turn his faculties . . . to inferior employments. (qtd. in Jaszi and Woodmansee 5)

Throughout his authorial career, Wordsworth passionately campaigned for the expansion of authors' rights in copyright. His direct intervention in Parliamentary debates over copyright law reform has enabled him to enlist the law in support of his authorial vision. His obsession with 'solitary origination' as the essence of creative process led him to project the author as a foremost source or origin of creation. Hence, during the eighteenth century the author came to be seen as the originator of the literary text rather than as a mere reproducer of tradition. With this re-conceptualization of creative process, the author-as-creator took on a prominent position in

law. As such, the law came to regard the romantic elaboration of such notion as originality, organic form, and the work of art as the expression of unique personality of the artist which constitutes an essential attributes of authorship. This legacy of romanticism which has "propelled the development of the notion of copyright and authors' right in Anglo-American and continental jurisprudence alike" for over the last two centuries is still much alive (Jaszi, Authorship and New Technologies 66). The progressive augmentation of terms of protection and the rejection of formalities as a precondition for protection are glaring examples of the continuing pervasion or influence of this notion. As Jaszi noted:

> Significantly, Wordsworth was not only a campaigner for an expanded appreciation of "authorship" in the abstract. His exalted understanding of the author's calling – and his own self-interest – made him a tireless campaigner for the expansion of authors' rights in copyright. The legislation that resulted, in part, from these efforts may have been too little and too late to please Wordsworth, but his intervention nevertheless help to fix the attributes of the idea of "authorship" in copyright, and to cement an association between that idea and the Romantic conception of the literary genius which persists down to the present. Even today, proposed changes in American laws relating to literary property tend to be rationalized in terms of the interests of the endangered species of "author'-geniuses whose natural habitat is a landscape of freezing garrets, ruined towers, secluded cottages, and cork-lined studies. (Authorship and New Technologies 65-66)

It has now been increasingly argued that this Romantic notion of 'author' handed down from the eighteenth century does not capture the realities of postmodern practices of literary and artistic productions which mostly take place in collective, corporate and collaborative environment. The legal notion of "authorship" thus derived from the Romantic concept conflicts with the contemporary developments in the ways works are created and packaged and disseminated, in particular the rise of the various so-called digital media. Today, the production of literary and artistic works mostly takes place within an employment relationship or upon commission involving a team of individuals and the use of computerized design tool and thus "quite frequently resembles an industrial activity rather than the creativity of a literary or artistic nature" (Drier 56). The author, far from being a solitary originator, is in essence a collaborator who for all his or her genius works under the direction of someone who controls the production. It is perhaps this collaborative aspect about contemporary writing practices of which the postmodern deconstructivists, such as Focault, Barthes and Derrida, have in mind as they came to question the validity of the basic notion underlying the author that he or she is the sole creator as envisaged by the Romantics. Towards the late 1960s appeared Michel Focault's most influential article, "What is an Author?" in which he asked literary critics and historians to question received modern idea of "authorship," and to reimagine its future by re-understanding its past (Jaszi, On The Author Effect 29). This article, it is submitted, marks what may be described as the beginning of postmodern deconstructivism. However, as Martha Woodmansee noted, the copyright law has "yet to be affected by the "critic of authorship" initiated by Focault and carried forward in the rich variety of post-structuralist research that has characterized literary studies during the last two decades" (On The Author Effect I 28). She writes:

> . . . research since the appearance in 1969 of Michel Focault's essay, *What is an Author?*, suggests not only that the author in this modern sense is a relatively recent invention, but that it does not closely reflect contemporary writing practice. Indeed, on inspection, it is not clear that this notion ever coincided closely with the practice of writing. Yet. . . this did not prevent the notion from becoming highly influential in promoting certain kinds of writing at the expense of others in our estimation. It has exerted this influence in no small measure by helping to shape the laws which regulate our writing practices. (On The Author Effect I 28)

As argued by Woodmansee the contemporary realities of writing practices which is increasingly collective, corporate and collaborative do not fully coincide with the basic ideology of copyright that attributes the essence of authorship to original, inspired creative genius. With this ideological framework of discourse in copyright it has become increasingly difficult to locate and identify the author with respect to modern media involving new methods for the creation and production of cultural products. As work is identified with the author it is fairly distinct with the traditional modes of creation such as books. The problem arises when the author is no more 'solitary' and becomes a part of the corporate and collaborative enterprise with the use of modern gadgets to assist in the creation of his work. In such cases the author becomes more and more elusive where it would be difficult to identify the marks of his individuality which is the basis of authorship. As Christopher Meyer puts it:

> All previous technological developments, from movable type through television and reprography, have been methods for the recording and transmitting the audible and visible manifestations of human creativity. An author inscribes the

> words of his choices, whether with a quill pen, a typewriter or a photocomposition machine. A musician plays a chord, or even random notes, according to his proclivities. A painter may spatter colours upon a canvas with no real conception of a final result but that result is dependent upon his choice concerning the manner in which the colours are applied. In each of these examples the resulting work may be copyrighted. When, however, a computer is used during the creation of a work, the nexus between man and work is less clear. (qtd. in Ploman and Hamilton 185-86)

The emerging new categories of works such as those represented by new forms of electronic production and of 'computer-generated,' works may be cited to illustrate the increasing difficulty of imposing the 'solitary, originary' author into the framework in which the modern creation takes place. As regards the electronic production, which involves the contributions of several persons - electronic producer, the producer/director or the person who performs the composition of the final work, – it is difficult to identify these individual contributions "when they become elements of an electronic ensemble which does not even have to exist in traditional physical forms" (Ploman and Hamilton 185). Similar is the case with the works created with the aid or intervention of a computer. To the extent computers are used as tools and selections or choices of various artistic combinations are controlled by the author, a work may be considered as containing human authorship and hence protectable. However, the question of authorship arises in such cases where the computer is programmed to make all the decisions so much so that the resulting work appears to be a computer generated rather than a computer-aided work. For example, there is no problem with the question of authorship when the computer is employed by the author as a tool to execute a form which he has already

preconceived; the problem arises only when it is used to help conceive the work itself and partly design its form. In such cases, as Dreier points out, the crucial question to be taken into consideration for deciding whether a work is protectable or not "then seems to be whether the output of the machine can in any meaningful way be attributed to any one of the numerous input activities involved" (Dreier 57). Thus a work may be considered a computer-generated work when the form of the output has been designed totally by the computer.

The assumption that authorship is inherently a solitary, individual act of creation has other important ramifications which are of special concern to developing countries. It failed to embrace many expressions of traditional cultures which carry immense value to the advance of human knowledge and civilization. These expressions are denied any meaningful protection simply because they have no individual identity. As such, 'folkloric works' which constitute one of the important cultural products of the majority of developing countries have still remained outside the scope of protection, not because they lack commercial value but that they are not traceable to a particular creative individual or individuals to which their authorship can be identified or attributed as the mark of the protectable work.

The basic notion of authorship which the law has inherited from the Romantics is still intact. This is apparent from the recent court decision in the United States. As Woodmansee noted, the law tends to "invoke the Romantic author all the more insistently" despite the fact that postmodern creative productions are becoming more corporate, collective, and collaborative (On The Author Effect I 28). It is basically to these realities to which the deconstructivists concentrated their focus while questioning the philosophical basis of the eighteenth century 'authorship' construct.

To the deconstructivist the author in fact is not a creator but simply an initiator of discursion who exercises an authorial function in the process of creation. Hence the essence of authorship lies not in the solitary originary creation as conceived by the Romantics but in the authorial function of the author as the initiator of the discourse. The essence of the deconstructivist claim, according to Dreier, is that the discourse of the author, far from being the expression of his or her individual inner voice,

> . . . emanates from several contexts which historically, socially and philosophically determine the author's personality. Consequently, the author ceases to be a creator in the conventional meaning of the word; instead, he or she becomes an initiator of discursivity, an "*instaurateur de discursivite*," someone who in turn exercises an influence on, and contributes to, his or her successors' discourse. Thus, the person whom we call an "author" exercises an authorial function rather than being an author. (Drier 52)

Dreier, however, maintains that this authorial function as formulated by the deconstructivist is adequately reflected in respect of traditional modes of creation in which author can have no claim to content other than form. Distinction between what is protectable and unprotectable is governed by this form/content dichotomy which is the fundamental characteristic of copyright law. Although the right in the protected work is attributed to its natural person, as is the case in the author's right system, he maintains that it by no means denies that a creator draws on preexisting material. "Indeed why ideas and unprotected elements must remain free is that their monopolization would otherwise hinder further creation" (Drier 52).

3.6.2 The Work

As noted earlier the notions of author, work and originality are inextricably linked with one another. They overlap one with the other because each is defined in reference to the other. Accordingly, the notion of work is closely interwoven with the notion of originality which in turn is embedded in the notion of authorship. In fact, they interact, as Michel Vivant pointed out, in a close dialectical relationship (70). The best example of this relationship is found in the German law (1965) in which each notion is defined in reference to the other in its logical order. The author, for example, is defined by reference to the work: "the person who creates the work" (Article 7). What is work? This in turn is defined in reference to original creation: "Works . . . include only personal intellectual creations" (Article 2). What then constitute "personal intellectual creations?" The answer that it is the individuality or the creative personality of the author leads back to the concept of author (Drier 52). It is this personality of the author in relation to his or her works, not the author as such, that is protected: "Copyright shall protect the author with respect to his intellectual and personal relations to his work" (Article 11).

The object of copyright is the protection of "works" in literary and artistic domain – hence the expression "literary and artistic works". The notion of work as applied in this expression is different from what it literally means. In its broader sense "work" in English means "the product of the operation or labour of a person or other agents; the thing made, or things made collectively" (Sterling 166). In narrower sense it means "a literary or musical composition, viewed in relation to its author or composer" (*ibid*). It is the second meaning, intellectual effort, or creative contribution, which is embedded in the notion of work. The expression "literary and artistic work" therefore implies the notion of "intellectual creation" or "the presence of some element of creativity". The work is the result of some creative activity which to be eligible for

copyright protection must have taken place in the literary and artistic domain (Ricketson par. 6.3).

The Berne Convention defines the "expression literary and artistic works" to include "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, ..." The expression "literary work" in copyright is understood as meaning "all sorts of original written works, be they of a belletristic, scientific, technical or merely practical character, irrespective of their value or purpose" (World Intellectual Property Organization, WIPO Glossary 149). Likewise, a general reference to scientific work in copyright laws is understood as meaning "all kinds of works other than artistic or fictional, such as technical writings, reference books, popular scientific writings, or practical guides"(World Intellectual Property Organization, WIPO Glossary 148). Scientific work, however, does not refer to such things as scientific discoveries, inventions, research work or scientific undertakings. Such things do not fall within the scope of copyright as it is the basic principle of copyright that ideas are not protectable, only the form in which they are expressed (Ricketson par. 6.5). Protection of these things is the subject matter of patent. An artistic work refers to a creation intended to appeal to the aesthetic sense of the person perceiving it. Works belonging to this category include paintings, drawings, sculptures, engravings, and also such works like works of architecture and photographic works. In most legislation, musical works and work of applied art are also included in this category.

Copyright can thus exist only in specified categories of works as defined by the national law or international convention. For copyright to exist there must first be a work, a personal intellectual creation, and secondly, the work must belong to one of the specified categories. As a

rule, protection is accorded to original literary and artistic works. However, almost all national laws on copyright contain a descriptions or enumeration of a list of works to be regarded as original literary and artistic works. The purpose of enumeration, as it appears, is to cover the principal categories of works which are recognized in the majority of national copyright laws. Enumeration, however, is not an exhaustive list of works as the works enlisted merely serves as example of the subject matter which falls within the scope of the expression "literary and artistic works." It suggests that there may be other kinds of work, not enumerated, which are still eligible for protection. However, as Ricketson shows, enumeration has a significant bearing in the context of international protection, since it is the only sure guarantee of protection under the international convention, such as the Berne (Ricketson par.6.8).

The works enlisted in the Berne Convention by way of enumeration includes not only such works as books, pamphlets and other writings but also lectures, addresses, sermons. Also included in the list are 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.

Copyright is not concerned with the quality or merit of intellectual creation. They are irrelevant for the purposes of protection. So is the purpose for which a work is created. "The work is protected irrespective of the quality thereof and also when it has very little in common

with literature, art or science, such as purely technical guides, engineering drawings or computer programs for accounting purposes" (World Intellectual Property Organization, WIPO Glossary 268). As such, the works as mundane as street directories, football pool coupons and mathematical tables have also been enlisted in the protected categories of works in the legislation of some countries.

The protection extended by the copyright does not extend to the ideas embodied in the work, but only to the form in which those ideas are expressed. This applies to factual information and subjects where no writer can have a monopoly over these things, which can be freely used in their works by other authors. This perhaps is the reason for excluding such items as laws and official decisions, news of the day and press information from the scope of copyright protection. Mental outputs not developed in a specific form of expression, such as mere ideas or methods, are not considered works for copyright purposes.

The mode or form in which the work is expressed is irrelevant for protection. Hence, whether the material substance in which the work is embodied is book or CD or magnetic tape or diskette have no relevance. However, national laws as regards the fixation of work in the tangible medium vary across countries. In countries with common law jurisdiction fixation in tangible medium is a prerequisite to protection. Article 3(2) of the Copyright, Designs, and Patents Act 1988 of the United Kingdom, for example, states that "Copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded in writing or otherwise; . . . . " Similarly, the copyright law of the United States, for example, requires fixation in some tangible medium for the work to be eligible for protection. This is clearly set out in Section 102 which reads: "(a) Copyright protection subsists . . . in original works of authorship fixed in any tangible

medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."

The Berne Convention on the other hand does not stipulate such requirement as a condition precedent to protection. Oral works, such as lectures, addresses, sermons, which only exist transiently at the moment of their performance qualify for protection. However, as many countries, especially those based on British system, require fixation of work as a precondition to protection, the Berne Convention adopted a compromise solution whereby the requirement of fixation was left to the discretion of the member countries.

With the advance in technology emerged new methods of creation and production that do not fully conform with the description of the classical categories of work, such as books. As for example, when sound recording and broadcasting came onto the scene, some countries responded to it as being a work of authorship and thus without any hesitation granted the same rights as those granted to authors. But for the countries adhering to authors' right system, such activities do not constitute the work of authorship because they do not involve creation which is the basis of protection. They are simply a fixation of work. Fixing a work or disseminating a work are certainly two activities of great importance. However, such activities cannot be identified with creation because they are technical activities not activities involving creation, not activities that bring about the emergence of the work. "Pressing a record, for example, is a technical activity; it is certainly related to musical creation, but clearly not to be identified with it" (Vivant 77).

However, these countries regarded such activities worthy of protection since they entail skill and investment and thus preferred to protect such activities under a notion of "neighbouring

rights" – a term originating in the French expression '*droits voisins*' – to indicate rights that are neighbouring to, but not part of , authors' rights . It is as Spanish law puts it "another right of intellectual property," another right which cannot but be "other" (Vivant 77). The protection afforded by neighbouring rights is relatively weaker to those protected by the copyright or author's right because it is primarily designed to adapt to such kinds of works which fail to satisfy the core criteria of works protected by the latter. They lack the creativity necessary to be protected by copyright or author's right. Where such productions, like snapshots, editions, technical plans, do not contain creative input, they are protected under some laws by related rights (Nimmer and Geller 1: 35).

Michel Vivant has distinguished between two kinds of neighbouring rights. The first category involves the activity where the creation does not take place – a right that is (only) neighbouring because creation does not take place. Sound recordings, broadcasting programs and similar other promoters of creation belong to this category. The second involves the activity where creation is not recognized – a right that is (only) neighbouring because creation is not recognized. To this category belong the performing artists or simply performers. The rights they enjoy are said to be in their "interpretation" or "performance" which are closer to the creative act, for they imprint their personality, often very strongly, on the play or composition that they are performing. The reason why these performers were not accorded the same status as that of the authors is that performance does not constitute work in its strict sense: it does not bring about the existence of new work although the performers imprint their personality to give a distinct interpretation or meaning to the play or composition which they perform. As Michel Vivant puts it: "The situation would seem to be that, while their status as "creation auxiliaries" requires that they be accorded a dignity similar to that of the author and rights similar to authors' rights, they

cannot, by any stretch of the imagination, be regarded as anything other than auxiliaries, cannot, to put it bluntly, be considered creators" (77).

It is noted that the basis of protection in both the common law system and the authors' right system is author. As for example, it is clearly stated in the British copyright law (1988) that the fundamental basis for the protection of work is the author: only productions that have an author are protected as works. Likewise, to take the example of the author's right system, the German law (1965) maintains that author is the person who creates the work, and works include only personal intellectual creations. But when it comes to the protection of sound recordings and broadcasting, the two systems take different position. The common law or copyright countries accords the same level of protection as it was accorded to the authors while the civil law or author's right countries accords the protection inferior to author's rights, that is neighbouring rights. These variations are in essence the reflection of the difference in approach between the two systems to the notions of author and work.

The author in the common law system is defined to include a physical person or legal entity. Hence, the legal entities such as the government, university, or company can own the copyright in works produced on commission or in the course of employment. Copyright in such works, unless otherwise stipulated in the contract between the employee and the employer, is deemed to be transferred by the operation of law to the employer or company from the moment they are created. With respect to "work", the common law system holds it not as an imprint of personality but as the product of skill and investment. As such, it does not attach so much importance to the moral rights or personality of the author in relation to his work. As a matter of fact what it basically protects is the skill and investment, not the personality of the author

attached to his work. This perhaps is the reason why it has been much easier for the copyright countries to assimilate the emerging new ways of production and dissemination, such as sound recordings and broadcasting organization, within the ambit of the system.

In contrast, the continental author's right system holds a rigid view and demands the author to be strictly a physical person: only the flesh-and-blood creators can be the author. This in fact is the reason that even in the employment situation, such as work produced in the course of employment or on commission, initial copyright, as opposed to the common law system, under the author's right system, is vested in the employees who by contract assign all or part of their rights to the employer. Work is regarded as the creation of the mind imprinted with the personality of its author. The author is the work and the work is identified with the author because it is the reflection of his personality. And it is the personality of the author, not the author as such, that is protected in the work. Originality is consubstantial with the work. As author's right system is much obsessed with the idea of personality, it found it extremely difficult to accommodate the rights of sound recordings and broadcasting organization within its system and thus had to invent the neighbouring right.

3.6.3 The Originality

With the Romantic conception of author as the creator of unique, inspired works of art in the mid-nineteenth century, the works protected by copyright came to be viewed as those "of high aesthetic creation, of individual intellectual activity of a unique and treasurable quality" (Cornish, The Notions of Work 83). However, copyright could no longer retain this image over the course of time as works containing little, if any, creative ingenuity came under the fold of protection. The question which then arose is to what extent the protection offered to the works of

high aesthetic excellence of enduring value should be diluted to cover all that is everyday, uninspired and mundane - all that are far from being the marks of 'unique and treasurable quality'. In other words, what should be the threshold level of creativity for the works to merit protection? Since it is difficult to develop criteria for evaluating and distinguishing between works on the basis of their quality, copyright laws in all countries have been "obliged to cover everything above a minimum qualifying level; and that qualifying level has been defined in terms of 'originality' " (Cornish, The Notions of Work 83). With this concept of originality there is no difference between the sublime and the mundane: a timetable index, trade catalogues, street directories, football fixture lists are as much a original works of authorship as *Iliad* or *Ulysses*.

The objects of copyright protection are literary and artistic works. But it is only the "original" works to which protection is accorded. This means that any work belonging to the literary and artistic domain does not automatically qualify for protection unless it is original. It is just one requirement that the works to be qualified for protection must fall within the literary and artistic domain. Originality is what distinguishes protectable from non-protectable works. It is an essential attribute of copyright in a literary and artistic creation. This is the rule that has been universally recognized (Drone 198).

Originality in its strict sense would mean that author is the sole creator of all that he has expressed in his composition. If this is so, very few, if any, intellectual productions can claim to be original. As such, this certainly is not the meaning to which originality is attached for copyright clearly recognizes that ideas, thoughts, and sentiments are essential elements for the production of creative works. It does not restrict the use of these elements from the pre-existing works. Hence, the basic principle of copyright that ideas are not protectable. The primary

concern of copyright is then the form of expression in which ideas are embodied. It is this expression which must be original for the work to be eligible for protection. If the right owners have any monopoly, it is in the form of their expression, not in the ideas which it embodies (Stewart par. 1.08). Expression is what constitutes the core of copyright protection and this protection is subject to originality. Originality for the purpose of copyright signifies the presence of creative and individualized expression which should originate from the author. It is not that thoughts and ideas which constitute the essence of literary works should be new and original. This is clearly explained in *Emerson v. Davies* where Justice Story puts:

> In truth, in literature, in science and in art . . .there are, and can be, few, if any things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and most necessarily borrow, and use much which was well known and used before. No man creates a new language for himself, at least if he be a wise man, in writing a book. He contents himself with the use of language already known and used and understood by others. No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. The thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection. If no book could be the subject of copyright which was not new and original in the elements of which it is composed, there could be no ground for any copyright in modern times, and we should be obliged to ascend very high, even in an antiquity, to find a work entitled to such eminence.

> Virgil borrowed much from Homer; Bacon drew from earlier as well as contemporary minds; Coke exhausted all the known learning of his profession; and even Shakespeare and Milton, so justly and proudly our boast, as the brightest originals, would be found to have gathered much from the abundant stores of current knowledge and classical studies in their days. What is La Place's great work, but the combination of the processes and discoveries of the great mathematicians before his day, with his own extraordinary genius? What are all modern law books, but new combinations and arrangements of old materials, in which the skill and judgment of the author in the selection and exposition and accurate use of those materials, constitute the basis of his reputation, as well as of his copyright? Blsckstone's Commentaries and Kent's Commentaries are but splendid examples of the merit and value of such achievements. (qtd. in Drone 198n2)

For works to be original they must be intellectual creation. What it all means by intellectual creation is that work should originate with the author: it should not be a copy of the pre-existing works. Originality does not mean novelty as it does imply in patent where ideas embodied in the invention must be new and non-obvious. In copyright, originality applies to form, not to ideas. As such, if originality requires any novelty, it is the form of expression, not the ideas which it expresses, that must be original to the author and not copied from another's work. As Vivant puts it, ". . . originality . . .is no more than novelty in the world of form" (72).

Copyright does not look into the quality of originality – merit and purpose for which the work is created is outside the scope of copyright. All that requires by originality is that it must be

an independent creation of the author. In an English case, *University of London Press v. University Tutorial Press*, Peterson J. said:

> The word “original” does not . . .mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of “literary work”, with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author. (qtd. in Cornish, Cases and Materials 239)

What is original from the point of view of copyright is that the work is independently created, not copied from another work. The true test of originality is therefore whether the work is the result of independent creation or of copying. Two works, for example, may have a close resemblance which in all likelihood would suggest the strong evidence of copying. But, if it could be established that the work is independently created, or that the resemblance between the two works is fortuitous, its similarity to other work is then immaterial. This is in sharp contrast to patent where the law does not recognize any independent devising of the same idea to which patent is granted and thus forbids any use of the patented idea or invention irrespective of whether it is independently devised or imitated. Copyright therefore presupposes the existence of two valid copyrights on two substantially similar works if they were created independently of each other. The U.S Supreme Court decision in *Feist Publications v. Rural Telephone Service*, for example, puts it: “Originality does not signify novelty; work may be original even though it

closely resembles other works so long as the similarity is fortuitous, not the result of copying" (qtd. in Gorman and Ginsburg 119). Such cases of close resemblance are, however, rare.

Originality may be distinguished from creativity: the former requires the independent effort by the author while the latter demands the exercise of a minimal level of artistic or literary ingenuity. According to Nimmer, "[A] work may be entirely the product of the claimant's independent efforts, and hence original, but may nevertheless be denied protection as a work of art if it is completely lacking in any modicum of creativity." The recent U.S. Supreme Court's holding in *Feist Publications v. Rural Telephone Service* supports this distinction: "Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity" (qtd. in Gorman and Ginsburg 119).

The work would be considered original if it is creative and individual. However minimal such creativity and individuality does not matter - a modicum of creativity would suffice: "[T]he requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be" (qtd. in Gorman and Ginsburg 119).

Abridgements, translations, adaptations, and digests are original works of authorship by virtue of the labor and skill expended by the person making such works. These works are known by derivative work in that the authors in such works start with a pre-existing work and by an additional intellectual input of their own create a new work (Stewart par. 4.04). An anthology which is a compilation of old materials gathered from published works and other common sources is an original production within the meaning of law. Here the test of originality is

applied, not to the materials, but to their selection, arrangement, and combination from the pre-existing works. It is labor, skill and judgment, exercised in selecting, arranging, and combining old materials in a new and useful form that creates a title to ownership. This is true of encyclopaedias and anthologies which are intellectual creations by reason of the selection and arrangements of their contents.

Maps or charts merely represents boundaries, places, and distances which are fixed by nature or man. But for the purpose of copyright it is an original work if its production is the result of independent labor. So are directory and catalogue: the former is but a list of the names and residences of citizens whereas the latter is often a mere arrangement of the titles of books or other things. A compilation of names and telephone numbers in a telephone directory is held copyrightable in most countries on the ground that a minimal expenditure of time, money, and labor in compiling the data is sufficient to make the resultant compilation eligible for copyright protection (Stewart par.4.04). However, after the U.S. Supreme Court holding in *Feist Publications v. Rural Telephone Service* it was held that a mere time, money and labor expended by the author in compiling the data is not sufficient to the entitlement of copyright unless it contains some minimal level of creativiy. Thus, in accordance with this holding a mere collection of well-known facts may be deemed original if it contains a modicum of creativity in their selection and arrangement apart from the labor expended to their collection.

The notion of originality differs between the two great legal systems of copyright: the Continental authors' right system, or the *dorit d'auteur* system, and the common law copyright system. Originality as applied in the Continental system means that the work should express something of the author's own character. It should bear the stamp of his personality. In short, it

should have something of the author's own individuality and character about it. As noted earlier, the author in the Continental system is not recognized as such unless he has imprinted his personality on a creation. A person who simply provides an idea cannot be an author. It thus follows that it is the personality of the author which is imprinted on a creation is what constitutes originality. Hence, the German definition of a work: "Work is a personal intellectual creation". What constitutes the creative personality, or originality for that matter, is a link between the author and the work. This link is described in reference to umbilical cord to emphasize the inalienable relationship between the author and the work. Thus originality from the point of view of the Continental system is essentially a subjective notion which as Vivant puts: ". . . the originality of a Chagall is that it is just that, a Chagall. And if merit does not normally have anything to do with protection, a mediocre work will be protected insofar as it is the reflection of its author (who is himself perhaps nothing more than mediocre)" (The Notion of Work 71).

