INTERNATIONAL COPYRIGHT PROTECTION:

THE STATE OF THE MALAYSIAN LAW, IN PERSPECTIVE*

The Supreme Court of Malaysia, through its decision *Foo Loke Ying & Anor.* v. *Television Broadcasts Ltd. & Ors.*,[1] appears to have settled the issue of whether a foreign national who first publishes in Malaysia may claim protection under Malaysia's Copyright Act, 1969. Prior to *Foo Loke Ying*, the Malaysian bench had disagreed as to the correct construction of those provisions of the 1969 Act which conferred copyright on eligible works. Most judges[2] read the statute as affording protection to foreigners irrespective of the existence of a treaty relationship or promulgation of ministry regulation, so long as the foreign author first publishes within Malaysian territory. Two cases,[3] however, interpreted the provisions differently,

*This article was written in view of and with reference to Malaysia's Copyright Act 1969. On 20 March 1987 the Dewan Rakyat passed a new copyright bill. The new law, to be known as the Copyright Act 1987, preserves those provisions of the 1969 Act which allow for and delimit recognition of copyright in foreign works: Section 3 of the new law retains the definition of "qualified person" found in section 5(1) of the 1969 Act; Section 4 of the 1987 Bill defines publication and first publication in a manner commensurate with section 2 of the old law; and Sections 9 and 10 of the Bill secure copyright protection for the same categories of foreign works as do sections 5 and 6 of the 1969 Act (those of qualified persons and those first published locally). The new law, by section 59, would permit the Government to expand the protection afforded foreigners in the event Malaysia becomes a party to an international copyright agreement. This is an analogue of the 1969 Act's section 20. Despite the transposition of section numbers and minor modifications in wording, the analysis which follows applies equally well to Malaysia's proposed new copyright law.

[1] [1985] 2 M.L.J. 35, 41.

[2] *Cheong Tong Yen & Anor. v. Television Broadcasts Ltd. & Anor.*, published as *Foo Loke Ying & Anor. v. Television Broadcasts Ltd. & Ors.* [1985] 2 M.L.J. 35, 36 (High Court at Ipoh); *Television Broadcasts & Ors. v. Seremban Video Centre Sdn. Bhd.* [1985] 1 M.L.J. 171; *Lee Yee Seng & Ors. v. Golden Star Video Bhd.* [1981] 2 M.L.J. 43. Compare *Asia Television Ltd. & Anor. v. Viwa Video Sdn. Bhd.* [1984] 2 M.L.J. 304, 307, wherein the Federal Court, as it then was, assumed, for purposes of examining the Copyright Act in relation to the Films (Censorship) Act, that first publication by a foreign author was alone sufficient to confer local protection.

[3] *Asia Television Ltd. & Anor. v. Mega Video Recording Supply Centre* [1985] 1 M.L.J. 250; *Foo Loke Ying & Anor. v. Television Broadcasts Ltd. & Ors.*, Ipoh civil

restricting the Act's protection to citizens and permanent residents unless and until the minister extended the Act's application to other nations.

Not unlike copyright legislation found in other nations, Malaysia's 1969 Act offers copyright protection, in relation to defined eligible works,[4] on any of the following bases: (1) the author is a Malaysian citizen or permanent resident;[5] (2) the work was first published within Malaysia;[6] or (3) the work was made by or under the direction of the government, prescribed governmental organisation or international body.[7]

There were certain parties, however, desirous of distributing Hong Kong made video materials without the inconvenience of paying copyright royalties. Though of foreign origin, the materials had been "first published" in Malaysia. When the distributors found themselves defendants to copyright infringement actions, they took the position that section 6 of the Act, that section conferring copyright on those first publishing locally,

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suit no. 1631 of 1984 (unreported), referred to in *Foo Loke Ying, supra,* [1985] 2 M.L.J. at 40 & n. 9.

[4]Section 4 of the Act describes the types of works eligible for copyright protection.

[5]Section 5(1) of the Act confers copyright on eligible works whose authors, or any one of them, were "qualified persons" at the time the work was made. A qualified person is defined as a citizen or permanent resident of Malaysia, or a body corporate constituted and vested with legal personality under the laws of Malaysia and established in Malaysia. Citizen is further defined in section 2(1). Permanent resident is not defined.

[6]Section 6(1) of the Act confers copyright on:

> every work which is eligible for copyright and which (a) being a literary, musical or artistic work or cinematograph film is first published in Malaysia; (b) being a work of architecture is erected in Malaysia or being another artistic work is incorporated in a building located in Malaysia; (c) being a sound recording, is made in Malaysia; and (d) being a broadcast, is transmitted from Malaysia . . . .

Section 2(2) of the Act delimits the concept of publication as follows:

> (a) a work shall be deemed to have been published if a copy or copies thereof have been made available with the consent of the author in a manner sufficient to satisfy the reasonable requirements of the public;
>
> . . . (and)
>
> (c) a publication in any country shall not be treated as being other than the first publication by reason only of an earlier publication elsewhere, if the two publications took place within a period of not more than thirty days.

[7]Section 7(1) of the Act.

merely qualified section 5, or was controlled by section 20,[8] but could not stand by itself. In short, they were submitting that first publication in Malaysia was not enough for protection, rather, the author so publishing must also be a citizen or permanent resident, or must be a national of a country to which the Minister has extended the Act's application by regulation. As the Minister has yet to make any regulations under section 20,[9] such an interpretation would foreclose copyright protection inside Malaysia to all not either citizens or permanent residents.

The Supreme Court, in *Foo Loke Ying*, refused to adopt such a "purposive" construction, labeling it an "exercitation (which) would mutate and indeed mutilate the intention of the legislature and amount to unwarranted judicial transgression into the legislative domain."[10] While the Court is probably quite correct in this regard,[11] the opinion shows a decided focus upon statutory analysis and a convenient avoidance of the underlying policy dispute.

The concern of the appellants in *Foo Loke Ying* was circumvention of royalty payments, and that of appellees the enforcement of those payments. But that case, and those which preceded it, reflect concerns of much greater import. They raise, though perhaps only tangentially, the difficult question of

[8]Section 20 authorizes the Minister charged with the responsibility of commerce and industry to:

> make regulations extending the application of this Act . . . (to citizens, permanent residents, and bodies corporate of, and works first published in, etc.) a country which is a party to a treaty or a member of any convention or union to which Malaysia is also a party or a member as the case may be *and* which provides for protection of copyright in works which are protected under this Act.

