

4. What is Copyright I “Works, Rights and Ownership”

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1. Introduction

In this, the first of three papers on the copyright system I will give today, I review the reasons and justifications for copyright protection and its importance to cultural development. I will consider the works protected by copyright, the rights granted to copyright owners and the rules in respect of ownership of copyright.

In order to do this I will review what is generally considered the most important copyright document – the Berne Convention. Mongolia became a member of the Berne Convention in 1998. Therefore Mongolia is required to have the same minimum standards of protection of copyright as all the other countries which are members of the Berne Convention, all 162 of them.

We could ask - why have 162 countries around the world chosen to become part of the one copyright system? What benefits does participation in the system bring? What are the objectives of the copyright system?

I hope my presentations today will answer some of those questions.

2. Rationales for Copyright Protection

The overarching objective of copyright is to enrich society and the public good by encouraging and fostering cultural and scientific activity.

To demonstrate its importance to culture and society, copyright is recognised as one of the Human Rights in the Universal Declaration of Human Rights. Copyright protects cultural works, the creative expression of thoughts and feelings. These works are in a variety of forms, art works, music, novels and poetry. They are the expression of a culture – its heritage, which is built on by each generation adding their own perspective to the existing culture, which will enrich the lives of generations to come.

In our increasingly globalised world, individual cultural expression not only communicates to others within the culture but is the means of people from other cultures experiencing and learning about the thoughts and feelings of other people. As a consequence, copyright becomes even more important as it is the internationally accepted

means of protecting the creators, whose works give voice to our culture.

The value and benefits associated with copyright and the systems which support it cannot be underestimated.

As a tool that can protect and enhance traditional cultural expressions and activities, many countries are now using copyright to protect valuable indigenous cultures, ensuring their vibrant and individual national cultural expression continues.

The existence of strong and enforceable copyright laws are a necessary precursor to participation in the global economic community, bringing particular benefits to the economies of developing countries.

The internet and lower costs of communication means that copyright works can be made available more easily, enabling improvements in the education system and skills development within communities.

It is for these reasons that creators, copyright owners and governments need to understand the key aspects of the copyright system, including its strengths and limitations.

Firstly let us consider copyright’s economic role. Copyright provides creators or authors of works with a set of exclusive rights over the works that they create. These rights enable copyright owners to control the use of their works and to negotiate payment for their use. The economic benefit encourages them to create more works, which is of benefit to society as a whole.

The other important aspect of copyright is its protection of moral rights – the rights of the author. These rights are very different from the economic rights of copyright but are equally important. They, by giving rights to the author to be attributed or to object to the derogatory treatment of their work, promote the status of the author in our society and increase our respect and appreciation for cultural works.

From this brief discussion, we can see that the purposes of copyright protection are:

- Protecting the legitimate markets of copyright owners; and
- Fostering the creation of new works;

- Providing access to works where it is in the public interest.

Through the careful balancing of these sometimes competing interests through the copyright system our society and culture as a whole is enriched.

In this presentation, I will look at the cornerstones of the copyright system – which works are protected, what rights are given over those works, and who is the owner of the copyright.

3. Works Protected by Copyright

Copyright protects and encourages cultural development by giving rights to creators and owners of original works. To better understand the copyright system we must understand exactly what the term “works” means in the copyright system.

The Berne Convention says its objective is to protect “every production in the literary, scientific and artistic domain”.

It then gives some examples of categories of works that are protected. I will consider some of the most important or common ones of those in a moment.

However, before doing so it is important to note a number of the rules that define which works are eligible for copyright protection.

Firstly, they must be **fixed in material form** – this means that they must be permanent and perceptible. When computers were first invented there was some debate about whether works stored in a computer memory were in a material form as they could not be seen or heard without the computer being used. However this question was settled and material form is now understood to mean any form of storage from which the work can be reproduced.

Another requirement for protection is that the work must be **created by a human author** who is a citizen of one of the countries which are also signatories to the Berne Convention.

Of course countries which are not Berne signatories are able to establish their own copyright frameworks. Berne establishes minimum protections and the principle of National Treatment, which ensures that copyright owners from Berne countries are given the same protection as local copyright owners when their works are used in foreign Berne countries.



This means that works by animals, no matter how talented, are not protected as copyright works. The same rule applies to computer generated works.