The common law copyright system on the other hand holds the work to be original if sufficient "labour, skill and judgment" or "labor, skill and capital" or "selection, judgment and experience" has been expended by the author in creating the work. It is this "labor, skill and judgment" to which protection is accorded. What it is that constitutes "labor, skill and judgment" is that "what is not copied" or that what is "done beyond the mere copying of an existing source or sources" (Cornish, The Notions of Work 83; Intellectual Property: Patents par.10-10). The notion of originality differs in its interpretation between the English and American law within the common law system. In English law, originality is often viewed as a mere requirement that the work in question has been generated by the author, rather than being copied from a pre-existing source. It is not creativity, but "labor, skill and judgment" which are regarded an essential attributes of originality. The work may utterly lack creativity but it is entitled to protection if it

involves labor, skill and judgment. Hence, the works as mundane as telephone listings and railway timetables are accorded protection under the theory of labor, skill and judgment. The United States, on the other hand, maintains that skill, labour and judgment are not sufficient and that it is the creative spark which qualifies a work for the protection of copyright. This requirement of creativity as an essential requisite of originality was clearly articulated in *Feist Publications Inc. v. Rural Telephone Service* where the Supreme Court ruled that Rural's white pages directory of its subscribers could not be protected as an original work of authorship. In so holding, the Court argued:

> The selection, coordination, and arrangement or Rural's white pages do not satisfy the minimum constitutional standards for copyright protection . . . . Rural's white pages are entirely typical. Persons desiring telephone service in Rural's service area fill out an application and Rural issues them a telephone number. In preparing its white pages, Rural simply takes the data provided by its subscribers and lists it alphabetically by surname. The end product is a garden-variety white paged directory, devoid of even the slightest trace of creativity.
>
> Rural's selection of listings could not be more obvious: it publishes the most basic information – name, town, and telephone number – about each person who applies to it for telephone service. This is "selection" of a sort, but it lacks the modicum of creativity necessary to transform mere selection into copyrightable expression. Rural expended sufficient effort to make the white pages directory useful, but insufficient creativity to make it original.
>
> . . .

> Nor can Rural claim originality in its coordination and arrangement of facts. The white pages do nothing more than list Rural's subscribers in alphabetical order. This arrangement may, technically speaking, owe its origin to Rural;...But there is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course . . .
>
> We conclude that the names, towns, and telephone numbers copied by Feist were not original to Rural and therefore were not protected by the copyright in Rural's combined white and yellow pages directory. As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity. Rural's white pages, limited to basic subscriber information and arranged alphabetically, fall short of the mark. As a statutory matter, 17 U.S.C. § 101 does not afford protection from copying to a collection of facts that are selected, coordinated, and arranged in a way that utterly lacks originality . . . . (qtd. in Gorman and Ginsburg 127-28)

Feist decision brought the American system closer to the originality requirement in authors' rights systems which maintain greater emphasis on the intellectual act of creation for the works to be qualified for protection. As opposed to the authors' rights, the common law approach, particularly the British and the kindred laws, is regarded as being more pragmatic and practical with greater inclination to the protection of investment. As such, in common law countries moral rights do not occupy prominent place. They are often viewed as being obstacle to the exploitation of the works, particularly in relation to the musical works which command a

huge market. Copyright laws in these countries do not provide express provision for moral rights. They are instead covered, to some extent, by other legal regimes such as the laws of unfair competition and defamation. In contrast, moral rights are of great importance in the countries with civil law, or author's right system, and constitute an integral part of their copyright laws. These rights, in its purest form as adopted in France or Germany, are tied to the person of the creator from the moment the work is created (Gautier 27).

3.7 The Death of the Author: The Post-Modern Literary Criticism

Literary criticism during the second-half of the twentieth century took a new drift with the rise of deconstructivist criticism of which French writers and philosophers such as Michel Focault, Jacques Derrida and Roland Barthes were its founders. In sharp contrast to the conventional mode of literary criticism in which 'author' dominated the interpretation of the text, deconstructivist criticism was poised to destroy this conventional belief in the rhetoric of author as the sole originator of literary text. This new philosophy in literary criticism was in essence a direct attack on the very notion of authorship founded on the Romantic characterization of creative process.

Stated broadly, it is a philosophical and philological concept of understanding or interpretation of literary texts. It is recalled that during the early modern period texts were not seen as a thing as they were during the late eighteenth century. They were rather thought as something which was done, as an action or performance, rather than as a thing (Sherman and Bently 47-50). Since texts were represented more as action or communication than as a thing, the idea of owning a text, as Rose pointed out, as property was then incomprehensible during this period (213). A book, for example, is seen more as action or performance embodied in a material

form rather than as an object in its own right. Curiously, somewhat similar to this way of thinking, the deconstructivist came to view the text as a discourse, something like performance or action, which serves as a building block to the discourses of its successors in the chain of creative process. In this process, the person who initiates the discourse simply functions, what Focault calls, an "authorial function" without being an author in the sense to which it is now attributed. It is, to put it in his own words, "a matter of depriving the subject (or its substitute) of its role as originator, and of analyzing the subject as a variable and complex function of discourse" (Focault 186). While dismissing the authorial supremacy as a myth, 'a culmination of capitalist ideology' (Barthes 147) or 'an ideological product' (Focault 186), the deconstructivist came to focus on language and the reader as the critical component of literary writing. Text, they believed, originates with language, for it is purely language, not the author, which speaks. Barthes, for example, asserts that "to write is, through a prerequisite impersonality . . ., to reach that point where only language acts, 'performs', and not 'me'" (147). They assumed that texts have no determinate meaning, for it is the readers who produce the meaning – each reader is therefore free to give the text his own meaning. On the contrary, the presence of author constraints the "proliferation of meaning" because ". . . he [author] is a certain fundamental principle by which, in our culture, one limits, excludes, and chooses; in short, by which one impedes the free circulation, the free manipulation, the free composition, decomposition and recomposition of fiction" (Focault 186).

As did Focault, Barthes concludes that "to give a text an Author is to impose a limit on that text, to furnish it with a final signified" (149). This led him to proclaim that "the birth of the reader must be at the cost of the death of the author" (150).

While the Romantics accorded a privileged position to the authors the postmodern literary criticism came to upend this position by accentuating the readers' role as the critical element in the existence of work. In contrast to the Romantic belief that only author can express the eternal truth because they are gifted with divine power to pierce through the visible to the invisible, the deconstructivist denounced the validity of such claim maintaining that there is nothing original about the text which is only a "tissue of quotations drawn from the innumerable centres of culture"(Barthes 149). With this view of originality, the postmodernist rejected the Romantic assertion that the author is the sole creator of inspired work of art. They believed that the discourse of the author originates from several contexts which historically, socially, and philosophically determine the author's personality. This is the reason they argue that instead of being the originator or creator of the text, the author exercises only an 'authorial function' rather than being an author. He is only the initiator of what Focault calls 'discursivity'. The person who is designated as author is in fact someone who in turn exercises an influence on, and contributes to, his or her successors' discourses (Dreier, Authorship and New Technologies 55). As such, they gave foremost prominence to the role that readers play in the creative process. For them the work comes into existence only when it is received by the readers. In other words, the texts receive their meaning as they come to interact with the readers. Barthes, for example, writes: "The reader is the space on which all the quotations that make up a writing are inscribed without any of them being lost; a text's unity lies not in its origin but in its destination. Yet this destination cannot any longer be personal: the reader is without history, biography, psychology; he is simply that someone who holds together in a single field all the traces by which the written text is constituted" (150).

In a similar vain Focault postulates: “In writing, the point is not to manifest or exalt the act of writing, nor is it to pin a subject within language; it is rather a question of creating a space into which the writing subject constantly disappears” (175).

At a time when assault on the author is beginning to mount from the very quarter that had established them two centuries ago as the supreme being, the rise of interactive mode of communication system has further raised doubt on the traditional view of author genius. Rapid development and changes have taken place in communication technologies during the second-half of the twentieth century. The rise of soft, electronic technologies, such as computer, digitization, and networking, has come to exert a profound influence in the prevailing creative conditions. New media which are amazingly fast in delivery and versatile in function are replacing old, traditional media. As development in media is relentless it is difficult to speculate about the particular form of media that will come to govern the mode of communication over the course of time. However, as indicated by the prevailing trend, this mode of communication is clearly shifting from material to immaterial form, from patchwork to network in which the most dynamic feature is its interactivity and interconnectivity. The implication of this feature in the creative process is that it allowed for the first time the space to the readers to directly interact with the content, the message, or the text. Computer and the Internet are example of this form of communication. With the use of these media readers have now remained no longer a passive recipient, as was the case with analog media; instead, they have now become very much a part of the creative process itself: a theme the post-structuralists literary criticism in varying way has come to emphasize. As text travels on the Internet readers across the world can access and work on it as they would prefer, and in doing so they may modify or transform it to create their own work, a derivative work, of which they are the author in its conventional meaning. Every reader

who thus comes to intervene the text is the author. In this vast multitude of possibilities for the succession of derivative creations, each derivative work in turn leading to other derivations (derivations of derivation), where then one should look for the work of original authorship in this interactive mode of communication system. What appears to be important with such communication system is not who said or wrote but it is rather what is said. In short, it is the verb, not the subject, which is important. Should authorship construction of romanticism remain almost the same with cosmetic modification or should it be radically changed to cope with new realities? – the issue which is the subject of intense debate at the turn of this new millennium.

3.8 Modern Creative Process: Collective, Collaborative and Corporate

After the Romantic movement of the eighteenth century which lasted close to mid-nineteenth century there has been a sea change in media technologies and other socio-economic conditions. The advent of soft, electronic media and the subsequent rise of media enterprises to exploit these new media in an ever growing market for cultural goods have brought about a radical change in the very process by which creative activities are undertaken in modern society. Far from being solitary and originary as conceived by the Romantics, creative activities in the modern society are more akin to the form of what Dreier calls "an industrial activity than the creativity of a literary or artistic nature" (Authorship and New Technologies 56).

Today they mostly take place in the form of project involving teams of authors from different fields of specialization where the contribution of each individual merges into a single composite whole making it very difficult, if not impossible, to trace or isolate the identity of each contributors from that whole. This in fact is the case with most forms of modern creative undertaking, be it in the field of culture, or any other field of research and development such as

engineering, biology, or genetic science, where creative inputs of hundreds of people are employed or exploited to conceive, develop and produce the final product. Copyright legalists would say that such contributions are governed by the employment relationship or by contract for commission where the contributors in return for the agreed remuneration are deemed to have transferred their claim on the ownership of their respective intellectual contribution to the person or legal entity that has initiated such undertaking in the first instance. The thrust of their argument is to create a legal myth that authors' identity is still intact no matter in whatsoever way the works are created. But the point here is that those who have contributed in such undertaking do not retain their individual identity for their respective contribution that goes into the making of the product. What remains is only the corporate identity, the identity of the product to which an entrepreneur has the property right over its market exploitation by reason of investment, the risk incurred to produce and bring the product in the marketplace. Instances of such cases are the way new products are developed and produced in the industrial firms. By far, the modern production of cultural goods is no less different. Today, most writings that take place in university, research, business, government, industry, the sciences and social sciences are basically collective involving teams of people possessing different professional skill. They are mostly produced within the scope of employment or upon commission by the entrepreneur under the contractual agreement. Rather than being a unique, inspired work of solitary origination, they have tended to become more polyvocal and mechanical involving an extensive use of computer design tools. The solitary, individual gifted author in 'flesh and blood' is now very much fading away in the very process in which modern creation takes place. More collective and collaborative than solitary, individual, more use of modern creative tools, such as computer, than

genius, more corporate than living and breathing author have now become the characteristics and reality of how cultural goods are produced and exploited in the modern context.

With these changes in creative condition, it has now been argued that the concept of Romantic 'author' which informs to-date the copyright law of both the Anglo-American and the Continental system does not reflect the contemporary writing practices. Since the publication in 1969 of Michel Focault's seminal article, "What is an author?", a number of contemporary scholars have come to focus on the subject of 'authorship'. A recent scholarship on the subject, as demonstrated by the contribution of Martha Woodmansee and Peter Jaszi, has raised question about the rationale of invoking the Romantic legacy of 'solitary originary' author in the evolving new condition where creative process is mostly collective and collaborative (Woodmansee, The Author Effect I 24-28; Jaszi, The Author Effect II. 32n13). In their articles, Jaszi and Woodmansee have documented a collection of examples and evidences to emphasize the fact that collaborative practice of writing persisted from the Middle Ages down through the Renaissance. The Romantic reconceptualization of this creative activity, they contend, through the projection of the author as a literary genius, the sole creator of unique, inspired work of art and the eventual incorporation of this individualized concept of authorship into copyright law came to impede the free flow of information which characterized the collective and collaborative process of creation. Apart from the writings of Johnson which, as Woodmansee has demonstrated, were mostly collaborative (The Author Effect, 17-24), Jaszi informs that this collaborative writing practice persisted among the very writers who were most active and vibrant in articulating the Romantic vision of creativity (Authorship and New Technologies 67). The case in point is the legend of Wordsworth's collaboration with Coleridge.

Law's persistent insistence on the presence of a Romantic 'author' for the work to be qualified for protection has created enormous difficulty in its dealing with modern forms of creations. Example may be cited of multimedia works. In most cases multimedia works are not a creation of solitary individual origination that can be attributed to a single author. They are most often a collective and collaborative works involving in its production the great variety of creative inputs. Today, most multimedia works that are intended for commercial use are produced by an entrepreneur. They involve a project in which the contributions or services of several individuals possessing skill and expertise in different fields are pooled under a contract agreement and the entrepreneur who organizes and finances the project is a legal person who generally holds *ab initio* the ownership of copyright in the works thus produced.

Aside from the question of individual authorship, multimedia works posed a problem to the traditional categorization of works which are essentially media-specific. Since multimedia is a composite work embodying texts, graphics, sounds, and images, it blurs the traditional distinction between different kinds of works. As such, it does not fit into the description of any specific traditional categories of works. Multimedia works generally build on the large reservoir of a variety of pre-existing works, both protected and unprotected. They virtually rely on computer programs for their development and operation. By the use of digital technology relevant materials in different mediums – texts, graphics, sounds, images, and videos – are combined and compiled. The materials thus compiled are processed into a definite shape and structure by the use of the appropriate software that administers the media. The resultant work is thus a coalescence of different copyrights blurring the traditional distinction between different categories of works. The problem that has arisen with such blurring is that different genre of works in the copyright system is not subject to one and the same treatment. They differ in respect

to the duration and applicable exceptions. Photographic works, for example, do not enjoy the same length of protection as do novels. So is the case between the cinematographic works and works of applied arts.

Despite the use of varied and multiple resources to form its content, it appears that multimedia works by the very nature of their composition constitute a distinct work inasmuch as it is a new way of exploiting the protected works in which the key element is computer software and digitization of constituent materials. What then should be its status in the legal categorization of works – literary, scientific, artistic or cinematographic? Or should it be treated as a distinct category of work in its own right? The law is yet unclear about the way how it should be treated. National laws across the countries vary in their perception and approach.

In the face of evolving new forms of work and the subsequent pressure for their protection, the Romantic 'author' has of late been subject to most liberal interpretation in an attempt to bring such works within the rubric of copyright protection. The most glaring example is the protection of computer programs and databases. Curiously, however, this is not the case when it comes to the protection of some of the oldest forms of cultural expression that have their abode (origination) mostly in developing countries. The works of 'folklore' are one such instance which, according to Jaszi, are denied protection under domestic and international law not because they lack form and value but that they simply do not fit into the framework of solitary originary 'authorship' in the person of one or more discrete and identifiable 'author' (Jaszi, Authorship and New Technologies 67). So is the case with various other forms of traditional expressions, such as paintings and carvings, songs and melodies, designs and potteries. While these expressions of traditional culture constitute a significant cultural assets of the developing

countries, their economic exploitation to the benefit of the community who have developed and preserved them has been persistently denied by invoking the Romantic 'authorship' construct. Due to absence of any mechanisms for their protection, these cultural assets of the developing countries have remained subject to free appropriation despite their increasing commercial exploitation in the West. It is indeed strange to see that the object as removed from literature as computer program was placed in the category of 'literary work' whereas the subject as close to literature as folkloric expressions was not accorded the same status to which they rightly belong. In other words, thing that has nothing to do with literature came to be treated as a literary work but the thing which is very much a part of the literature was not considered as such simply because folkloric expressions originate with the community to which individual authorship cannot be attributed. Since they have no author they were treated as the collective property of humanity. This perhaps is the reason for the argument that copyright is not the right choice for the protection of the works of folklore. Rules governing the copyright do not fit into the context where the work in question is collective in origin without identifiable author(s) (Ficsor, Guide to the Copyright par. BC-15.11). Most new creations of folklore, it was argued, are mere variations or transformations of original expressions of folklore that existed long before the arrival of copyright. They developed within the given cultural context by way of adaptations and modifications of original expressions over the course of time. By the prevailing copyright norm, such materials come into the description of public domain (Ricketson, The Berne Convention 313).

If a legal entity or a person other than its creator can be the author of the work by virtue of investment to produce it (a work for hire doctrine, for example), there is no reason why a respective municipal agency (local government) which spends a large sum of money in the

preservation and promotion of local cultural heritage cannot assume as a juridical person the ownership of any folkloric works that originate with the community belonging to its jurisdiction by virtue of the same principle that entitles the employer or producer to the ownership of copyright.

Article 15(4) of the Berne Convention which provides a somewhat limited protection to the folklore creations appears to be premised on this consideration. Protection offered by this provision is based on the presumption that works of folklore are unpublished works of an unknown author who is a national of a given Union country. This means protection is available subject to the fulfillment of three conditions: (i) it must be an unpublished work, (ii) it must be a work by an unknown author, and (iii) the unknown author must be a national of a given Union country. Given these conditions, any competent authority designated by the national legislation may represent the author in the same way as do publishers of an anonymous work. The term 'folklore' does not appear anywhere in the text for it was difficult to define it precisely. Instead, the text employs the expression 'works of an unknown author' to be treated as a special category of anonymous work. Accordingly, Article 7(3) that sets the terms of protection for anonymous works applies *mutatis mutandis* in relation to the works of folklore.

Given the collective and collaborative nature of modern forms of creation with their creative use of technology and the prominent role of the entrepreneurs in their production and exploitation, it appears that the Romantic authorship construct needs reformulation in a way that would reflect the modern creative process. Such reformulation must also take into account the ways and means by which the traditional forms of cultural expression can be brought within its purview. One of the current issues facing the international copyright community is how

traditional cultural expressions can be protected within the existing copyright paradigm. A more conservative view placing greater weight on traditional authorship construct would certainly favor authors' interest. But this would restrict the protection needed for the production and exploitation of modern forms of creations. Such a view would neither allow any possibility for extending protection to the works of folklore. Conversely, a more relaxed view would tend to offer more protection to the interest of the entrepreneurs. But then copyright might turn into an instrument for protecting the sole interest of the commodifiers of intellectual property with little to protect the interest of the authors. This being the case the opponents of extending copyright protection to the works of folklore have argued for the creation of a separate regime, such as a *sui generis* system, to take care of the issues. Furthermore, Ricketson points out that the protection of folklore creations involves issues "that go beyond the usual concerns of the Berne Convention, involving important questions of a social, cultural and religious kind" (The Berne Convention 313).

3.9 From Creativity to the Protection of Media

As law took on a modern form it came to focus more on the object than the mental labour or creativity embodied in it. Unlike during the early modern period in which the law was obsessed with the enquiry into the amount of mental labour used to create the work, the modern law that developed during the course of the nineteenth century moved away from such enquiry to focus on the object in its own right (Sherman and Bently 4). In other words, the law turned from metaphysical reasoning about the nature and the essence of intellectual property which characterized the early modern law to think of the work as a closed, stable, unitary entity, not as a separate entity detached from the material object (*ibid*). While thinking of object in this way, what then came to be valued is not the worth of mental labour but the impact or contribution

which the object had on the economy, on the progress of art and the sciences (*ibid*). A book, for example, came to be valued in its own right irrespective of any amount of mental labour that went into its creation.

As object became the primary concern of law, works came to be defined and classified in reference to the media in which they were inscribed. What then became more important is not the thought conveyed but the media or the carrier through which intellectual property was circulated and consumed. In short, value was attached to the conveyance rather than to the thought conveyed. Thus for all practical reasons media came to assume the most prominent role and their protection became the central concern of copyright law.

During the early years of development in the communication it was not possible to convey in the same medium sounds, texts and visuals. Different platforms were needed for different modes of communication. This means different genre of works, according to their modes of communication, needed specific media for their material representation: print for texts and photos, vinyl records for sounds, celluloid film for moving image, and so on. With this genre-specific 'platform', books, for example, came to designate literary works, phonograms musical works, and so on.

Rapid development in the technology of communication during the nineteenth and twentieth centuries saw the arrival of a platoon of new forms of media that enabled the exploitation of the cultural goods containing intellectual property in a variety of ways that were not possible before. The upshot of this development was the rise of cultural industries in which media enterprises came to play a prominent role in the market exploitation of various form of new media. Since this exploitation of media which requires a huge amount of money is not

possible without their adequate legal protection guaranteeing a reasonable share of return on investment, copyright became more inclined to the protection of media which in essence means the protection of investment. However, in the face of multiple uses to which a work of authorship can be exploited in the new media, such as digital media, protecting the interest of creator as well as copyright owners has become a major challenge to copyright. The advent of every new development in the media technology has thus tended to bring with it greater pressure to bear on copyright.

CHAPTER FOUR

Development of Authorship and Copyright in Nepal

4.1 Status of Authors in Nepal

The 1965 copyright act came at a time when the conditions precedent for the development and promotion of creative works were virtually lacking. Indigenous production of cultural goods such as books and music, the two most important categories of copyrightable works, was almost negligible and their market severely limited for copyright compliance to be of any incentive for the publishers. This in fact largely explains why publishers in Nepal remained indifferent to copyright. The academic community on their part did not take the violation of copyright as being a serious crime, for the concept of property in intangible goods was alien to Nepalese culture. The work was deemed to fall into public domain once the author exercises his or her moral right to publish it. As such, instances of plagiarism, and unauthorized reproduction and adaptation of work for various purposes have become common in Nepalese literary scene. In many instances, the publishers did not even feel it expedient to mention the author's name in the book. The infrastructural and other institutional supports and facilities needed for the development and promotion of creative works were virtually lacking. Few of those that existed were poorly equipped and their impact was hence negligible. Sound broadcasting began in Nepal from 1951 with short wave broadcast by Radio Nepal from Kathmandu. Later in 1969, a medium wave broadcast was added to the transmission (The Radio Nepal 1). Possession of radio or a transistor radio was then a

luxury marking a symbol of social status. Television was a distant phenomenon – a name then unheard of. There was no recording industry as such. Recordings of music and songs were made at the studios in the neighbouring Indian city of Kalkata. Magnetic tape reproduction equipment like audio cassettes were then a rare object found in a few houses of wealthy aristocratic families. Film industry was yet to make its appearance. Printing industry was passing through the early stages of its development. The off-set lithography printing technology was introduced only towards the mid-seventies. Printings of books were mostly carried out in Varanasi (now Banaras), the adjacent border city of India. Book industry was almost predominated by foreign imports and national authorship had not yet taken its root. All that existed in the name of publishing industry were a handful of government and private publishing houses which operated on a small scale. Publications of newspapers, periodicals, and magazines were few and scarce, and much of the domestic need for such publications was filled up by foreign imports.

The condition of the Nepali writers was then terribly pathetic. It was all misery and hardships for these writers could hardly live on their works unless they have income to feed their family from other sources. Royalties if it was paid at all were negligible. On top of it writers had no organization of their own that would represent their voices and bring pressure to bear on the government to take steps in their favor. In the absence of such organization to protect and promote their interest, they were left exposed to an unfair and unscrupulous exploitation by the publishers without any prospect of earning reasonable royalties from the cultivation of their harvests. Robbed of their royalties these writers had no other means than to look to their wealthy patrons or ruling elites to earn

their bread and butter. Slowly, as they became more and more conscious of the injustice done to them by depriving them of their rewards, they came to protest it calling for some protection against the unauthorized appropriation of their works. By this time several writers have joined in raising voices for the protection of their works against their unauthorized and uncompensated use. The most prominent among them was the legendary poet, Laxmi Prasad Devkota. In his essay "The Necessity of a Strongly Organised Writers Union for Nepal", originally written in English, Devkota bemoans the pitiable condition of the Nepali writers calling them "the most unfortunate of human tribes" because they are not "paid their royalties, they are denied copyright and there are no laws in their favour" (Devkota 5). These voices as it were did not go unheard. Few years later the government responded to it by enacting the first copyright law in 1965. Devkota had not lived to see this day; he died in 1959.

The publishers, as it appears, did not join their hands with the writers; they remained largely indifferent to the writers' call for legal protection of their rights – there is no record whatsoever of the involvement of publishers in bringing pressure to bear on the government for the enactment of copyright law. It may therefore be presumed that initiatives for copyright law in Nepal solely came from the writers. This perhaps may be the reason why the first registrar of copyright was appointed from the person who is none other than himself a writer – one of the most prolific writers of the time, Bhim Nidhi Tiwari. This development of copyright is in sharp contrast to the case in England where the first copyright act, the Queen Anne's Statute, was promulgated in response to the intense pressure from the publishers (the stationers) and writers had no role in it. By

contrast, it was mainly the pressure from the writers that led to the enactment of first copyright law in Nepal; the publishers on their part remained silent without any involvement

Copyright was then something the value and function of which were little known to authors and publishers as well. If it is known at all, it is simply known as a right of the authors to receive remuneration (royalties) from the publication and sales of the copies thereof. The public or users were virtually unaware of it. Despite the fact that several publications during the period before and after the appearance of the 1965 act carried with them copyright notices inside their cover page yet it is difficult to assume that they truly mean it for copyright owners, both publishers as well as writers, hardly sought to assert their rights against any unauthorized use or reproduction of their works. A mere fact that a book has an affixation of copyright notice, no matter whether one would respect it or not, was all to which the use of copyright was confined. There is no record of any complaints being lodged with the Registrar of Copyright against copyright infringement during the course of 25 years since the enactment of the 1965 act. Since copyright was never asserted, the law did not come into use and thus remained obscure for almost three decades till it was amended in 1997. The law was then as good as being dead and over the course of this time neither authors nor users appear to be aware about the existence of law. As such, quite contrary to the argument that the law has never been implemented by the State the truth is that the use of the law has never been made and when the occasion to use it arose the provisions in the law were found not only obsolete but also unclear and inadequate for it to be implemented.

The most curious aspect about the development of copyright in Nepal is that writers who cried for copyright protection have never stood themselves to see it enforced to their interest. It is not simply because, as has often been pointed out, rules to implement the law were lacking. The most revealing question is why it had to wait as long as 25 years for these rules to appear. The explanation for this is perhaps simple: writers had never sought to invoke the law and bring the culprit to justice. And neither did publishers. Had it not been so and writers sought to assert their legal rights in defending their property, the government would have long been obliged to create necessary mechanism to expedite the implementation of the law. But, as it appears, the writers did not move to take advantage of the privileges granted to them by the law. Instead, they resigned themselves to see their works being freely exploited doing little or nothing to defend them. In short, the stakeholders hardly tried to exercise their rights and as law did not come into use, no one cared about it – the law sank into oblivion.

The fundamental question that arises at this point is why these writers who by this time are awakened to the sense of injustice done to them by depriving them of their rewards and who themselves were largely instrumental to get the law enacted remained virtually indifferent to assert the very privileges which they themselves had asked for and which is now guaranteed by the law. The explanation for this passivity on the part of writers lies partly in the way the property in literary creations was viewed and treated by the society, and partly in the prevailing market condition for books.

First, the idea of property in literary works was almost alien to the Nepalese society that grew on the tradition of free exchange and sharing of knowledge. This tradition is the outgrowth of how authorship was taken up during its formative years, particularly during the time when printed words began to appear in Nepal. Publishing in the modern sense began with the establishment of printing press towards the mid-1850, which was then in the control of the members of the Rana family that ruled the country since 1846 to 1950. Initially confined mainly to the publication of religious texts, publishing activities slowly expanded to cover language and literature as the number of printing presses came to be added over the course of time. By 1893 the first printing press was established in the private sector that began publishing some literary works. At this time those who could read and write could be counted on the finger. Unsurprisingly, those having some skill in writing were difficult to find and to publish them was still more risky because anything deemed to be seditious, libelous, and blasphemous would bring to its authors and publishers a harsh punishment.