(Emphasis supplied). The Explanatory Statement appended to the Bill explains, under 3(h), that section 20 is intended to extend the Act's protection to countries showing works of Malaysian origin reciprocal consideration. However section 20, by its terms, can only be implemented in the case that Malaysia concludes an international agreement, and it was clearly designed to permit Malaysia the option of adhering to the Berne, and/or the U.C.C.

[9]Malaysia is not at present a party to any treaty or international convention pertaining to copyright. *Foo Loke Ying, supra*, 2 M.L.J. at 40.

[10]Abdoolcader, S.C.J., [1985] 2 M.L.J. at 44–45.

[11]The Court reached its conclusion solely through examination of the statutory language and structure. However an examination of the Act's history, and comparison to other domestic copyright laws, and Commonwealth copyright statutes in particular, would have lead the justices to the same result.

whether one country should accord copyright protection to works of authors of other countries, and if so, under what conditions and to what extent.

Lower court judges had acknowledged an awareness of these incipient issues. In *Asia Television Ltd. & Anor.* v. *Mega Video Recording Supply Centre,* Judge Zakaria Yatim was "unable to accept the argument that . . ." first publication could be an independent basis for protection, because

> [i] f this argument is accepted, then Malaysia will be unilaterally protecting works of foreign origin including works published in Hong Kong without reciprocity from those countries. There is no evidence that Malaysia had concluded any bilateral arrangement with the United Kingdom to protect copyright of works originating in Hong Kong. Malaysia, therefore, is under no legal obligation whatsoever to protect copyright of works originating in foreign countries.[12]

But Judge V.C. George, when ruling in *Foo Loke Ying* at the High Court level, expressed an opposing view respecting the underlying considerations.

> There is nothing absurd or even startling about the "outsider" who being an architect erects his building here or being a writer of a book or song or a producer of a cinematograph film who has the first publication of his work here, being given copyright protection in Malaysia. On the contrary and as I have already premised, the scheme of the Act provides copyright protection in Malaysia that has the approbation of good sense and logic.[13]

While the Supreme Court in *Foo Loke Ying* may have lain to rest this dispute insofar as it relates to the proper construction of the 1969 Act,[14] debate respecting the proper scope of copyright protection for foreign works continues. The problem is neither new nor is it peculiar to Malaysia. It has been a sub-

[12] [1985] 1 M.L.J. at 256.

[13] [1985] 2 M.L.J. at 40.

[14] The materials sought to be protected in *Foo Loke Ying* were cinematograph films. Strictly viewed, the case only construes section 6(1)(a) of the Act. Still the Court's reasoning should apply with equal force to the remaining provisions of section 6.

ject of controversy in the West since the early nineteenth century and a topic of discussion at recent conferences among developing nations including those of Southeast Asia.[15] While the West lobbies Malaysia and her neighbours to join international copyright conventions affording outsiders greater access to local copyright protection,[16] others may consider, as did Judge Zakaria Yatim, that national laws which unilaterally confer copyright on foreign works as already too generous.[17]

This article does not seek to examine the correctness of the decision in *Foo Loke Ying.* That case interpreted a statute as the legislature in all likelihood intended it to be read. Neither will this article attempt to address the moral, cultural, political and economic aspects of the question whether nation states, and in particular those that are developing, should accord authors of foreign states copyright protection, without condition, commensurate with the protection they afford their own authors.

Yet it is not possible to evaluate the impact of *Foo Loke Ying,* or the effect of joining an international convention, without first appreciating the present state of the law of international copyright. How does Malaysia's copyright law compare with legislation found in other nations? Does she stand alone in offering to protect, unilaterally, foreign authors who first publish within her borders? Can Malaysian authors readily acquire protection outside their country? And does Malaysia's position with respect to affording foreigners copyright affect Malaysian authors' ability to acquire protection in other countries?

These are the questions to which the authors and artists themselves need answers, and with which governments must

[15] *E.g.*, Workshop on Copyright Law of ASEAN Countries, 22 January 1985, at Bangkok, Thailand; Copyright Protection Seminar, 29—30 January 1985, at INTAN, Petaling Jaya, Malaysia.

[16] The presence of U.S. copyright experts has been felt recently both in Kuala Lumpur, as speakers at the 1985 Copyright Seminar, note 15, *supra*, and in Singapore, as consultants for proposed copyright legislation. Policy Statements, 27 Mal. L. Rev. 392–93 (1985). Their perceived view is that the Southeast Asian nations should join copyright treaties affording protection to Americans and other outsiders. See also Wright, "Copyright in Singapore: Some Recent Developments," [1986] 1 M.L.J. cviii, cxxvii.

[17] See, *e.g.*, Wright, *op. cit.*, at cviii-cix.

begin to obtain the necessary perspective for determining future policy. Unfortunately the answers are not found in one, or several volumes. They are a consequence of a rather complex interplay between treaties, national laws and executive decrees. It is to these questions that the remainder of this article directs itself.

THE NATURE OF INTERNATIONAL COPYRIGHT AND SOME HISTORY

Copyright is concerned with the property in the work, not the property itself. As such, the governing law does not follow the property as it might with personalty, but is determined by the *lex fori.*[18] That is, each country determines whether and to what extent a copyright will be permitted to inhere in a work. This is referred to as the territorial nature of copyright.

Being territorial, some claim the concept of international copyright is a misnomer. There is no international copyright law per se, binding equally on all nation states, in absence of treaty, as there are international laws of war.[19] Yet there exists substantial law which extends recognition of copyright beyond national borders, giving authors access to protection in countries they have never lived in, or even visited. It is this aspect of copyright regimes that is commonly referred to as international copyright.

The ideology of copyright was absent from early civilization. First recognized as a privilege granted in the form of royal patents, the right now universally owes its existence to

[18] S. Stewart, International Copyright and Neighbouring Rights, 1983, at 34–35.

