

COPYRIGHT: AN OVERVIEW

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Introduction

There are different forms of intellectual property of which copyright is one of them. Copyright deals with that part of intellectual property which falls under the domain of literary, scientific and artistic works. It is a limited monopoly granted to authors to protect their works from unauthorised copying. With the rapid development in information and communication technologies, the scope of copyright has substantially broadened to cover various forms of creation, dissemination and use of literary, scientific and artistic works. The evolution of copyright, in fact, is one of continual adaptations and adjustments to new technologies. Today, copyright has established as one of the most important legal entities for the protection of intellectual property rights. However, the task before the copyright in the face of emerging new technologies is growing ever more complicated and challenging.

Copyright extends protection not to ideas but only the form or manner of their expression. Protection under the copyright may not be extended to ideas, procedures, and methods of operation, mathematical concept, systems, or principle as such. It will not constitute infringement of copyright if a person arrives at the same result solely by his independent means. The scope of protection generally covers the works of intellectual creations in the fields of art, science, music and literature, and their various forms, rights of authors to authorize or prevent certain acts, and duration of protection. National laws of copyright give protection to the works of its nationals within its territory whereas the multilateral or bilateral treaties extend protection across national boundaries.

Copyright is originally based on the premise that authors are the prime beneficiaries of copyright protection. They have the first and foremost right to ownership in their works, and they should be protected against any unauthorized use of their works to enable them to receive due share of benefit from the use of their works by the public. The earlier copyright laws including the Berne Convention for the Protection of Literary and

Artistic Works (1886) are founded on this concept. However, English copyright Law and the copyright system of the United States together with few other countries adopted a different view opposed to this. They held that protection should be accorded only to the extent that is necessary to induce authors to create and disseminate their works. This, in essence, means that protection should not be extended to the point that it would constitute barrier to the dissemination of knowledge needed for the larger interest of society. As opposed to the earlier view which gave more prominence to the author's interest, it lays greater emphasis on the public interest. This view is enshrined in the 1957 Universal Copyright Convention. Towards the second half of the twentieth century, a view that took the middle path between these two opposing views gained wide popularity among the increasing number of countries. According to this view, the objective of copyright is "both to stimulate the creation and public dissemination of works, and to give their authors a generous reward for their contribution to society" (Encyclopaedia Britannica 1981:153). These two objectives, though conflicting at times, form the basis of modern copyright system. It recognizes the needs of society for access to knowledge as an important factor to be ensured while defending and safeguarding the legitimate rights of authors needed to promote creativity. A view similar to this is embodied in Article 27 of the Universal Declaration of Human Rights adopted by the United Nations. It states: "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." But at the same time it makes further addition to it: "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 crux of the problem is therefore the need to achieve balance between the right of the creator and that of the general public. As stated by Wegman (1982: 17), "it is the interplay between these two rights which determines what measures of protection the author is granted and what measure is reserved for the general public."

The ability to reconcile and maintain balance between these two apparently conflicting interests of societal needs and the rights of individual creator is indeed one of the distinct characteristics of modern copyright system.

Technology and Copyright

Technology has invariably been the central focus of discussion in the world of copyright since most of the issues that concern copyright originate from technological innovations in the fields of information and communication. Lehman (1995: 75) described the modern copyright law as the creature of

technological change--from Gutenberg's Movable type to digital audio recorders, and everything in between--photocopiers, radio, television, video cassettes, cable television and satellites. Contemporary literature on copyright is flooded with references to heightening threats of emerging sophisticated technologies to the subsisting system of international copyright due to possibility of their wide range of application and commercial exploitation in different forms and fields. Take, for instance, the case of digital technology which in itself is a fascinating innovation. Digital technology, to quote Tournier (1994:154) is "the nexus common to all innovations" that are now taking place in information technologies. It has revolutionized the ways in which copyrighted works are created, reproduced and disseminated. Bogsch (1994:20) called it "a common denominator" of all categories of work. Digital technology, in essence, means the storage, reproduction and transmission of materials, whatever its forms of expression (text, words, sounds, 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 1994: 179; Kerever 1997:4).

What is distinct about this technology is its remarkable capability and versatility for a wide range of application with quality and quantity that far excels the conventional analog technology. It is this feature that has brought with it an immense opportunities for commercial exploitation of protected and other works on a wide range of scale with the ease and speed that could have been never imagined before. Noted below by way of reference are some of the key features of this technology that would suffice to indicate the possible implications of its application to various innovative services on an extensive scale to the existing concept and structure of international copyright system.

- any works 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;
- works, combined with telecommunications system, can be transmitted anywhere in the world with remarkable speed and ease;
- Enormous volume of materials can be stored in a selectively small space, allowing increased portability. As for example, a 12cm CD-ROM has a capacity of up to 650 megabytes of data, equivalent to 2,50,000 A4 pages of text, 7000 photographs, 72 minutes of animated pictures or two and a half hours of recorded stereophonic sound (or a combination of two or more of these).

- information, together with proper software, is easily indexed and accessible according to various needs of users;
- any kind of change or manipulation in the information is possible;
- the originals can be copied over and over again and copies made from copies to an unlimited extent without any loss of quality.

The features above, however, are not meant to be exhaustive, but simply to emphasize the role which digital technology will play in changing the existing conventional communication and information services. Technology development is a continuing process. It keeps on developing constantly. The changes that its application brings in the services lead to dramatic change in every aspect of human lives. And this exactly is what is happening with digital technology. While this technology vastly expanded the scope for commercial exploitation of protected works, it has also come up with entirely new type of creation like multimedia products which is now becoming increasingly popular throughout the world. Combined use of innovations became possible by virtue of this technology and as a result many new inventions capable of delivering multiple services, like video, telephone including on-line services, came into existence. The implications of these developments are so much extensive and pervasive which, according to Bogsch (1994:19) "... raises [the] fundamental questions regarding the international system for the protection of copyright and neighboring rights."

Convergence of Technologies

Another important development closely associated with digital technology is the convergence of technologies. The implications of convergence to the existing regulatory framework of international copyright system is indeed profound as well as challenging since it opens up new avenues of markets for exploiting copyrighted works. To quote Lehman (1995: 76) 'convergence is changing dramatically how people and business deal in information products and services, and how works are created, owned, distributed, reproduced, displayed, performed, licensed, managed, presented, organized, sold, accessed and stored.' This section, therefore, briefly outlines the services emerging from the convergence and its increasing scope for further consolidation and extension due to commonality of technology applied in the communication and information sectors.

Convergence, stated in a simple language, means the coming together of consumer devices such as the telephone, television and personal computer on the same medium. The Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors of the European Commissions (1997:1), provides a clear illustration of convergence:

Traditionally, communications media were separate. Services were quite distinct--broadcasting, voice telephony and on-line computer services. They operated on different networks and used different 'platforms': TV sets, telephones, and computers. Each was regulated by different laws and different regulators, usually at a national level. Now-a-days digital technology allows a substantially higher capacity of traditional and new services to be transported over the same networks and to use integrated consumer services for purposes such as telephony, television or personal computing.