Elementary reading materials needed to literate and educate the people were almost non-existent. Standardization of vernacular grammar and vocabularies had not begun. Writing was then seen as a generous service to the development of language and literature. Literary works were taken not as an object to be traded in the marketplace but as a generous contribution of its authors to the benefit of the society. That it takes time and labour to create them and that without any reasonable compensation to their creators to support their family, authors may not be able to engage in writing and produce the works that society expects from them received least consideration. Given this attitude, the

notion that creation of literary works gives rise to the entitlement of its creator in his or her creation by virtue of labour and time expended on its creation was something that was inconceivable. Since it was believed that writing is essentially an activity devoted to the service of language and literature, authorship had nothing to do with the profit. They were not supposed to sell their works for a profit because the very idea of offering the work for sale did not fit into the prevailing belief that regards writing as being purely an act of selfless devotion to the service of language and literature. It was thus beneath their dignity for authors to seek price for their creation.

This romantic elaboration of writing as an act of selfless devotion to the cause of language and literature is largely responsible for creating the myth that did not motivate the authors even to assert their elementary right –the right to ask a fee for their contribution. Hence writers did not expect any profit from their contribution. If they expected any benefit at all it is the hope of winning the reward or honor from their patrons which could be either '*bakshis*' in cash or kind or an appointment to government position. Since this reward was the only source of income that could get them out of hunger and starvation, most writers devoted their writing to please the taste and convictions of their wealthy patrons, the elite of the Rana autocracy, in the hope of securing a decent living.

Second, market for books had not come into existence. Dissemination, rather than profit, was the primary objective of publishing which was then mainly in the hands of the public sector. As such, the government had a virtual control over the materials to be

published. Publishing as a commercial activity in the modern sense was out of the scene until 1950 when one or two private houses started publishing a handful of titles on various subjects, mostly those related to text books and literary and religious works. As market for books had not developed and their commercial exploitation had not begun, authors were yet to realize the potential value of their works other than the reward and honor which their publications would bring to them from their patrons. They would thus consider it a favor if they only could get their works published. Once the work gets published, the author has no control over it; anyone can freely appropriate it as one chooses – the work becomes almost like a gift to the public. But such unauthorized appropriations were never seriously questioned by the authors as they still had no idea that they have an inviolable property in their creation and that they have a right to be benefited from the use of their works. This is simply because authors had not yet come to see the prospect of earning profit from the sale of the copies of their works. As it appears from the prevailing custom, authorship was acknowledged as a creator of the work but the fact that author has a property interest in his creation was generally ignored. As such, the author has control over his work so long as it remains unpublished but the moment it comes into circulation, it is treated as being a common property of which every member of the society is free to use it without requiring any authorization from its author. The author thus loses his control to the discretion of the public who may or may not wish to pay for the use of his works. This is to say that the author has a property in his work until it is published but the moment he elects to put his work into circulation he loses this property to the sole benefit of the public.

In the absence of any protest from the authors and any law explicitly recognizing the authors' elementary right to benefit from their works, society came to view the works of authorship as belonging to common property for the use of which no consent whatsoever of its creator is required. Over the course of time this belief came to shape the perception of the people who then began to suspect that author has any claim, other then being its creator, on his work once it comes into circulation. As free and unfettered use of literary works never came to be seriously challenged or objected by its stakeholders, particularly authors and publishers, it came to be seen as an acceptable norm in the academics and businesses without anyone bothering to question or pause whether such uses are legally justifiable or morally defensible. Free uses then grew into a tradition. What would be the consequence of such uncompensated use in the promotion of national authorship and national culture was then a subject none gave any thought to it.

The context changed over the next 30 years since the Act came into existence in 1965. Market for indigenous music, film and books started developing with the growth in the level of overall economic and social indicators. Democracy was reinstated in 1990, and with it Nepal went for market economy liberalizing and privatizing several key sectors. The subsequent years saw, among other things, a dramatic surge in the music, film, and broadcasting sector. Towards the mid-1990s musical and audio-visual works became the object of widespread piracy. Cheap pirated copies of local films and audio music cassettes started flooding into the market to an alarming extent displacing the original products. It is at this moment of the history of copyright in Nepal, copyright owners started looking for copyright protection. But, to their utter disappointment, they

found the punishment provided in the law for the infringement of copyright too negligible to be any deterrent to the infringers. A group of artistes which included the most popular artistes of the day, Madan Krishna and Haribansha Acharya, started bringing pressure to bear on the government for the immediate amendment to the existing provision of punishment to quell the raising piracy of their works. Pressure from industry and artistes, especially those in the music sector, mounted up for revision in the existing law demanding effective penal actions to discourage piracy. This ultimately led to the first amendment of the Act in 1997. The need for copyright compliance thus arose, over twenty-five year since the first copyright act was enacted!

In 1997, under the initiative of some artistes and a music publisher, a copyright society was established primarily with the objective of building pressure on the government for upgrading and implementing the copyright law. The society intensified its pressure through different channels for the protection of domestic music and film market against the surging infiltration of pirated copies. Coincidentally, at about the same time, Nepal was pushing hard to obtain the membership of the WTO for which compliance to the TRIPS Agreement which embodies a substantial portion of the Berne text was obligatory. Need for updating the copyright law to meet the minimum international standard was thus felt by the government in anticipation of accession to the WTO. As a matter of fact, these two factors were largely instrumental to the subsequent moves of the government that ultimately culminated in the enactment of the new copyright law in August 2002 replacing the old 1965 law.

4.2 The Early Copyright

Nepal made its beginning with copyright as late as 1935/1936, well over a quarter and two centuries after the enactment of the Statute of Anne in England, the first legislation on copyright anywhere in the world. The law appeared in the Nepalese code, known as *Muluki Ain*, during the last quarter of the hundred and four years of autocratic rule by Rana families in Nepal. It contained a single paragraph under section 31(ka) of the Miscellaneous Chapter (*Adalko*) in Part V of the code.

The history of copyright preceding the promulgation of this law remained largely obscure as nothing much about the development that occurred during this period could be traced out in the absence of documentary evidences. Important documents on copyright preserved with the Ministry of Education were reported being lost in the 1973 fire that gutted the Singha Durbar Central Secretariat building. Few writers have here and there accidentally mentioned the instances of unauthorized edition or reproduction of popular books with only cosmetic change in title and contents without even acknowledging the authorship of the book. In his article, "*Chiranjibi Kalam*", Kamal Dixit, for example, tells us the plight of a book, entitled "*Bele Patro*" written by Chiranjibi Sharma Paudyal towards the last decade of the 19th century (Dixit, *Yesto Pani* 15-16). A book on the subject of astrology, it became very popular with the readers to draw the attention of the publishers. Several publishers soon published this book with different title and a slight alteration in the content without mentioning the author's name anywhere in the book. Not to say anything about these unscrupulous publishers, even the original publisher of the book did not see it expedient to imprint the author's name.

In yet another revealing article, entitled "*Kallai Bhannay*? *Sabai Ustai*!" (To Whom to Complain? All Being Same!), Dixit has enlisted some half a dozen of titles copies of which have been reproduced by several publishers with a different title and some insignificant alteration in the contents without any approval from their original authors (Dixit, *Yesto Pani* 95-106). Barring few such fragmentary illustrations, literature documenting the events that led to the adoption of the law in 1935/36 does not appear to exist. What then could have prompted the Rana regime to promulgate this law was therefore a matter more of a conjecture than of facts. However, drawing on the fragmentary information as available in those articles, it can be safely presumed that the law might have been framed in response to the appeal by some authors or publishers for the need to regulate the ever growing anarchy in the publishing of books. Unless the fact shows otherwise, there is nothing more to be added to it.

Copyright did not exist in Nepal in any form whatsoever before it was introduced in 1935/36. Censorship, however, prevailed long before it. As early as 1914 then *Rana* Prime Minister Chandra Shumsher granted his consent to establish *Gorkha Bhasa Prakashini Samiti* (Gorkha Language Publication Committee) – the first such committee to be founded in Nepal with a pious objective of promoting the creation and publication of Nepali language literature and text books. But it did not take long for the government to realize the threat if the *Samiti* was allowed to publish the books at its sole discretion without any control over its publications. No sooner than a year after its founding a separate scrutiny board was constituted in 1915 whereby the *Samiti* was required to obtain approval from it for the publication of any book. It was in fact a beginning of

direct censorship by the government. A few years later in April 1920 occurred a classic case then known by the name of *Makai Parva* (the Maize Episode) (Paudyal 99-100). The case involved a booklet entitled '*Makaiko Kheti*' (Cultivation of Maize) written immediately after the First World War presumably by Krishnalall Adhikary. As its title suggests, the booklet was all about the use of new techniques in the cultivation of maize for higher yield. This perhaps was the first book ever written by a Nepali author on the subject of agriculture (Dixit, *Aitihasik* 110). Surprisingly, the book was held to be seditious to constitute state offence. Every single copy of the booklet was seized to be burnt and all those involved in its publication were condemned to a punishment. A jail term of six years, and another three years, if the last copy of the book could not be produced, was handed down to its author. Krishnalall died serving his jail term.

The charge of state offence, as it appears, was leveled for two reasons: first, somewhere in the preface of the book it was thus stated: we give much importance to foreign breed dog than to our own domestic breed dog. But when it comes to our protection from thieves and brigands it is the domestic breed dog that comes to use, not the foreign breed dog that sleeps on the cushion (B. Sharma 355); and second, there was a reference to 'red-headed' and 'black-headed' pest, the terms which the author used to describe two kinds of insects destroying the maize crop (Dixit,.*Aitihasik* 101). Those terms were somehow maintained by the accuser as being directed, not towards the pest in its literal sense, but towards the Rana Prime Minister and *Mukhtiyar* for no other apparent reason than for the fact that the then Prime Minister Chandra Shumsher would wear the

red cap and Bhim Shumsher, the next in succession, the black cap as parts of their respective official attire (N. Sharma 78).

The Maize incident was significant in that it further spread popular consciousness "especially among the educated youths coming out of Tri-Chandra College [the first undergraduate college in Kathmandu founded in 1918 by the Rana Prime Minister Chandra Shumsher] and many Indian universities" (Khanal, Literature 126). This, according to Khanal, "made the authorities even more suspicious, leading to a game of hide-and-seek between them and the growing number of awakened youths as well as the issues they raised" (*ibid*).

In November 1927, seven years after the Maize Episode, the law regulating the press (censorship law) was promulgated. It appeared under section 56 of the miscellaneous chapter (*Adalko*) in Part V of the 1927 edition of the *Mulki Ain*. The law, as it appears, was simply the codification of what already existed before in the form of order requiring approval from government officials and the *Samiti* for publication of any materials. Eight years later in 1935/1936, this section appeared under section 33 to which was added sub-section 33(ka) which deals with copyright.

Copyright thus came as a part of the press regulation aimed at controlling the print media. The law explicitly lays it down that only new books and articles sanctioned for publication by the *Nepali Bhasa Prakashini Samiti* were eligible for copyright registration. Since the eligibility for copyright protection was subject to approval by the government, it is apparent that the law was not brought with any intention of encouraging

the learning or promoting the literature needed for the advancement of the society. It was in fact ostensibly intended as a reward for those supporting and endorsing the views of the regime. Section 33(ka), for example, when read in conjunction with section 33 appears merely the extension of the latter which fully subordinates copyright protection to censorship. The emphasis on censorship is unmistakable, for it is again reiterated in the sentence beginning sub-section 33(ka).

The law was simply a protection against unauthorized reproduction, and extended no further than books and articles. It provided protection for the period of ten years or for the life time of the author. After the death of the author, the work would fall into public domain unless 'rightful person' gets it registered in his or her name 'for a limited period'. Thus a post mortem protection was provided subject to registration of a work by a 'rightful owner'. But it is not clear who it is by the 'rightful owner'. For example, is anyone authorized by the author free to get the work registered after the death of its author? Or is it only the heirs of the author who are entitled to do so? Nor the term of such protection was specified.

As to its enforcement, the law did not contain any regulation other than punishment which included confiscation of unlawfully printed books or articles. A penal redress in the form of fines for unlawful reproduction and sales of the copies was also provided. In the absence of any provision for its implementation, it is however doubtful whether the law has ever come into force. Evidences of its application in any manner are not documented in any literature. The significance of this law in the history of Nepalese

copyright is therefore limited to being a mere beginning in the field of copyright, albeit not in the sense of copyright proper.

4.3 Copyright Act, 1965

With the end of democratic regime that survived for a brief period of ten years, from 1950 to 1960, Nepal once again fell into autocratic regime under the direct rule of the king. It lasted for 30 years till it was overthrown by the people's revolution in 1990. During this period publishing activities almost came to be confined in the hands of the state-owned organizations. The new regime restricted the publication of materials that were considered to be seditious and blasphemous. In 1965 the first copyright act was enacted. Surprisingly, as one would expect, none of the articles in the act imposed conditions subjecting the availability of copyright to censorship. But then there were other laws outside copyright through which printed materials were regulated.

The 1965 Act contained 27 articles divided into seven chapters. It includes the following main features:

- Recognition of author as a primary beneficiary of copyright.

- Term of protection lasting for a life and a post mortem period of fifty years.

- Registration required for obtaining copyright protection.

- Copyright exemptions for a wide range of usage to include private study, research, criticism, review, teaching, press reporting and court proceeding.

- Provision of civil redress and penal sanctions against the infringement of copyright. The former includes recovery of damages and the latter, both fines and imprisonment.

- Compulsory licenses for reproduction, translation, and public exhibition.

The Act came into force on April 13, 1966 by a notification of the Ministry of Education published in the Nepal Gazette on April 4, 1966. The appointment of the Registrar was also announced in the same notification. The history of next 24 years before the Copyright Rules was formulated in 1989 remained largely obscure as no evidences of any measure to implement the law appear to be recorded in any document. Most of the preliminary documents recording the events of the initial years of copyright were reported to have been destroyed in the 1973 fire. It is therefore only after the Copyright Rules 1989 came into effect from December 4, 1989 that the Ministry of Education took some fresh initiatives towards the implementation of the law. Administration of copyright was then entrusted to the Nepal National Library (NNL) and its chief designated the Registrar of copyright. In the meantime, a copyright committee to advise the government and resolve the issues facing the copyright was set up on February 12, 1990 representing members from different related organizations.

These initiatives, however a beginning, made some visible impact on the registration of copyright which, by the end of 1997, stood 189 titles for books, 204 for audio cassettes, 5 for audio-visual films and 9 for painting. During this period only three complaints were lodged with the Registrar against copyright violation: one relates to

book, one to film and the other to audio cassette. Whether the Registrar took any action to resolve these cases is not recorded in the document available at the Registrar's office.

Mere legislation of copyright act does not invariably imply the availability of copyright protection unless the right owners are able to invoke the law and bring legal actions against those infringing their rights. This necessarily presupposes the existence of adequate mechanism for the administration of law whereby right owners without incurring much cost, time and effort can enforce their rights guaranteed by the law. Regrettably, the 1965 Copyright Act of Nepal, the first legislation that survived 47 years until it was replaced by the 2002 Copyright Act, did not give much thought to the ingredients needed for its enforcement. Not to mention such provisions as collecting society, copyright contract, related-rights, the law did not even clearly define author's rights. Chapter 2, for example, is entitled "Owners of Copyright and their Rights" but it does not mention anywhere what rights, economic and moral, are granted to the authors, apart from right to the ownership of copyright in Section 3. Neither did the law anywhere define the term 'copyright'. Surprisingly enough, one has to look into the chapter dealing with the licensing of copyright to discover the rights conferred by the law on the authors. The law appears to have recognized a couple of rights such as reproduction, translation, and communication to the public by virtue of such provisions as the 'grant of license by copyright holder' (Section 10), 'license for translation' (Section 12), and 'license for public exhibition' (Section 13).

The worst part of the law, that which is largely responsible for its failure to come into operation, was the absence of express provision defining the jurisdiction in relation to the administration of civil remedies and penal actions. Section 17 of the Act, for example, prescribes punishment containing both civil remedies and penal sanctions for the infringement of copyright but nowhere for its execution did the law entrust power and responsibility to any official, or the Registrar, or the court. So was the case in relation to Section 18 which lays down punishment for the importation of infringing copies. This ultimately resulted into a denial by the Registrar of taking any civil or penal action against the infringers on the grounds of being outside his jurisdiction. The court on the other hand would, for the same reason of not being explicitly specified in the law, refuse to entertain the copyright infringement cases.

It is noted that the law in respect of "punishment for acting in contravention of the license" (Section 19); "act leading to false entry" (Section 20); and "other punishment" (Section 21) clearly designated the Registrar with an authority to punish. Likewise, it empowered the Registrar "similar to that of a court of law" to: (a) summon any person and make inquiry after administering oath; (b) compel search of any document and direct the submission thereof; and (c) requisition copies of any document or record from any officer or court (Section 23). It further provided for appeal to His Majesty's Government within 35 days against any decision or order of the Registrar (Section 22).

The first amendment, 1997 came into force with a notification published in the Nepal Gazette on December 17, 1997. The amendment did not bring about any

substantial changes in the existing provision. It was in fact simply a patch work designed with an objective of addressing the issues of immediate concern which related to coverage and punishment. Two new items, namely, computer programs and research works, were added to the list of coverage in the literary works. The punishment for the infringement of copyright, hitherto negligible, was made more severe with a fine up to Rs.10000 (approx. US $ 1400), or six months imprisonment, or both. The punishment is doubled for second conviction. Section 15 dealing with "restriction on unauthorized publication" was redefined whereby any of the following acts without the authorization from the right owners would constitute infringement of copyright: (a) making the reproduction by way of trade or financial gain; (b) making the imitation by way of advertisement or publicity; (c) making the adaptation; and (d) making the false representation for financial gain.

Subsequent to the first amendment the copyright law came to be tested for the first time before the Registrar of Copyright. Unfortunately, this amendment did not bring about any apparent changes in the status quo of the copyright enforcement situation, for it did nothing to remove the confusion over the issue of jurisdiction in relation to Section 17. Since the law had never come into usage, much of the defects and deficiencies thus went undetected through the passage of the amendment. As the law came with stiff penalty to assure protection, copyright owners began filing the case with the Registrar of Copyright who then was supposed to act as the court of first instance for adjudicating the cases involving copyright. But, unfortunately it was only to discover that provisions in the law were unclear and inadequate for the Registrar to act on it. The defects in the Act

became at once apparent as it contains no express provision empowering either the court or the Registrar to punish the infringers as provided by section 17. Hence, to the utter disappointment of right owners, the Act could not come into operation due to the dispute over the issue of jurisdiction. The Registrar declined to take action on the grounds of having no jurisdiction while the court for the same reason would refuse to entertain the cases related to copyright. Confusion prevailed until the Patan Appellate Court in *Foundation Books v. Registrar of the Nepal National Librar*y declared that where there is no clear provision in the law defining the jurisdiction, the District Court, by virtue of section 7 of the Judiciary Administration Act, 1991 shall have the jurisdiction thereto. The Supreme Court sustained the decision. The two major cases that exposed the law to its defects in its implementation were *The Music Nepal v. Dil Bahadur Lama* and *The Foundation Books v. The Registrar of the Nepal National Library*.

4.3.1 The Music Nepal v. Dil Bahadur Lama

The first case to be filed with the Registrar after the amendment was *Music Nepal (P.) Ltd. v. Dil Bahdur Lama*. This perhaps was also the first copyright case to reach the Supreme Court. In August 1998, the plaintiff, Music Nepal, lodged a complaint with the Valley Crime Investigation Department (VCID) of the Police demanding action against those illegally involved in producing and selling counterfeited copies of music audio cassettes in which the plaintiff owns the copyright. In course of police action the defendant, Dil Bahadur Lama, was caught red-handed with 100 pieces of counterfeited music audio cassettes from the plaintiff's two music albums, entitled '*Aasha*' and '*Aina Herera*' together with recording equipment. The police then filed the case with the

Registrar for the prosecution of the defendant under the Copyright Act, 1965 (as amended in 1997). In the meantime, the plaintiff filed a separate petition with the Registrar claiming a damage of Rupees 120.000/- (approx. US $ 1600) from the defendant.

Having taken statement from the defendant who duly confessed his guilt, the Registrar ordered the release of the defendant from the police custody under the responsibility of some legal practitioners, although further investigation on the matter was continuing. Despite being a *prima facie* case of piracy prohibited by law under section 15(1), the Registrar refrained from giving any decision, and instead referred the matter to his concerned Ministry, the Ministry of Youth, Sports and Culture, seeking advice from the Office of the Attorney General on the question of his jurisdiction: whether the Registrar has the power to take action under section 17 of the Act in relation to the offence thereof; if not, where the case in question should be referred to.

In his opinion, the Attorney General affirmed the absence of power in the Registrar to punish in relation to the offence committed under section 17 of the Act and indicated that section 7 of the Judiciary Administration Act, 1991 may be attracted in such cases. On the basis of this opinion, the Registrar notified the plaintiff that no decision on the matter can be given. Against this decision of the Registrar refusing to take action against the defendant, the plaintiff went to the Supreme Court with a petition for the grant of a *writ of certiorari mandamus*.

In his pleading brief the appellant focused his argument on the interpretation of the relevant sections of the Act and the legal validity of the 'opinion' of the Attorney-

General on the basis of which the Registrar refrained from giving his decision on the case. First, the appellant insisted that sections 17, 23 and 22 are complementary to one another and should be read as a composite whole inasmuch as section 17 has provided for punishment for unauthorized publication of protected works in relation to which section 23 has invested the Registrar with the power similar to that of a court to take action and punish, and section 22 has provided for appeal to the Appellate Court against any decision of the Registrar in the course of the proceeding. It is, therefore, not correct to interpret the law that section 7 of the Judiciary Administration Act, 1991, applicable only under the situation where the provision of jurisdiction anywhere in the law is not specified, will be attracted in relation to the offence committed under section 17, simply on the basis of the study of a single section in isolation and the absence of jurisdiction therein. If it had been the intent of legislatures that the District Court will have the jurisdiction with respect to matter under section 17, this would have been clearly specified so in the relevant section. By way of illustration, the appellant cited the example of the Company Act, 1996 where the division of jurisdiction between the District Court and the Board of the Company in respect of certain provisions in the Act has been clearly delineated.

The appellant further argued that the spirit of the whole Act is protective in nature, and if it is to be interpreted that the offence for unauthorized publication and distribution would fall under the District Court's jurisdiction, the Copyright Act 1965 would become absurd and useless. This is because the District Court has no legal mechanism by which a culprit can be immediately arrested and search order issued in

order to gather necessary evidences against the infringers. As such, by the time the culprit is presented before the court after complying with necessary procedures, apart from serving notice on the defendant from the District Court, thousands of counterfeited goods would have made their way to the market, causing injustice to the public without any immediate remedy for it. The culprit at the same time may be able to prove his innocence by immediately concealing the infringing goods or closing the publication for the time being. This would give rise to a situation where the people would be deprived of legitimate, original goods, and publishers and sellers would lose their credibility. Furthermore, such clandestine activities as producing and selling counterfeited goods would cause leakage in the revenue collection of the government, and the lack of necessary action would further encourage it.

Second, the appellant referred to section 4 of the Preliminary Statement (*Prarambhik Kathan*) of Common Law (*Mulki Ain*) which lays down that "where there are separate laws on subject to subject, it should be done as provided therein and where it is not provided in such laws, it should be done according to the provision in this common law" (G. Shrestha 4). In the present context, if it appears that the case cannot be registered in the absence of jurisdiction, endorsement stating this reason should have been made as provided by No. 27 of the Court Administration (*Adalati Bandobasti*) of the Common Law. But, as it appears, it has not been done as such. Instead, after the case was filed by the VCID along with the culprit and the material evidence of the crime, the Registrar took the statement of the accused (defendant), extended time for police custody from time to time, and asked the plaintiff to file the application claiming damage which

the plaintiff did as provided by section 17 of the Copyright Act, 1965 (as amended in 1997).

Given this context, the appellant argued that to suspect oneself on one's own jurisdiction when no one has questioned it and to seek opinion thereto from the Attorney-General is not permissible by law. If one had a doubt as to one's own jurisdiction or if the question of jurisdiction had to be considered owing to a complaint by someone, this should be resolved by oneself according to the law. If it appears that one has the jurisdiction, the case should be proceeded forward and decision given; if it does not appear so, an order or decision stating this fact should be made, giving the party not satisfied with it a time to appeal in the Appellate Court. It was further contended that it is contrary to the law for judicial or quasi-judicial institutions to seek the opinion from the Attorney-General over the subject of its jurisdiction during the course of litigation.

Third, the appellant raised the issue whether the Registrar, on receiving the opinion from the Attorney-General, should, after evaluating it, decide the matter on his own or is it simply sufficient for him to notify the 'opinion' as such to the concerned party without giving any decision on his own. In its reply to the Ministry of Youth, Sports and Culture, through which the Registrar had sought the opinion from the Attorney-General, the Office of the Attorney-General had clearly stated that its opinion will not be binding and that the requester is free as to whether or not to follow it. Since this 'opinion' is not binding, the appellant maintained that the Registrar, after considering it, should have given his decision on the matter but instead he simply notified the 'opinion' as such

to the plaintiff as though the plaintiff himself had sought the 'opinion', thus refraining from his legal obligation to give his decision as required by the law.

Last, the appellant referring to section 110(1) of the Constitution of the Kingdom of Nepal, 1990 and section 2(i) of the Act Relating to Legal Interpretation, 2010 questioned the legality of the 'opinion' of the Attorney-General and argued that the opinion given by the Attorney-General is unlawful since he has no right to give legal advice to the Ministry of Youth, Sports and Culture and the Registrar of the Nepal National Library. Neither have the Ministry of Youth, Sports and Culture and the Registrar of the Nepal National Library the right to seek legal advice from the Attorney-General. The opinion thus sought and given illegally constitutes an 'unauthorized opinion' and the notification of this unauthorized opinion to the concerned parties together with the whole procedure relating to it is unlawful.

On May 31, 2000, the Supreme Court handed down its decision dismissing the case for technical reason. The Court, referring to section 22 of the Copyright Act, 1965 (as amended in 1997), said that the appellant failed to produce factual evidences showing why this provision has been rendered ineffective under the situation where the Registrar has notified his decision to the plaintiff. It is submitted that the appellant came straight to the Supreme Court with a writ petition without making an appeal against the Registrar's decision in the Appellate Court as available under section 22 of the Act. This perhaps was the major reason for the failure of the writ. The Court in its holding noted that where alternative means of redress against any decision or order by the Registrar are available, a

petition for the issuance of a *writ of certiorari mandamus* without resorting to these means cannot be granted as this is against the established principle of law. The Court confined its holding to this requirement, saying nothing on the issues raised by the appellant in the course of the pleading; perhaps it did not find it necessary to address these issues as they should be resolved at the Appellate level.