[19] See Copinger & Skone James on Copyright, 12th ed. 1980, at 563. But this is not altogether certain. Art. 27, para. 2 of the Universal Declaration of Human Rights, G.A. Resolution of 10 December 1948, recognizes that "[e]veryone 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." This declaration was never by itself intended to bind nations. I. Brownlie, Principles of Public International Law, 3d ed. 1979, at 572. But when considered together with the modern acceptance of the open copyright conventions and the acknowledgement of limited foreign protection by domestic copyright regimes, something approaching a practice among states recognized as obligatory is in evidence. Art. 38(1) (b) & (c) of the Statute of the International Court of Justice; I. Brownlie, *op. cit.*, at 3.

statute.[20] The earliest statutes protected only local works, and international piracy was prevalent.[21] Limited protection for foreign works became accessible first in England, in the eighteenth century,[22] and then more widely, and throughout Europe, by the early nineteenth century.[23] The United States totally refused outsiders protection until 1891, after which it accorded only selective protection through the better part of this century.[24]

[20] Abelman & Berkowitz, "International Copyright Law," The Complete Guide to the New Copyright Law, (22 N.Y.U.L. Rev. nos. 2–3) 1977, at 327–28 & n. 2, citing, 1 S. Ladas, The International Protection of Literary and Artistic Property, 1938, at 15.

[21] Abelman & Berkowitz, *op. cit.*, at 328; 1 S. Ladas, *op. cit.*, at 16–17. The first substantial copyright law appears to have been the 1709 English Statute of Anne. By its terms, it protected all works first published in England. Denmark enacted a copyright statute in 1741, which protected only works of local residents. Ordinance of 7 January 1741. See Abelman & Berkowitz, *op. cit.*, at 329; 1 S. Ladas, *op. cit.*, at 17–18.

[22] Via the Statute of Anne, *supra* note 21. Though by the terms of the statute anyone first publishing in England was entitled to protection, English courts began requiring the authors' presence in England at the time of first publication. *Boosey v. Purday*, (1849) 4 Exch. 145, 154 Eng. Rep. 1159; *Jeffreys v. Boosey*, (1854) 4 H.L. Cas. 815, 10 Eng. Rep. 681. This judicially created requirement was later questioned. *Routledge v. Low*, (1868) L.R. 3 H.L. 100 (judgments of Lord Cairns and Lord Westbury). Nevertheless, Malaysian piraters of Hong Kong videos attempted to rely on the outdated, inapposite English precedent. *Lee Yee Seng & Ors. v. Golden Star Video Bhd.* [1981] 2 M.L.J. 43, 43–44.

[23] In 1828, Denmark extended its copyright law to include foreign works where Danish citizens were accorded equal recognition in the author's country. Shortly thereafter, England similarly extended its law to foreign authors on the basis of reciprocity. The International Copyright Act, 1 & 2 Vict., cap. 59 (1838). In France, the Law of 19 July 1793, promulgated in consequence of the French Revolution, gave recognition to all works, irrespective of citizenship, residence, place of first publication or reciprocity. This was reaffirmed by the French Decree of 1852, which expressly provided protection for works first published outside France. Other European states, such as the German Federation, enacted similar laws. See generally Abelman & Berkowitz, *op. cit.*, at 329; M. Boguslavsky, Copyright in International Relations: International Protection of Literary and Scientific Works, 1979, at 156.

[24] Immediately following independence, the original American states each enacted laws protecting only American authors. This allowed English works to be legally, and liberally, pirated. Abelman & Berkowitz, *op. cit.*, at 330. When copyright became a matter of federal legislative jurisdiction, the American Congress continued the policy of refusing protection to foreign authors. The Copyright Act of 1790, 1 Stat. 124, cap. 15, sec. 5. See Kaplan & Brown, Cases on Copyright, Unfair Competition & Other Topics, 3d ed. 1978, at 703.

Not until passage of the Chase Act, in 1891, did non-resident foreigners have any possibility of acquiring recognition for their works in the U.S. That Act authorized the executive to extend protection to foreigners on the basis of reciprocity, but at the same time introduced burdensome formalities and manufacturing requirements.

It was during the nineteenth century that states began entering into international copyright agreements, both bilateral and multilateral.[25] The treaties afforded nationals of the contracting states rights in the other states in addition to those rights that may have already been available under the national laws. In 1886, the first of the two major multilateral copyright treaties, the Berne, was concluded. The United Kingdom, together with most European nations, joined the Berne union, while other important states, such as the United States, refused membership. Despite the continued importance of this open copyright treaty today, both the U.S.S.R. and the U.S.A. remain outside the Berne union.

The second major copyright treaty, the Universal Copyright Convention (or U.C.C.), was concluded at Geneva, in 1952. It resulted from a successful effort on the part of the United Nations to secure U.S. adherence to a copyright agreement of global application.[26] The U.S.S.R. has since become a union member, as have the majority of nations holding membership in the Berne. Although these two copyright conventions encompass differences in the quality and quantity of the foreign pro-

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Cap. 565 (Rev. Stats. secs. 4952–67), 26 Stat. 1106. See Kaplan & Brown, *op. cit.*, at 711–12. Recognition of copyright for foreign works first published locally was unavailable until after America's most recent revision of its copyright law in 1976. Pub. L. No. 94–553, secs. 101 et. seq. See Abelman & Berkowitz, *op. cit.*, at 340. But U.S. copyright protection had by then already become more accessible to foreigners by virtue of America's 1955 accession to the Universal Copyright Convention. See discussion, *infra*.

From a historical perspective, most view America's attitude towards recognition of foreign copyright as decidedly stubborn and selfish. See, *e.g.*, Kaplan & Brown, *op. cit.*, at 703 et. seq.; Ringer, "The Role of the United States in International Copyright – Past, Present and Future," 56 Geo. L.J. 1050, 1078 (1968).

[25] In the mid-eighteen hundreds, European nations, prompted by domestic laws encompassing reciprocity provisions, entered into a number of bilateral treaty relationships. *E.g.*, between France and Great Britain, 3 Nov. 1851, 54 Parl. Papers 103; between Great Britain and Prussia, 13 May 1846, 107 Consolidated Treaty Series 1 (1969). See W. Briggs, The Law of International Copyright, 1906, at 495. In the later part of that century, regional copyright treaties developed in Europe as well as in the Americas. *E.g.*, the Berne, originating as a European regional treaty; the Montevideo Treaty (Uruguay) of 1889, for nations in the Americas. See Abelman & Berkowitz, *op. cit.*, at 333–34, 339 & 342–343.