By way of example, the green paper cites the following new, convergent services:

- Internet services delivered to TV sets via system like Web TV;
- E-mail and World-Wide-Web access via digital TV decoders and mobile telephones;
- Webcasting of radio and TV programming on the Internet;
- Using the Internet for voice telephony.

The phenomenon of convergence, albeit a recent development, is moving fast ahead in communications and information sectors. The major reason for increasing trends towards convergence is development in digital electronics and software, which created technological potentials for convergence of different communication and information services in varying degree. The examples quoted above clearly demonstrate possibilities and prospects for further extension of convergence to various services in the communication sector.

Almost all the convergences that are now taking place in the communications and information sectors are based on the common application of digital technology to systems and networks associated with delivery of services. In fact, digitalization has almost been a common synonym for convergence of technologies in the communications and information technologies (IT) sectors. Both these sectors are now increasingly employing the same digital technology which serves as a convenient vehicle for convergence. As noted in the Green Paper, the convergence is not just about technologies. It is about services and new ways of doing business and interacting with society. The convergence of technologies subsequently led to the convergence of services and markets as a chain effect of convergence at the technology level. This, in fact, is obvious, as the increasing use of the same technology has led to rapid

transformation of existing services in communications and information sectors. With all the networks now being able to deliver any service to any platform, convergence is also increasingly blurring all the distinctions between services.

Convergence of technologies is thus simultaneously leading convergence of services and markets in different ways at different levels. The effects of such convergences are manifest in the capability enhancement of existing services and the appearance of new information products and services. This, in turn, has expanded the overall information market, providing greater impetus to the development of global information society. With new opportunities and prospects created by convergences, many sectors in communications like telecommunications and media are now working out for cross-product and cross-platform development in telecommunications, media and information sectors, such as home-banking and home-shopping over the internet, voice over the internet, e-mail, data and World-Wide-Web access over mobile phone network and host of such other developments which will increasingly push the world towards globalized economy.

The discussion above is clear enough to indicate that impact of convergence on the ways that copyrighted works are created, reproduced and disseminated may be enormous. And this impact has already become visible in respect to many kinds of protected works at a varying scale and magnitude calling for new adjustments and adaptation within the framework of existing copyright laws.

Market for Copyright Goods and Services

Over the last few years, the market in products and services protected by copyright and neighboring rights is recording a significant growth rate. According to various sources quoted by the Commission of the European Communities (1997:4), the market in recorded music which constituted US \$ 39.8 billion worldwide in 1996 has grown by nearly fourfold in dollar value over the last decade. The EU market in software products achieved a growth of 8.8% to ECU 27.3 billion in 1995. This growth is expected to rise by 9.1% and 8.8% in 1996 and 1997. The total audio-visual turnover for the 50 leading European companies amounted to ECU 49 billion in 1994 which was up by 10.2% from 1993.

The market in copyright goods and services contains those items of intellectual property whose rightholders are authors, performers, publishers, phonogram producers, film producers, and broadcasters. These items generally include products and services of wide variety of both traditional and modern products containing protected subject matter, such as graphics, print products, phonograms, films, computer programs, electronic products,

CD and Video rental, theatre and concert performances, literature and music, art exhibitions and auctions, and satellite and cable broadcasts.

Recent developments in technology have produced a remarkable growth and expansion in the products and services protected by copyright. The advent of digital technology and its widespread application has eventually led to the explosion of new innovations and inventions, especially in telecommunications, media and information technology sectors. This, in turn, has brought about a dramatic change in the scope and content of the existing products and services protected by copyright and neighboring rights. Vast improvement in the delivery capability due to emergence of new distribution channels like satellite, cable and digital transmission methods has immensely contributed to the growth in the copyright market. The development of higher performance new products and services containing intellectual property like CD-Audio, VHS, CD-ROM and CD-I has opened up new vistas of market. Further to this development is the increasing trends towards convergence of audio-visual, telecommunication and information technology sectors which has given rise to new and more efficient ways of exploiting various types of protected works.

The new products and services offer huge scope for both off-line and on-line applications. Off-line applications of multimedia products, like CD-Audio, VHS, CD-ROMS, and CD-Is are dominating the emerging new market for intellectual property. As a result, the creation of multimedia products is soaring high to meet varying needs of the market. These off-line products serve mainly leisure activities, information and education, financial transactions, and communications (CEC, 1997:4). The PC Magazine (1994: 114) reported that an estimated 8,000 Multimedia CD-ROM products had been created and released by the end of 1993, and an estimated 16,000 by the end of 1994. Similarly, Financial Times (1995:5), revealed that approximately 10.3 million personal computers capable of playing these CD-ROMs shipped in 1994 alone. Today, most of the major international publishers and audio-visual companies are increasingly attracted towards electronic publishing which, according to CEC (1997:5) is "estimated to make up 5.15% of the publishing market by the year 2000 and to be worth ECU 8.8-12.4 billions."

With this growing market, the capacity of off-line carriers is also fast increasing. For example, the CEC (1997:7) reported that one DVD can carry about ten times the content of a CD, depending upon the specific characteristics of the carrier, and the quality is perfect. A projection made by the Consumer Electronic Industry indicates that some 25 million DVD drives will have been sold by the year 2000.

It is predicted that the entry of digital broadcast, with its fibre-optic cable, will further help enlarge the market for copyright and related rights as it will enable handling several channels simultaneously which was the major constraint of analogue technology.

On-line applications and services are also gradually making inroads into the new market. These applications and services are based on the Internet, the network of computers, which provides for electronic mail and transfer of files in digital form worldwide. Several private networks are also providing such services to users through computers fitted with 'modems' that allow communication with other computers. Use of such 'on-line applications' is increasing as the demand for 'on-demand' services is picking up the market in several cities and countries at present. According to ECE (1997:5), 'a range of such 'on demand' services has already emerged in the European market, starting in 1995 and 1996, particularly in the United Kingdom, France and Germany, although still... at a trial stage'. In several cities, 'video-on-demand' services have already come into existence. It is a service 'whereby television programs or motion pictures can be 'called up' and viewed on line by numerous people at the time of each person's choosing' (Holleyman and Steinhardt 1995: 59). In the United States, 'on-line music shops' have almost been established and it is in the process of being set up in many European countries.

TRIPS and Copyright

Today information products and services constitute one of the major items of international trade. Growth in this sector is speeding up at an ever increasing rate as the world is moving towards the creation of global information infrastructure (GIS). Increasing integration of trade and commerce with the mainstream of information superhighways—the high-speed, high-capacity electronic information system and networking—is leading the world economy to rely more on information products and services. The low cost of establishing a presence on the World-Wide-Web has been a leap forward towards the global economy as it has enabled the businesses of all sizes and kinds to develop regional and global reach.