4.3.2 The Foundation Books v. The Registrar of NNL

On May 31, 1999, precisely five months before the Supreme Court gave its decision on the writ petition filed by Music Nepal, the Patan Appellate Court withheld from granting *mandamus* to a similar writ petition filed by the *Legal Research Associates* on behalf of the *Foundation Books*, New Delhi (India). The issue in *Foundation Books* was similar to what it was contended in *Music Nepal* that it is unlawful for the Registrar to decline from taking action as provided under section 17 of the Act. In both cases, the *mandamus* was denied but for different reason. The Appellate Court in *Foundation Books* refused because in its opinion the power to punish in relation to section 17 is not vested in the Registrar; the Supreme Court in *Music Nepal* did so on the ground that the appellant has failed to make appeal against the decision of the Registrar in the Appellate Court before filing a writ petition in the Supreme Court. It is submitted that judges in *Music Nepal* may have been aware of the decision rendered by the Appellate Court in *Foundation Books* and this perhaps could be the reason why the Supreme Court in *Music Nepal* refrained from making any comment on the issues raised by the appellant; the Appellate holding in *Foundation Books*, to a large extent, had addressed these issues. Similarly, the judges in *Foundation Books* also knew (because the appellant in his written

reply submitted to the Court had mentioned that a similar issue is now under consideration in the Supreme Court) that the issue which they were called on to address involves the same issue which was then pending in the Supreme Court to be decided.

The Appellate Court in *Foundation Books* reviewed the relevant sections of the Copyright Act in order to determine whether the Registrar, as asserted by the appellant, has authority under section 17 to take action on the appellant's complaint demanding punishment and recovery of damages. The appellant stated that legal provisions providing punishment for unauthorized publication and protection to the rights of authors do not exist in Nepal prior to the enactment of the Copyright Act, 1965. In order to fill up this void, the Copyright Act, 1965 was framed with a view to protect the rights of authors and to punish the person making an unauthorized publication. The law under section 23 has also provided the Registrar with a power similar to that of a court. Viewed in this context, the appellant maintained that section 17 should be construed according to the 'mischief rule' and when it is thus construed, it is apparent that the Registrar, with respect to section 17, has the power to punish anyone making an unauthorized publication, similar to those provided to him under sections 18, 19, 20, and 21.

The Court did not agree with this argument. The Court, noting the language employed in section 17 as being clear and simple, pointed out that since there is no provision under this section, before and even after the amendment, as to who it is to punish the person making unauthorized publication and to recover damage for the aggrieved party, it is not correct, contrary to the intent of the legislature, to interpret

against the established principles of legal interpretation, as asserted by the appellant that this authority is vested in the Registrar. The Court declared that where no official or court to punish and recover compensation in relation to the provision under section 17 of the Copyright Act (as amended in 1997) has been specifically designated, the District Court by virtue of section 7 of the Judiciary Administration Act, 2048 (as amended) shall have the original jurisdiction thereto. Furthermore, the Court made it clear that it cannot be taken to mean that the Registrar, by notifying the appellant that action on the complaint cannot be taken, has refused to discharge his legal obligation. Power in relation to the punishment and recovery of damages as provided under section 17 of the Act does not appear to have been entrusted to the Registrar.

The Supreme Court confirmed this view. Upholding the decision given by the Appellate Court, the Supreme Court noted that the Act with respect to sections 17 and 18 does not appear to have designated the authority with a power to punish whereas the Act in respect of sections 19, 20 and 21 has clearly designated the Registrar with a power to punish. It thus becomes apparent that it is only with respect to section 17 that the Act has not entrusted the Registrar with a power to punish. Therefore, the assertion in the present case that the Registrar should exercise his power to punish when this power in fact has not been entrusted to him by the law would be a wrong construction of the provision that is clearly laid down in the Act. Where the punishment is provided for but an authority to execute it is not designated in the act, the jurisdiction of the District Court of the concerned geographical area, in accordance with section 7 of the Judicial Administration Act, 1991, appears to be attracted.

The case in *Foundation Books* relates to an unauthorized publication of two books - Meaning into Words Intermediate Student's Book and Meaning into Words Intermediate Work Book– in which the Cambridge University Press had granted exclusive, non-transferable license to the plaintiff (Foundation Books, New Delhi) for printing, publishing and selling these books in South Asia. The plaintiff had secured copyright protection for the books in Nepal in accordance with the provisions of the Copyright Act, 1965 by obtaining copyright registration certificate in June 1998. On knowing that some local individuals and publishers in Kathmandu are producing and selling low quality reproductions of these books in the form of student's guide, the plaintiff published a warning notice on December 26 and 27, 1998 calling to desist from such illicit activities.

On April 29, 1999, the Foundation Books filed a suit with the Registrar against B.N. Books & Stationery, Vidhya Pustak Sadan and others demanding action against unauthorized reproduction and distribution of protected books and claiming a damage of worth Rupees sixteen hundred thousand (Approx. US $ 8000.00) which it had to incur due to the loss of sales by the presence of illicit copies in the market. Similar to what it happened in the case of *Music Nepal*, the Registrar, instead of arriving at any decision on his own, referred the case to his concerned ministry seeking opinion from the Attorney General whether he has jurisdiction under the prevailing Act to take action as demanded by the plaintiff. While the defendants were held under the dates after making necessary inquiry on oath and taking their written statements, the Registrar notified the plaintiff, citing the opinion from the Attorney General, of being outside his jurisdiction to initiate

any further action on the case. The Appellate Court turned down the writ appeal by the plaintiff for the grant of *mandamus*.

The two books which were the subject of litigation in *Foundation Books* were both foreign publications produced under the joint authorship of Adrian Doff, Christopher Jones and Keith Mitchell. It is submitted that the Copyright Act, 1965 (as amended) does not contain anywhere the provision referring to the protection of works of foreign authors or foreign publications. If so, how these books were deemed to be qualified for protection? What was the basis on which these books were granted copyright registration certificate?

The law does not prescribe any eligibility requirements for a work to be qualified for copyright registration other than what it is laid down in section 6(1): "(1) Any person entitled under Section 3 and desirous to register the Copyright of any work shall submit to the Registrar's Office an application accompanied with the prescribed fee giving all the prescribed particulars along with his evidence of his ownership in such Copyright."

By Section 3(2), "the right to have the copyright of any work registered" has been vested "solely in the person who is its author", except under certain specified condition.

The question that arises in the case of *Foundation Books* is whether the term 'any work' in Section 3(2) can be construed to include works of foreign publications, and hence eligible for copyright registration. But in the absence of express provision anywhere in the Act, it seems illogical to stretch the meaning of this term to cover the

works of foreign publications without sufficient judicial reasoning and legal basis supporting this extension. Furthermore, Nepal by then was not a party to any international copyright conventions, namely, the Berne and the UCC, nor has it entered into any bilateral copyright treaties with any country – in which cases the obligation arising out of such conventions and treaties would have been clearly reflected in the Act.

In mid-Spring 1998, the Foundation Books, through its Attorney, applied to the Registrar for copyright registration of the book, Meaning into Words. The Registrar, as it appears, could not decide on the eligibility of these books for copyright registration under the provisions of the prevailing Act. On February 24, 1998, the Registrar wrote a letter to his concerned Ministry seeking its opinion on what he should do in reference to an application by the Foundation Books for the registration of two books as the prevailing Act has no express provision extending protection to the rights of a person or organization in respect of imported foreign books, films, video-films, and audio-cassettes. In reply the Ministry wrote:

> If the Syndicate of the Press of the University of Cambridge has lawfully assigned copyright to the Foundation Books, and if the latter has legally appointed Attorney for the registration of its books in Nepal, the Nepal National Library, to which lies the responsibility of making necessary inquiries on the application being received for registration and of registering the work, should register the work pursuant to the Act if an

> application by a person thus appointed was submitted in accordance with the prescribed rule.(Ministry of Youth, Letter no.2952)

Should the Registrar grant or reject copyright registration when the work in question is one of foreign publication? What does the law say on the registrability of foreign publications? The Ministry's reply in fact said nothing to be of any guidance other than suggesting what is clearly stated in the Act, and for which there was no need to seek its opinion. Nevertheless, as it appears, the Registrar took the opinion as such as being the affirmation of eligibility of foreign works to copyright registration.

On June 21, 1998, the Registrar granted copyright registration to the Foundation Book for the book, Meaning into Words, which consisted of two parts: Student's Book and Work Book. These two books were perhaps the first foreign works to obtain copyright registration certificate in Nepal. Five years later, in 2002, came a new legislation on copyright which for the first time accorded protection to foreign works subject to condition that they be first published in Nepal or, if published elsewhere, within next 30 days. The Foundation Books' Meaning into Words satisfies neither of these conditions. But then no one can now challenge the validity of its registration for whatever reason since Section 43(3) of the new Act has clearly maintained that "acts done in pursuance of the Copyright Act, 1965 shall be deemed to have been done in accordance with this Act." Assuming that the new Act does not allow reopening the case that has been decided five years ago in accordance with the law then in force, can anyone appeal in the Appellate Court for a review of the decision invoking the old law? This

indeed is not clear. But the Court would, most probably, not entertain it, at least on the technical ground, because the time-limit to make appeal in the Appellate Court has long been expired.

Unfortunately, the defendants at the time of litigation failed to bring this issue of registrability to the fore, challenging the validity of registration of these books in the Appellate Court. Had it been done so, the Court would have been obliged to look into this issue and arrive at a rational conclusion. Perhaps the plaintiff would have then no cause of action against the defendants had the Court declared the registration invalid.

It is noted that *Foundation Books* is the first case to reach the Appellate Court and the second, after *Music Nepal*, to the Supreme Court. Barring these two cases, no other cases on copyright have come for adjudication either in the Appellate or the Supreme Court before the implementation of the new Copyright Act, 2002.

4.4 Copyright Act, 2002

Nepal stayed outside any international conventions on intellectual property rights till it joined WTO in September, 2003. With this accession to the WTO it became obligatory for Nepal to adopt and enact legislation conforming to the WTO TRIPS provisions that largely embody the fundamental principles and provisions of the existing international IP conventions. Intellectual property laws governing plant breeders' right, integrated circuit layout design and geographical indications do not exist in Nepal. Nor is there any law for regulating unfair competition. Nepal joined the Berne Convention for the Protection of Literary and Artistic Works (1971) as late as January 11, 2006.

In August 2002, Nepal enacted a new legislation on copyright replacing the old 1965 law. The new law was contemplated inasmuch as against the backdrop of Nepal's preparation to join the WTO as against its own domestic needs. As such, the new law is more extensive and well organised in structure than the former Statute. With Nepal's accession to WTO membership in September 2003 and its commitment to adopt TRIPS Agreement by 2006, the relevance of this law has greatly increased. The new Act contains more detailed provisions concerning enforcement which, to a considerable extent, conform to the minimum requirements set by the TRIPS Agreement. It is divided into seven chapters containing 43 articles. It extended protection for the first time to the related rights of the performers, phonogram producers and broadcasting organisations.

4.4.1 Rights of the Authors

4.4.1.1 Economic Rights

Chapters 1 and 2 of the new Act are wholly devoted to substantial matters such as definition and rights of the authors. Article 7 enlists a bundle of economic rights provided to the authors. The Act emphasises that these exclusive rights are not exclusive of any limitations, and for that reason, they do not confer on the right owners an absolute power to control the use and access to their works. This is evident from the construction of Article 7 which at the very beginning of the sentence refers to Chapter 4 that restricts the exercise of these rights to the limitations and exemptions provided therein. Article 7 reads: "Subject to Chapter 4 the author or the copyright owner shall have the exclusive right to do the following acts. . . . ." As a matter of fact, there was no need to employ

such restrictive phrasing in the article devoted entirely to set out economic rights as Chapter 4 would have *ipso facto* made it clear. But for the reason of added emphasis on the allowance to be made for the public policy consideration, and which indeed seems to be the intent of the law, Article 7 is calculatedly loaded with reference to Chapter 4 that curtails the use of exclusive rights in the broader public interest.

4.4.1.2 Moral Rights

The new law embodies features reflecting both the two great legal traditions of copyright: common law tradition or Anglo-American System and civil law tradition or Continental System. It is closer to common law in that it makes no distinction between copyright and related rights. But when it comes to moral rights it turns to the civil law tradition of continental Europe. The Nepalese law approaches moral rights from dualist point-of-view, and hence holds these rights as distinct from, and independent of, economic rights. Article 8 of the new Act explicitly recognises three distinct moral rights: right to paternity, right to integrity and right to modify works. However, the core underlying moral rights – *perpetuality*, *inalienability* and *imprescriptibility* – are not fully respected and preserved in Nepalese copyright law. For example, Article 14, in line with Article 6bis of the Paris Act (1971) of the Berne Convention, delimits the moral right to the period extended to economic rights, namely, life plus post mortem period of 50 years. In the case of performers, to whom Article 9(3) accords right to identify as such or claim their name in relation to the performance and the right to prohibit any distortion, or any other alteration, of their performance to the detriment of their reputation and popularity, these moral rights run, parallel to other rights, for 50 years from the date of fixation in a

sound recording or from performance. When the law restricts the life of the moral rights to a specific period, the question that immediately arises is what would happen to the integrity of works as they enter into the sphere of public domain. Nowhere does the law state that the author's heir or the State would take the responsibility of protecting the integrity of works that fall in the public domain. Under these circumstances, the question that logically arises is whether anyone should be free to use and manipulate a work or a performance, the way he or she chooses? This perhaps is one of the issues to be possibly addressed in a future amendment of the Nepalese Copyright law.

Another distinct aspect about moral rights under the Nepalese Copyright Act is that they are transferable by the author's last will and testament. Article 8 (2) sets the limit to non-transferability of moral rights to the period covering the author's life-time, thereby allowing the author to transfer it by his last will and testament to any natural or legal person whom he has appointed as the person to exercise his moral rights after his death. Such transfer, as laid down in Article 24 (2), shall be executed in written contract, subject to the condition that the transferee shall not change the name of the author with regard to his works. Failing such transfer by the author, after his death his moral rights shall be deemed to pass to his heirs.

But the law does not anticipate the fate of these rights in the event where the author has not transferred these rights, nor does he leave any heirs. It is to be noted that by virtue of this transferability provision, the publishers may be induced to exert pressure

on authors, so that these rights could be transferred to them and thus, enhance their control on the exploitation of works.

4.4.2 Scope for the Application of the Law

Under the new law, copyright protection is available to authors whose works were first published in Nepal, and authors whose works were first published in another country and within the next 30 days published in Nepal, irrespective of authors' nationality, domicile or residence. This is set out in Article 13 (1:b) which deals with the scope of application. These provisions which limit protection to be granted to works of foreign authors were amended in September, 2005 by an Ordinance Made to Amend Some Nepal Acts relating to Export and Import and Intellectual Property.

By this amendment protection has been granted to the works of authors domiciled in the Kingdom of Nepal or in a Member country of the World Trade Organization. Protection is accorded to audio-visual works produced by a producer domiciled in the Kingdom of Nepal or in a Member country of the WTO. Likewise, architectural designs of a building made in the Kingdom of Nepal or in a Member country of the WTO or any other kind of artistic works used in a building, or any other structure are protected by the Act. The Act also accorded protection to the works published in the Kingdom of Nepal by an author domiciled in a country other than the Kingdom of Nepal or a Member country of the WTO or an audio-visual work produced in the Kingdom of Nepal by a producer of such other country.

The protection, as prescribed by the Berne Convention, is automatic without requiring compliance with any formalities. However, authors wishing to register their works are provided with an option for registration under Article 5(1). The registration may serve as a valuable evidence for establishing ownership in the works in case of dispute regarding the date of creation.

4.4.3 Protected Works

Any work of original and intellectual creation in a literary, scientific or artistic domain is eligible for protection according to the definition of 'work' as provided in Article 2(1). A list of works cited therein as being works of this description illustrates the broad scope of the coverage for a wide variety of works.

The definition above clearly sets forth two basic eligibility requirements for a work to qualify for copyright protection. First, it must be original and intellectual in creation and second, it must belong to a literary, artistic or scientific domain. But nowhere does the law clarify, or provide any clue for, the amount of originality needed for a work to constitute an intellectual creation. This is left entirely to the rational interpretation by the courts on a case-by-case basis. In the absence of adequate case law, it is yet to be seen how the courts would interpret the originality requirement in different categories of works.

As a rule, originality for copyright is not viewed against the literary merits or utility of the work. Nor does it presuppose the presence of any novelty. For copyright any work of independent creation involving time, labour, skill or expense is original. A

timetable or street directory (Stewart par.4.02), a football coupon or examination paper (Stewart 50), can be a original work by reason of the 'sweat-of–the-brow', and hence can attract copyright protection. A mere selection and arrangement of pre-existing works are enough to constitute originality or intellectual input for collective works such as anthologies to claim a separate copyright. It is for this reason, facts and information as banal as a football coupon which in itself is not eligible for protection can become a subject matter of proprietary interest, and hence can come under copyright protection. Such works mostly constitute compilations wherein information is packaged into certain form and configuration to justify the evidence of creative effort, or to use copyright jargon, selection and arrangement, for copyrightability. A benchmark for copyrightability is then the amount of time, labour, and skill or ingenuity or money expended in creating a work against which the originality is measured (Stewart 51). This essentially is the English view of originality to which the American and some European jurisdictions of civil law tradition such as Germany do not lend their support in wholesale. The American emphasis is on a creative spark (Mazeh 563-65) not just the sweat-of-the-brow, since the objective of copyright is to 'promote the progress of science (i.e., knowledge) and useful arts (i.e., technology).' In Germany, it is the authors' personal creative contribution, a term which may vary to different legal interpretation, to which originality implies.

4.4.4 Unprotected Works

Article 4 enumerates items that are excluded from protection. They include ideas, scriptures, news, methods of operation, concepts, principles, court decisions, decisions of administrative agencies, folk songs, folk stories, proverbs and statistics of general information. Except for these exclusions, copyright is available for any literary, scientific or artistic works of original and intellectual creation.

4.4.5 Ownership of Copyright

As a matter of rule, the initial ownership of copyright is vested in the author of a work. Article 2(b) defines the author in relation to a work as being the person who created it. Exceptionally, however, the meaning of author varies with the situation under which a work is created. The Statute under Article 6(2) envisages five such cases where copyright belongs to a person or legal entity other than the actual creator: (a) in the case of a joint work prepared under the direction or control of a person or legal entity, the person or legal entity under whose direction or control the work is prepared; (b) in the case of a commissioned work, the person or institution that have commissioned the work; (c) in the case of an anonymous work, the publisher until such time as the identity of the author is revealed and substantiated; (d) in the case of audiovisual works, its producer unless otherwise stipulated in a contract, and (e) in the case of a work of joint authorship, the co-authors. In the latter case, if such work is divided into chapters where individual contribution can be distinguished and used separately, each individual author will have copyright in his or her respective contribution.

4.4.6 Transfer

Chapter 5, which concerns the transfer of copyright, is very brief. It contains only one article (Article 24). According to this article, the copyright owner can transfer or license his or her economic rights in whole or in part with or without specifying any condition. The article, however, maintains that such transfer must be executed in a written contract, but it does not contain any provision specifying the modes of transfer.

4.4.7 Terms of Protection

As regards the duration of protection, the Nepalese law, like the laws of Germany and the Nordic countries, makes no distinction between moral and economic rights, and extends the same period of protection to both categories of rights. Protection is generally available for life plus a post mortem period of 50 years. However, this term of protection varies with the nature of the respective work as follows: (a) in the case of work of joint authorship, 50 years from the death of the last surviving author; (b) in the case of works prepared under the direction or control of a person or legal entity, 50 years from the date of the first publication or from the date of the first public dissemination, whichever comes first; (c) in the case of anonymous or pseudonymous works, 50 years from the date of the first publication or from the date of the first public dissemination, whichever comes first (if the author revealed his or her name within this period, the period of protection would extend for either life plus a post mortem period of 50 years or 25 years without post mortem period, depending upon the category of work to which they belong) ; (d) in the case of works of applied art and photographic works, 25 years from the date of

their creation; and (e) in the case of a work published after the death of its author, 50 years from the date of its publication.

4.4.8 Neighbouring Rights

The new Act contains for the first time a set of provisions that recognise the rights of performers, phonogram producers and broadcasting organisations. It appears that these provisions are mostly influenced by the Rome Convention (1961) and, to some extent, by the WIPO Performances and Phonograms Treaty 1996 (WPPT). The Act does not contain a separate chapter dealing with the rights of performers and organisations. Unlike the civil law jurisdictions where terms such as 'related' in Germany and 'neighbouring' in France are used to refer to these rights, the Nepalese law refrains from making any such distinction. Instead, it employs, as do the common law jurisdictions, the same term 'copyright' to describe these rights of performers and organisations.

The protection by law is automatic without requiring the registration of performances, phonograms or broadcasts. However, those wishing to register their performances, phonograms or broadcasts can apply to the Registrar of copyright under Article 2 (1).

By the amendment of September, 2005 protection was accorded to the foreign performers, producers of phonograms and broadcasting organisations.

4.4.8.1 Performers

Article 2(l) of the Nepalese Act defines “performers” to mean “actors, singers, musicians, dancers and other persons who, through the medium of acting, singing, musical playing and dancing, perform literary or artistic works or expressions of folklore.” This definition is much similar to the one contained in Article 2 of the WPPT, except that the Nepalese definition includes the words (noun form) ‘ musical playing’ and ‘dancing’ in place of the words (verbs) ‘ deliver, declaim, play in, interpret, or otherwise. . . .’ used in the WPPT definition. This change in wording with a slight variation in the syntax appears to make Nepalese definition semantically narrower in scope in contrast to the WPPT definition. For example, it is not clear under the Nepalese definition whether those who conduct or direct the performances are performers, and hence eligible for protection. The use of the verb ‘interpret’ in this respect in the WPPT definition is significant. The intention for the use of this word, as Ficsor argues, seems to be “to extend the definition to those whose substantive contribution to performances is the interpretation of the works performed" (The Law of Copyright 596).

Another important point to note is that the definition does not indicate anything about the performers who perform other than literary and artistic works or expressions of folklore. Take for example the case of magic. It does not belong to literary or artistic works; nor does it involve acting, singing, musical playing and dancing, the methods to which the performance is restricted by definition. The notion of performing artists by definition is thus confined to the scope of literary and artistic works (Walter 5). But under the Rome Convention, national legislation is free to extend protection to such

performances of works that do not constitute literary or artistic works. Article 9 of the Rome Convention expressly provides that "[a]ny Contracting State may, by its domestic laws and regulations, extend the protection provided for in this Convention to artists who do not perform literary or artistic works." The Convention has therefore set a minimum standard to be complied by the member countries while allowing the national laws free to extend protection to other categories of performers whose performances are not based on works of authorship.

The duration of protection provided to the performers is 50 years from the date of the fixation in phonograms, or failing such fixation, from the date of performance. It is noted that the term of protection for unfixed performance does not make much sense since the use of performance cannot take place without fixation. It is, as pointed out by Ficsor, is merely theoretical (The Law of Copyright 643). The TRIPS Agreement (Article 14.5) makes no reference to unfixed performances.

The law vests the performers with extensive rights to control the use of their performance. These rights set out in Article 9(1) include: (a) broadcasting and communication of their performance to the public, (b) fixation of their performance in any manner or form and reproduction of such fixation, (c) making available to the public of the original or copies of their performance through sale or transfer or change of ownership, (d) letting for hire the copies of their performance, (e) making available to the public their fixed performances by wire or wireless means, and (f) modification and alteration of their performance. Performers, however, cannot exercise these economic

rights after having given their consent to use their performances in a visual or audio visual work. In such a case, the performer is deemed to have ceded all his economic rights in the performance to the producer or organisation producing the audio visual work. This is explicitly laid down in Article 2 which states that once a performer has consented to the inclusion of his performance in a audio-visual fixation, he cannot exercise thereto the rights provided under Article 9(1). This provision is mutatis mutandis to Article 19 of the Rome Convention which reads: "Notwithstanding anything in this Convention, once a performer has consented to the incorporation of his performance in a visual or audio-visual fixation, Article 7 shall have no further application."

Article 3 deals with the moral rights which run parallel to Article 5 of the WPPT. The only difference is that the Nepalese provision does not contain the phrase 'except when omission is dictated by the manner of the use of the performance.' The reason for this exclusion is, however, unclear. It is noted that Article 6bis of the Berne Convention also refrains from using a similar phrase. But it does not mean, as Ficsor points out, that the author's name must always appear at any event 'even when the manner of use . . . makes this impossible or, at least, highly impractical' (The Law of Copyright 618). In such performances as orchestra and ballads, where a large number of performers are involved, indication of their name is not only impractical but it also has little, if any, effect on the identity of the performers. It therefore seems advisable in the context of the Nepalese provision to employ such phrase as 'unless it turns out to be impossible', the phrase which the EC Information Society Directive has employed in the case of various exceptions mentioned in Article 5(3) (The Law of Copyright 618).

The law maintains that moral rights are independent of performer's economic rights and can be exercised even after the transfer of those rights. These moral rights relate to live aural performance or performance fixed in phonogram in relation to which performers have the right to identify and claim as the performer of their programs, and to object to any distortion or mutilation or other modification of their performances that would be prejudicial to their reputation.

The Statute does not mention anywhere the duration of moral rights of the performers. However, Article 24 (2), which deals with the transfer of moral rights, uses the expression 'person holding the moral rights' instead of referring to 'author'. This appears to imply that provision under this Article is applicable both to authors and performers who hold moral rights. If this is so, the performers will enjoy moral rights till the expiration of their economic rights, which is 50 years from the date of the fixation in the phonograms or, failing such fixations, from the date of performance. Furthermore, since the provision on moral rights (Article 3) is modelled on Article 5 (1) of the WPPT, it is most likely that the draftsmen must have been fully aware of the terms of protection of moral rights accorded to the performers under clause 2 of the same article.

Under Article 4 the performers enjoy the right to enter into contract with terms and conditions under which they can receive more benefits or concessions from the use of their performances.

4.4.8.2 Producers of Phonograms

Article 2(e) defines "phonogram" to mean "any exclusively aural fixation of sounds of a performance by any manner in any medium, other than simultaneous fixation of sounds and visuals".

The new Act under Article 13(1) extends protection to phonograms produced by Nepalese nationals. The protection is accorded to phonograms, the sound of which is first fixed in Nepal, and phonograms published in Nepal. The period of protection extends for 50 years from the year of publication of phonogram

Rights of the producers of phonograms are set out in Article 10. These rights enable producers to (a) reproduce directly or indirectly phonograms in any manner or form, (b) import the copies of the phonograms, (c) make available to the public the original or copies of the phonograms through sale or other transfer of ownership, (d) let for hire or rent, (e) make available to the public phonograms, by wire or wireless means, in such a way that a member of the public may access them from a definite place or at a place individually chosen by them.

The law under Article 11 grants the producers of phonograms the right to claim a single equitable remuneration from the users if a phonogram published for commercial purposes, or a reproduction of such phonograms, is used directly for broadcasting or for any communication to the public. This provision has been directly adopted from Article 12 of the Rome Convention, except the last sentence where the Nepalese law has given preference to the producers of phonograms in place of the option provided therein: ". . .

to the performers, or to the producers of the phonograms, or both." Article 2(1) concerns the sharing of the single equitable remuneration between the performers and the producers of phonograms. According to this provision, in the event of contract between the performer and the producer of the phonogram, the sharing will be as stipulated therein, and in the absence of such contract, the performer will receive half the amount that the producer gets. The right to receive equitable remuneration, as specified under Article 3, will last for 50 years from the year of publication of the phonograms or from the year of fixation of the phonograms.

4.4.8.3 Broadcasting Organizations

The new law under Article 13 (4) extends protection to the broadcasts transmitted by the organisation whose office is located in Nepal and the broadcasts made from the transmission station located in Nepal. The rights of the broadcasting organisations are protected for a period of 50 years from the year of transmission.

Article 12 sets out the rights of broadcasting organizations. It provides that broadcasting organizations have the right (a) to rebroadcast their broadcasts, (b) to communicate to the public their broadcasts in such a way that members of the public may access them, (c) to make fixations of their broadcasts, and (d) to reproduce the fixations of their broadcasts.