[26] Abelman & Berkowitz, *op. cit.*, at 345–46. Because the U.S. had repeatedly refused to join the Berne, while its citizens took advantage of Berne protection through the Berne "back door" (see discussion, *infra*), finding an open copyright treaty in which the U.S. was willing to participate became a primary aim of the international intellectual property community.

tection they guarantee,[27] both boast today of similar importance and equivalent constituencies,[28] and provide the main vehicles to securing copyright abroad.

While the industrialized states made their own decisions respecting how to formulate domestic copyright laws and whether to conclude international copyright agreements, second and third world nations, upon gaining independence, inherited their statutes together with, in some cases, international copyright obligations. For the most part, these laws came from England, France, and the Netherlands.[29] The newly emergent states found themselves obliged, by virtue of devised statutes and treaties, to protect select works of foreign origin.[30]

Prior to the Copyright Act, 1969, the copyright law of Malaysia was in a state of confusion which reflected her colonial make up. The F.M.S. Copyright Enactment applied to the former Federated Malay States, the 1911 U.K. Act applied to the former Straits Settlements, and the 1956 U.K. Act applied to Sabah and Sarawak. No copyright law at all existed in the former non-Federated Malay States.[31] In many of its aspects

[27] Both the Berne and the U.C.C. are open, multinational conventions, which include similar machinery affording similar protection. There are some differences. Limited formalities are required under the U.C.C., namely the notice formality, requiring the name of the owner and year of first publication, together with the encircled "C" symbol, on all authorized copies of the work. The Berne demands a higher level of copyright protection from its participants. A longer minimum term of protection is guaranteed (see note 36, *infra*), and moral rights of authors are protected under the Berne, though not under the U.C.C. See, generally, Abelman & Berkowitz, *op. cit.*, at 334–342 & 345–351; Copinger & Skone, *op. cit.*, at 563–601.

[28] As of January 1986, Berne treaty membership numbered 76 nations, as compared with U.C.C. membership of 78 nations. There are 52 nations holding concurrent memberships in both unions. See 22 Copyright no. 1, at 6–8 & 12 (WIPO 1986).

[29] *E.g.*, the copyright laws of Malaysia (before 1969), Singapore, Fiji, Tonga, and the New Hebrides (in part) were derived from U.K. law; Syria's law of 17 January 1924 was promulgated there by France; and Indonesia's Copyright Act of 1912 was effected by Holland. See Copyright Laws and Treaties of the World (hereinafter cited as "C.L. & T.W."), UNESCO, 1982.

[30] Singapore, for example, found herself obliged to protect works first published in the United Kingdom, which protection may later be construed to apply to works first published in other countries as well. See note 35, *infra*, and accompanying text. The law given Indonesia by the Netherlands may provide protection for Dutch citizens, in addition to protection for its own. See note 74, *infra*.

[31] See Explanatory Statement appended to the 1969 Copyright Bill.

the language and design of Malaysia's present law, the 1969 Act, continues to borrow from English law.[32]

At the time of the drafting of this article, the copyright law of Singapore remains the 1911 U.K. Act.[33] In *Butterworth & Co. (Publishers) Ltd. & Ors. v. Ng Sui Nam,*[34] the Singapore High Court held that this statute afforded protection, not only to works of Singaporeans, but also to any work first published in the United Kingdom, by virtue of a 1959 amendment to the 1956 U.K. Act.[35]

That developing nations do not appreciate discovering themselves compelled to offer unilateral protection to nationals of former colonial powers should not come as any great surprise. Yet as these nations begin to re-examine their situation, they must do so in light of the copyright protection offered their nationals by other countries, the developed and under-developed. What, then, are the presently available avenues to foreign copyright protection worldwide?

[32]Much of the structure and terminology of the 1956 English Act is evidenced in Malaysia's 1969 Act. The English enactment utilizes the term "qualified person," has provisions for first publication, and a simultaneous first publication within 30 days of publication elsewhere, can be extended to other countries by order in council and describes the types of copyrightable materials in much the same manner as does the Malaysian law. *Accord*, Ramachandran, "Copyright Law in Singapore," [1978] 1 M.L.J. xxv, xxxi.

[33]A new copyright act, which is reportedly very similar to the 1968 Australian Copyright Act, expects to see enactment by the end of 1986. See Policy Statements, 27 Mal. L. Rev. at 392- 93; Wright, *op. cit.*, at cviii & cxvii.

[34][1985] 1 M.L.J. 196.

[35]Because both the 1911 U.K. Copyright Act, and the 7th Schedule of the 1956 U.K. Act (as amended by the 1959 Transition Extension Order), were part of the law of Singapore immediately preceding Singapore Day, both remain a part of Singapore's law by virtue of sec. 13(1) of the Singapore Independence Act and art. 162 of the Singapore Constitution. Section 1(1) of the 1911 Act extends copyright protection to works first published in "His Majesty's dominions." The High Court in *Butterworth* held Singapore bound, thereby, to protect all works first published in England (except for works first published during the period 1 June 1957 to 26 January 1959, that period between when the U.K. 1956 Act went into effect and the 1959 Transition Extension Order amended the Act's 7th Schedule). [1985] 1 M.L.J. at 203.

The court there noted, and commentators have discussed, the possibility that this construction of the 1911 law would require further that Singapore protect works first published in any and all of the Commonwealth states to which the 1911 Act once applied. As if this were not enough, commentators suggest that Singapore might also be obliged to protect works first published in all nations to which Britain extended the 1911 Act pursuant to the Berne. See Kang, "Copyright in Singapore After the Butterworth Case," [1986] 2 E.I.P.R. 60; Wright, *op. cit.* The case is currently on appeal to the Singapore Court of Appeals.

AVENUES TO FOREIGN COPYRIGHT PROTECTION

The machinery making foreign copyright available are treaties and domestic legislation, together with executive orders and decrees which implement and qualify the treaties and national laws. The avenues to foreign protection created by this machinery are conveniently divided into three categories: (1) Protection afforded nationals of treaty states, within other treaty states, by virtue of treaty obligation, automatically; (2) Protection available to nationals of non-treaty states, within treaty states, by virtue of treaty obligation, upon satisfaction of a pre-condition; and (3) Protection available to authors irrespective of nationality, in other states, by virtue of the other states' domestic laws, generally upon satisfaction of a pre-condition. Because protection adhering the result of treaty membership is most clearly delimited, we begin here.