The works created must be **original**. This does not mean that they must be unique or valuable. What it means is that the work must be the product of the skill and labour of the creator and not copied from another work.

This is not a particularly high standard and copyright protection does not depend on any aesthetic requirement or value judgement. Rather it depends on the skill and effort that goes into the creation of a work. This means that a simple sketch or plan for a house can be protected, as can a private letter or email.

Another requirement is that copyright protects expressions of ideas, not the ideas themselves. What does this mean? Think about a love story – a couple meet, they fall in love, they are separated, then reunited and live happily ever after. This storyline is an idea and its expressions would be in any number of books, movies, poems – each of which is protected by copyright – copyright protects the expression, but it doesn’t protect the ideas.

Some common examples of copyright works are:

Category of work	Examples
Literary works	Novels, poems, scientific articles, film scripts
Choreographic works	For ballet or dance
Artistic works	Paintings, drawings sculpture, cartoons, maps, designs, photographs
Musical works	Musical pieces with or without words
Cinematographic works	Films, television shows, video games

The list in the Asian Copyright Handbook is slightly different. This is because it is open to different national governments to describe the

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works that are protected by copyright in different ways. You will find that Mongolian Copyright Law may arrange the categories of protected works differently as well.

However, a quick look at the examples in the table above shows us that typically these works are:

- Fixed in material form
- Created by a human author
- Original
- Expressions of an idea.

In addition the Berne Convention gives governments the scope to make special rules for certain categories of material, as follows.

(a) Translations

Translations, adaptations and arrangements of works will be protected as original works. This means that if you translate a work that is in or out of copyright you will have a copyright in your translation. You can control the use to which your translation is put but you cannot stop another person translating the original work into their own words into the same or a different language.

If the original work that you want to translate is in copyright you will need to obtain the permission of the copyright owner in the original work for the translation to be made. This is because translation is a copyright right.

Experience in a number of developing countries can be that it is difficult to obtain translation rights from foreign copyright owners. I don't know if this is a problem in Mongolia, but if it is we can discuss it at the workshop tomorrow.

(b) Collections of Works

Collections of works such as encyclopaedias can also be protected by copyright. This copyright is independent of the copyright in the individual works or information making up the compilation. In order to be protected however, the selection and arrangement of the works has to be sufficiently original to create a copyright right in the collection itself.

The threshold of originality required for this protection varies amongst countries. For example in Australia the telephone book and television listings are considered to be sufficiently original to attract copyright protection, but in some other countries this is not the case.

(c) Legislation and other Government Publications

Governments can also decide whether or not to provide copyright protection for certain categories of works. These include legislation and official texts of an administrative nature. The approach often depends on the philosophy of the government concerned and the culture in the country. For example, in the USA all government publications are copyright free. The Australian government has retained copyright in its publications, and licenses these copyrights to publishers.

Each of these decisions is motivated by a desire to make access to government publications as easy as possible. In the USA it is felt that removing copyright protection means that participants in the free market economy will take up the opportunity to republish the works which will then become more widely available.

In Australia the government licenses the copyright to others, and controls the production of government materials. This also ensures that the access is to the correct and authorised version of legislation or legal cases.

Governments can also choose the extent to which political speeches, lectures and addresses can be reproduced by the press for informational purposes.

(d) Neighbouring Rights

Also, there is a specific type of copyright protection given to those involved in the production or transmission of works. The thinking here is that these activities value add to the copyright works, and should be protected independently. These works are called neighbouring rights.

The most common examples of neighbouring rights are:

- record companies have a copyright in their sound recordings
- broadcasters have a copyright in their broadcasts, and
- performers have a copyright in their performance.

Neighbouring rights are akin to copyright as they grant exclusive economic interests to those who have been involved in the production of copyright works.

However, neighbouring rights are often distinguished from copyright in original works in

various ways – usually they apply in more limited circumstances, or a more limited set of rights are attached to them.

For example in Australia, broadcasts are only protected for 50 years from their first publication; and sound recordings and cinematograph films have a copyright for 70 years from their first publication. The term of protection for original copyright works, is the life of the author plus 70 years.

It is important to remember that these neighbouring rights exist independently from the copyright in original copyright work being transmitted or produced. This means that separate copyrights can exist in the one item – for example, in a CD of musical works there might be a copyright in the original composition, a copyright in the performance and a copyright in the sound recording itself – each owned by a different copyright owner.