4.4.9 Limitations and Exceptions

Articles 16 through 23 under Chapter 4 extensively deal with limitations and exemptions which apply to the rights of the authors as well as those of the performers and organizations. Unlike the Anglo-American system where statutory limitations and exemptions are further supplemented by the so-called doctrine of 'fair use', the Nepalese Copyright law, like those of the Continental laws, has simply opted for providing a number of statutory exemptions allowing the users to make short excerpts or reproduction from the published copyrighted materials for specific purposes without authorization from the copyright owners. These exemptions basically relate to such uses as research and teaching, quotations, private use and reproduction of a single copy for library and archival use. The extent of such free usage is, however, subject to the condition that it does not undermine the copyright owner's economic rights to exploit his works.

4.4.9.1 Private Use

The reproduction of "some part" of a published work for private use is allowed under Article 16 (1). However, reproductions consisting of a "substantial amount" of the work are subject by law to the condition that they do not prejudice the economic rights of the author or copyright owner. Article 16(2), for example, forbids the reproduction of the architectural designs of a constructed building or other designs related to construction, or the reproduction of a substantial portion of a book, or the reproduction of musical works in the form of music scores, or the reproduction, in whole or of a substantial part, of a database by way of digital transcription, in a manner that would prejudice the economic

rights of the author or the copyright owner. It remains, however, unclear whether this restriction is intended to mean the second and third step of the three-step test as provided in Article 9(2) of the Berne Convention, which reads: ". . . provided that such reproduction does not conflict with a normal exploitation of the work and does not unnecessarily prejudice the legitimate interest of the author." But the absence in the Nepalese provision of any expression reflecting the third test indicates that compliance with the second test will be sufficient to avoid infringement of copyright. If this is so, the condition set for the free use of copyrighted materials under Nepalese law is relatively less stringent than the Berne prescription.

Also worth noting is the language used in Article 16(1) – 'some part', and that used in Article 16(2) - 'substantial portion' of a book. Article Only Article 16(2) contains the condition that the reproduction of protected subject matter should not undermine the economic rights of the author or copyright owner. A close comparison of these two provisions unmistakably points to the fact that the Nepalese law makes no distinction of 'some part' or 'substantial portion' based on a criterion other than the quantity of borrowing. According to this distinction, it can be safely presumed that any borrowing, whatsoever may be its quality, will not be deemed an infringement of copyright if it is a short excerpt in proportion to the length of the original text.

This perhaps is the reason why no restriction of any kind is implied in Article 16(1) as in the case of 'substantial' borrowing or reproduction in Article 16(2). The law therefore appears to have taken it for granted that only 'substantial' portion of borrowing

or reproduction may undermine the economic rights of the copyright owner, hence the insertion of the restrictive condition in Article 16(2).

If quantity or volume is the sole criterion governing the free use of a work, the question which then arises is how much of the length in relation to the original will constitute 'some' or 'substantial' portion, of which the law contains no explanation. According to the language of Article 16(2), it appears that even the substantial amount of borrowing or reproduction will not constitute an infringement of copyright as long as it does not undermine the economic rights of the author or copyright owner.

It is submitted that, for copyright purposes, substantiality is not determined by a mere quantity or volume of the taking. What equally comes into consideration is the quality of the taking. In some cases, the extraction of a few lines may constitute an infringement while in other cases even a bulk may be held fair use. Since the notion of 'quality' is governed by a number of factors, the idea underlying 'substantiality' is in a way similar to the US doctrine of 'fair use', where the use made of a work in any particular case is determined by a set of factors or criteria prescribed by the law. These criteria, however, are not free from criticism (Seltzer 18-23). In the Nepalese context, these issues are bound to come up as cases start emerging in the course of time. The way the court will take these issues and interpret them will supplement the law to fill the vacuum.

4.4.9.2 Teaching and Illustration

The Act contains an exception for the use of works in teaching, subject to the condition that such uses do not undermine the economic rights of the author or copyright owner. The permitted uses, as laid down in Article 18(1), extend to the reproduction of short excerpts from any published works, by way of illustrations, writings (publication) or audio-visual recordings. The exception also includes reproduction, transmission, and display of some portions of works, for the purposes of instruction in a classroom. There is, moreover, an exception in favor of quotations from published works under Article 17. But where such uses are made, the title of the work and its author must be indicated.

4.4.9.3 Library and Archival Use

Public libraries and archives which supply materials to individuals for research and private studies without any profit motive can, under Article 19, reproduce a single copy of any work in their possession that has been lost or damaged or old or where such work cannot be acquired.

4.4.9.4 Reproduction for Information Purposes

Article 20 of the Nepalese law deals somewhat extensively with the exception provided for the reproduction, the broadcasting and the communication to the public of a work for the purposes of public dissemination. These exceptions are subject to the condition that the title of the work and its author are acknowledged. Article 20(a) permits the reproduction by newspapers and periodicals, as well as the broadcasting or the

communication to the public, of articles published in newspapers or periodicals on political or religious topics, and of broadcast works of the same nature. This provision has been directly adopted from Article 10bis (1) of the Berne Convention. The law maintains that such reproduction, broadcasting, or communication to the public, should not prejudice the economic rights of the author or copyright owner.

The free reproduction, broadcasting or communication to the public is allowed under Article 20(b) for the purpose of reporting current events or illustrating an event. Likewise, Article 20 (c) permits the reproduction, the broadcasting or the communication to the public, for the purpose of reporting current events of some portion of the news items or judicial proceedings published in any newspaper or a regular periodical.

The reproduction, the broadcasting and the communication to the public provided under Article 20 cannot be made when the author has expressly reserved to himself such reproduction, broadcasting and communication to the public. This is stated in Article 20(2). It is this condition that limits the application of this exception to a limited situation.

4.4.9.5 Public Exhibition

Article 23 contains a provision by which anyone is free to make a public exhibition of the original or a copy of a work, without the authorization of the author or copyright owner. Such exhibition must take place without the use of cinematography, slides, television, screens, or any other mechanical devices.

4.4.9.6 Reproduction of Computer Programs

Article 21 permits the free reproduction of a single copy of a computer program in the case where such reproduction is necessary in order to utilize the program or for the purpose of a back-up copy, or in the case where a lawfully acquired computer program has been lost or destroyed or rendered unusable.

4.4.10 Infringement of Copyright

Article 25 of the Nepalese Copyright law defines the acts that constitute infringement of copyright. According to Article 25(1:a), the reproduction of works or phonograms, with or without economic gain, for sales and distribution or for any other purposes, their public communication or renting them, without the authorisation from the copyright owner, or, if licensed, in violation of the terms and conditions thereof, will represent infringement of copyright.

Under Article 25(1:e) of the Act, the importation, production or rental of equipment and devices designed or produced for the purpose of circumventing a technological measure used to protect the unauthorised reproduction of protected works, will be an infringement of copyright. Similarly, the production or the importation of equipment that enables or facilitates the viewing of encrypted broadcast programs constitute an infringement under Article 25(1:f).

Article 26 prohibits the importation for commercial use, of copies of protected works and phonograms made in another country, which, if made in Nepal, would have been infringing copies. There is, however, an exception under Article 23, which allows the importation of single copies for private use without the authorisation of the copyright holder.

The use of the term 'commercial use' in Article 26 in relation to the restriction on the importation of unauthorised copies is imprecise as it could be taken to mean that importation of unauthorised copies for any purpose other than commercial is permissible, and hence it would not constitute an infringement of copyright.

For example, if a sizeable number of copies, say a hundred copies, are imported for exclusive use in teaching or research or such other purposes where selling and distribution or circulation of copies for profit or any kind of monetary gain does not take place, the literal application of Article 26 would perhaps hold it as a lawful importation. Since there is no definition of 'commercial use' in the Act, it can equally be argued the other way. The importation of multiple unauthorised copies, irrespective of any use or purpose, may be considered as being commercial as long as such importation will impair the local market and reduce potential demand for the respective work. The loss of sales resulting from such importation will take away the bulk of the profit from the legitimate holder of copyright, and hence such importation may be held as infringement of copyright.

Furthermore, if Article 26 is interpreted in conjunction with Article 22, which allows the importation of a single copy for the private use of the importer, there is no need to mention 'commercial use'. In this context, the term does not serve any function. Instead, Article 26 may safely use such terms as 'irrespective of any use or purpose', or 'whatever may be the use', or 'commercial or any other use'.

Related to the importation of unauthorised copies are issues involving parallel imports and the exhaustion of rights, which unfortunately are not addressed in the law. For example, it is unclear whether the right owner's authorization will be needed for the importation in Nepal of a product or a work which have been produced in another country by him, or with his authorisation. Article 26 in this respect appears to suggest that importation of any such copies which, had they been made in Nepal, would have constituted an infringement, would be deemed unauthorised. It is obviously the non-authorised reproduction which would have constituted an infringement if the copies were made in Nepal. It thus follows that any copies produced, or put into circulation, by or with the authorisation of the right owner, are legitimate copies, and can be lawfully imported without the right owner's consent.

Assuming this to be a correct interpretation of Article 26, it could be concluded that the right holders have no right to prevent the parallel imports of their copies or products from another country where they are lawfully produced or placed in the market. This, in essence, implies further the exhaustion of rights, where the copyright owner may

not exercise his rights over the further distribution or resale of the copies of his works once they are put on the market by his consent.

The question of whether a copyright owner or his exclusive licensee for publishing a work has the right to prevent the importation of copies of the work lawfully made or placed in any other country by the copyright owner himself or his assignee is entirely governed by the legal position of each individual jurisdiction in respect of the exhaustion of rights. For example, in the European Community (EC), the principle of exhaustion applies only within the community countries (community exhaustion), and any parallel imports from non-member countries are held to be an infringement of copyright. The TRIPS Agreement in this respect does not prescribe any definitive standard, thereby allowing the countries to legislate according to their choice.

4.4.11 Remedies for Infringement

Articles 27 to 29 and Article 36 provide for civil remedies and penal sanctions. Civil remedies include injunctions (Article 36) and recovery of damages from the defendant (Article 27:2). Under the penal sanction, the law prescribes a minimum fine of Rs.10,000 (approximately US $130) up to Rs.100,000 (approximately US$1300) or 6 months imprisonment or both for the offence first committed. The punishment is doubled for a second or further infringement, and carries confiscation of all infringing materials and equipment used for its reproduction.

4.4.12 Enforcement

The law invests police officials with the power to search and seize infringing copies. This is provided in Article 32(1), which states that a right holder who suspects that his work has been, or is likely to be, reproduced in violation of Article 25 may file a complaint before a police official for the investigation of the offence. Upon receipt of the complaint, the police official shall take necessary measures to prevent infringing copies from being sold or distributed and, if necessary, may even search and seize the infringing copies.

Article 32(2) further provides that materials and equipment used to reproduce infringing copies may also be seized. It remains unclear whether the issuance of a warrant is needed before proceeding to search and seizure of infringing copies. It is most likely, however, that such warrants may not be needed, as delay in most cases would result in the removal or destruction of evidence. The law stipulates that seized articles should be destroyed if the court has ordered their confiscation. Under the new Act, the police official who investigates copyright cases should hold the rank of inspector.

Article 37 contains measures to prevent the importation of unauthorised copies. According to its provision, the customs official will have the right to suspend the release of the imported unauthorised copies for a period of 10 to 20 working days. Under Article 31(1), a copyright holder who suspects that unauthorised copies are about to be imported in contravention of Article 26 may request in writing the customs authorities to suspend the imports of such copies. The customs official, if he finds the request reasonable after

having made the necessary enquiries, may, under Article 30(2), suspend the release of these copies for a period not exceeding 20 working days.

The punishment prescribed by Article 28 for unauthorised importation of infringing copyright materials includes the confiscation of imported copies together with a fine up to Rs.100,000 (approximately US $ 1300) and the recovery of damages to the copyright owner.

The Nepalese law, regrettably, does not contain any provision to prevent the possible misuse of these measures to abuse legitimate trade. The TRIPS Agreement contains such provision. For example, "the applicant for customs actions may be required to lodge security, and if no wrongdoing is found, must be liable to compensate the owners of the goods for any injury caused" (World Trade Organization, Guide to the Uruguay 219).

4.4.13 Collecting Society

The law has abolished compulsory licenses. Instead it provides for the setting up of autonomous collecting societies. The law allows the establishment of one collecting society for the administration of authors' rights in each category of works. This has no precedent in Nepalese copyright law. Under Article 30 (2), the law invests the Registrar, with the power to oversee and control the activities of each collecting society. It is submitted that the task of setting up collecting societies, an essential component of copyright enforcement, may be extremely difficult for Nepal. The receipts from the commercial exploitation of protected works are likely to be very low, given the size of

the copyright market and the scale of use of copyright materials. As the experience of most countries demonstrates, the initial period for a new collecting society is usually challenging and arduous with administrative expenses running much higher. At times, income may even be negative. On top of these expenses come the costs which a collecting society, during the start-up years, may have to incur for numerous litigation cases, since most users in the beginning are generally reluctant to pay for the use of protected works, thus obliging the collecting society to instigate legal proceeding against them (Tiang, The Role and Significance 16-18). It is for this practical reason that the establishment of copyright collecting societies in private bodies may not be initially viable in the Nepalese context unless they are adequately supported by government funding. Nevertheless, copyright, being an essentially private right, the responsibility to administer such rights should be ultimately left to private bodies, with appropriate regulations governing their proper operation. This generally is the practice in countries with market economies.

It is regrettable that, despite the two years spent on drafting and finalising this law, some of its provisions are still inadequate, while others require textual clarity. Confusion in many instances arises simply because of obscurity in the text. Take for example the case of right to amend or modify a work provided under the economic right (Article 7:c). It is strange to discover how this right which is also included under the moral right (Article 8:d), and which rightly belongs to it, can be justified and treated as an economic right. It raises the question of whether this might bear printing error or a sheer negligence on the part of the draftsmen. Equally strange to see in the category of

economic right is Article 7(f) wherein the authors are granted the right to transfer or let for hire the right they own in respect of audio-visual works, works embodying sound, computer programs, databases or musical notation. The language being too imprecise, it is difficult to understand the intention of this right. If it is a right to transfer the right the author owns for a particular category of works, there is no need to state again such right: the author can simply transfer the ownership in whole or in part by way of assignment or licensing. Again, transfer is not a right in itself but a mere deed or instrument that comes into effect by means of conveyance or by operation of law. How transfer can then be treated as a right.

Nowhere does the Chapter concerning infringement of protected rights and penal sanctions contain any provision governing infringement of moral rights. Much to the disappointment of the declared objective in its preamble, the Act takes no account of some of the critical issues arising from the new developments at the frontiers of technology, such as the digital technology, which has a significant impact on copyright.

Another important feature that is missing in the new Copyright Act is that it has no provision regulating copyright contract between the author and the publisher or producer. Individual authors' contracts are agreements negotiated between an author or his or her successor in title and publisher or a potential user of the author's specified work. Contract regulation constitutes an integral part of modern copyright law in Continental Europe. The rationale for such regulation is the presumption that authors are not in a position of equal bargaining strength with the publishers or producers. This gives

rise to the situation where authors are obliged to accept unfair or oppressive terms and conditions of their publishers. Hence, contracts entered into are likely to be less favorable to the author. In many instances, particularly in the context of the least developed countries like Nepal, individual authors are often unaware of their rights and often have no knowledge of the economic potential of their rights and interests. In such situation, statutory provision on copyright contract may check the instances of unfair exploitation of authors by the publishers. However, it is noted that in the countries adhering to common law system, such as the United States and the United Kingdom, contract practices in the field of copyright are not regulated by law. They are determined by free negotiation. Adhering to this system presupposes a fully developed infrastructure where authors are fully aware of their rights and interests, have access to information about contracting practices, and where professional services in the relevant field of law and business are easily available. Since these conditions are lacking in Nepal, it would be difficult for local authors to secure a fair terms from the publishers in the absence of some statutory regulation governing copyright contract.

A close and critical reading of the text reveals several instances of such lapses and defects which exist, to a large extent, simply because the use has never been made of copyright law in Nepal. The new Act will perhaps be the first Nepalese law on copyright to see a trial before the court. With its increasing use and exposure to cases involving a variety of issues and circumstances, the law in the course of time will gradually mature, and will become eventually more refined and polished, more consistent and reliable. Until such usage of law, the *lex scripta* will remain largely incomplete, and defects and

deficiencies will simply pass undetected till the need arises to respond to disputes or litigation, or that what is happening in 'the market place'.

The law, no matter how well drafted and conceived, is unlikely to sustain its credibility unless adequate mechanisms ensuring its proper enforcement are put in place. Since the implementation of this law, especially after the formulation of copyright rules in 2004, a number of cases involving mostly musical works have come for their adjudication before the district courts in various cities of the country. The issue in litigation in most of these cases has to do with the unauthorized use of the protected works. As the number of such cases involving intricate issues grows over the course of time, it will help cure the defects and deficiencies in the law and bring more clarity and precision in its application and interpretation. The success of the law will much depend on the ability of the judges to give rational and creative interpretation of its provisions, and its proper enforcement by the court and the administrative authorities. Regrettably, Nepalese judges and advocates do not possess adequate knowledge of intellectual property law, for they have never had occasion to confront the issues involving intellectual property rights. Given this situation, together with other problems such as copyright awareness and easy and affordable access to copyrighted works, it is apparent that Nepal has still a long way to go, which at times may even be frustrating, before it is able to develop and establish a sound copyright regime.

CHAPTER FIVE

Authorship, Publishing, and Copyright

5.1 Development of Publishing in Nepal

The history of printed words in Nepal stretches a little over one and half a century when the first Rana Prime Minister Jung Bahadur brought with him a hand-operating printing machine to Kathmandu from London in 1851 (Dixit, Nepal 203). The arrival of printing press, or the *Gidda Press* (the Vulture Press), as it was popularly known, marks the beginning of mechanical reproduction in Nepal. Prior to this, the only method of reproduction was hand-copying. As the reproduction became much easier and economical with its mechanization, book publishing slowly emerged in a modest scale towards the 1860s. By 1893, as it appears, there were four printing presses in Nepal, virtually owned by the members of the ruling family: (a) the Tikat Adda, (b) the Narayanhiti Chhapakhna, (c) the Basantpur Jangi Lithography Chhapakhana, and (d) the Nepal Manoranjan Press (Dixit, *Yesto Pani* 21-28). Their precise date of establishment, however, is not known. These printing establishments were "mostly used for publishing laws, Acts, statutes, stamps and official proclamations" (Malla, The Intellectual 270). It is only after 1893 when first public press, the Pashupat Press, was set up under the partnership of Moti Ram Bhatta and Pundit Krishna Dev that some literary publications including poetry and fiction, such as *Sanskrit Prabeshini* began to appear. The first electrically operated printing press was introduced in 1912. By 1950 there were less than ten public presses in Nepal (Malla, The Intellectual 270).

It is, however, still difficult to point out with conviction the precise name and date of the first book printed and published in Nepali language as much of the extant documentary evidences are incomplete and unclear. In his seminal essay, *Yesto Pani*, Kamal Dixit maintains that "*Mokshyasidhi*", written in Sanskrit, should be recognized as the first book to be printed and published in Nepali language as it contains for the first time two lines in Nepali language on its back cover page (26). Navigating through the evidentiary descriptions presented in the same essay, it appears that book printing and publishing began with the establishment of the Nepal Manoranjan Press, possibly the first printing establishment to come into operation after the arrival of the *Gidda Prsss*. Although the exact date of its establishment is not known, the Press by 1862 had printed and published four books in Nepali and Sanskrit (27). These books containing mostly religious texts may, until refuted by further evidences, be regarded as the beginning of book publishing in Nepal.

In 1884 Moti Ram Bhatta published the first Nepali literary work, *Balkanda Ramayan*, from Kasi, Banaras (Dixit, *Kalo Aksar* 21-28). A number of literary works, especially poetry and fiction, were published since then under the individual initiative of some young literary enthusiasts. Moti Ram Bhatta and Pandit Krishna Dev, for example, jointly set up in 1893 a printing and publishing company, known by the Pashupat Press. The grammar of Nepali language, written by Shree Gururaj Hemaraj Pandit, "*Chandrika Gorkhabhasa Byakarn*" appeared in 1912 (Aadi, *Chandrikako* 81). The following year saw the birth of the *Gorkhabhasa Prakashini Samiti* (later changed into *Nepalibhasa Prakashini Samiti*, hereinafter only *samiti*) with the pious objective of producing school and literary textbooks. But it was ostensibly created as an instrument to exercise control

over the seditious publications that may pose any threat to the existence and continuity of the Rana regime. Internal friction among its members prevented it from achieving much of its objective. It could only publish 32 titles over the period of 19 years (Aadi, *Gorkhabhasa* 58-72). However, it made some noteworthy contribution in its attempt to bring about standardization in Nepali language and literature. The *samiti*, as it appears, adopted "*Chandrika Byakaran*" as a standard for Nepali language since 1920 (Aadi, *Gorkhabhasa* 71).

Book publishing was basically confined to a mere handful of publications covering a limited range of subjects. Excepting one or two, literary journals and magazines did not exist. The first Nepali literary periodical, *Sudha Sagar*, published by the Pashupat Press appeared in 1898; and the first Nepali newspaper, *the Gorkhapatra*, in 1901. However, most literary journals and magazines over this period took their birth in Banaras, the Indian city close to southern border in the State of Bihar. Printing cost in Banaras was definitely much cheaper than what it was in Kathmandu; but it was not so much a cost as there were other important reasons at this time. First, the censorship requirement, under which publishers and writers had to submit the texts for scrutiny and approval by the government official for their publication. This was not only burdensome and delaying but frustrating as the text may be rejected for no apparent reason, depending upon the attitude and perception of the scrutiny officials. Second, it was not possible to write anything against the regime, however trivial, without an imminent risk of being persecuted. These perhaps were the major reasons why Nepali writers and publishers found this city as a most safe and convenient place to pursue their literary enterprises.

Several other factors equally contributed to preference for this city. The existence of a large number of printing set-ups in Banaras does not only mean competitive price and fairly good standard of printing but books could be published in a much shorter time than it was in Kathmandu where only few printing presses existed. Next was the presence of a relatively large community of Nepali expatriates, who arrived here from almost all parts of the country. The bulk of this community comprised students in the Banaras Hindu University seeking higher education in different faculties of arts and humanities. Banaras was then a centre for the Nepalese of both learning and launching activities against the despotic rule of the Rana families. Many of these students, apart from those who had fled from Kathmandu to take asylum in this city, lived on writing articles or books for the publishers. Lastly, it may be added that Banaras carries a special religious significance. Being the holy pilgrimage of the Hindus, thousands of Nepalis from all over the country pay visit to this city every year.

Banaras thus enjoyed the privilege of being home to Nepali publishers and writers for a long time. *Upanyastarangini* was published from Banaras in 1902, *Sundari* in 1906, *Madhavi* in 1909, and *Gorkhali* in 1916. A few number of literary journals such as *Gorkha Khaber Kagat* (1909), *Chandrika* (1918) were published from Darjeeling, another Indian city close to eastern border in the State of West Bengal, where the Nepali-speaking community constitutes the dominant population. The contribution of the Nepali community in Darjeeling to the political awakening and to the advancement of Nepali literature was noteworthy.

The existence of educational institutions to which the development of publishing is closely and inextricably linked was virtually missing. The floodgate of education opened very late in Nepal. The course of history for a long period turned most inhospitable to its development. As early as 1901, the Rana Prime Minister Dev Shumsher, who is known for his liberal policy, introduced primary education to promote and spread literacy in the country. The key figure who tremendously contributed to this noble cause was the king of Bajhang, *Raja* Jaya Prithbi Bahadur Singh. His "*Bhasa Pathasalas*" sowed the first seed of mass literacy programme in Nepal (K. Shrestha 2). As many as 50 such schools in Kathmandu and some hundred in the hills and the *Terai* were established (K. Shrestha 2). A humanist and a champion of freedom and democracy, development and education, Jaya was an ardent advocate of Nepali language who always stood for the use and promotion of Nepali language to the dominance of Sanskrit and English as a medium of instruction in the primary schools, or *Bhasa Pathasalas*, as they were called (Singh 24-26). He wrote a series of Nepali primer as a text-book to be used for teaching in the *Bhasa Pathasalas* (Singh 25; K. Shrestha 2).

Unfortunately, these *Bhasa Pathasalas* were mostly closed soon after Chandra Shumsher came into power in June 1901 (B. Sharma 352). Dev hardly ruled four months before he was unceremoniously forced to resign by Chandra for no other apparent reason than the fear of his reform programs which may destabilize the family regime of the Ranas. Ironical to Chandra's manifest abhorrence to the spread of education in the country, it was during his rule that the first undergraduate college of liberal Arts was founded in Kathmandu; the Durbar High School was opened for public admission; and some dozens of primary schools in different parts of the country were established. His

29-year rule remained eventful for several reasons but none was as epoch-making as the foundation of the Tri-Chandra College (Tribhuvan University 3, 19). The reason was all too obvious for the role it was to play in bringing the regime down. However, it was apparent that these liberal gestures were not spurred by any pious desire to promote education. At work behind such moves were external forces to which Chandra reluctantly yielded. He was, for example, pretty aware of what it would cost to his regime to establish a college as his own remark during its inauguration makes it explicitly clear: "This is the beginning of our end" (Malla, Intellectual 272).

At this time of postwar period, some dozen of Nepalese students were studying in Calcutta where political agitation and civil disobedience were gathering momentum under the influence of Bolshevism, Communism and Gandhism. Chandra was quick to see that such subversive movement could inspire Nepalese students to turn against the established regime in the county and hence the need to shield the country from their influence. To this end a number of steps were taken of which the establishment of the Tri-Chandra College was one of them. It was ostensibly created with this objective of checking "the exposure of the Nepalese youths from the seditious ideas that flowed so freely in the centers of learning in India" (P.Uprety 101; Tribhuvan University 3). All English and vernacular newspapers and periodicals dispatched from India to their subscribers in Nepal were rigorously censored, and restriction was imposed on foreign travel for any such purpose as higher education, medical treatment and even for the purpose of trade and commerce (P.Uprety 97-99, 101). Like the Tri-Chandra College, primary schools were established not without some implicit reasons: the literacy requirement imposed by the British government in India for the Nepalese people to be

eligible for recruitment in the British Indian Army. Hence, these schools were mostly set up in those locations from where people were recruited for the British Indian Army (K.Shrestha 2).

As the regime was firmly set against the spread of education, trade in book which largely relies on the existence of a literate class of people for its market, could not grow. Prior to the establishment of Tri-Chandra College, book trade in a modern sense was yet to appear. In the absence of educational institutions, the market for book was limited to the sales of a few selection of title, mostly religious books written in Sanskrit. Access to education was confined to a few privileged people, who were mainly members of the ruling family and the family of the Royal Preceptor. The government exercised tight control over the establishment of educational institutions to ensure that the mass had no access to education. Demand for books was thus negligible and hence there were only few outlets dealing with books.

A quick look over the history of book sellers in Nepal reveals the existence of some dozen or more sellers before their number started ascending, particularly after 1933 (S. Regmi 42-49). The first book stall to come into existence was *Harihar-Sharada Pustakalaya* in 1887. Although this stall is named *Pustakalaya* meaning 'library' in the modern sense of the term, it was basically a book stall in its old sense. It sold mostly religious books written in Sanskrit apart from some language related books published in Banaras by Hari Har Sharma. Next to appear was the book stall, known by the name of *Pundit Nara Dev Moti Krishna Sharma*. It came in 1886 under the joint partnership of Moti Ram Bhatta and Krishna Dev Pandey. Three more book stalls came into the scene

between 1901 and 1905: *Nar Hari Tirtha Bhattarai* (1901), *Hom Nath Lila Nath Rimal* (1905), and *T.D.H. and Adbhut Karyalaya* (1907).