Growth of trade in information products and other intellectual property goods, and their increasing vulnerability to piracy and other illegal acts due to development of new technologies to exploit these works in a variety of ways raised widespread concern, especially among the developed nations, over the increasingly open violations of intellectual property rights which they considered should be incorporated as one of the basic components forming multilateral economic arrangement. It was primarily this realization that drove the international community to conclude the

Agreements on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as an integral part of the Agreement to establish World Trade Organisation (WTO). Since TRIPS Agreement is basically guided by economic interest more than any other, it offers 'substantially new elements in the international system of protection of copyright and neighboring rights in respect of enforcement of rights and settlement of disputes' (Fiscor, 1994:211). The major emphasis of the TRIPS Agreements is on enforcement aspects for which it sets out detailed and extensive enforcement procedures which every member country of the WTO should under its domestic law be in the position to implement them. TRIPS adheres to the Berne principle and requires all member countries to comply with Article 1 to 21 of the 1971 Paris protocol with the exception of Article 6bis which contains the moral rights of paternity and integrity. It extends protection covering computer programs and databases and requires rental rights to be provided for computer programs and for recordings.

TRIPS obligates all its members to provide to nationals of other member countries a minimum level of intellectual property protection on the basis of the principle of national treatment and the principle of most-favored-nation (MFN) treatment. The principle of national treatment prohibits to make any unfair discrimination against foreign right-holders while the principle of most-favored-nation restricts one foreign holders of rights from being treated differently from another (Morner 1991:25:11).

The TRIPS Agreement is considered as an important step towards the 'harmonization of intellectual property laws and an essential element in laying the foundation for the Global Information Society' (Golberg and Feder 1995: 284).

TRIPS is seen as being in much favor of developed nations, the major exporters of intellectual property goods, rather than developing nations who, for the most part, had to rely on the imports from these countries. The single most important setback to the developing countries is that TRIPS denies any concessions other than those contained in Appendix I to VI of the Berne Convention. As the developing and least developing countries were respectively given a preparation time of 5 and 10 years for them to move to the TRIPS, it may take next 10 to 15 years before the impact of TRIPS implementation could be fully visible on a global scale. However, the implications of the TRIPS Agreement for the least developing countries like Nepal may be frustrating and far-reaching unless the writers, artists, publishers, producers, scientists and the host of other elements that make up intellectual property industry are well developed and capable enough to meet the needs of the country. This, in essence, calls for the formulation and adoption of well-defined and well-integrated policy instruments that could address all the components of intellectual property industry in its entirety.

Need for Greater Protection

The remarkable development which digital technology has brought on the techniques of copying (reproduction) and manipulation (creation) has opened new prospects for use and dissemination of creative works. But it has, at the same time, been a major risk factor for security of protected works. However, the developments that are now taking place to control the unauthorized use of works through technical devices may substantially help check the possibilities of large-scale piracy and other illegal uses of protected works. Perhaps, it is the technology ultimately that would help find solution to the problems which it has given rise to. As for example, Holleyman and Steinhardt (1995: 61) have illustrated how technical controls can help prevent unauthorized on-line access and use in the information society.

Already CD-ROMs can be encrypted, allowing access and use of one or more parts of the CD only upon the payment of required fee to the author or his representative. Private data networks (as opposed to the Internet) already require a user's billing details for access to the network or to particular works or services; the service provider can set any number of time-based or copy-based fees for the different items that the user wishes to access, copy or use.

Apart from this, there are other technical means, such as copy-protection and copy-management systems, smart cards, digital sub-codes, identification numbers, counters, and the like which are being increasingly introduced and applied to control over the uses of protected works (Ficsor 1994: 219).

While technology is thus playing an important role towards the development of information society by providing immense opportunities and outlets to the authors to create and exploit their works in different ways, it is, at the same time, adding new problems to the security and protection of authors' rights which constitute the fundamental element for the growth of innovation and creativity. The genesis of problem, as Sirinelli (1994: 33) has pointed out, lies in the fact that 'copyright evolved in an analog world, and that the transition to digital technology' has made much difference to the past reasoning. However, he cautions that any move to revise the existing system should first 'ascertain whether modern developments are bringing about radical, substantive changes of nature or merely a change of degree.'

Whatever may be the impact of technological development on the ways works are created, reproduced and disseminated, the major concern underlying

the basic idea of copyright remains the same: right of authors should be adequately guaranteed and protected in order to encourage the development and distribution of works of authorship. Development of technologies should necessarily promote, not inhibit, the creativity and innovation for the benefit of society and authors. Any misappropriation and manipulation of technologies that would interrupt and interfere with author's rights should be dealt with appropriate legal and other mechanisms to prevent any dilution to these rights. More than technology, which by itself does not generate any creative works unless it receives human input by way of data, it is the creativity, the whole range of intellectual creations and innovations on which rests the future of the global information society. As pointed out by Holleyman and Steinhardt (1995: 59) "the infrastructure is not the totality of the information society; its development and ongoing existence depends heavily on creative content - a wealth of works, data and services available on-line that business, government and the public will want to use and pay for". It is thus the creative content or creativity needed for the sustenance and growth of the existing information and communication infrastructure that is of vital importance for the continual development of the Global Information Society. This indeed explains for the need of strong protection to provide market-based incentive and rewards for ensuring the constant growth and availability of creative works which ultimately encourages further investments in infrastructure development. Any relaxation or compromises in the protection may bring halt to the development of creative works and infrastructure needed for the development of Global Information Society.

With digitalisation and networking, it is becoming more complicated and challenging to defend and safeguard authors' interests. Digitalisation has, in fact, created a kind of, what Drier (1994:59) calls "technical freedom to appropriate and manipulate someone else's protected works". Technology is evolving and it may not be that easier at this moment to predict the extent of changes that digital technology might produce in the future in respect to creation, reproduction, dissemination and use of protected and other works. The General Information Document prepared for the WIPO Worldwide Symposium (1994) noted that "... not only some new provisions and new licensing techniques, but also the need for a completely new structures for the protection, exercise and enforcement of right, may become necessary" to deal with new developments brought about by the advent of digital technology.

The problems raised by digital technology in the existing copyright laws are basically tied up with two fundamental questions: (a) what should be the legal status of such new creations like multimedia products, given its

complex nature of production, within the framework of subsisting copyright legislations, and (b) what further new mechanisms are warranted for the consolidation of existing copyright regulation to deal with the development of huge technical capabilities for copying and manipulation of protected works and other intellectual creations?

Multimedia creations are a recent phenomenon which, according to Mille (1995: 11). "no legislation has yet taken them into consideration, nor has any country been involved in litigation which might constitute a case law." Multimedia technology involves combining in one and the same medium various elements, like text, graphics, sound, image and videos. In many cases, multimedia products are derivative works, recreating a pre-existing work. The subject of multimedia products is still an on-going issue for debate in the international copyright community.