4. The Rights of the Copyright Owner

Copyright is often referred to as a bundle of rights. What that means is that copyright is a set of rights to manage and control particular uses of works. If the use of the work is not one that is specified as a copyright use, the copyright owner does not control that particular use of their works.

Although there is a core set of copyright rights (as set out in the Berne Convention) these rights can be described differently in different countries.

Sometimes the rights differ between countries, as some countries might give copyright owners greater rights than the bare minimum specified in the Berne Convention. For example, Japan has a display or exhibition right for artistic works but that right doesn't exist in Australia.

This is also the situation with moral rights. In some countries – mainly those with a European tradition, authors have very high standards of protection of their moral rights. In others, those with an English or common law tradition, the rights can be much more limited.

It is also important to note that sometimes not all copyright works have the same rights attached to them – for example in Australia literary works have a different set of rights from artistic works. This often derives from the fact that different copyright works are used in different ways. For example, a right of display or exhibition is more important to owners of artistic works than it is to owners of literary works.

(a) Economic Rights

I will firstly consider the economic rights of copyright. Here are some examples of typical copyright rights and examples of how they are used:

Right	Explanation	Example
Reproduction	To copy or reproduce. It can be in a different form including sound or visual recording	Photocopying, photography, printing, recording
Performance	To publicly perform It includes individual performances as well as playing CD's in public or using speakers to broadcast	Playing CD's in a shop, performing a play in a theatre
Communication to the public	Broadcasting by wire or wireless including one to one communication on the internet	Radio, television, internet use, email
Publication or distribution	Make the work available to the public for the first time	Publishing a book
Adaptation or translation	Making a translation or dramatised version of a literary work	Screenplay of a book, translation of an English work into the Mongolian language

In addition to the most common rights as mentioned above, other rights exist in some countries or for specific categories of copyright material. Some examples are:

- The right of display or exhibition which can apply to artistic works

- The right of rental which usually only applies to films or CD's.

(b) Moral Rights

Moral rights protect the honour and reputation of creators. The rationale for moral rights is that creative material is an emanation or extension of

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the creator's personality and what is done with their copyright works may affect their standing and reputation.

Moral rights provide an ongoing connection between the individual creator and his/her audience. They ensure cultural and educational best practice by requiring correct attribution and faithful reproduction of works.

There are three basic types of moral rights:

- an author's right to be attributed as the creator of a work (including the right not to be falsely attributed as the author of a work);
- an author's right to object to derogatory treatment of his or her work which prejudicially affects his or her honour or reputation (the right of integrity of authorship of a work); and
- the right of disclosure – the right to determine if and when material is made public.

The Berne Convention only mentions the rights of attribution and integrity of the author of a work (the first two points above) and not the right of disclosure. This means that in some countries, such as Australia, creators only have the first two of these moral rights. In other countries, such as Japan, creators have all three moral rights.

Moral rights generally endure for the same period as copyright in a work – for Australia, much of Europe and the US that is 70 years after the death of the author. Moral rights can be waived by written agreement by the author. However, unlike economic rights they are not assignable or transferable. Once the author has died, his or her heirs have the ability to exercise moral rights over the author's works.

In Australia moral rights over works automatically apply. However, in some countries, such as the UK and New Zealand, authors must assert their moral rights if they want to benefit from them.

5. Ownership of Copyright

One of the most important things to note about copyright is that it is a set of rights given to the creator or author of a work. We have already discussed the different categories of copyright works, and the different rights given to copyright owners.

We need now to consider the rules that apply to ownership – who is the copyright owner and therefore entitled to control the uses being made of the work.

The first and most important thing to note is that ownership of copyright exists independently of the ownership of the physical item containing the work. If for example an artist creates a painting and then sells it, the copyright in the painting doesn't automatically pass to the new owner of the painting – it stays with the artist. Similarly when you buy a book, you are merely buying a copy of the work – not the rights to translate or reproduce the work contained in the book.

The general rule is that the first owner of copyright is the creator, the author or artist whose creative ideas are expressed in the work. Someone who acts as a mere scribe, taking down dictation does not qualify as an author.

If there is a single author, this is reasonably straightforward. However, if there is more than one author, we need to consider the rules that apply to joint authors.

A work of “joint authorship” means that two or more authors have collaborated in such a way that their contributions are not separate.