(1) AVENUES MADE AVAILABLE THROUGH TREATY MEMBERSHIP

Author nationals of states party to international copyright agreements are benefitted directly in that they acquire legal recognition for the property in their works within all other states party to the agreement, and the works are protected to the same extent as the foreign states protect works of their own nationals.[36] Such recognition is automatic in the sense that it is secured without respect to the author's residence, domicile, or

[36]This describes the principle of "national treatment," modernly accepted as governing the quality of protection to be afforded foreign works. S. Stewart, *op. cit.*, at 37; A. Latman, The Copyright Law, 5th ed. 1979, at 260. It incorporates the concept of "formal (or partial) reciprocity," that is, that the foreign state agrees to protect the work but not necessarily to the same degree as would the author's country. Adoption of the alternative concept, "material (or substantive) reciprocity," would require national courts to construe foreign law, and has been acknowledged as unworkable. S. Stewart, *op. cit.*, at 41.

But treaties normally require minimum standards for the quality of protection that is afforded, and to this extent incorporate an aspect of material reciprocity. *Id.*; Copinger & Skone, *op. cit.*, para. 1300, at 566. The Berne, for example, requires its member states to protect foreign works for a period of at least 50 years post mortem auctoris, regardless of the protection guaranteed local authors by the domestic law. Art. 7 (Berlin text). The U.C.C. requires a term of at least life plus 25 years (or in some cases, 25 years from the date of first publication). U.C.C., art. IV.

to the place or manner of first publication of the work.[37] There exist bilateral,[38] regional,[39] and open multilateral[40] copyright treaties.

While regional agreements may continue to play a significant role for the future of international copyright,[41] bilateral treaties have all but disappeared, and it is the two open multinational conventions that claim primary importance and utility. Author nationals of Berne and U.C.C. member states, as well as authors habitually resident in Berne States,[42] are guaranteed copyright within the territories of all other nations party to the respective agreement. Recognition of copyright is extended

[37] However formalities, in certain cases, may be required. There are no formalities for acquiring Berne protection, except that an author may have to comply with formalities of his own country to also assure protection at home. Art. 2 (Berne text); Art. 4 (Berlin text). The U.C.C. operates similarly, with the addition of the notice formality described in note 27, *supra.* U.C.C., art. III.

[38] *E.g.*, the U.S.—Taiwan copyright treaty, Title 17, 33 Stat. 2208 (1903)(T.S. 430) & 63 Stat. 1299 (1946) (T.I.A.S. 1871), one of the few bilateral treaties continuing in force today. The importance of the bilateral treaty relationship has been displaced by the open copyright conventions. S. Stewart, *op. cit.*, at 35; Abelman & Berkowitz, *op. cit.*, at 351.

[39] *E.g.*, the Mexico City Copyright Convention of 1902, and the Buenos Aires Copyright Convention of 1910, both of which still operate today.

[40] The Berne and the U.C.C. It is important to note that both treaties have undergone several revisions, and nations adhere to different texts. The Berne (1886) saw revision at Berlin (1908); at Rome (1928); at Brussels (1948); at Stockholm (1967); and at Paris (1971), and the U.C.C. (Geneva 1952), at Paris (1971). See the UNESCO publication, Copyright Laws & Treaties of the World (C.L. & T.W.), for the complete text of each Berne and U.C.C. revision. The January issues of Copyright, a WIPO publication, include current lists of convention members and to which of the texts each adheres.

Because the provisions of the various texts differ, state members assume different obligations vis-a-vis author nationals of other member states, as well as vis-a-vis author nationals of non-member states, dependent upon the most recent text under which each contracted. An author seeking protection through the open treaties is well advised to check the provisions of all convention texts adhered to by the nations within which he desires protection, and to ensure compliance with all applicable provisions of all the applicable texts.

[41] The availability of protection under the open copyright treaties has undercut the importance of regional relationships. Abelman & Berkowitz, *op. cit.*, at 342–45. It has been suggested, however, that concluding new regional treaties would provide developing nations alternatives to the choices presently offered by the open copyright unions. *E.g.*, M. Boguslavsky, *op. cit.*, at 42; J. Sterling & G. Hart, Copyright Law in Australia and the Rights of Performers, Authors and Composers in the Pacific Region, 1981, at 226.

[42] U.C.C. (Paris text) Art. II(1); Berne (Paris text) Art. 3(1) & (2) (habitual residents were not provided for in the Berne Brussels, and earlier texts). C.L. & T.W.

regardless of the place and manner of a work's first publication.[43]

Treaty membership greatly facilitates the ease with which citizens of member countries can achieve effective global protection for their creations. These two open conventions offer more, however, as they also include machinery capable of conferring global protection on works of non-member nationals.

(2) AVENUES MADE AVAILABLE BY TREATY TO NON-MEMBER NATIONALS

The most powerful avenue to international protection for author nationals of states party to neither the Berne nor the U.C.C. is nevertheless through the Berne and the U.C.C. Sometimes referred to as the "back door" to convention protection,[44] both multinational treaties offer protection within the territories of all member states[45] in the event that the work is

[43]The recognition is automatic except that it may be conditioned upon compliance with those formalities mentioned in note 27, *supra*. Note, also, that an author whose country adheres to a pre-Stockholm Berne text forfeits protection should he first publish outside the Union. See, *e.g.*, art. 4 (Brussels text), and discussion in Copinger & Skone, *op. cit.*, at 567 para. 1301.

[44]See Kaplan & Brown, *op. cit.*, at 716; 3 N. Nimner, Nimner On Copyright, 1978 (& 1984 Supp.), at 17–12 et. seq., also referred to as the Berne "free ride." Wells, "The Universal Copyright Convention and the U.S.: A Study of Conflict and Compromise," 8 A.S.C.A.P. 69, 84 (American Society of Composers, Authors & Publishers – Copyright Law Symposium) (1957). While these terms are normally used with reference to the Berne, they would appear equally suitable for use in the context of the U.C.C.

American authors "discovered" the Berne back door, and utilized it liberally to gain global protection for their works prior to their country's joining the U.C.C. Kaplan & Brown, *op. cit.*, at 716; Wells, *op. cit.*, at 83–84. Americans still use it today to secure protection within those Berne nations not also party to the U.C.C. 3 N. Nimner, *op. cit.*, at 17–12 to –13.