Legislation of Copyright in Nepal

The Copyright Act of Nepal dates from 1965, and it was amended 32 years later in 1997 to update some of its provisions in conformity with the present need. Theoretically the Copyright Act, 1965 came into force on 13 April 1966 by a notification of the Ministry of Education published in the Nepal Gazettee on 4 April 1966. The appointment of the Registrar was also announced in the same notification. Apart from this, there exists little evidence and documents to show the implementation of the Act until the Copyright Rules 1989 was formulated and brought into effect from 4 December 1989. In the meantime, the Ministry of Education came up with some fresh initiatives to revitalise this Act on 12 February 1990 when it constituted under the chairmanship of its Additional Secretary a copyright committee representing the members from the Royal Nepal Academy, the Nepal Fine Art Campus, the Ministry of Law and Justice, the Department of Archeology, the Royal Nepal Film Corporation, the Royal Nepal Academy of Science and Technology, the Sajha Publication, the Janak Educational Material Centre, the Ratna Recording Corporation, and the Nepal National Library (NNL) as a member-secretary. Furthermore, the chief of the Nepal National Library was appointed the Registrar of copyrights. These initiatives, however, a beginning, made some visible impacts on the registration of copyright as reflected by growing number of various kinds of literary and artistic works being registered at the Registrar's office. At present, various works registered for copyright protection at the Nepal National Library include 189 titles of books, 204 audio cassettes, 5 films and 9 paintings.¹ So far, only three complaints have been lodged with the NNL against copyright violation: one relates to book, one to film and the other to audio cassette. With the amendment of the Copyright Act in

1997, the responsibility of copyright administration has been entrusted to the Department of Archeology under the Ministry of Youth, Sports and Culture.

The Copyright Act, 1965 came at a time when the infrastructural and other institutional supports and facilities needed for the development and promotion of creative works were virtually lacking, and few of those that existed were poorly equipped and their impact was hence negligible. Sound broadcasting began in Nepal from 1951 (2007 B.S.) with short wave broadcast by the Radio Nepal from Kathmandu. Later in 1969, a medium wave broadcast was added to its transmission (Maung and Ghimire 1997:1). Possession of radio or a transistor radio was then a luxury marking a symbol of social status. Television was a distant phenomenon – the name then unheard of. There was no recording industry as such. Recordings of music and songs were made at the studios in the neighbouring town of Calcutta (India). Magnetic tape reproduction equipment like cassettes were then a rare object found in a few houses of 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, the adjacent border town 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 were filled up by foreign imports.

It is thus obvious that the Copyright Act that was framed against such landscape can barely meet the present need for the protection of creative works which has grown so much complex and challenging. New concepts and approaches to copyright protection are being evolved and adopted to accommodate emerging trends and opportunities within the existing framework of international copyright system. With new technologies offering various ways of creating, reproducing and disseminating protected works, the prospect for exploiting these works for various commercial purposes has broadened immensely. As a result, intellectual property containing protected works has now become a subject of foremost importance in the world of trade and commerce, and hence the TRIPS Agreement came into existence. It has linked copyright to the world trade system. With TRIPS, the formulation of national copyright laws is now no longer a matter of entirely national discretion, for the norms and standards which the TRIPS has set out should be fully reflected in the domestic laws

of each contracting state – the basic objective being the harmonization of domestic copyright laws to a uniform international system for the smooth and effective regulation of international trade in intellectual property goods.

Unfortunately, the 1997 Amendment of the Copyright Act, 1965 has failed to consider all such developments and their implications in a national and global perspective. It has made no substantial changes other than those making a few alterations on matters of immediate concern which relates to coverage and punishment. Two new items, namely, computer programmes and research works, were added to the list of coverage and the punishment for infringement of copyright (unauthorised publication), hitherto negligible, was made more severe with a fine upto rupees one hundred thousand, or 6 months imprisonment, or both for the offence committed first-time and for each offence thereafter it is rupees two hundred thousand, or one year's imprisonment, or both. Some sections of the Act dealing with 'restriction on unauthorised publication' (Section 15), 'punishment for unauthorised publication' (Section 17), 'punishment for acting in contravention of the license' (Section 19) and 'other punishment' (Section 21) were replaced by a new text.

Some Fundamental Features of the Act

The Copyright Act of Nepal extends protection to literary and artistic works to which computer programmes and research works were later added by the amendments of 1997. The law, however, is not explicit on the status of derivative works, like translation, adaptation, arrangements and other transformation of literary and artistic works, and collection of literary and artistic works, such as encyclopaedia, anthologies which, by reason of the selection and arrangement of their content, constitute intellectual creation. The copyright laws of most countries offer protection to such derivative works based on pre-existing works, without prejudice to the right in the pre-existing works.

The Act recognizes the basic underpinning of the Copyright that the person who creates a work should benefit in the first instance from copyright protection. Section 3:2 of the Act clearly lays down that only the authors are entitled to the ownership of copyright in their works. This means that the rights in the work vest originally in the author who created it. In the absence of proof to the contrary, the author is the person under whose name the work is disclosed. However, under certain conditions, like the works created for the employer or the person commissioning the work, the right to claim authorship is deemed transferred to the employer or to the person commissioning the work. In some laws, such transfer implies the

transfer of only economic rights whereas the author retains all the moral rights in his work.

The Copyright Act provides authors with right to transfer copyright ownership, wholly or in part, or authorize to use it with or without specifying any condition (Section 4). But it is not clearly expressed anywhere in the Act whether such transfer involves moral rights which generally is deemed perpetual, inalienable and imprescriptible, and hence non-transferable. Article 6^{bis} of the Berne Convention maintains that moral rights are independent of the author's economic rights, and even after their transfer, the author retains the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to his work, which would be prejudicial to his honour or reputation. Nepalese Act contains no express provision for the author's moral rights as it does in most copyright laws of other countries. Reference to those rights is just faintly implied with respect to Section 15 which deals with restriction on unauthorised publication. As for example, Section 15:1(c) and (d), provides:

- (c) In case, with an intention of making financial profit, work of different subject or nature is created from other's work by changing its structure or the medium of language,
- (d) In case, effort is made to make profit by producing any matter directly or indirectly, through advertisement or through any other medium, with an intention of creating false illusion in the audience, listeners or readers that it is a different work.

[Author's Translation]

Section 15:2(b), with respect to certain condition in which it will not be deemed unauthorised publication, sets out:

- (b) In case any publisher publishes with bonafide intention for the use of educational institutions, short articles, from any unpublished work, clearly indicating the use, the title of such work and the description of the author thereof.

[Official Translation]

Such indistinct and vague references set in different context, however, may produce varying legal interpretations and, hence, they do not establish sufficient ground on the basis of which moral rights can be claimed by the authors.

The Act offers the authors a number of economic rights which include right of reproduction (section 10), right of translation (section 7) and right of communication of the work to the public by performance or by

broadcasting (Section 13). These rights are not, however, expressly stated in the Act. More about it will be dealt later in connection with the structural aspects of the Act.