The test is whether each author has made a distinct contribution. If two authors work together, and each writes separate chapters of a book, they are not joint authors, because their contributions are distinct. This contrasts with the situation where each author contributes/edits the same work – they are then joint authors.

In the case of joint authors, no one author can exercise copyright rights without the consent of the owner.

There are also several important exceptions to the general rule about copyright ownership.

(a) *Employment*

If the creator of a work is employed and the creation of the work is included in their duties at their work, then the copyright in their works will generally be owned by their employer.

For example when an employed journalist writes an article, their employer, the newspaper publisher is the copyright owner of the article. This means that the newspaper publisher, not the journalist can publish or syndicate the work. Similarly if someone is employed as a website designer, then websites they create in the course of their employment will be owned by their employer.

If an employee creates a work that is not related to their actual job, the employment rule does not apply. For example consider a schoolteacher who at weekends and evenings writes a textbook for use in schools. The teacher's employer is not the copyright owner of the work, as writing the textbook was not what they were employed to do. The scope of their employment was teaching. The teacher therefore is the copyright owner and can enter into a contract with a publisher to publish the work.

What about someone employed by the government to write text books for schools? In that case the copyright in the work would be owned by the employer, the government.

In some circumstances this rule can be difficult to interpret – for example some academics are employed by their universities to undertake teaching and research. If as part of their research they write a scientific paper, on weekends, then is the university the copyright owner or the academic? Because of these difficulties many universities have developed intellectual property policies that explain the way they apply the rules in more detail.

Another example is someone employed as a tour guide. Because this person has an interest in web design they agree to develop a website for their employer. Who is the copyright owner of the website? The answer might depend on whether the work was done during business hours or whether the author was paid separately to do the work. If he was paid separately to do the work, another ownership rule then becomes important – the rule with respect to commissioned works.

(b) Commissioned Works

If you are commissioned by someone to create a work different ownership rules can apply. In some countries the person that commissioned the work is the copyright owner, for some or all uses of the work. In other countries, the creator is the copyright owner. In other countries, the situation depends on the type of copyright work it is, and the use it is intended for.

For example in Australia until 30 July 1998 if you commissioned a photograph you were the copyright owner of the work. However in that year the rule was changed. The situation now depends on the purpose for which the work was commissioned. If photographs are commissioned for private or domestic purposes (i.e. wedding photographs), the client/commissioner retains copyright in the photographs. If they are

commissioned for any other purpose – i.e. for commercial purposes, the creator retains copyright in the photographs.

(c) Government Works

In some countries there are different rules if you are employed or commissioned by the government to write or create a work.

For example, in Australia where a work is created under the 'direction or control' of the Crown/government, the government retains copyright in the work. This is beyond the general provision relating to employment which I referred to a little earlier – and covers works created by third parties who are not employed by the Crown. For instance, if a consultant is engaged to create a report under the 'direction and control' of the government, then the government has copyright in the report, even though the consultant is not a government employee.

The owner of the copyright is able to enter into arrangements to use and exploit their copyright works. I will talk about contracts in respect of copyright works in our next session.

6. The International Copyright Framework

In this review of copyright I have constantly referred to the system in different countries being slightly different. I have also referred to the Berne Convention, which is the main treaty governing copyright works.

From the very beginnings of the copyright system there was a question about how the separate national copyright systems would relate.

This was prompted by the trade in copyright good and the recognition that in order for this trade to be efficient common rules should apply between countries.

An example of the problems that can be caused by national systems only protecting their own citizens occurred in the USA - in the early years of America's copyright system. The American government decided that they could only protect the rights of American nationals. The thinking was that America was only interested in encouraging and protecting the creativity of American citizens and American culture. Why should America protect nationals (and cultures) from other countries – particularly England, given they had just fought the war of independence.

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The result was that the American market was flooded with low cost copies of English works. These books could be sold more cheaply than American works because the publisher didn't have to negotiate copyright contracts for the works or go to the expense of readying them for publication. The outcome was that the American government (lobbied by American creators) was required to extend copyright protection to works from all countries. The objective was to ensure that the rules applying to all copyright works were the same – to create a level playing field.

This is why the international copyright system developed. I will now review some of the key elements of the international copyright system.

(a) *The Berne Convention*

The minimum standards of copyright protection are set out in the Berne Convention¹, which was developed in 1886. Australia became a member of the Berne Convention in 1928. Mongolia became a member of the Convention in 1998.