[45]Except that the U.C.C. will not guarantee protection within the member state where publication first occurs. Art. II(1) (Paris text). "Published works of nationals of any Contracting State and works first published in that State shall enjoy *in each other* Contracting State the same protection as that State accords to works of its nationals first published in its own territory. . . ." (Emphasis supplied).

This would not normally be of consequence as the domestic legislation of virtually all states incorporate provisions providing protection for works first published locally. See discussion, *infra*. Note, however, that U.S. domestic law prior to 1978 did not protect foreign works first published there in absence of treaty obligation. Note 24, *supra*. Therefore, a foreign work (of a non-U.C.C. national) first published in the U.S. prior to the recent legislation would have gained protection in every U.C.C. country but the U.S., a somewhat anomalous result. See discussion, 1 N. Nimner, *op. cit.*, at 5–37 to –38.

first published, or "simultaneously" first published, in any member state.[46] These routes to realizing union-wide protection, made obligatory by the treaty provisions, are in addition to those automatic avenues above described for nationals of the member states. The back doors' enormous utility lie in the fact that, in view of the high level of convention membership today, a first publication in one convention country can trigger copyright protection in more than one hundred other countries.[47] They thus place author nationals of non-member states in a position only slightly disadvantageous with respect to author nationals of member states.

The first publication pre-condition must be treated with particularity and care. Non-convention nationals desiring to achieve back door protection must ensure a publication capable of qualifying the work. The conventions describe both temporal[48] and qualitative[49] criteria in relation to the first publica-

[46] U.C.C. (Paris text) art. II(1), as quoted in note 45, *supra;* Berne (Paris text) art. 3(1)(b): "The protection of this Convention shall apply to . . . *(inter alia)* authors who are not nationals of one of the countries of the Union, for their works first published in one of those countries, or simultaneously in a country outside the Union and a country of the Union." See discussion in 3 N. Nimner, *op. cit.*, at 17–13 n. 23.

[47] As of January 1, 1986, 52 nations held concurrent memberships in the Berne and U.C.C. See 22 Copyright, *op. cit.*, at 6–8 & 12. A first publication in any one of these states will secure protection throughout the 102 different nations which are member to one, or the other, or both of the unions.

[48] The Berne has always provided for protection in the circumstance of "simultaneous" first publications made inside and outside the Union. *E.g.*, Rome text, art. 4(3). However, beginning with the Brussels, the Berne texts define a "simultaneous publication" as occurring where a work "has been published in two or more countries within 30 days of its first publication." Brussels text, art. 4(3); Paris text, art. 3(4). Compare sec. 2(2)(c) of Malaysia's 1969 Act, quoted at note 6, *supra.* Considering there are Berne states still adhering to the Rome text, non-Berne nationals desiring to maximize protection obtained through the Berne back door should plan simultaneous, same-day, publications. See Nimner, "Simultaneous Publication as a Route to Berne Protection for Non-Berne Nationals," 50 Il Diritto Di Autore 704, 706 (1979), also found in 3 N. Nimner, *op. cit.*, sec. 17.04[D] [2] [b], for a more complete discussion of the temporal considerations and problems.

While the U.C.C. makes no express reference to simultaneous first publications, it is generally accepted that simultaneous first publications, had both inside and outside the Union, on the same day, will suffice for purposes of article II(1) (Paris text). A. Bogsch, The Law of Copyright Under the Universal Convention, 3rd ed. 1968, sec. 14, at 14–15. The 30 day period provision found in art. IV, para. 6 of the Convention was included only for determining the "rule of the shorter term," and only for simultaneous publications taking place in two or more U.C.C. contracting states. That provision was not meant to serve the same function as the 30 day provision found in the Berne, and an author should not allow himself to be misled thereby. *Id.*

[49] Distribution of a single copy of a work is unlikely to be deemed publication for purposes of acquiring convention protection. The treaties contemplate more than a

tion (and simultaneous first publication) condition. And member states are free to construe convention requirements restrictively.[50] Nevertheless, this route to international protection will continue to be the most expansive, and of greatest usefulness, for authors whose nations remain outside the two multilateral copyright unions.

(3) NON-TREATY AVENUES

In contrast to the closed character of the early domestic legislation, the great majority of today's national copyright regimes offer the possibility of protection for foreign materials beyond that which may be demanded of them by treaty obligation. That is to say, domestic copyright laws include machinery for the protection of foreign works independent of those provisions intended to effectuate whatever responsibilities the country may have under international agreements. This protection is offered both on the basis of reciprocity, and unilaterally. When unilateral, it is almost always subject to pre-conditions.[51]

Included within much domestic copyright legislation are provisions directing government officers, when satisfied with

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mere colourable publication, but rather some serious attempt to satisfy the public demand for the work.

Though absent from the Berne Rome and earlier texts, a definition for the concept of "publication" can be found among the provisions of the later texts of both conventions. Art. 3(3) of the Berne (Paris text) provides that, for a work to be deemed published within the meaning of the convention, the availability of copies of the work must have been "such as to satisfy the reasonable requirements of the public, having regard to the nature of the work." The U.C.C., art. VI, specifies that publication shall mean "the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived." See generally Copinger & Skone, *op. cit.*, at 567–68; Nimmer article (*supra* note 48); A. Bogsch, *op. cit.*, at 69; A. Latman, The Copyright Law, 5th ed. 1979, at 263.

[50] The definitions of publication provided for by the conventions are sufficiently vague as to allow flexibility in their construction by domestic tribunals. This was illustrated by the Netherlands Supreme Court in The Daughter Of Fu Manchu case, H.R. June 26, 1936, N.J. 1936, 1059, where that court held an attempt to utilize the Berne back door, by distribution of American works in Canada, insufficient to satisfy the Berne publication requirement. See 3 N. Nimmer, *op. cit.*, at 17–19 to - 20; Wells, *op. cit.*, at 85 & n. 74.

[51] The exception, historically, has been the French copyright law which, as described in note 23, *supra*, accorded recognition to foreign and domestic works alike, without regard to nationality of the author or place of first publication, and irrespective of the treatment given French works by other nations. Recently, the French situation has become somewhat more restrictive. See note 64, *infra*.

the quality of protection afforded their nationals in another country, to promulgate regulations, or issue decrees, extending the automatic protection available under their domestic law to author citizens of that other country. Such was the manner in which the United States first offered to selectively protect foreign works during the first half of this century.[52] Similar provisions operate within copyright statutes of many Commonwealth countries.[53] Malaysia's Copyright Act of 1969 includes such a provision,[54] though no regulations have ever been promulgated thereunder. In consequence of the modern popularity of multilateral conventions, these provisions no longer hold great independent significance.