The rights granted to authors are given protection throughout the life of the author plus fifty years after his death. In the European countries such protection extends throughout the life of the author plus a post-mortem period of seventy years. But in the United States and most other countries in Asia and Latin America, copyright protection subsists for a term consisting of the life of the author and fifty years after the author's death. This is a minimum level of protection which the Berne Convention requires to be extended by all its member countries.

Fair-use: The rights granted to the authors are generally exclusive rights but they are not absolute in the sense that they are not free from some exceptions and exemptions. These exceptions are known by various term, such as 'fair dealing' in the U.K. and 'fair use' in the U.S. The object of such exceptions to the rights of authors is to allow certain free uses of copyrighted works for which the consent of author is not required and which do not constitute infringement of copyright. The need for such uses arises for a number of reasons of which societal need for education and development is of primary concern. The Berne Convention (Article 10 and 10^{bis}) has also endorsed certain free uses of literary and artistic works, like making a quotation from a work for reporting current events, use of works by way of illustration in publications, broadcasts or sound or visual recordings for teaching and other such purposes. Such uses, however, should be compatible with 'fair practice' and 'to the extent justified by the purpose'. Where use of work is made, it should be accompanied by a sufficient acknowledgement indicating the source and name of the author.

In the U.K, exemption is provided to the libraries for particular use of protected works like archiving and this is called library privilege. The equivalent of such exemption in the copyright law of Nepal is provided in section 14 which allows public libraries to reproduce a copy of protected works for keeping in the library subject to certain condition.

Under the existing copyright law of Nepal, use of 'fair and necessary portion' of any work 'for the purpose of private study, research, criticism, review, or for the press or the radio, or for purposes of court proceeding' does not constitute unauthorised publication [Section 15:2 (a)]. Similarly, publication of 'short articles from any unpublished work, clearly indicating the use, title of such work and the description of the author thereof' is not considered unauthorised publication provided it is published 'with bonafide intention for the use of educational institutions' [Section 15:2(b)]. What is

striking here is the use of such vague and abstract expressions like 'fair and necessary portion', 'short articles' which do not convey any precise meaning leaving much room for discretionary arbitration to resolve the disputes arising thereof.

The idea 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 (1982:7), "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".

Some Defects in the Act: Some of the major defects of the Copyright Act, 1965 are that it is obscure and obsolete in many respects. Obscurities arise mainly because of two reasons: language and structure.

(a) Language

The language of the text is not simple and precise. In many instances, it is difficult to comprehend the text for it is excessively loaded with loose, complex and abstract expressions. The two excerpts quoted below from the text will suffice to make this point clear:

- (i) Any article, essay, story, poem, novel, epic, lyric or any other kind of book, pamphlet, descriptive writing as a whole or part thereof in prose or poetry, written, printed, lithographed, typed or issued or produced through any other mechanical device or broadcasted, in original or in translated form whether it be a complete set or part thereof...

[Section 2:1(a)]

- (ii) In relation to any other work which is on sale, distribution or use by the public or is produced so as to be sold or distributed to or used by the public as well as any work which is fit to be staged and is publicly exhibited in a form with or without being translated or adopted.

[Section 2:1(d:2)]

What for example the expressions '... as a whole or part thereof in prose or poetry...' in excerpt (i) and '... or is produced so as to be sold or distributed to or used by the public...' in excerpt (ii) add to the meaning other than adding to confusion. Such obscurities are obstructions rather than being aid to the protection and to the smooth and efficient delivery of justice. Presence of unclarities in the language is often risky in that it may give rise to entirely different interpretation than those intended by the law. The objective of law is simply not to make things complex by being vague in itself but to facilitate the justice for which it should be stated to the extent

possible in a simple and clear expression. Vagueness and ambiguities may in no way be overlooked as flexibility which in legal discipline is generally allowed to some extent, especially in drafting the constitutional laws, in order to provide room for dealing with some unanticipated situation.

(b) Structure

The existing copyright law is structurally confusing as it is not well laid out and well organised. By structure we mean the basic components that constitute framework for the copyright laws in general. Copyright laws of various countries may differ in approach but the fundamental constituents remain more or less the same. These components mainly include scope of protection (coverage) and its limitations, ownership of copyright, rights of authors and their limitations, free uses of protected works, and terms of protection. The other elements, like licences, registration of copyright, infringement of copyright, civil remedies, transfer of copyright and such other details are much related to technical part of the law.

The structural confusion becomes at once glaring as one looks for the rights granted to the authors. Nowhere in the Act has it been clearly laid down what rights are granted to the authors, apart from the right to ownership of copyright in Section 3. What is yet striking is that the chapter bearing the title 'Owners of Copyright and their Rights' should contain none of the rights of the authors except the right to register to establish the ownership of work which is a mere technical formality. As a rule, rights of authors are explicitly expressed in the statutes generally under a separate heading. Where the rights of authors are not explicitly stated, it is made clear at the outset by defining what 'copyright' means for the purpose of a given act. But in the case of Copyright Act of Nepal, neither does it define the meaning of 'copyright' to cover the rights of authors nor provide any express declaration about it. Surprisingly enough, the readers are left to recognize the existence of various rights by virtue of the obligations or conditions laid down by the Act for granting licence for reproduction, translation and communication of work to the public by performance. As for example, the condition laid down for granting licence for translation in Section 12:1(b) indicates that the author is conferred with the right of translation:

- (b) If the copyright-holder has refused to grant licence to translator even after being requested to do so or if the copyright holder cannot be traced.

It is difficult to understand that provision of licence which is meant to be limitation to the rights of authors should serve as a basis for the recognition

of authors' rights. And this is totally strange of the Copyright Act of Nepal to treat it so lightly so important a matter that is crucial to the very idea underlying the concept of copyright.

Most of the provisions of Nepalese Copyright Act are obsolete in the present international context. Section 6 and 7 of Act dealing with registration of copyright are completely redundant in relation to the Berne Convention which sets down that protection should be automatic, and not conditional upon compliance with any formality, such as registration, deposit and copyright notice. With the withdrawal of registration requirement, the pre-existing text under Section 3 (Acquisition of Copyright) and Section 4 (Transfer of Copyright) will need a new suitable text befitting the context to replace it. Similarly, such provisions like 'notice to be given of transfer of copyright' in Section 5 and 'restriction on any act leading to false entry in the register' in Section 20 will have no relevance under the condition of automatic protection.

The Berne and Nepalese Copyright Act

The copyright law enacted in 1965 does not meet international requirements for copyright regulation as Nepal is not yet a signatory of any multilateral copyright convention, like the Berne Convention or the Universal Copyright Convention – the two major international copyright conventions now in existence. However, at present the international copyright system is dominated by the Berne Convention for the Protection of Literary and Artistic Works. With the United States' accession to the Berne Convention in March 1989, and the TRIPS obligation on the part of its member countries to comply with Article I to 21 and Appendix I to VI of the Berne Convention and Article 1 to 15 and 19 of the Rome Convention, the significance of the Universal Copyright Convention (UCC) has largely diminished.