In 1916, Pandit Toya Nath Panta opened a book stall in his own house; so did Daibagya Man Joshi in 1921 and a poet Prem Prasad Bhattarai in 1926. The *Gorkha Agency*, set up by Jagan Nath Joshi Sedai and his son Baij Nath Sedai in collaboration with Pundit Krishna Chandra Aryal, started selling its publications since 1914. It also imported books for sale. The founding of Tri-Chandra College in 1918 gave rise to a couple of new book stalls, such as the *Mahbir Singh-Chiniya Man Singh* (1923), *Bhakta Bahadur Publishers and Book Sellers* (1928), and *Buddi Man Udaya Man Rajbhandari* (sometime before 1933). These book stalls were more inclined to deal with Nepali and English text books apart from conventional religious books in Sanskrit, indicating the rise in demand for English tittles and marking the diversification in the selection of titles.

Outside the Valley, Birgunj had one book stall around 1907-1909. In Palpa and Butwal, it appeared as late as 1935. Similar book stalls appear to have been established in Nepalgunj, Pokhara, Dharan and Biratnagar towards the last quarter of the Rana regime.

Integral to the development of education and publishing is the existence of adequate network of library facilities. Regrettably, such facilities, let alone their creations by the government, were not even allowed to be established on public initiatives. Any attempt to their establishment was viewed with suspicion and apprehension of being threat to the regime, and hence thwarted by suppression. The case in point was “the library episode” that occurred during the time of Bhim Shumsher (1929-1933). It was, as a matter of fact, a trivial case of not much significance – few young enthusiasts in the

wake of the new awakening in the country were in the process of setting up a public library. But the way the Rana administration reacted and went for its suppression gave it a greater prominence. The incident was simply an indication of the arrival of a new awakening: its suppression did nothing more than exposing the intent and atrocities of the regime which further added fuel to the surging wave of awakening in the country.

The Bir Library, the first library in a modern sense, came during the time of Bir Shumsher, after his own name, in 1900. In 1918, the Tri-Chandra College Library was established along with the founding of the Tri-Chandra College the same year (Karki 9-10). The *Bir Library* is said to have been replaced by the Tri-Chandra College Library: the bulk of the *Bir's* collection was transferred to create it. The remaining collection of the *Bir Library* was handed over to the Department of Archeology. At the time of its establishment, the Tri-Chandra College library had the collection of some 1500 volumes consisting of text books, periodicals and magazines and modern books (N and S. Mishra, 19: 235). Few libraries evolved out of private collections, such as the *Keshar Library*, the *Singh Library* and the *Gurju Library* (Karki 11-13). The first two of these libraries, as their name indicate, belong to the families of the ruling class while the last is owned by the Royal priest. The relevance of these libraries to the development and spread of education, however, is insignificant as they were meant for the exclusive use of the member of the Royal families

The scenario, however, started slowly changing with the series of events that took place in and outside the country during the last quarter of the Rana regime. In particular, it was the last 17 years of the Rana regime, beginning from 1933, during which

publishing sector began to appear in the modern sense. The rise of mass awakening and the spread of literacy were, *inter alia*, two important factors in this period that gave rise to demand for new books and periodicals. Book sellers and publishers in the private sector came into the scene largely in response to this newly created demand. The flashbacks of the political and socio-economic development of this period would suffice to appreciate their relevance and impact on the publishing sector.

Towards the early 1930s national movement against the Rana regime was gathering strength. A couple of organizations in and outside the country, such as *Aaryasamaj*, *Gorkha Lig*, and *Nepali Nagrik Adhikar Samiti* were actively working for public awakening through their various publications and other activities. At this time, freedom struggle in India was gaining momentum, and this had a profound impact on the young minds of educated Nepali people. In the meantime, the return of the Gorkhas, with their exposure to the world outside Nepal during their services in two World Wars, added much strength to the spread of awakening throughout the country.

The political organization such as the *Nepal Praja Parishad* was founded in 1936 defying the government restriction on the formation of any organization or association without its approval. The main goal of this organization was doing away with the despotic regime. Ruthless suppression of the activities of this organization, in which four of its members were convicted of treason in 1941, gave rise to widespread discontent that further reinforced and consolidated the national movement against the regime. The expatriate Nepali community, especially in Banaras, India, consisting of a large number of students, were freely writing and advocating for change. The founding of the Nepali

Rastriya Congress in Banaras in October 1946 gave the popular movement a definite course that culminated in an armed insurrection in 1950.

While the political state of the country was charged with the surging wave of awakening against the family regime of the Ranas, the economic sector, in contrast, saw some new initiatives that brought with it the establishment of a whole set of new industries. Barring few sporadic development efforts in the interest of the ruling class, the Rana government had never before come up with such liberal policy to the development of industries in the country. As noted by Pant, "it is a matter of history that for more than one century the Rana rulers were generally content simply to administer; they developed almost a negative attitude with regard to any systematic development of the country" (Pant 169). Over this whole period, "education and innovation were discouraged and blind loyalty and obedience from the masses to the whims and wishes of the oligarchy was expected" (Lohani 203).

In 1936 the first Nepal Companies Act was established, and the following year, the first commercial bank, the Nepal Bank Limited, was set up with seven branches in various parts of the city. By 1945, a total of 21 new industries had come into existence. Prominent among them were two cotton mills, two match factories and two jute mills (Lohani 205). Most of them were concentrated in Birgunj and Biratnagar, the Tarai towns close to the Indian rail-heads. These industries, however, could not run efficiently for the lack of adequate financial and marketing knowledge. Two of them which consisted of the bulk of the industrial investment between 1936 and 1945, the Birgunj Cotton Mill and the

Biratnagar Cottton Mill, went into liquidation immediately after the end of the Second World War (Lohani 205-206).

Among other important economic developments during this period was the establishment of the Agriculture Development Council through which measures were taken to reform the primitive practices of cultivation (B.Sharma 370). Efforts were made to introduce scientific cultivation for which foreign experts were invited. Some half a dozen of irrigation channels, including those in Saptari, Rautahat, Khajahani, Siphalebasha, Birgunj were constructed, and over a dozen of them in Kathmandu (370). Some improved variety of seeds were developed in the country while some imported from abroad for use and distribution in various parts of the Tarai and the mountains. Likewise, a number of agricultural training schools were set up in various parts of the country and officials were assigned to promote the scientific cultivation (370).

In education, a couple of new high schools, such as Juddodaya, Padmodaya and Shanti Nikunj, came into the scene during the twilight years of the Rana regime. In the meantime, primary schools started proliferating all over the country giving rise to a new class of literate people. By the end of the Rana regime in 1950, Nepal had one college, “11 high schools” (T.Uprety 61) and some “310 middle schools” (T.Uprety 61) to cater to her “eight million people” (Shrestha, Educational 2). At this time, there were 31 libraries all over the country (Ministry of Education 9). Scores of schools and colleges sprang up subsequent to the installation of democracy in the country (Pandey, et al. 42). Of considerable importance was the establishment of the Tribhuvan University in 1959. At

this time the university had the enrollment of some 2500 students with the affiliation of 19 colleges (Tribhuvan University 19).

Over half a dozen of monthly magazines and periodicals appeared in the last 17 years of the Rana regime of which the most influential was *Sharada*, a literary magazine. It appeared in 1934 marking the beginning of modern age in Nepalese literature. The magazine would not have come into existence had it not been for, what Khanal has described "a product of an unwritten, silent compromise, allowed and accepted as an experiment, between the authorities [Rana government] and the rising impatient intellectuals"(Y. Khanal, Literature 126). It produced a new generation of writers who under the influence of a new awakening in the country began to express themselves different from conventional ways. They brought with them a new genre of literary expressions – essays, short-stories, and novels – and new devices of literary applications, such as the use of symbols, chartering a new course and direction to Nepali literary movement that long dominated the Nepali literary scene. Belonging to this coterie of writers who grew around *Sharada* were Siddicharan Shrestha, Gopal Prasad Rimal, Govind Bahadur Gothale, Vijaya Malla, Guru Prasad Mainali, Shanker Lamichhane, and the host of other young writers. As Khanal put it, *Sharada* age was an age of enlightenment to which belong all the writers of this time because "all of them were part of that new awakening of which *Sharada* was a collective expression" (Y. Khanal, Literature 126).

The other major publications that appeared after *Sharada* were Udhyog (1938), *Sahitya Srot* (1947), and *Gharelu Illam Patrika* (1947). By the end of the Rana regime,

there were as many as ten monthly magazines, two weekly newspapers and four bi-monthly periodicals (G. Devkota 578-616). Except one or two, almost all these publications appeared over the last 17 years of the Rana regime. The Revolution of 1951 gave rise to a sudden spurt in the publication of magazines and newspapers. Until 1960, Nepal had 42 daily newspapers (five of them in English), 80 weekly newspapers (seven of them in English), and some 68 monthly magazines.

The most distinct aspect about this period is that it was the most crucial and critical period in the history of Nepalese literature. Despite the fact that there were only few writers at this time yet it produced some of the finest and the most enduring writers that were to dominate the Nepali literary scene for the long time. Laxmi Prasad Devkota, Lekhnath Paudyal, Siddhicharan Shrestha, and Balkrishna Sama were some of those figures whose contributions have firmly entrenched the foundation of Nepali literature.

With the end of democratic regime that survived for a brief period of ten years, from 1950 to 1960, Nepal once again fell into autocratic regime under the direct rule of the king. It lasted for 30 years till it was overthrown by the people's revolution in 1990. During this period publishing activities almost came to be confined in the hands of the state-owned organizations. The new regime restricted the publication of materials that were considered to be seditious and blasphemous. In 1965 the first copyright act was enacted. Surprisingly, as one would expect, none of the articles in the act imposed conditions subjecting the availability of copyright to censorship. But then there were other laws outside copyright through which printed materials were regulated.

It is only after the reinstatement of democracy in 1990 that publishing industry began to grow in Nepal in somewhat modest scale. This is largely due to the adoption of open, market-based economic policy and the subsequent liberalization of the economic sectors. This growth in the publishing sector is evident from the growth in the number of ISBN registration of titles published from Nepal. The ISBN registration started in Nepal from the year 2000. A total number of 1126 titles were registered this year. Over the course of seven years it has increased to 2305 titles (The Central Library of TU, ISBN Registration Division). This indicates that market for books is steadily expanding. This growth in the market is not only due to the rise in the literate population, rise in the income level and other economic activities. Over the past few years the rise of various new forms of media, such as broadcasting (the rise of TV and FM stations in the private sector), the Internet, and multimedia, brought with them a new market for the use of literary works.

With this growth in the market piracy of works of local authors also became widespread. As means of reproduction, such as photocopying machine, became much cheaper, piracy became much easier and profitable. A majority of photocopying stalls in Kathmandu and other major cities of the country are now freely engaged in reproducing the popular works of both local and foreign authors which are then sold in the form of books at a much reduced price. Similarly, the unauthorized use of literary works for various purposes in various media, such as radio, broadcasting, the Internet has become rampant. Authors and publishers are therefore not in the position to realize a due share of profit from the market exploitation of their works. This will seriously retard the growth of national authorship which is critical to the growth of national art and literature. However,

local authorship will not develop unless authors are able to live on their works. It is therefore crucial to ensure that authors are able to receive compensation for the use of their works through the effective implementation of copyright law.

Development of authorship and publishing industry are complementary to one another. Growth in the publishing industry supports and sustains the development of local authorship. It is through the publishers that authors receive royalties for the market exploitation of their works. In the absence of copyright protection, publishers will not be able to recoup their cost and pay royalties to the authors. Copyright is therefore essential for the publishers to exploit the market and earn a reasonable share of profit to be able to compensate the authors. The existence of a viable publishing industry would enable the authors to earn their living from writing. Once this happens writing develops to take the form of profession in which local authorship grows. This gives rise to the birth of an independent, autonomous author who will look to his readers, not to his patrons, since it is the market that sustains him. As long as authors are bound to live by other sources, or on the bounty of his patrons, writing will not develop to become a profession. What is needed to develop it into a profession is economic independence and copyright is a means by which authors can secure this independence. Because, it is essentially a right designed to secure reward or payment to the author for the use of his works. The history of publishing in Nepal shows that publishing industry could not develop for the lack of sufficient market and this in turn inhibited the growth of local authorship.

As domestic production of books needed for education and other usage was far from being sufficient, foreign books dominated the book market in Nepal. The bulk of

this market constituted pirated editions of foreign works. As a rule, protection of foreign works would strengthen the competitive position of national authors and reduce the dependence on foreign works. In Nepal foreign works were protected only since 2005. The free influx of pirated copies of foreign works further constrained the market for the works of local authors. Since these works are sold much cheaper there is no way by which works of national authors could compete with them. Normally the prices for the works of local authors are relatively higher because they are printed in low quantity for the lack of market and their printing cost owing to high cost of paper is expensive. This perhaps is the reason publishers in Nepal would generally prefer to print in the neighbouring Indian cities, such as Varanasi and Patna, across the southern border of the country. It is noted that almost all publishers in Nepal are involved in selling these pirated foreign works as they receive higher margin of profit from their sales.

Since market for national authors was lacking and publishing in modern sense did not exist copyright did not come into implementation. However, this does not mean that piracy did not exist at all. It was there to some extent but its impact on the business was negligible in the absence of market. The most distressing fact is that publishers themselves were involved in piracy as there are many instances of unauthorized publications of the same work by several publishers. Hence neither the publishers nor the authors came to bear pressure on the government for the implementation of copyright law despite its existence since 1965. Neither did they, both authors and publishers, ever seek to assert their rights. Had it been so the government would have long been obliged to look into the matter and bring necessary correction in the law to get it implemented.

5.2 Authorship, Publishing and Market

Albeit different from other consumer items, book in the modern society has come to be viewed as a commercial object to be traded in the marketplace. Book publishing developed in the form of commerce with its own ethics and rules. Its ethics lies in the respect to the intellectual property contained in the book and its rules are governed by the right to benefit from the use of one's intellectual creation which over the course of time came to be codified as "copyright." The rapid growth and proliferation of book market in England and the Continental Europe during the 16th, 17th, and 18th centuries fueled the growth of publishing industry that hastened the commercialization in literary creations. Such commercialization of literary works enabled the authors to enjoy greater autonomy and independence to pursue their career by relieving them from their dependency on noble patrons for earning their living. This over a time paved the way for the profession to establish itself. The point here is that commercialization is one of the essential conditions for the growth of authorship. However, this commercialization may not take place unless there is a market for books. It is only when books will begin to sell in large quantity authors will become aware of the economic value of their works and writing will then begin to take the form of profession. Put it simply, as market would develop and publishing industry would become viable, it will create a situation where authors can make their living by their works and when this happens writing will develop into a profession – a condition that is essential for the authorship to take its root. Such a development will induce the authors to become more market-oriented: they would more tend to look for readers than for the capricious reward of their patrons for it is only when

their works can live up to the expectation of the buyers, they have a chance to receive ample rewards for their works.

Since market is the major source of incentives that copyright secures to its authors and publishers, it is often pointed out that copyright offers little incentives for those who create and produce serious works. This in most instances is true but then there is other mechanism by which such works are produced and promoted. One such mechanism is subsidy in the form of grant which the government offers to the universities and national research institutes to undertake the works requiring large financial outlays and considerable amount of time in their production in the interest of the society.

In the context of Nepal, writing is still taken up as something other than a profession. The notion that it is a profession constituting an integral part of commercial activity has yet to take its root. This has partly to do with the cultural makeup of the Nepalese society and partly with the lack of taste for reading hindering the expansion of book market and the growth of publishing industry. The idea of property in literary creation is wholly alien to Nepalese society that believes in free use and dissemination of knowledge. It is essentially a Western concept that is basically premised on the values of mental labor to which Nepalese society does not recognize as such.

As early as 1935/1936 the Rana autocratic government which ruled the country from 1846 to 1950 promulgated a law prohibiting unauthorized publication of literary works. But this law was then mainly directed to control the publication and circulation of seditious materials because protection was strictly subject to government censorship. Prior to this, the author had virtually no control over their works once they chose to

publish them. Any publishers could freely publish the books that are successful in the market. The work thus belongs to the author as long as it remains unpublished but on publication it is as free as those in the public domain without any control of the author over his work. Until the enactment of the new Copyright Act in 2002 authors in Nepal were not in the position to secure remedies against the infringement of their works. Neither was it possible for the publishers due to obscurity in the 1965 law over the matter of jurisdiction. The Registrar of Copyright would decline to take action on the grounds of having no jurisdiction while the district court for the same reason would refuse to entertain the case involving copyright. This was the main defect failing the implementation of the law. The most telling point here is that not a single author or publisher has ever brought a case before the Registrar over a period of 25 years since the enactment of the first copyright law in 1965. The defects in the law came to be exposed only when a handful of cases invoking the provision of the law started coming up before the Registrar toward the mid-1990s. These cases mainly involved the piracy of books and music albums. But it is the music publishers and the artistes who first came in the forefront demanding protection against the increasing piracy of their works. This reveals the most fundamental aspect for the development of copyright. And this aspect is market. As market for music began to expand the piracy of these musical works soon became rampant depriving the artists of their royalties from the sales of their music albums and making it difficult for the original publishers to stay in the business. This led some artistes and music publisher to form Copyright Society in order to persuade and pressurize the government to take some immediate measures to deal with the situation. The point here is that the prerequisites for the development of copyright did not exist in

Nepal till the market, particularly in the field of music, gradually developed towards the 1990s.

In contrast to the music, the book publishers responded with little enthusiasm because market for books was not expanding as fast as it was for music. The publisher would say that works of national authors do not sell as easily as those by foreign authors because they, in their opinion, are not offering what the readers are looking for. This suggests that market is there but local authors have failed to capture and exploit this market because they are not responding to the taste of the readers. The authors on the other side are mostly content to see their works published. They are motivated not so much by the thought of what they could economically benefit from their works as by the thought of what they could gain by way of social recognition or by way of winning some lucrative rewards from the government either in the form of promotion in their service career or appointment to some higher position. How their works are performing in the market is of least concern to them because it is not the market to which they turn for their livelihood but to their patrons, who are mostly noble "*bhaardaar*" loyal to the service of King. This means authors are not market-oriented; they are for the most part still writing for their own satisfaction, or to the satisfaction of their patrons in the hope of winning some rewards to have a decent living. The idea that writing is basically an interaction between the subject and its recipients is yet to gain recognition. As such, readers who constitute an essential part of writing have no place in writing and are therefore largely ignored. Authors remained totally indifferent, or insensitive, to the changing taste of the readers who in essence are the source of rewards for their works. One of the possible reasons for this attitude is the belief that has still been taken for granted: books do not sell

in the market as do other consumer goods because people have low income to spare on books, and low reading habit. On top of it the literate population, which constitute the bulk of the book market, is fairly small. These reasons have been cited for the last several decades to account for the slow development of book market and local authorship. But the indicators underlying these assumptions do not fully support them. They tell somewhat different story pointing visible improvement over the span of, say, thirty years: literate population of the country grew from 13.9 percent in 1971 to 54.1 percent in 2001 (CBS, Population Profile n. pag.). Per capita income which stood at US $ 100 in 1971 crossed over double this figure in 2001 (CBS, The Analysis of the Population 124).

The point here is that market scenario for books is not the same as it was thirty years ago. Book market in fact is slowly changing its face against the ever-growing expansion and proliferation of educational institutions, emergence of new market for creative works due to the rise of new media, such as the Internet, and host of other economic activities in the country. It is growing on both the supply and demand side, albeit this growth may not be viewed as fast as it is needed for the emergence of a publishing industry that can grow and sustain on the publication of local authors. The fact that almost all publishing houses in the private sector are owned by the family indicates that the existing book market in Nepal is still small for the emergence of large corporate publishing houses. Until this market grows further bigger and the corporate publishing houses come into existence, the publishers may not realize the full potential of copyright regime in protecting their profit interest. But when this eventually happens over the course of time, publishers would at once realize that publishing without copyright would

be suicidal to their own interest. Doing business in books is essentially doing business in copyright.

5.3 National Authorship and Protection of Foreign Works

Market for printed materials has significantly expanded in Nepal over the last few years. This is largely due to the policy of economic liberalization that was introduced in Nepal since 1990 after the reinstatement of democracy. The subsequent rise and proliferation of educational establishments and other economic activities brought with it the existence of a fairly large market for books of various categories. But this market in which the share of domestic authors appears to be relatively much smaller is largely dominated by foreign works. One major reason for this domination is that they are not protected in Nepal; they are freely pirated and sold in the local market at much cheaper price. As such, it was difficult for the works of local authorship to compete with them.

Since copyright in Nepal was not implemented till the enactment of new copyright act in 2002, the unauthorized use of the works of domestic authors was widespread. Such use virtually foreclosed the prospect of earning revenues by the national authors from the market exploitation of their works. On top of it the overwhelming presence of foreign pirated editions in the domestic book market made it extremely difficult for the works of national authors to compete with them and secure a sizable market needed for their growth and expansion. Hence, if a market is to exist for the works of national authors it is not sufficient to protect national works: protection of foreign works is also equally important. Where foreign works are unprotected, they tend

to compete unfairly with the works of national authors and may displace the latter because their use is less costly (Lipszyc 588).

The critics of protection to foreign authors would come up with the argument that such protection would tend to make their access much costlier and thus restrict their widespread use. This would have a tremendous negative economic and cultural implication particularly in the context where the country excessively relies on foreign imports to meet her educational and other development needs. The most crucial point to be noted in this context is that copyright works in favor of those who produce knowledge because it is essentially designed to protect the owners of intellectual property. There is thus less to expect from copyright for those who remain consumers or who have little to spend on books despite the fact that it contains certain features to ensure the free flow of information. In order for the country to be able to take benefit from this system, she should be in a position to produce much of the knowledge that can meet her domestic needs, and that at the same time can be exported to other countries.

Since the building-block of knowledge is itself knowledge, creation and production of knowledge has much to do with the availability of, and the ability to consume, knowledge. Where this ability to consume knowledge is poor owing to low purchasing capability and the lack of taste for reading, there is little creation and production of knowledge. As a rule, creation and production of knowledge grows with its increasing consumption – they go hand in hand. This in fact is a two-way traffic: countries, for example, that have high consumption of books produce as much to export

it. By contrast, countries that have low consumption of books have low capacity to create and produce it, and hence they largely remain a net importer of knowledge.

Importation of foreign books can complement, not substitute, the specific need of individual countries. This means every country has to create and develop its own knowledge base to meet its specific requirement. This, however, may not be possible without the development of local authorship which, it is submitted, is a key to the realization of self reliance in the creation and production of knowledge. Development of local authorship presupposes the existence of a viable publishing industry that can feed and sustain the local authors. Critical to the growth of publishing industry is the existence of market for books. The rise in the consumption of books would create the market in which publishing industry arises and grows to exploit it. The purpose of copyright is to secure this market to authors and publishers by enabling them to receive benefit from the market exploitation of their works. The exclusive rights granted to the authors are means to this end. However, these exclusive rights would fail to secure this market for domestic authors if foreign authors were denied protection, allowing them to be freely pirated. In the absence of protection to foreign authors, domestic authors would lose their significant market to pirated works of foreign authors which are sold much cheaper to those of national authors. This would defeat the very policy objective of copyright which is to promote national creativity and culture by helping local authors and publishers to compete with the imports of foreign works. Put simply, allowing the pirated copies of foreign works free to circulate in the marketplace would certainly facilitate the access to their works but then, which is perhaps more important, it would weaken the competitive

strength of local authors and publishers and badly harm the potential market for their works.

The central issue in this context is whether free access to foreign works by letting them freely pirated would help or harm the development of local authorship. It appears that to certain extent free access to foreign works would help develop the competitive capability of local authors but the moment works of local authorship starts raising in their number in the marketplace, the existence of pirated foreign works would have a countervailing effect due to the fact that such pirated copies would sell at a much lower price than those of the local authorship. Hence leaving the foreign works unprotected may look beneficial when viewed from a short term perspective but in the longer run it would further reinforce the reliance on foreign works by inhibiting the development of local authorship. The long-term cost of denying protection to foreign works appears therefore much higher than the short-term benefit which it yields during the initial period. The case appears much different when foreign and national works are accorded equal protection: the latter have the competitive advantage over the former due to the fact that foreign works, especially those published in the West, involve higher production cost.

The argument that protection to foreign works will escalate their access cost much higher appears to be an over exaggeration of the actual situation. Three reasons may be cited to explain why this access cost may not rise to the extent beyond certain level. First, copyright does not create monopoly as do patents. It allows anyone to compete with the original works, provided expressions are not copied from them. Monopoly in copyright is in essence a monopoly in the expression, in the form and manner in which ideas are

expressed. Ideas clothed in the expression belong to the public domain and are therefore unprotected. Anyone can freely appropriate it and create a new work to compete with the original work. This means right- holders do not enjoy the privilege of monopoly position in respect to their works. There may be hundreds of works on the same subject and the availability of this substitute restricts the right-holders from setting an arbitrary price for their works. Copyright protection therefore does not enable the copyright holders to charge the price as they would wish. Except in certain cases where the value of the work lies not in the copies but in the original manuscript, such as painting, right-holders' ability to fix monopoly price is constrained by the availability of competing substitute works.

Second, the threat of piracy may restrain the publishers to set the price beyond a reasonable level. As a rule, piracy occurs where profit is high and the means of reproduction are easily available. Given the market, the pirates are able to undercut the prices of the original books by the margin which the original producers have to incur in the form of fixed costs. As such, setting the price at the higher level would tend to give more incentives to the pirates to indulge in illegal reproduction and this in turn would seriously damage the market for original books. Publishers on their part are well aware of this fact and are therefore generally not tempted to inflate prices of their books beyond a reasonable level. The lead-time-advantage argument which Prof. Breyer had advanced to disarm the publishers from copyright protection does not appear convincing in the modern context where books can be reproduced in large quantity within a matter of few hours, thanks to the development of sophisticated reproduction technology (281-351). It is submitted that piracy is a phenomenon which by any means is difficult to eliminate

hundred percent. In China, for example, violation of trademark is an offense subject to capital punishment but this did not deter the counterfeiting of trademarks since the "profit margins from counterfeiting rival mark-ups for narcotics"("Dogging").