Routes to foreign protection offered unilaterally in domestic legislation are commonly pre-conditioned upon one or more of the following criteria: the author's residing locally; first publishing locally; or depositing or registering the work with a local depository or office.

Persons permanently residing, or domiciled, in a foreign country at the time of a work's creation, or first publication, will often discover the work eligible for protection there under the national copyright law.[55] The availability of this protection is neither particularly useful nor convenient. At most it can offer but one country, in addition to the country of citizenship, within which the work gains recognition.

[52]Through provisions in the Chase Act, note 24, *supra*. Anologous provisions are now found in the new U.S. copyright law, 17 U.S.C. sec. 104(b)(4), through which the president, by proclamation, can extend protection of the domestic law to nationals and domiciliaries of the nations extending "copyright protection on substantially the same basis" as that extended to its own citizens, to U.S. nationls and domiciliaries, and to works first published in the U.S.

[53]*E.g.*, sec. 32 of the U.K. 1956 Act, effected through order in council, and analogous sections found in the copyright legislation of Australia and India. C.L. & T.W.

[54]Found in section 20 of the Act. But as discussed earlier, note 8, *supra*, it can only be applied pursuant to an existent international agreement. This is not true of the reciprocity provisions found in the other cited legislation.

[55]*E.g.*, section 2(2)(b) of the U.K. 1956 Act, which provides for copyright recognition for works authored by "qualified persons," if the author held the qualified status at the time the work was first published. By section 1(5), a qualified person includes persons resident or domiciled in the United Kingdom. The U.S. law, at 17 U.S.C. sec. 104(b), protects the works of citizens and persons domiciled in the U.S. at time of first publication of the work. The Malaysian law will protect the work of a person who permanently resided in Malaysia at the time the work was made. See note 5, *supra*.

Rather it is those avenues conditioned upon first publication, simultaneous first publication, registration or deposit,[56] that offer realistic possibilities to securing protection in the many nations refusing adherence to the Berne and the U.C.C. One or more such avenues are found in virtually all national copyright regimes today.[57] As there exists considerable variation between the different domestic regimes,[58] close examination of the statutory language of each nation's law is necessary to ensure fulfillment of the pre-condition and the consequent acquisition of copyright recognition. Fortunately, nations representing the largest markets for copyrightable material are parties to one, or the other, of the open conventions.

To summarize, an author who is able to anticipate in which states he will forever after desire copyright protection for his works can, for the most part, ensure this protection. Taken together, the above-described avenues offer authors and artists of all nations, wherever situated, the possibility of achieving world wide protection with a minimum of activity and expense. The two open multilateral conventions afford protection in all states comprising their respective unions. When the author is a national of a member state, this protection is automatic. When he is not, or desires protection in states party to a convention to which his country does not belong, he must ensure his work is

[56] Certain nations condition protection upon registering locally, *e.g.*, Nepal, or deposit, *e.g.*, the Philippines; Syria, or some similar local process. C.L. & T.W.

Most nations condition unilateral recognition of foreign copyright upon a first local publication, or a simultaneous first local publication. *E.g.*, U.K. 1956 Act, sec. 2(2)(a); U.S. law, 17 U.S.C. sec. 104(b)(2); Malaysian 1969 Act, sec. 6 (see note 6, *supra*). But national laws may in addition require compliance with formalities. *E.g.*, U.S. law, which makes registration a prerequisite to bringing an infringement suit. Abelman & Berkowitz, *op. cit.*, at 341.

[57] After spending considerable time reviewing national copyright legislation, this writer located no regime which did not include some vehicle by which a non-resident author could obtain local protection without reference to the author's nationality.

[58] As with seeking protecting through the convention back doors, both the quality and the timing of the first publication is critical. Section 49(2)(b) of the U.K. Act requires, using similar language as the Berne, that the first publication be more than merely colourable. Some domestic legislation requires same-day, simultaneous first publication locally, *e.g.*, the U.S., others allow for a 14 day period between the actual first and qualifying simultaneous first publications, *e.g.*, Singapore (see note 72, *infra*); Canada (sec. 3(4), cap. 55, Rev. Stats. 1952), while the most liberal recognize first publications made within 30 days of one another, *e.g.*, U.K. 1956 Act; Indonesian law; Japanese law; and Pakistan's domestic law. See a further description of some of these laws, *infra*. C.L. & T.W.

first published, (or simultaneously first published), within a state member to that convention. If he does, his work acquires the same quality and quantity of protection as it would automatically were he a national of the convention state.

Should an author seek protection for his work in a state not party to either convention, carefully planned simultaneous first publications and/or registrations will normally effect that protection. While perhaps not as convenient as achieving the protection through treaty channels, copyright recognition is nevertheless available.

Examining the present state of international copyright law from the perspective of those nations not yet party to either open copyright convention, there would appear little incentive for joining the unions. Authors of non-member states are free to take advantage of the conventions' back doors, while consumers of these outsider nations can pirate, legally, most foreign works.[59] So long as these nations continue as "importer" nations, it may be in their national interests to remain outside the conventions.[60] But continued non-participation is not without

[59]Except those foreign works first published locally. But the first publication requirement provides non-convention nations the security of knowing that foreign authors and publishers expecting royalties will be compelled to market their works locally at the same time they make the works available to consumers in developed states.

[60]That "book hunger" is a significant problem in most developing states has been well documented. "Developing Country Need for Copyrighted Works," 15 Copyright Bulletin Quarterly Review (hereinafter "C.B.Q.R.") no. 2, at 10–11 (UNESCO 1981). Of the books published in the world each year, only 2.5% go to Asia, where 28% of the world's population lives. Twenty to 25% of all Asia's books are imported. The largest importers, in order of volume of imports, are the U.K.; the U.S.; Spain; France; Japan; and the F.R.G. M. Boguslavsky, *op. cit.*, at 37–38. If copyright was to be accorded all imports, the price of education and technological development for the already poor countries would increase substantially. Foreign book publishers often refuse, once copyright is recognized, to license publication rights locally, as they can derive larger profits from importation of the finished products. Hansan, "Copyright and Development," 16 C.B.Q.R. no. 1/2, at 10, 12 (UNESCO 1982).