The Berne is administered by the World Intellectual Property Organisation (WIPO) which was established by a convention signed in 1967 and brought into force in 1970. It became a U.N. specialized agency in 1974.

The original Berne Convention signed in Berne in 1886 has gone through several important revisions: at Paris in 1896, Berlin in 1908, again at Berne in 1914, Rome in 1928, Brussels in 1948, Stockholm in 1967 and Paris in 1971. Its most recent amendment was made in 1979. Some 121 countries are now members of the Berne Union.²

The Berne Convention (Article 5) is based on three basic principles: (1) Automatic Protection – According to this principle, protection should be granted automatic without any formal requirement for registration. No

placement of copyright notice on a work is required. A work, whether published or unpublished, is automatically protected if the author is a national of a Berne Union country. If a work is first published in one of the Berne countries, either alone or simultaneously with publication elsewhere, it receives protection whatever may be the nationality of the author; (2) National Treatment – According to this principle, a country should provide to the works of foreign authors the same protection which it accords to the works of its own nationals. No discrimination whatsoever should be made between the works of national and foreign authors; and (3) Independence of the Protection – According to this principle, the protection given in a Berne country is independent of the existence of the protection in the country of origin of the work.

The other important aspect about the Berne Convention is that it lays down a minimum level of protection which all member states should be in the position to provide under their domestic legislation. The minimum protection is required for all literary, scientific and artistic works, for the rights of author which include translation, adaptations, and adjustments, public performance and rental, reproduction, communication and broadcast; for moral rights of paternity and integrity; and for a minimum duration of protection which, in general, extends to the author's life plus a post-mortem period of 50 years. The Berne Convention has recently extended the terms of protection to the life of the author plus seventy-five years.³

Viewed against these basic requirements of the Berne Convention, the existing Nepalese Copyright Act reveals plenty of gaps both in scope and structure. It says nothing about the moral rights of paternity and integrity which under the Berne Convention is mandatory. The Berne also recognizes the doctrine of *droit de suite* according to which "authors with respect to original works of art and original manuscripts of writers and composers, enjoy inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work" (Article 14^{ter}). Although not binding, many copyright laws of the European and other countries have adopted this provision. Unlike the author's other economic rights, the *droit de suite* is inalienable, but it does not mean that it is untransferable. The *droit de suite* applies only to the original copy or copies of the works made by the artist himself.

As discussed earlier, author's rights are not clearly spelt out in Nepalese Copyright Act and hence there is a need for express articulation of these and other rights as required by the Berne Convention. Any country under the Berne is free to add under its domestic law to the list of works and rights covered by the convention according to its specific requirement. As for example, the Tunis Model Law⁴ on copyright extends protection to such

works like 'tapestries' which is not included in the Berne list of protected works. Since this type of artistic creation has special cultural importance in Tunis and is susceptible to economic exploitation, it was added to the Berne list under its domestic law. The point here is that the Berne is flexible on the matter of country specific requirement for protection except those which it sets out as a minimum requirement to be complied with.

Neighbouring Rights

The Copyright Act, 1965 contains no provisions regarding the so-called related rights or neighbouring rights of the performers, producers of phonograms and broadcasting organisations⁵. As pointed out earlier, development of activities that particularly relate to these rights took place long after the enactment of copyright law, and this perhaps can be the reason for their omission. It is, for the most part, only during the period of late 1980s that some visible growth in the field of record industry, cinematography and broadcasting took place in the country. Television broadcasting made its beginning as late as 1987 (2042 B.S.) which was preceded by a year-long trial transmission. The presence of TV and Video opened up a new market for video film industry which for a time flourished in the country. The coming of Satellite TV transmission like Star and Zee and the introduction of cable TV network gradually drove away the video film from the market. In the meantime, the Radio Nepal came up with FM service, virtually operated by the private sector, and a new channel from the private sector, namely, Image Channel, was added to the existing transmission of the Nepal Television. These developments in the field of broadcasting, particularly the private sector participation, has warranted the need for extending protection to the rights of the broadcasting organisations. In the music industry, the emergence of private enterprises like the Music Nepal and host of such other music enterprises has brought with them a new market for music products. It is estimated that some 250 to 300 music albums are released every year these days. Annual sales of these products are estimated at 3 million copies of which, it is reported, half this number accounts for counterfeiting.⁶ The boom in the music industry is largely fueled by the growth in the film industry. The film industry which about a decade and a half ago was almost crippled is now producing over a dozen films a year. The sudden upsurge of progress in these fields of communication and entertainment is largely ascribed to the open, market-based economic policy adopted by the government after the 1990 reinstatement of democracy in the country. The emphasis laid on liberalisation and privatisation and the subsequent relaxation of rules and procedures have, in particular, contributed to this growth.

Publishing Industry

On the publishing sector, which is one of the major concerns of copyright, many new entrepreneurs have come into view over the last few years, and this by no means indicates that market for books is increasingly expanding. With the development that is now taking place in various sectors, especially education, demand for books of all kinds is growing at an ever increasing rate. In the absence of a reliable database, it is yet not known exactly how many new titles a year are published from Nepal: estimates, however, vary between the range of 600 to 700 titles.⁷ It is a common feature under the copyright law of most countries including the United Kingdom that publishers are required to make a compulsory library deposit of a few copies of published books to maintain complete archives of books published in the country, and to advance scholarship. In the absence of such provision in the copyright law of Nepal there is no other mechanism to find out the titles of book produced every year in the country. The principle applied to books can also be extended to films, and published visual and sound recordings (McFarlane 1982:10). Besides, there exists no official statistics indicating annual consumption of books, volume of imports and exports other than a wild estimate which puts the annual demand for all kinds of books at worth Rs.1000 million. According to this estimate, 40 to 60 percent of the demand is met by domestic production while the rest is fulfilled by the foreign imports. It is thus difficult to describe the present status of publishing industry for the lack of detailed information. However, growth in the number of publishing houses, printing set-ups, book-stalls, reading materials and such other factors definitely point out that market for publishing industry is growing and so is the investment in this sector over the last few years. But to what extent has this growth been able to develop and promote national authorship needed to strengthen domestic publishing industry and achieve self-sufficiency in book production is not clear in the absence of any reliable study.

Development of publishing industry largely reflects the situation of copyright in the country. Without good copyright protection neither the publishing industry nor the indigenous authorship and creative writing can sufficiently flourish in the country. In Nepal development of national authorship and other creative works is very much inhibited due to weak copyright protection which virtually exists only in name. Even when there is a flagrant violation of copyright writers are helpless to stop it as it involves lot of time and money which they are not in the position to afford. Writers and artists are often unduly exploited by the publishers for their lack of knowledge about copyright and legal matters involved in drawing the contract.⁸ Abuses of photocopying are tremendously increasing and such

unauthorised reproduction and copying of original works have largely affected the income of the writers from their works. Punishment for infringement, before the amendment of the subsisting Act, was so negligible that it can be hardly described as any deterrent to infringement.