Furthermore, the conventional argument that protection of foreign works would enable their right-holders to charge higher prices restricting the access of Third World countries to the much needed materials for education and other academic activities does not appear to be wholly true when seen against the existing on-the-ground realities. In many instances the prices of foreign books have instead come down to the level at which local publishers have difficulty to compete with. The availability of copyright protection and remedies for its violation has encouraged increasing number of publishers in the West to bring out cheaper local editions in collaboration with local publishers. A high-priced original edition which would easily sell in the European and American market, for example, would not sell in the South Asian market for the simple reason that economic standard of the peoples between these two stratum of market presents a wide gap. Market realities dictate that if the large publishing houses in First World countries are to compete and dominate in the emerging vibrant book market in Third World countries, they cannot do this by charging a uniform price for all segments of the market. By any business principle, no large publishing houses would wish to forego the huge potential market as long as it is well insulated by copyright regime. Price is not a deterring factor for there are ways by which these publishing houses can substantially cut their prices to remain competitive and dominant in the export market. One such means is the establishment of subsidiaries in the importing country – an example is the Oxford University Press in India which is a wholly owned subsidiary of Oxford University Press. The other, perhaps more

popular and convenient, is the system of licensing by which the publisher in the importing country is legally authorized to bring out cheaper local editions for the specific territory and specific time period on the agreed royalty fee and other terms and conditions. For their inherent advantage of saving enormous cost in terms of labour, transport, and other overhead expenses, these business schemes have come to be preferred in many instances over the conventional mode of doing business where books were supplied directly from the country where they were originally published. Several large publishing houses in the West have come to rely on such arrangement to retain their competitive position in the lucrative market of Third World countries. They have either their subsidiaries or the licensees in the major regional marketplaces from where books are published and distributed to its small neighboring markets. In the South Asian region, for example, India has emerged as the major regional centre for the production of books. Cheaper editions of Western publications are produced under license agreement in cities like Bombay, Madras, Kolkata and Delhi from where they are exported to Nepal, Bangladesh, Bhutan and Sri Lanka. Seen against these backdrops, it appears that copyright protection of foreign works does not necessarily lead their prices up; the prices in many instances have instead significantly come down as it encouraged the foreign publishers to bring out the cheaper editions at an affordable price. This in turn has facilitated the wider dissemination of works. However, this is not the case in respect to least developed countries where the market is small. Excepting some negligible cases, most publishers in the West would refuse to grant license for the reprint of local editions in such markets on the ground that transaction cost is higher than the receipt of royalties. As a rule, territorial rights for such markets are granted to the regional publishers.

Leaving aside the cost/benefit equation, the argument for letting the free appropriation of foreign works appears wholly untenable against the theoretical premise on which protection is justified. Once it is universally accepted that authors have property right to their works, every country has a moral obligation to respect their right irrespective of their nationality and origination of works. The case in point is Article 27.2 of the UN Universal Declaration of Human Rights which categorically states: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

There is yet another point that can be mooted in favor of extending protection to foreign works. This is particularly important in the case of developing countries to which it has been increasingly difficult to preserve and promote their cultural identity and integrity in the face of growing threat of cultural invasion and colonealization from the countries with larger economy who are the major exporter of cultural products containing intellectual property. These cultural exports, such as cinematographic and musical works, videos and multimedia works, are superior in quality and competitive in prices with global network for their distribution and marketing. By contrast, such products in developing countries are relatively inferior in quality and are mostly restricted to the market within the national territory. Their ability to export or capacity to reach wider audience is severely constrained by language barrier. The point here is that if cultural imports are left unprotected and freely allowed to compete in the domestic market, the widespread piracy, and other illegitimate trade, of these products would soon bring their prices to an unbelievable level making it virtually impossible for the domestic cultural products to withstand the competition. This would stifle the growth of national creativity

and indigenous cultural industry while exacerbating the reliance on foreign imports. It is submitted that excessive reliance on imported cultural products may bring with it a gradual erosion of indigenous culture and identity which ultimately give way to cultural domination or homogenization (Mcanany and Wilkinson 3-29 and Sinclair 30-59). This domination becomes much easier, particularly for a larger over a weaker economy, when there exists between them what is called 'cultural proximity'. Indeed there is ample reason to support this hypothesis and, to a greater extent, this explains why it has been relatively easier for Indian cultural industry to establish its dominance in the Nepalese cultural market. Protection to foreign cultural products is therefore important in order to safeguard the promotion of domestic cultural products.

The argument above points to the fact that contrary to the conventional belief that it would enormously increase the trade deficit and the balance of payment, the protection of foreign works, together with other necessary supportive policy measures, would instead help promote the works of indigenous authors and the development of local publishing industry. This over the course of time would not only significantly reduce dependency on foreign works for educational needs but at the same time enhance the competitive capabilities of these authors to make their presence in the international knowledge market. Besides, foreign works cannot meet the specific needs of the country; they are written in different context and are tailored to meet the specific situation for which they are intended. Local needs of the country would be best served only when local authorship develops. With the growth of the local authorship flourishes national art and literature, enriching national cultural heritage. Copyright should therefore be primarily directed to the promotion of national authorship, to the strengthening of their

competitive capabilities, along with the appropriate formulation and adaptation of other policy instruments to support and achieve this goal. Far form being a deterrent to this goal, protection of foreign works would strengthen the position of national authors and publishers by enabling them to take advantage of their lower cost of production against the relatively high-priced foreign books.

Until the ordinance protecting the works of foreign nationals was promulgated in Nepal on September 23, 2005, foreign works could be freely pirated without the fear of any legal action. This made the access to pirated foreign works relatively much cheaper than the works of national authors. If, for example, a consumer can buy a work of fiction written by a well known foreign author for much or less the same price for a similar kind of works by a national author, the choice, in most instances, would preferably go for the former. Given the fact that English is the source of knowledge and a medium of instruction in most developing countries, such as Nepal, the existence of a national language does not constitute an effective deterrent against the overwhelming presence of works by English authors in the domestic knowledge market.

Granting protection to foreign authors in this situation makes a great difference to the promotion of national authors as this would significantly bring the prices of foreign works up against those by the national authors. This would enable the latter to retain their share in the domestic market. Access cost to foreign works would increase limiting their market in favor of the domestic authors because such increase would provide incentives to national authors and publishers to produce much of the needed materials which over the course of time would lead to the path of self-reliance, saving much of the expenses of

hard currency on imported materials and reducing ever-growing deficit in the balance of payment situation. In Nepal, this aspect of copyright has never been fully explored in the policy formulation for national book development.

5.4 Copyright Relation Between Developed and Developing Countries

A simple reading of copyright would perhaps pose no problem. The message is clear and convincing – authors and those who invest on them to bring their works to the marketplace should receive adequate protection to enable them to obtain their due share of return for their contribution to the welfare of the society. Accordingly, the foremost goal of copyright has been to promote the creation and dissemination of creative works for the good of the society. As a means to realize this objective incentives to the authors are guaranteed by law by empowering them for a limited period with exclusive rights that can be sold or transferred in the marketplace. Copyright in essence is a body of rules designed to secure this incentive to the creators in the larger interest of the society.

Although there is nothing much to dispute about this fundamental objective, copyright becomes at once vexing as it moves from domestic to international protection. Since the issues involved in it have several dimensions which have a direct bearing on trade and development. These issues are very complicated as they have much to do with the existing level of disparity across the countries in their capacity to produce knowledge. Over 80% of the world's knowledge industries are situated in the North and their output is copyrighted there (qtd.in Chakava 17).

Developing countries have very little of their own to protect because their capacity to produce knowledge is severely constrained by the fact that most of them are

still in the process of developing the essential infrastructure, the prerequisites for the growth of local authorship and commercial publishing. Development of these infrastructures is easier to state than to realize for it is inextricably linked with the overall economic performance of the country. On top of it, most of them have colonial history, particularly African countries, and by the time they became independent, they had virtually nothing of their own to begin with their education and academic requirements other than relying on those institutions and structures which they had inherited from their colonial government. It further reinforced the dependency of these countries on their former colonial government for meeting their basic educational needs. Given this situation, the international copyright convention, such as the Berne Convention, to which most of these countries have joined under their colonial regime, has but heightened the frustration of these countries as it prevented them from their easy access to much of the needed materials for their education and other economic activities. They would argue that rules governing the Berne Convention are heavily influenced by the large publishers in the affluent countries who have their major interest to protect in the export market. Since these rules are much biased in favor of the commercial interest of the Western publishers they tend to inhibit rather than facilitate the flow of information from industrialized countries in the North to the developing countries in the South.

The advanced countries on the other side would argue that creation and production of knowledge cost enormous investment and such costs must be redeemed to ensure the development and future availability of knowledge for the welfare of the society. As such, developing countries should not expect to obtain it free of cost: they should either build their own knowledge base reducing their dependency on foreign

imports or be able to pay for its use. The message is plain and simple: the proprietary information contained in the form of books cannot be freely distributed without adequate compensation to its right-owners.

The question that arises is to what extent the developing countries are capable of paying the price for the materials which they desperately need for the development of their education and other academic pursuits. Given the higher prices of the books produced in the advanced countries and the weak economies of the developing countries to afford it, the basic tension is one of cost. Developing countries would argue that they are not demanding that knowledge should be transferred to them free of cost but that it should be made available to them at an affordable price – charging the same prices that are set for the markets in the affluent countries is therefore unfair. To this the publishers in the advanced countries respond that production cost of books is higher due to their higher living standard and therefore they cannot be supplied to the developing countries below their threshold price. Thus what appears to be reasonable by the standard of advanced countries is something developing countries cannot afford and that which appears reasonable by the standard of the latter is something the former cannot, or are unwilling to, sell.

It appears that much of the cost of the original editions can be substantially reduced to the level that is affordable to the developing countries by granting license for low-cost English reprint editions to the local publishers in Third World countries. Now that most countries in the Third World, under the obligation of the WTO TRIPS Agreement, have revised and consolidated their copyright and other intellectual property

laws, the possibility of large-scale piracy of foreign works does not exist as it was before. The licensing arrangement would be beneficial for both the authors in the advanced countries and the potential readers in Third World countries: the former would benefit from the extensive exposure (dissemination) of their works in addition to earning some extra royalties although this royalty income would be comparatively much lower to what they would normally receive from the sales in their countries. The latter would have greater exposure to the large number of foreign writers at an affordable price. This exposure would both help develop the competitive capability of local authors while facilitating the authors in the advanced countries to establish and expand their market base in these countries. By the time the economy of these countries grows and market for books considerably expands, these markets are likely to become one of the promising sources of income for the authors and publishers in the advanced countries. This is already happening in the case of the several newly industrialized countries in Asia, such as Singapore, Korea, Hong Kong, and Taiwan.

Despite the fact that licensing agreement for the low-cost English reprint editions of original publications can be profitably worked out to the mutual advantage of the publishers in both the advanced and developing countries, it appears that only limited titles have been made available in the South under this kind of arrangement (Malhotra 44). Views from the North are yet not cordial to the idea of granting license for such low-cost English reprint of original edition to the publishers in the South. They tend to hold that licensing a low-cost English reprint of original edition in developing countries is by no means profitable for the original publishers in the North. Far from being profitable to

its original publisher, such licensing for reprint edition amounts to a loss of established market for the original edition. Lynette Owen, for example, puts the case bluntly:

> Even a higher number of sales of the licensed edition will probably not compensate for the loss of a lower number of direct sales of the original edition, as royalties from the license will normally be based on a very low local price. It is a sad fact that income from licenses of this kind often does not cover even cost of the paperwork involved in contracting and administering the license and therefore represents an overall (and sometimes substantial) loss to the original publisher.(96-97)

By contrast, Henry Chakava, writing from the perspective of developing African countries in the South, offers a view opposite to it:

> It cannot be argued that they [publishers in the North] make less profit when they sell rights [reprint license] since in cases where such rights are granted, they would normally insist on a maximum royalty of 20% (which goes into their books "below the line"), yet the majority do not net that kind of profit in their normal publishing operations. We can only surmise that the real reason is selfish and protectionist – they do not want to transfer capacity and the skills that go with its development. (21)

Owen's representation perhaps overstates the case. It is true that granting license for low-cost English reprint edition to the publishers in developing countries where the market for book is small, particularly those in the least developed countries, cannot be

profitable to the publishers in the affluent countries. But then, neither is it profitable for the former, given the limited market that constrains the scope for economies of scale and host of other conditions required to meet the terms and conditions stipulated for license agreement to take effect. This perhaps is the reason that, barring a few rare cases, cheaper local reprint editions of foreign English publications is hard to find in the least developed countries such as Nepal. Publishers in the advanced countries would normally prefer to serve these markets either by direct selling of their low-priced editions or through large regional publishers who are licensed to produce and sell the low-cost reprint edition in the specified territories which usually cover the market for the neighboring countries. In the case of Nepal, the bulk of the imports of foreign publications constitute low-cost Indian reprints of original English edition: territorial right for marketing these books in Nepal is usually retained by the Indian publishers who are authorized to produce such reprints.

However, the argument that direct sales of limited copies of original edition would bring to their publishers more revenues than what they would receive by granting low-cost reprint licenses does not appear convincing in the case of the developing countries where market for books and local publishing industry are fast growing to become one of the major publishing centres in their region. In these countries, books can be published in large quantity with economies of scale and demand for low-cost reprint editions is much higher for such edition to become commercially profitable for both the licensor and the licensee. The fact that it takes the sales of several copies of low-cost edition, say at least 10 to 15 copies, to match the profit from the sale of a single copy of original edition should not make much difference to the Western publishers if their

interest like those of the manufacturers of other consumer items is simply to earn profit. Obviously, profit per unit of copy would drop many times corresponding to low sales price of the reprint edition but manifold increase in the number of sales of the reprint edition would bring the total royalty earnings to its original publishers almost around, or sometimes even higher, the same level of profit which they would receive from direct sales of lower number of original edition. Where the market is very much sensitive to price, like those in the developing countries, low-cost edition normally sells much faster than the high-priced original edition: hundred copies of low-cost reprint edition, for example, may be easily sold in a week's time against a single copy of original edition. This is very much true in the case of developing countries where the market is extremely price-sensitive due to low-income level of the people. The longer it takes to dispose the book the higher is the cost/investment for the publisher since this would tie up the much needed working capital which otherwise would be available for other investment. Additionally, this would further add to the storage and insurance cost, apart from increasing the risk of loss from damage due to mold and insects.

The argument that the existence of low-priced reprint edition would damage the market for original edition reducing the profit to its publishers is misleading. The buyers of low-cost edition cannot be the buyers for the high-priced original edition since these two groups constitute an entirely different segment of market. This in fact is a common knowledge which no publishers are unfamiliar with. It is basically for this reason they would first bring out the high-priced hard-cover edition focusing on affluent buyers. This is the most critical segment of the market yielding high profit to the publishers. When this market is fully saturated they would come up with paper-back edition to concentrate on

low-yielding market which mostly includes low-income buyers who can wait for such edition. Over and above these two large segments of market, publishers have a wide range of other markets to exploit a panoply of subsidiary right which they usually own by reason of the fact that they retain copyright on publication of the work. Among these subsidiary rights, two are most relevant in the context of developing countries: right to reprint and right to translation. Given the fact that reprint licenses are normally granted subsequent to the market exploitation of hard-cover and a series of paperback edition on strict terms and conditions and that such licenses are not usually offered for the works that have an enduring market value, the argument that loss of market for the original edition resulting from the grant of reprint licenses to the publishers in developing countries is something that is unprofitable cannot be taken for granted and is therefore subject to suspect.

Arguments of this kind are often more strategic than factual – they are worked and circulated to cover-up much larger interest. It therefore appears that the issue underlying the grant of reprint licenses is not solely one of loss, as the publishers in the West would tend to project, but that such licenses conflict with their monopoly interest. Since the availability of reprint edition means wider dissemination, and hence greater access, it is essentially this access the publishers in the industrialized countries are seeking to hold back in their pursuit to retain and promote their monopoly control in the international book market. It is not that they have no profit, as they would put it, but that reprint licenses in most instances would impure their monopoly in the access which allows them to obtain higher prices, and hence to the extent possible, they would tend to refrain from granting such licenses on varying pretexts such as high transaction cost or

low yield against the original edition. This in fact is not the situation with all the developing countries since the level of economy widely varies across these countries. Some like India have made a remarkable stride in publishing and have lined up in the rows of book exporting countries. With annual book title production of around 57,400 in 1997 and a turnover of over US$455, it ranks amongst the top ten in the world in book publishing industry (Shahid 61). The fact that reprint licenses are most difficult to obtain even for the well established large publishers of developing countries that have a vibrant economy and a considerably large and ever-expanding market for books, not to mention about least developed countries, sharply contradicts with the assertion of the publishers in the West that such exploitation of their publications in developing countries is risky and unprofitable against the direct exports of their original edition.

Viewed from the perspective of authors, greater control on access to exact monopoly price would not serve their overall interest as it does to publishers beyond a certain level of their pecuniary expectation to benefit from the creation and circulation of their works. Authors have basically two interests that at times conflict with one another: one is pecuniary and the other, creative. These two interests conflict when author assumes different positions at different times: as a creative user of copyrighted materials, he or she would wish that he or she could liberally quote from others but, just opposite to it, as an author of the copyrighted material, he or she would not want to return the same favor (Kastenmeier xi-xiii). Despite this fact the two interests are inextricably linked, one complementing the other. First, to illustrate the point, why do authors write? Just in the hope of making money? Or have they any other interests besides money? Authors generally wish to be published in as many countries and languages as possible so that

they could reach wider audience – they want to be read, known, and recognized as widely as possible. Why are leading writers, for example, in non-Anglophone countries in Asia and Africa tempted to write in English? Why do they prefer to be published in the West, such as in Britain, France, and the United States rather than in their own home countries? It is not solely because they could make more money by switching over to English; the most important element is that it offers them a chance to secure greater exposure and recognition for their works across the national boundary. The pecuniary interest of the authors is best served only when their works are widely recognized. It is this recognition that establishes them in the market and that endows them with greater bargaining power in relation to their publishers. After all, what sells in the market is a 'name' or, to use modern jargon, a 'brand'. And this is what every author would crave for, but very few succeed to achieve it. This, however, simply is not possible from the local publishers who possess neither requisite skill nor adequate fund to bring out quality production. Nor do they have knowledge and capacity for distribution of works in the international market.

Greater exposure and circulation of works would give their authors more feedbacks which in turn would help them enhance their subsequent contributions and earn greater recognition and market across the countries in the world. With better image and better prospect of success in the market, authors would be able to command greater strength in their capacity to bargain with their relatively much stronger publishers in negotiating the provision of the contract to their advantage. Authors, particularly during the initial stage of their career, have therefore much advantage not in clinging to the tight control over the access to their works but in relaxing this access beyond the realization of a certain level of pecuniary benefit. In most instances, this can be done by offering the

book at a price greater number of readers across the countries can afford it. For the readers in Third World countries, a grant of reprint licenses would best serve this purpose.

Control in the use and circulation of works does not necessarily bring with it greater wealth to their authors. It delays faster and wider dissemination of works which hampers authors' interest of gaining wider recognition of their works. Unless authors could gain this recognition for their works, the prospect of financial payoff from the market exploitation of their works is not likely to be high. Greater control would tend to back-fire the pecuniary interest of the authors who are yet to establish themselves in the market. In many instances, for example, works of greater excellence come to be recognized very late in the life of their creators, in many cases even after the death of their authors.

This perhaps is one of the principal reasons for prolonging the duration of copyright to cover three generations. Recall that Talfourd's argument during the famous English parliamentarian debate on the extension of copyright duration is premised on such assumption that value of works generally comes to be known long after their publication and that the authors are motivated to engage in their profession not so much by the immediate gain as by the desire to see their wives and children have something to live on after their death. To what extent is it rational to extend copyright duration on such assumption is indeed subject to dispute from the viewpoint of economics.

Traditionally, it was the author genius construction of Romantic literary criticism by which any enlargement in the scope and duration of copyright was rationalized. Such

rationale which still informs the copyright law is now however being increasingly questioned in the face of growing industrialization and commodification of cultural objects where most works of commercial value are created and produced not by a 'solitary, originary' author but by teams of authors in the form of project which is generally initiated and funded by a producer or a legal entity to whom the ownership of copyright is attributed. These works are collective and collaborative in character in that they involve a creative interaction and collaboration among the group of authors rather than being an individual origination; they are corporate in their production in that they are produced under the initiation and financial investment of a producer or a legal entity who by law retain the initial ownership of copyright in the work thereto.

With this process of modern creation and production of works and the rise of large multinational organizations who virtually own and control the media and dominate the global cultural market, there is very little that authors can benefit by any extension or enlargement in their privileges. These privileges in reality, as demonstrated by the way copyright works in actual situation, are meant to be transferred or assigned to the publishers who are in the position to exploit and enjoy them much to their benefit than to the advantage of authors. Any augmentation in the existing duration of copyright has therefore a similar effect: it increases the publishers' share of revenues without corresponding increase in the authors' share but all this at the cost of social welfare. In his economic analysis of copyright protection, Hakfoort suggests that ". . . a too high level of copyright protection might . . . be that it simply redistributes revenues from authors to publishers and does not affect the incentive for authors in itself" (69).

As the commercial interest of large corporate organizations involved in the creation and the production of cultural objects came to predominate the economics of copyright it is not so much the unique, inspired works of gifted authors as the investment of the entrepreneurs to which copyright has now become more akin to protect. As a result, demand for greater term of protection is now being justified not so much by invoking the romantic author of the nineteenth century as by reference to new techniques of cultural production, the hard core economic realities of raising cost of production and increasing risk in publishing due to new developments in the techniques of accurate and cheap reproduction, the risks involved in publishing the new titles and new authors, and so on.

The public benefit rationale which informs the Anglo-American laws of copyright assigns greater weight to the protection of investment on the premise that inadequate protection of intellectual property discourages the flow of investment needed for its creation and production. This leads to under-production of creative outputs resulting in greater loss in social welfare. As such, author in these laws can be corporate employer under the writer for hire fiction. Countries that adhere to this system, such as the United States and the United Kingdom, are therefore more bent on safeguarding and protecting the private interest of seeking rent in order to ensure and promote the adequate flow of investment on the creation and production of cultural goods. By contrast the countries that ascribe to the continental European legal tradition, namely, the author's right system, do not straightforwardly protect investment as it does by the former. Author under this system has to be a natural person and no legal person or corporate entity, except by the legal presumption of assignment, can exploit the rights of the author. Unlike the common

law copyright system which focuses on protecting the work itself the continental European system of author's right attaches foremost prominence to the creator, or the author since the work under this system is inseparably linked to the personality of its creator. Despite this difference arising from the differences in the philosophical basis of the two systems, countries adhering to both the Anglo-American and the continental author's right system are now keen on protecting the investment due to emerging new developments in media and the subsequent need for protecting and promoting these media under pressure from those who have invested on their development and promotion. This need to protect and promote the investment on ever-emerging new media has now been one of the major factors behind the rationale for prolonging the duration of copyright protection. But such augmentation in the duration of copyright has, however, serious ramifications on the access to cultural products and, hence social cost.

The longer the term of protection the higher is the cost of access. A monopoly enduring for a long span of time is economically more profitable with respect to such works that involve huge investment to create and bring them in the marketplace or that have an ever-lasting value such as the great classical works of Shakespeare. The majority of protected works however do not fall into these categories. Most protected works in circulation have relatively short span of life in terms of their potentiality to bring profit to their authors and publishers. The value of these works fades over the passage of time with the change in the context, change in the taste of the readers, the rise of new thinking and new ideologies, the coming into being of new values, and so on.

Since most new works are built on pre-existing works, retention of longer monopoly would inevitably raise the cost of their creation, inhibiting the production of adequate new creations needed for the advancement of society at large. This increasing cost resulting from the increasing length of protection is hard to defend on economic ground. Neither does it look rational on social ground that justifies copyright monopoly on the assumption that benefit accruing from the grant of exclusive rights to authors for limited duration in recognition of their contribution to the advancement of learning far outweighs the burden it imposes on the society. It now appears that the length of this monopoly can be extended to any period and can still be held and maintained to be 'limited'. It has no fixed range and therefore any specific period of time can be conveniently defined to be 'limited,' only to distinguish it from being 'perpetual'.

Originally granted for 28 years of two equal terms when the Statute of Anne, the world's first legislation on copyright, was enacted in 1709, – the first 14 years on the creation of copyrightable works and the second term of equal duration if the author is alive by the termination of the first term – copyright now stretches to the duration as long as life plus 50 years, covering almost three generations. Publishers would argue that the present threshold term of protection is still inadequate to recoup their investment due to the rising cost of production. But this cost would further rise for new production if the life of exclusive rights is prolonged further and further delaying the arrivals of new entries into the public domain. Where then is the end to this ever-expanding length of copyright protection? Preparation is now underway at the international level to add next 20 years to make the present threshold term of protection to the *post mortem* period of 70 years. The European Communities in its Council Directive of 29 October 1993

harmonizing the term of protection of copyright and certain related rights has already adopted this longer term of life plus 70 years (Article 1).

5.5 Can Nepal Benefit From International Protection?

WIPO has listed a number of advantages which developing countries can receive on being a member of the Berne Convention (Advantage of Adhering 4-6). These claims, however, do not hold as much promise as they were projected to appear, for it demands a great deal of capability on the part of developing countries to be able to reap benefits from what has been offered to them. To what extent a least developed country like Nepal can avail of these facilities is largely governed by the level of her intellectual property development, its infrastructure set-ups and the present need for access to knowledge-based products. In fact, the Berne tacitly presupposes a certain level of capability in the intellectual property productions for a country to be able to exploit the full range of its provisions and facilities. Countries whose knowledge industry is very weak and dependent on foreign supplies may instead of profiting from the Berne find themselves in an awkward and unfavourable position owing to the stringent obligations which they will have to comply with in relation to the use and reproduction of works by foreign authors. The following are some of those claims about the Berne held as being supportive to the needs of a least developed country like Nepal.

5.5.1 International Protection

It is contended that one of the major advantages of acceding to the Berne Convention for the developing countries is that works of national authors will receive protection in all countries party to the Berne. But what benefit can the least developed

countries like Nepal expect out of this provision whose base for knowledge industry is so much fragile and so much insufficient to support its own needs, let alone making entry into the international market of intellectual products. Trans-border protection for least developed countries carries little significance unless their intellectual products are well developed to be able to find access to the international market of intellectual products.

5.5.2 Compulsory Licence

The Berne accords a preferential treatment to the developing countries on a non-reciprocal basis under the Special Provisions Regarding Developing Countries included in Appendix I to VII of its Paris Act. The Appendix forms an integral part of the 1971 Paris revision of the Berne text. The crux of those provisions is an introduction of a limited compulsory licensing system which grants the publishers in Third World countries the right to translate or reproduce works produced in developed countries subject to compliance with certain conditions. The rights so granted are non-exclusive and non-transferable. A licence for translation is granted ‘only for the purpose of teaching, scholarship or research’ (Article II (5)) whereas a license for reproduction is granted for ‘use in connection with systematic instructional activities’ (Article III:2(a)). Books thus produced under such licenses for translation and reproduction may not be used for profitable sales and not exported to third countries except under specific condition.

The condition and procedures laid down for conferring compulsory licenses are so much complicated, lengthy and time-consuming that many publishers in Third World countries often find it extremely difficult to get through them. Publishers in developing countries may not acquire compulsory licenses until they exhaust all the normal methods

of locating the copyright holder of the original work and normal business negotiations break down (UNESCO, ABC 70). Besides, it is often reported that many publishers in the industrialised countries, who are the major exporters of copyright materials, do not normally respond to request for reprint or translation rights. In many instances, the fees charged for such permissions are clearly beyond the ability of Third World publishers to pay. Under such circumstances, the utility of compulsory licensing scheme introduced to provide Third World countries-based publishers an easy and prompt access to the works needed by them for education and such other uses is highly questionable. To what extent the licensing system has been useful to help meet the needs of developing countries need no further explanation than the sheer fact that "in the more than twenty-five years since its adoption (compulsory license) it has been hardly applied" (Altbach, The Subtle Inequality 12).

5.5.3 Foreign Direct Investment

It is often pointed out that the existence of adequate intellectual property right protection is one of the preconditions for promoting foreign direct investment (FDI). With the world economy becoming more and more knowledge-intensive, the intellectual property right protection factor is likely to assume an ever increasing importance and may hold as a critical factor for attracting foreign investment in Third World countries. However, there is no definite evidence as yet suggesting that the intellectual property right protection is a single most important determinant of foreign direct investment. Primo Braga cites some important studies and surveys which do not fully support the contention that weak intellectual property system is enough to deter foreign investment (Braga et al. 83). A survey study quoted by Braga clearly points out that "the impact of

weak intellectual property system, although often referred to as a problem, is overshadowed by other considerations – particularly the overall economic environment of the country.” Besides, the importance of IPR in relation to FDI depends upon the sensitivity of the specific sector to IP protection (Abbott 497-521; Mascus 119-135). The case in point is the pharmaceutical sector. It thus leads to the conclusion that intellectual property right protection may not be equally relevant and important to the flow of FDI in every sector to which intellectual property is attached.