The Berne Convention is an international treaty which sets out standards for copyright protection by its signatory nations. There are currently 162 signatories to the Berne Convention.

The Berne Convention provides standards for the term of protection of copyright and guidelines on exceptions to copyright owners' exclusive rights in a work.

The standards for protection of rights contained in the Berne Convention are incorporated into later treaties, such as the 1994 World Trade Organisation's Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS), and the World Intellectual Property Organisation's Copyright and Performers and Phonograms Treaties of 1996. The 1996 WIPO treaties were drafted to take into account recent digital developments and their effects on copyright interests.

(b) *The Rome Convention*

The official name of the Rome Convention is the international convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations. The convention sets out the system of protection for the holders of neighbouring rights. There are currently eighty-three contracting states.

(c) *The Trips Agreement*

This agreement, regarding Trade Related Aspects of Intellectual Property Rights (TRIPS) ties copyright protection into the wider economic environment. TRIPS was developed to tackle problems of inconsistent IP rights under different countries laws. This became increasingly important as the value of the trade in IP goods rose. Therefore, TRIPS contains minimum agreed standards of protection for the various IP rights, such as copyright, trademarks, and patents, that member nations have to afford other WTO members. It also sets a framework for the resolution of trade disputes in relation to the TRIPS agreement.

(d) *WIPO Copyright Treaty / WIPO Performers and Phonograms Treaty*

The purpose of these Treaties which are known as the WIPO Internet Treaties is to strengthen and supplement the Berne and Rome Conventions' standards of protection in response to the new challenges of the digital environment. They were introduced in 1996. They clarified that the reproduction right covered digital as well as analogue copying of works; and introduced the new right of communication which I discussed earlier in this paper.

A key feature of the Treaties is their protection of digital rights management tools, and electronic rights management information.

It is through these conventions that the various national governments around the world have worked together to build the international system of copyright protection.

¹ The Berne Convention for the Protection of Literary and Artistic Works, 1886.

What is Copyright I Works, Rights and Ownership

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Rationales for Copyright Protection

- Protects and promotes the creative expression of thoughts and feelings
 - Fosters the creation of new works
 - Provides access to works when it is in the public interest
-

The Copyright System

- Economic dimension
 - Moral and ethical dimension
-

Elements of Copyright Protection

- Works
 - Rights
 - Ownership
-

Works Protected by Copyright

“Every production in the literary,
scientific and artistic domain”

Subsistence of Copyright

- Material form
 - Human author
 - Original work
 - Expression not idea
-

Material Form

- Permanent
 - Any form of storage from which the work can be reproduced
-

Human Author



Original

- Not an aesthetic standard
 - Product of skill and labour
 - Sketches, plans, telephone books can be protected
-

Ideas/Expressions

- Copyright protects the expression, not the ideas themselves
 - Can be a difficult line to draw
-

Examples of Copyright Works

Category of Work	Examples
Literary works	Novels, poems, scientific articles, film scripts
Choreographic works	For ballet or dance
Artistic works	Paintings, drawings sculpture, cartoons, maps, designs, photographs
Musical works	Musical pieces with or without words
Cinematographic works	Films, television shows, video games

Ideas/Expressions

- Copyright protects the expression, not the ideas themselves
 - Can be a difficult line to draw
-

Special Rules – Collections of Works

- Collections can be protected as original copyright works
 - Must be 'original' in their selection and arrangement
-

Excluded from Protection

- Some works can be excluded from copyright protection
 - Legislation, official texts
 - Political speeches, lectures – reproduced by the press
-

Neighbouring Rights

- Value added activities
 - The production or transmission of works
 - Sound recordings, broadcasts, performances
-

Copyright Rights

- Bundle of rights
 - Economic rights
 - Moral rights
-

Economic Rights

- Reproduction
 - Performance
 - Communication to the public
 - Distribution
 - Adaptation
-

Moral Rights

- Attribution
 - Object to derogatory treatment
 - Disclosure
-

Ownership of Copyright

- First owner is author
 - In course of employment = employer
 - Commissioned works
 - Government works
-

International Copyright

- The Berne Convention
 - The Rome Convention
 - The Trips Agreement
 - WIPO Copyright Treaty
 - WIPO Performers and Phonograms Treaty
-

Questions?

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