Computer Software

The arrival of computer in the early 1980s led to the development of new industry in the country, usually known as computer software programme. The 1997 amendment recognized the software programme as a part of literary works to be extended protection. Use of computer in various works is now fast increasing in Nepal and with this protected works have become more vulnerable to unauthorised computer use of such works. Use of computer for such services like e-mail and internet has also come into existence since a few years back.

Collecting Societies

New ways of creation, reproduction and dissemination of protected works brought about by technological development have made it increasingly difficult for authors and other copyright owners to detect and identify various uses made of their works. As a result, illicit use of protected works is increasing excessively. Besides, there exists in the country no effective mechanism to regulate the new methods of exploiting the protected works, and hence the authors and right-owners are obliged to lose much of their economic gains by way of royalties. Despite the existence of various professional organisations, like the Nepali Writers' Association, The Nepal Cine Artists Association and host of such other associations, the concept of copyright collecting societies has not yet been introduced. The importance of such collecting societies is now being increasingly felt, particularly in the field of music where the introduction of FM radio service and other TV broadcasting services has made it more difficult for the composers of music and other right-owners to discover, for example, who are using a particular song, and how many times has it been performed in the course of a day or a week. In such circumstances, the collecting societies usually known as the Performing Right Society (PRS), serve as the most convenient pool between the users and the copyright owners. Under this system, the users are generally granted a blanket licence for a definite period whereby they can make use of the entire stock of protected works for a single annual royalty. The users are thus relieved from a lengthy and cumbersome procedure of locating each individual right-owners and settling terms and conditions with them for the use of their works. In the same way, it relieves the individual authors and right-owners from the burden of keeping track of what is happening to their works, for it is policed by the collecting societies which

collect all the royalties with respect of the uses made of the protected works and distribute the proceeds thereof to each member who is entitled to a share.

The problem of identification is also growing in the field of literary world with the opportunities provided by the emerging technologies for new ways of exploiting the literary works. Increasing computer use of literary works, like storing literary works in data banks and reproducing them on video screens, and use of literary works for multimedia development is making it more complicated and difficult for an individual author to keep track of uses made of his works. Unless there exists some collecting societies to administer this matter, it is simply beyond the capability of an individual author to detect such uses of his works and collect compensation thereof. In the United Kingdom, the organisation known as the Authors Lending and Copyright Society (ALCS) takes care of these matters in the field of literary works.⁹

The discussion above indicates that the subsisting copyright Act is outdated and ill-adapted to embrace all the developments that are taking place in the country in the field of intellectual productions. In view of the growing trend towards the commercialisation of intellectual property goods at the international level, it has become a pressing need to develop and strengthen the existing level of development in the knowledge-based industry to reduce over-reliance on foreign imports and check the increasing deficit in the balance of trade on those items. While the revision of existing copyright act is needed to address the present developments and the problems arising thereof, this alone would not bring about much improvement in the prevailing copyright situation unless its enforcement aspects are strengthened and capable enough to deal with the situation. Merely having a good copyright law does in itself make little sense without any commitment to its implementation. The challenge in fact lies not in the formulation of law but in its implementation for which a detailed procedure and mechanism should be developed and strengthened. The need for Nepal is not a copyright law that is complex and costlier to administer. Rather it is a copyright law that can help meet her specific need for promoting and safeguarding the interest of both the producers and the users and developing a congenial atmosphere for the overall advancement of intellectual property industry – a law based on reality, simplicity and, above all, the fundamental spirit of copyright.

Joining the Berne: A Problem or Solution?

WIPO (1989) has listed a number of advantages which developing countries can receive on being a member of the Berne Convention. These claims,

however, do not hold as much promising 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 benefit from what has been offered to them. To what extent a developing country like Nepal can avail of these facilities is largely governed by the level of her intellectual property development, its infrastructural set-up 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. This section, therefore, briefly looks at some of those claims about the Berne held as being supportive to the needs of a developing country, particularly in relation to Nepal.

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 developing 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. Transborder protection for developing countries carries little significance unless their intellectual products are well developed to be able to find access to the international market of intellectual products. The obligations under the Berne to provide protection to the works of foreign nationals, on the contrary, gives rise to most unfavourable situation in which developing countries are bound to suffer alarming and ever-increasing deficit in the balance of trade in the intellectual products. This is particularly so because the volume of import may keep on raising without significant improvement in the export to offset the deficit, and the authors in the exporting countries may at the same time demand higher royalties which will require the developing countries to come up with ever increasing expenses of hard currencies to meet their growing needs for knowledge products. Such investment for developing countries may put up undue pressure on their economies which are basically characterized by limited resources, low capability, and low purchasing power. This situation may prevail unless the developing countries are able to reduce significantly their dependency on the flow of foreign works for which indigenous knowledge-products must

be in the position to command the major share of domestic market for intellectual products. The argument put forward by the WIPO (1989) in this context is rather deceptive, and hence it is worth quoting:

The fact that the number of foreign works protected in the country would probably be larger than the number of national works protected abroad is not a situation peculiar to developing countries. The same situation exists in several developed countries. It should be borne in mind, however, that the share of royalty payments in the total foreign exchange expenditures of a country is generally extremely modest.

What is described here as 'generally extremely modest' may hold true in relation to developed nations but it may not be so in the case of developing nations, particularly in relation to a least developing country like Nepal, for whom the marginal increase in the forex expenditure on royalty payments could reflect significant setback to the essential imports needed for other crucial sectors of the economy. Added to this is the fact that the total amount of royalty payments may keep on increasing every year both as a result of hike in the prices of intellectual products due mainly to inflation and increase in the volume of imports due to addition of new titles and the requirement for ever increasing quantity. This would definitely add to the pressure on the forex expenditure which a country like Nepal may not afford to take it liberally in view of her other pressing needs.

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 VI 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 of certain conditions. The rights so granted are non-exclusive and non-transferable. A license 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 other countries except under specific conditions.

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: 1981). Besides, it is often reported that many publishers in the industrialized 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 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 licence] it has been hardly applied" (Altbach 1997:12-13).

Promotion of National Creativity: It is argued that if protection is denied to foreign works, it will weaken the competitive position of national creators "since preference might be given by publishers and other users to works of foreign authors available under more favourable financial conditions. The inevitable result would be an increased dependence on foreign works and a decrease in national creativity" (WIPO 1989:5).