The discussion above clearly points out that joining the international convention, for example the Berne, may add problems to the least developed country like Nepal whose level of intellectual property development is too inadequate to meet the national requirements. The Berne in fact does not hold any such provisions which may be truly described as ‘relief’ to the need of least developed countries, and it is unless those countries can help themselves by formulating and adopting effective policy and other necessary regulatory measures to bring about dramatic improvement in their existing level of intellectual property industry, which indeed is less likely to happen in the foreseeable future, there is little for them to console from the Berne.

5.5.4 Copyright Balance-Sheet

With the TRIPS Agreement, access to knowledge and knowledge products will certainly tend to become much costlier, particularly to the developing countries. It will not be as free and easy as it was before. This possibly is the reason why Altbach called it “a blunt instrument which will inevitably work to the disadvantage of poor nations in terms of access to knowledge”(7-14). The implication of TRIPS is far reaching to the economies like Nepal which relied much on supplies from abroad to make up her

domestic need for knowledge products. In proportion to import, the traffic in the other direction is almost negligible. This implies that protection across the border has little relevance for Nepal at the present level of her intellectual property development unless she is able to take up this industry at the threshold level (Konan et al. 26). The situation, however, would have been different had there been any single item under the rubric of cultural industry that could compete in the international market and fetch a significant receipt needed to sustain the import of other cultural goods, such as books. The existence of such a complimentarity among the various categories of cultural goods would certainly give rise to a new equation calling for a departure from a narrow territorial outlook towards a more congenial attitude for a wider international protection. But, unfortunately, the case in Nepal is not so. A look at the list of items being exported from Nepal reveals that not a single item under the rubric of cultural industry has to-date been able to register its name in the list.

Given the present need for knowledge products, especially textbooks and technical books, and the level of knowledge industry in the country, compliance with international copyright system would most likely be a difficult proposition for a country like Nepal. Once it comes within the network of international copyright regime, the cost of books and other knowledge-based products would escalate much higher than the prevailing price and the current national expenditure of hard currency would substantially increase in their importation. Much of the present need for knowledge products, especially textbooks and other reference materials for education and research, is fulfilled by the pirated editions of foreign authors which constitute the large bulk of prevailing market for knowledge-based products in the developing countries. The irony of copyright

is that when foreign works are allowed to be freely pirated, it has a negative impact on the market for the works of national authors. Hence it seriously undermines the growth of national authorship which in turn may further increase the reliance on foreign works.

With the development of new information and communication technologies, particularly the Internet, it will be increasingly difficult for the least developed countries like Nepal to get free and easy access to information and other knowledge-based products. As Fedotov puts it, ". . . not only is every access to information highway to be paid for, but so too is a fleeting glance at a work to see whether or not you actually want it" (20). While it will vastly strengthen the position of intellectual property exporting countries in pumping resources towards them, the poor countries will run the risk of becoming still poorer. Debarred from the world of communication, they may be left out of the global process of the development of Civilisation.

It is often argued, and which indeed contains a valid reason to support, that "attachment to international copyright grows stronger in proportion to the increase in the number of a country's authors whose works are being produced outside the borders of the State" (Wegman 18). This in fact is one of the prime reasons why copyright adherence is generally viewed as a national process of social and economic development. The change in the posture of the United States and a few other countries like the former USSR from being a notorious violator of copyright to being a defender of international copyright system should serve as a best illustration to this reality.

Seen against the predominance of imported copyrighted materials, especially books, and the poor market performance of the Nepalese copyright industry, it is apparent

that there is little Nepal can gain from its adherence to WTO TRIPS Agreement, and hence the terms of trade is not in favour of her national interest. The balance-sheet, however, may slightly vary if TRIPS is viewed along the framework of total WTO Agreements, and if the gains that the potential export sectors of Nepal may receive from market access and other concessions are weighed against the loss to be incurred from compliance with TRIPS.

Although the odds are heavily set against the favour, there is, however, no option before a country like Nepal other than yielding to the dictates of the international community. In the present context, if she is to gain from the membership of international copyright regime, the only option open to her is to develop and strengthen her own cultural industry, particularly publishing industry. Once the indigenous publishing is well developed there is more benefit than harm from compliance with international copyright system. Take for example the case closer to home: India, who at one time was an ardent critic of international copyright system, changed its posture as it emerged capable of exporting books.

5.6 The Rise of Authorship in Copyright: A Revisit

With the Statute of Anne an author came to be legally recognized as the sole creator of literary text and hence the primary beneficiary of copyright. The statute at the same time made copyright transferable. Since authors can normally exploit their works only by assigning copyright to their publishers, it is virtually the latter that in reality retain copyright. It thus follows that empowering authors with exclusive rights for longer duration would in turn enable the publishers to gain greater control as these rights are

ultimately transferred to them once an author chooses to be published. Publishers knew this well and cleverly used it as a ploy to secure perpetual monopoly which they had lost to statutory provision of fixed duration. They did it by instigating a series of lawsuits on the pretension that authors being the creator have natural rights in their creation which is but perpetual and independent of statutory rights. As an assignee to whom authors are supposed to have transferred their rights, publishers sought to assert their perpetual common-law copyright by seeking injunctions against the unauthorized publications of their works which by statutory term had fallen into public domain. They won the initial battle in *Millar v. Taylor* that confirmed and upheld the authors' natural right in their property which existed in perpetuity and independent of statutory copyright.

A few years later the same case turned up before the House of Lords. The work and the issue in question were one and the same except that persons involved in the litigation were different. This time it was Alexander Donaldson, a Scottish bookseller, who appealed to the House of Lords against the grant of injunction by the Chancery for his unauthorized edition of the work, *The Season*, in which Thomas Becket claimed infringement of this perpetual copyright that had been established by the *Millar* court. In facing this issue, the Lords avoided to engage, as did the *Millar* court, in metaphysical questions surrounding the nature of intangible property, to concentrate squarely on the consequences flowing from the grant of perpetual monopoly. Seeing the imminent danger of perpetual monopoly to the advancement of learning and education, the Lords moved to destroy it by declaring that the Statute had taken away all common-law rights after publication. This in essence means published work can claim no copyright other than that granted by the statute.

Despite the legal recognition of their status as initial owners of copyright, authors were reluctant to assert their position. The reason for this can be partly traced back to the historical development of copyright and partly to the prevailing ideologies of the early eighteenth-century patronage society in England. Authors who now have the foremost claim to copyright were out of the scene until the Statute of Anne established them as the primary beneficiary of copyright. They have virtually no role in the development of copyright except as a provider of manuscript. The concept of copyright originated with the stationers, the guild of London booksellers, who came to be established as the Stationers' Company by a royal charter in 1557. The stationers, who were the forerunners of modern publishers, developed it as a device to regulate book trade among the members of the guild and to maintain their monopoly over the trade. It was therefore mainly used to protect and promote the private interests of the stationers to earn monopoly profit. Copyright was then solely confined to the right of print, publish and vend the copies of the work. As Patterson and Lindberg have pointed out the right is not the right to sell the work, only to sell a copy of the work (117).

Refusal by Parliament in 1694 to renew the Licensing Act of 1662 disarmed the stationers from their monopoly in the book trade. Uncertainty and anarchy prevailed in which piracy flourished depriving the stationers of their return on investment. The stationers lobbied with repeated petitions to Parliament for restoring order in book trade. The result was the Statute of Anne of 1710 that transformed the stationers' copyright "into a trade-regulation concept to promote learning and to curtail monopoly of publishers" (Patterson and Lindberg 28). Authors were established as the primary owners of copyright while publishers were relegated to the position of being an assignee. The

Statute did it by vesting the initial ownership of copyright in authors and making copyright available to anyone who created work in the first instance. It set a limit to the duration of copyright and created the concept of public domain, thereby effectively putting an end to perpetual monopoly which the stationers were enjoying for nearly two centuries.

Although the Statute secured benefits to authors by establishing them as the initial owner of copyright, this at all was not its intention. Its primary concern was to break publishers' monopoly. In doing so, it used authors as a means to this end. It was just accidental that authors came to gain a windfall profit in a move that was basically meant to benefit the society at large by doing away with publishers' monopoly. Since this legal entitlement was something authors had not expected, it did not bring about radical change in their existing position. Although they were well aware about its economic significance in the growing marketplace society and the prospect which it opened to them in liberating themselves from their dependence on noble patrons for their livelihood, the prevailing ideology of the traditional patronage society that sustained authors during this period did not motivate them to assert their proprietary right in their creations. As Mark Rose explains what was then valued most was "gentlemanly honor", and reward, rather than profit, was what one expected from his creations (216). Besides, the very conception of respectable authorship as a learned and polite activity that prevailed during the early eighteenth-century did not "encourage authors to rush into litigation in defense of their literary properties" (*ibid*). Authors have therefore no significant involvement in the literary property debate that sparked from booksellers' legal battle to establish perpetual monopoly. They were solely used by booksellers as a means to their end by invoking

authors' natural right to their creations as a rationale for the retention of perpetual monopoly. But in doing so, they helped establish authors as a sole proprietor of literary text. Thus by the end of literary property debate authors came to be viewed as the source or originator of property in literary text.

The rise of this individualistic author was, over the course of history, to influence and shape the basic contour of English copyright law. The Romantic movement that started subsequent to the literary property debate during the late eighteenth-century, and of which William Wordsworth was the chief protagonist, firmly fixed this individualized concept of 'author' as a creator of unique, inspired work of creative genius. This conception of author is based on the assumption that writing is essentially a solitary individual origination which, in the words of Wordsworth, must "introduce a new element into the intellectual universe" (qtd. in Woodmansee 16). They believed that authors have divine power and peculiar insight, which they call imagination, that are at par with God. For them, when an author exercises these divine intellectual faculties, they partake of the creative activities of God. As English copyright law came to embody these idealistic formulations of authorship, author became the nucleus, the focal point around which legal concepts of copyright were developed and organized. By this time copyright came to be seen basically as a law of authorship, and the rules governing copyright were formulated ostensibly to protect and promote the interests of authors. These rules were in turn rationalized either by appeal to author genius or by reference to social benefit. A classic example is Sergeant Talfourd's appeal to author genius as he defended longer term of protection (life plus sixty-years) during the House of Commons debate on the extension of copyright duration in 1841: "The term allowed by the existing law is

curiously adapted to encourage the lightest works, and to leave the noblest unprotected" (qtd. in Drone 75).

The irony of the Romantic authorship construction and the resulting copyright law is that it benefited the publishers and other intermediaries involved in the production and distribution of creative works more than it did to the authors to whom it is ostensibly intended. Despite the fact that the Statute of Anne broke the publishers' monopoly by placing the authors as the primary beneficiary of copyright and relegating the publishers to own copyright only as an assignee, this reallocation of position did not in reality displace the dominant position which the publishers were enjoying long before. It is simply because authors by themselves were not in a position to exploit their works without assigning copyright – a series of economic rights – to the publishers who solely function as an outlet to book marketing. As a matter of fact, market exploitation of works presupposes the assignment of copyright to the publishers. But copyright would have little significance if it had not been to the benefit of authors for their labor, and this benefit being subordinate to the condition that they assign their economic rights to the publishers to be paid for their works, the authors' relative position vis-à-vis publishers remained very weak. Authors thus held copyright only in theory whereas it is ultimately the publishers who in reality retain copyright and exercise the rights therein by virtue of transfer. It is therefore publishers who are able to enjoy greater benefits from the privileges accorded to the authors. As Patterson and Lindberg conclude: "For regardless of conventional wisdom, which has long viewed copyright as belonging to authors, copyright began and continues to function much the same as it did for its originators, that is, primarily to protect the publisher's marketing of works" (20).

CHAPTER SIX

Summary and Recommendation

6.1 Summary

Copyright is essentially an outgrowth of technology. The advent of printing press in Europe towards the mid-fifteenth century transformed the economics of copying business as it sharply reduced the marginal cost for the reproduction of subsequent copies. Books then became cheaper and affordable for mass consumption. Publishing arose to exploit this market which soon expanded and proliferated throughout the Continental Europe. But the same technology that revolutionized the book trade also provided the means by which piracy became profitable. Prior to the appearance of printing press piracy was not profitable since pirates had to incur the same cost as it did to its original publishers. But with the arrival of printing press, reproduction of copies became much easier and cheaper that enabled the pirates to undercut a bulk of the expenses which the original producer had to incur in the form of fixed cost, such as royalties to the author, editing, lay-out designing, and so on.

Copyright arose to control this piracy. Historically, it was publishers' invention to maintain order and control in the book trade. It developed with a guild of London publishers who by a Royal Charter in 1557 came to be established as the Stationers' Company. All that copyright entails at this time was the right to print, re-print and vend the copies. These were the rights all that publishers needed to establish their property in the books and maintain monopoly in the book trade. In its origin, copyright has nothing to do with authorship and the promotion of creativity. It has been shaped more by the economics of publication than by the economics of authorship. It was only much later

copyright was introduced as a law of authorship and as a means of ‘encouraging learning’. By the Statute of Anne enacted in 1709 authorship came to be legally established as the source of copyright.

The subsequent development of copyright came to focus on authorship. However, it remained unclear long since the enactment of the Statue of Anne as to what it is – text or the physical material, ink and the paper, in which it is embodied – that is protected by the law. It was only during the literary property debate on the nature of copyright which began with the famous Battle of the Booksellers that property in literary creation came to be defined. Once the text, as distinguished from its material support, was accepted as something wherein lies the property in literary creation, author came to be seen as the sole originator of text having the first and foremost claim to it. This gave rise to the birth of an ‘individualized author’ that over time was further reinforced by the Romantic reconcepualization of authorship construction and the creative process which it entails during the early nineteenth century. The influence of the Romantics on copyright was most profound and enduring.

The concept of originality which constitutes the bedrock of copyright is an upshot of this Romantic reformulation of the concept of author. In its beginning, authorship had nothing to do with originality. All that it entails was the act of creation that gives rise to a claim to copyright. Anyone who creates a new work is its author and this authorship entitles him to obtain copyright which can be assigned or transferred for valuable consideration. It has nothing to do with the nature or content of the work: a frivolous creation is as much a work of authorship as the creation of works having enduring value.

Authorship came to be associated with originality as the Romantics came into the scene with their expansive and idealistic view of the author as the sole creator of unique, inspired works of art representing in their expression the indelible marks of their creators. The Romantics assumed that genuine authorship lies not in the slavish imitation or adaptation but in original, inspired creative genius which ought to introduce, what Wodsworth calls, “new element into the intellectual universe.” Authors, they believed, are endowed with the organic qualities of genius, taste, imagination, and judgment. And it is these qualities that make their creation a unique, inspired work of art.

As this notion of originality and works of art as the expression of the unique personality of the author came to be grafted into copyright law, the author arose to become a dominant figure around which copyright came to be organized and defined. With this Romantic theorization of author as being a ‘gifted species’, a creator of unique, inspired works of art and the very process of creative writing as an act of solitary individual origination, the author came to represent a high artistic quality of superior order. This author is an individual solitary being who loves to dwell in “freezing garrets, ruined towers, and secluded cottages.” He is a genius gifted with divine faculty, a peculiar insight (imagination) by which he sees things to which the ordinary intelligence is blind, and by which he discovers and conveys the mysteries or eternal truth of Nature for the enlightenment of the ungifted mass. His creations are not just a slavish representation of Nature, the visible world, as Pope and Johnson before the Romantics would believe it; they are essentially an articulation of deeper realities, of the unseen, hidden world that only men with gifted insight can see and convey it in concrete form and

shape. It is such works the originality of which, they claimed, warrants special protection of law.

The Romantics succeeded in fixing this concept of authorship into copyright law as a guiding principle by which rules governing copyright came to be defined. This rule is that copyright can subsist only in “original works of authorship.” Embedded in this prescription is the core concept of copyright: author, work, and originality. Each of them is inextricably linked to the other and is hard to define the one without reference to the other. Together they form a bed-rock of copyright.

Corresponding to the Romantic formulation of authorship, author came to be defined by reference to the original creation: the author is the creator of the original creation. The work or creation is defined by reference to originality and author: the ‘work’ is an original creation with distinct marks of their creators in their expression. The originality in turn came to be defined by reference to the author: originality is that which exhibits the unique marks of their creators in their expression identifying their authors. This in essence means that originality is something that reflects the individuality or personality of the author. Hence the basic postulates of copyright that it can subsist only in the “original works of authorship.”

Since the creative process was believed to be essentially individual and original, it was maintained that works can be distinguished from one another to identify their authors by the individuality, the unique marks, of their creators in their expression. Accordingly, it was maintained under copyright law that a work may not be considered original if it is not traceable, or cannot be attributed, to particular individual as its creator. This means a

work without its identifiable author in flesh and blood may not be deemed original and hence protectable under copyright law. Since originality is an essential attribute of authorship through which author reveals his personality to be identified as such, a work without its identifiable author cannot be conceived to be original. Given this construction of authorship and originality, the work of folkloric expression, which constitutes a major cultural asset of most developing countries, came to be excluded from protectable works because they have no identifiable author or authors to whom authorship can be attributed. And it is for this reason they disqualify to be called an 'original' work. Hence the foremost mark of protectable work is the presence of individual author. Where this human author is not traceable or cannot be located, the work may not be deemed to be original. Discovery of author is therefore fundamental to rationalize copyright protection of any categories of work.

As English copyright came to encapsulate the Romantic author the scope and duration of copyright was progressively enlarged which in turn was justified and rationalized by reference to author genius. It is noted that such enlargement would not have been possible had it been for the sake of publishers. The legislatures would have probably turned it down on the ground that it would prolong their monopoly in the trade. While this enlargement in scope and duration of copyright was all justified in the name of author in reality it only further strengthened the monopoly position of the publishers. As the ownership of copyright was made assignable and authors were obliged by the normal practice of the trade to assign all their interest in the work to the publisher before they could exploit their work, it was virtually the publishers who in reality retained the ownership of copyright. Publishers knew this well that any enlargement of the right of the

authors would be ultimately transferred to them to their benefit. This was the reason why they pleaded for the authors' perpetual right during the Battle of the Booksellers in the mid-eighteenth century by invoking natural right to their work by reason of being its creator. The publishers won the initial legal battle. However, shortly after this legal victory in *Millar v. Taylor* which established perpetual copyright, the Lords in the *Donaldson v. Beckett* case overturned the *Millar* decision establishing copyright in published work as a grant of the statute which in effect means that copyright in published work can exist only for a period specified by the statute. With the *Donaldson* decision, the publishers lost the crucial battle and their claim to perpetual monopoly.

Copyright involves the adjustment of two equally competing interests with each limiting the other: the private interests of copyright owners, that is authors and those engaged in the production and dissemination of creative works (intermediaries whose function is to bring the creative works in various formats and media into the marketplace for their commercial exploitation), to earn profit from the market exploitation of their works and the interest of the public to benefit from the free use and sharing of creative works. Thus, the major tension in copyright is to balance these two interests in a way both can be optimized. Wider dissemination or public benefit is the major concern of copyright as long as its pursuit does not undermine the creation and production of creative works. Promotion of creative activities is its major concern as long as its pursuit does not impose undue burden on the society. Copyright seeks to reconcile these twin objectives by securing incentives to the authors through the grant of exclusive rights in exchange for the creation and dissemination of works which are needed for the advancement of the society. Since these exclusive or monopoly rights enables authors to

charge fee for the use of their works by controlling or limiting access to their works by the public, copyright is essentially a trade off between the costs and the benefits of granting exclusive right to secure incentives to the authors. The basic premise underlying this trade off is that creation and dissemination of sufficient amount of works of intellectual creation is needed for the advancement and well being of the society. Very little of this intellectual creation will be produced and disseminated if anyone can freely appropriate it depriving those engaged in their creation and dissemination of their fare share of return from their mental effort and investment. This under-production of works of intellectual creation will seriously retard the growth of the economy, and hence detrimental to the continual progress of the society. Copyright monopoly for a limited duration is thus justified in the larger interest of the society.

Ostensibly copyright came to be represented as authors' right. But despite this legal empowerment, the position of author vis-à-vis publisher is rather relatively weak. It is simply because copyright is exploited in the marketplace only through the publishers. The author, as a customary business practice, is obliged to assign all his interest to the publisher before he is able to exploit his works. This in essence means that it is the publishers who have indirectly come to gain more by the rights and privileges granted to the authors. It is the irony of copyright that it works much in favor of the publishers than of the authors who are supposed to be the primary beneficiary of copyright. The authors have thus come to serve as an effective blind for the interest of the publishers.

Copyright in Nepal is a recent phenomenon. Despite a legal history of over 42 years behind it, copyright came to be implemented as late as 2002 when the new act

replacing the 1965 act was enacted. This belated implementation of copyright, as the history of its development demonstrates, is primarily due to the non-existence of the condition precedent for the development of copyright. And this condition is the existence of market for books and other copyrightable products. The sudden growth and expansion of market for copyrightable works, particularly the works of music, subsequent to the reinstatement of democracy in 1990 gave rise to the widespread piracy of musical works, thereby creating a need for copyright protection of these works. It is at this moment in the history of copyright development in Nepal that copyright owners in musical works started pressing for the implementation of the copyright law. This led the government to take steps towards updating and implementing the law. The Nepalese case thus amply substantiates the hypothesis that the need for copyright compliances arises as market expands and cheaper and efficient means of reproduction become easily available for piracy to become profitable. As domestic pressure for revision and implementation of the law was mounting, Nepal was in anticipation of joining the WTO family for which it was necessary for her to revise the domestic law relating to the protection of intellectual property in conformity with the provisions of the WTO/TRIPS Agreement. The coincidence of these two events resulted in the formulation and enactment of new copyright law in 2002.

The fundamental prerequisite for the existence of copyright is market. The need for copyright compliance, as the history of English copyright demonstrates, arises with the growth and expansion of market for literary and artistic works, such as books, music, film and so on. Piracy arises only when market for such works expands and cheaper means of reproduction are easily available. The history of Nepalese copyright

demonstrates that the availability of the means of reproduction is not enough for the piracy to flourish unless there is market where consumers are willing to pay for it. In Nepal market for books could not develop long after the introduction of printing press by the Rana Prime Minister Jung Bahadur. The reason perhaps was that the size of the literate population which largely determines the market for books was almost negligible as education was ruthlessly suppressed and the people were virtually thrown into isolation from the outside world during a hundred and four years of Rana family rule that ended in 1950. After a brief interval of democratic regime, the autocratic rule by the Shah dynasty for the next 30 years since 1960 came to suppress the freedom of expression and free circulation of information. Publishing was then a risky undertaking as anything deemed to be seditious would bring to its author and publisher a harsh punishment. Thus for various political and economic reasons, book market could not grow in Nepal for publishing industry to sustain on the publication of local authors. This in turn inhibited the growth of local authorship. Copyright thus has nothing to do before the market comes into existence. It is the market that provides incentives or rewards to the authors. The function of copyright is to secure this reward to the authors by enabling them to control the use of their works. Copyright is essentially a market-based concept designed to regulate the market. It does so by granting the authors exclusive rights that empower them to charge a price for the use of their works. The relevance for copyright protection therefore arises only when market for books begins to appear and grow.

In Nepal it is only after the reinstatement of democracy in 1990 and the subsequent liberalization of economy that market for books started developing. Several indicators, such as the growth in the number of printing establishments, publishing

houses, book-stalls, educational establishments point to this growth. Over this period the number of titles published from Nepal has significantly increased showing the growth in the works of local authorship. This growth in the titles may be taken as an indication of the fact that market for the works of local authorship is now growing. Corresponding to this growth piracy of popular works of local authorship has also increased. Many photocopying stalls in the major cities of the country are now freely engaged in the illegal photocopy reproduction of such works to be sold in the form of books. Albeit small the market for books is now ever-widening since the reinstatement of democracy in the country. This growth in the market can be harnessed to the benefit of the local authors and local publishers only when authors are guaranteed by law of their entitlement to receive benefit from the use of their works. Copyright protection becomes thus essential to ensure the promotion of local authorship and local publishing industry. Without such protection local publishing industry may not come forward with adequate investment in the publication of the works of local authors. This in turn will retard the growth of local authorship which is a key element to attain self reliance in the creation and production of books. This perhaps is the reason copyright is now promoted in the developed countries as critical to creativity and cultural development. It is used as a policy instrument to help local authors and publishers to compete with their foreign counterparts.

6.2 Recommendation

One of the primary objectives of copyright is the promotion of local authorship and local publishing industry. Development of local authorship is key to the development of national art and literature. It enriches national culture and enhances national prestige. Above all, it is the only way by which a country can achieve self-reliance in the supply of

materials needed for the development of education. The study suggests the following measures to be taken in the field of copyright for the promotion of local authorship:

1. The first and foremost condition for the development of local authorship is the existence of domestic market for the works of local authors. Government should extend every possible support for the development of this market by encouraging the spread of education, providing tax exemption in the import of paper, printing materials, and so on. As educated population swells and as books become more affordable, market for books will begin to expand where domestic publishing industry can grow and sustain
2. Unauthorized use of protected materials (literary works) in various media should be brought under the purview of law. For example, the Nepalese law does not contain provision regarding the use of literary works in the Internet. The existing law therefore should be amended to cover digital media.
3. Adequate protection must be accorded to foreign works. Allowing these works to free riding would make them much cheaper for the works of national authors to compete with them. This would seriously undermine the market for the indigenous works to the detriment of local authors. Equal protection should therefore be accorded to both national and foreign works.
4. Copyright being an essentially a market-based concept favors mostly those authors who sell in the market. Authors who are yet to establish in the market and authors who are engaged in producing works of serious nature demanding much time, effort and investment may not receive adequate or commensurate compensation or reward from copyright protection. As such, copyright alone is

not sufficient to ensure a fair development of art and literature unless it is complemented by other scheme in the form of government grants or subsidies which should be provided to universities, research institutions and such other academic institutions to support and encourage the creation and dissemination of such knowledge that requires much time, effort and investment. Thus, where the market fails to provide sufficient incentives to such works which are needed for the advancement of the society, government should come forward with subsidies in order to ensure the creation and production of such works.

5. Training and workshop programmes on various aspects of copyright should be organized for authors at regular intervals. This would help them understand the economic value of the rights granted to them by law and enable them to exploit these rights most profitably.
6. The bargaining power of authors is generally weak as compared to publishers. This is particularly true in relation to such writers who are yet to earn recognition and establish in the market. These writers are often obliged to accept unreasonable terms and conditions of the publishers in the hope of getting their works published. In order to check such exploitation, copyright law should provide a regulation governing contract agreement.
7. A reprographic reproduction organization (RRO) to enable the authors to receive benefit from the massive illegal reproduction of their works, especially photocopying, should be established. The establishment of such an organization would bring the unauthorized photocopying of books into a legal framework by

which anyone engaged in such acts would have to pay a certain percentage of royalties to the organization that administers the rights of the authors.

8. Writers' organizations should be strengthened to guard and defend their rights.
9. Copyright awareness programmes should be launched throughout the major cities of the country. It will help reduce the illegitimate use and sell of protected materials.
10. A course highlighting the importance of copyright and its basic rules should be included in the school curriculum. Such education at the school level would promote respect for intellectual property and help reinforce the voluntary compliance with copyright.

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