It is fallacious to argue, especially in the context of developing countries, that competitive position of national authors will be strengthened and dependence on foreign works will be reduced simply by virtue of the fact that foreign works are protected, and pirated and other illicit production of such works are debarred from getting unrestricted access into the market. While it is assumed that protection to foreign works may generate some demand for works of indigenous authors, it may also hold equally true that such demand may not be realized due to poor infrastructural supports and other constraints peculiar to developing countries. It should be borne in mind that development of national creativity is linked up with many interrelating factors of which government policies towards book development, existence of viable market, development of publishing industry, literacy in the country, purchasing capability and reading habit of the general public are some of the basic elements setting the necessary background for its development. Copyright has its own role to play in safeguarding the interest of the authors but it certainly is not a key element

to the advancement of national authorship. Take for example the case of music industry at home. Over the last few years it has been able to record a significant growth albeit no protection exists either for domestic or foreign producers of phonogram. Several factors have played their part in this growth: favourable changes in the government economic policies, setting up of recording studios, development in celluloid industry, emergence of broadcasting organizations in the private sector, launching of FM services, etc. As the market for music products set on picking up, the producers of phonograms were quick to see adherence to copyright in their best interest and hence they started raising the voices for amendments in the existing copyright law for adequate and effective protection to the industry. But to other sectors of copyright industry, particularly publishing industry, where market for indigenous products is developing very slow and where the contents of foreign imports are relatively high, copyright is still less appealing. Responses from most publishers in the country towards copyright are rather lukewarm because they have little to gain and more to lose from compliance to copyright. However, this situation will totally reverse once the market for indigenous products grows stronger, and it is at this stage of development adherence to copyright becomes the most critical factor for the publishers to promote and protect their interest.

The discussion above clearly points out that joining the Berne may add problems to the least developing countries like Nepal whose level of intellectual property development is too inadequate to meet the national requirement. The problems may not be reflected only on their ever increasing balance of trade deficits but also on other sectors of the economy which may not receive adequate fund owing to increasing investment needed for the imports of copyright materials. The Berne in fact does not hold any such provision which may be truly described as 'relief' to the need of least developing 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, there is little for them to console from the Berne. All in all, the Berne has much to offer in favour of 'haves' than to 'have-nots'.

Conclusion

The fact that Nepal has not yet ratified the Berne Convention is now irrelevant, especially after the TRIPS came into existence. It is now more of a compulsion than a choice to adopt the Berne, the major part of which (Article 1 to 21) is enshrined in the TRIPS Agreement. While the TRIPS embodies major part of the Berne, the later, in turn, has assimilated the

essential part of the former to harmonize and facilitate the implementation of the TRIPS Agreement. What is distinct about the TRIPS is that it looks at knowledge products as being purely commercial object without much attachment to moral issues. It is, as Altbach (1997:4,8) pointed out, solely guided by the view that "those who bring knowledge products to the market place should be able to completely control them". Perhaps in next 10 to 15 years when the TRIPS will come into effect throughout the world, access to knowledge and knowledge products certainly will not be as free and easy as it is available today, particularly to the least developing countries. This perhaps 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'.

The implication of the TRIPS is far-reaching to the economies like Nepal which relies 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 which 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 off this industry from the level of net importer to exporter. Compliance to international copyright system at this level of development would therefore entail losing something for nothing. Once it comes within the network of international copyright system, the cost of books and other knowledge-based products would escalate much higher than the prevailing price due to substantial increase in the current national expenditure of hard currency on imports of such items. This, in turn, would definitely affect the large sections of the populace who can hardly afford to pay such prices for access to knowledge-based products. It is an open secret that need for knowledge products, especially textbooks and other reference materials for education and research, is mostly fulfilled by the pirated books of foreign authors which constitute a large bulk of prevailing market for knowledge-based products in the developing countries.

Seen against such developments in the international community in the field of copyright, revision of the existing Nepalese Copyright Act to make it compatible with the Berne Convention has become imperative to avoid international trade sanctions. It is, however, apparent that Nepal's move to join the Berne Convention is certainly not in favour of the national interest, given the present need for knowledge products, especially textbooks and technology, the level of knowledge industry in the country, and given the fact that legal structure of international convention like the Berne is in favour of the interest of the developed nations. For 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 reproduced outside the borders of the State' (Wegman 1982:18). This in fact is one of the prime reasons why copyright adherence is generally viewed as a natural 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 violators of copyright to being a defender of international copyright system should serve as a best illustration to this reality.

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 Nepal is to gain from the membership of international copyright convention, the only option open to her is to develop and strengthen her own domestic publishing industry. Once the indigenous publishing is well developed there is more benefit than harm from compliance to 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 tone on copyright issues as it emerged capable of exporting books. To conclude it is Altbach (1997:12) again whose observation here seems very pertinent: 'Nations must see copyright as in their best national interests before they become fully supportive of it'.

Notes

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2. The Berne Convention lays down that 'the countries to which this convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works'. This intergovernmental Union is usually referred to as the 'Berne Union'.
3. The recent extension of the terms of protection by the Berne Convention to the life of the author plus seventy-five years is reported under the heading

- 'Understanding the Berne Convention' in web-site: <http://www.indexstock.com/pages/berne.htm>.
4. The Tunis Model Law on Copyright was adopted by the committee of the Governmental experts convened by the Tunisian Government in Tunis from February 23 to March 2, 1976, with the assistance of WIPO and UNESCO. It also includes a commentary by the Secretariat of UNESCO and the International Bureau of WIPO.
 5. Neighbouring rights relate to the rights of performers, producers of phonograms and broadcasting organisations. It is governed by the international convention known as the Rome Convention, 1961. This convention is also a part of the Berne Convention.
 6. The facts and figures cited here in relation to music industry were obtained from the Director of the Music Nepal Pvt. Ltd. upon inquiry through telephone on 6 September, 1998.
 7. This estimate is based on the number of Nepal-published titles procured by the Central Library of Tribhuvan University for the fiscal year 1997-1998. During this fiscal year, the library procured a total of 506 titles published from Nepal of which 63 were in English. It covers, according to library officials, 65 to 70 percent of the total titles published from Nepal. If this is taken for granted, the total titles published from Nepal is estimated to come around the range of 600 to 700 titles a year.
 8. It is reported that publishers, with the help of their legal advisers, are often able to draw up contract agreement to the best advantage of their interest while the writers and artists, unable to afford such legal experts and with no organisations to guide them on such matters, are left exposed to unscrupulous manipulation by the publishers. Furthermore, it often comes to the hearing that some publishing houses in the private sector have gone to such an extent that they would print copies four/five times higher than a print-run specified in the contract agreement, and would keep on delaying and postponing the payment of royalties due to the author on the ground that his/her book is not selling well in the market. The book, on the contrary, would have long been out of market had it been printed a specified quantity. The existence of such fraudulent practices is difficult for an individual writer to detect in the absence of copyright societies to pursue such matter, and even when it is discovered the writer is unable to bring the case to litigation in view of the time, money and effort needed for public prosecution. On top of it, the provision of penalty made in the Copyright Act is so minimum and absurd that the whole exercise of prosecution seems futile. Perhaps this may be one of the reasons why only negligible number of complaints against copyright infringement have been lodged with the Registrar's office despite the existence of widespread copyright violations in different forms and scale. Case laws arising from copyright dispute do not exist in Nepal as the enforcement of copyright law is virtually lacking in reality.

- 9 For a detailed elaboration of copyright societies, see Gavin McFarlane, "A Practical Introduction to Copyright", (Berkshire, England: McGraw-Hill Book Company Limited, 1982), p. 116-122.

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