Professor Stewart has expressed the economic considerations of developing nations facing the question of protection of foreign materials through the equation: Ex + NPg = In, where "Ex" represents the total copyright exports, "In" the imports, and "NPg" a subjective factor reflecting national prestige. S. Stewart, *op. cit.*, sec. 12.04, at 279–280.

There are also substantial arguments for the protection of foreign materials within even the poorest of nations. The most persuasive of these might be that without protection, foreign works are purchased in preference to the more expensive, protected local works, diluting, thereby, the importance of national works and displacing local culture. See, *e.g.*, S. Stewart, *op. cit.*, at 35; Kunz-Hallstein, "Recent Trends in Copy-

a certain danger, as there exist legislative machinery which can be utilized to withdraw the foreign recognition currently made available to authors of the recalcitrant nations.

THE REPRISAL CLAUSES

The notion of reciprocity lies at the very heart of international copyright legislation. It was the condition upon which national laws first acknowledged protection in foreign works,[61] is the premise upon which the international copyright agreements are structured, and continues to be a basis for recognition of foreign copyright included within domestic regimes.[62]

While much of the protection accorded foreign works is today conferred unilaterally, certain treaties and statutes generously providing this one-sided recognition include provisions capable of withdrawing it in the event of its perceived abuse. The Berne, though not the U.C.C., includes such a reprisal clause. That clause permits Berne countries, dissatisfied with the protection being made available to their nationals in a non-Berne state, to retaliate by denying recognition to works first published locally by nationals of that non-union state.[63] Domestic schemes, as those of England and France, include similar

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right Legislation of Developing Countries," 13 Inter. Rev. of Industrial Prop. & Copyright Law, 689, 697 (1982).

[61] See notes 23 and 24, *supra*.

[62] See notes 52 through 54, *supra*, and accompanying text.

[63] Art. 6(1) (Paris text) reads in relevant part:

> Where any country outside the Union fails to protect in an adequate manner the works of authors who are nationals of one of the countries of the Union, the latter country may restrict the protection given the works of authors who are, at the date of first publication thereof, nationals of the other country and are not habitually resident in one of the countries of the Union.

The provision first appeared in 1914, in the form of an additional protocol, done in response to the Americans' liberal use of the Berne back door. Kaplan & Brown, *op. cit.*, at 716; Wells, *op. cit.*, at 84.

provisions.[64] No Berne state has yet exercised the reprisal,[65] although they would have been amply justified in having done so,[66] and none among the various clauses evidenced in domestic copyright laws, with the possible exception of the French,[67] has ever seen use.

But this reprisal machinery does not, for the moment, pose a serious threat. Exercise of the French reprisal can only make more difficult the manner in which French protection is acquired, leaving open many remaining avenues to local protection in France.[68] Exercise of the other reprisal provisions, those

[64]The English provision is in section 35 of the 1956 Act, where, by order in council, Britain may declare works by author citizens of the designated country ineligible for protection under the Act. Analogous provisions are found in section 185 of the Australian 1968 Act, article 42 of India's 1957 copyright law, and chapter 6 (art. 55) of the Pakistan 1962 ordinance.

By the Law (no. 64–689) of 8 July 1964, France circumscribed the availability of the protection it had generously accorded foreigners since 1793. See note 23, *supra*. Article 1 of the law provides, subject to France's obligations under international convention, that:

> in a case where it is discovered, after consultation with the Minister for Foreign Affairs, that a State does not grant to works which appeared for the first time in France . . . sufficient and effective protection, works which appeared for the first time within the territory of that State shall not be protected by French law so far as copyright is concerned.

The article goes on to direct that the moral rights of the authors shall, nevertheless, be protected, and royalties that would have been due the author are paid instead to local authors' societies. C.L. & T.W. See also Decree of 6 March 1967, 3 Copyright no. 9, 209 (WIPO 1967).

[65]Kaplan & Brown, *op. cit.*, at 716; Compare Abelman & Berkowitz, *op. cit.*, at 337 & n. 73, and Wells, *op. cit.*, 84–85. Neither has the U.K. domestic law reprisal been exercised. Laddie, Prescott & Victoria, the Modern Law of Copyright, 1980, sec. 4.22 at 164.

[66]Consider, for example, the position of the United States prior to its joining the U.C.C. Its domestic regime afforded outsiders very restrictive avenues to local protection, note 24, *supra*, while its author citizens made heavy use of the Berne back door. Note 44, *supra*.

[67]See Correspondence from France, 3 Copyright no. 9, 210, 214–15 (WIPO 1967); 7 Copyright no. 9, 173, 179–180 (WIPO 1971).

[68]The French clause cannot be used to curtail all avenues to French copyright protection as it only applies to works first published in the targeted country, and then only subject to France's treaty obligations. Note 64, *supra*. As France is a contracting state to both the Berne and the U.C.C., works first published in any convention state must be accorded French copyright. Similarly, works first published outside the targeted state would be accorded French copyright. See decision of 15 November 1968 of the *Tribunal de Grande Instance* of Paris, described in 7 Copyright no. 9, at 179–180 (WIPO 1971). It is not known which states, if any, have been designated as not affording French works "sufficient and effective protection" or whether such determinations are to be made on a case by case basis.

found in the Berne and in the domestic copyright regimes, are made difficult, if not impossible, by virtue of their terms and in light of the concurrent international obligations owed.[69] It would seem, therefore, that the recalcitrant states will continue to be permitted to abstain from treaty participation without jeopardizing their author nationals' abilities to obtain foreign copyright recognition. While non-participation in the copyright unions may weaken the momentum towards achieving a pervasive, worldwide regime,[70] it is unlikely that nationals of selected states will be singled out in an effort to coerce the outsider nations into the unions.

RECOGNITION OF FOREIGN COPYRIGHT IN SOUTHEAST ASIA, EAST ASIA, SOUTH ASIA AND THE PACIFIC BASIN

It is hoped the reader now appreciates that Malaysia is one of a large number of developing states which, while refusing adherence to the multinational copyright conventions, confers copyright protection on foreign materials satisfying the criteria found in her domestic copyright law. It should also be understood that Malaysian authors and artists can achieve extensive

[69] The reprisal clauses found in the domestic laws of Commonwealth nations and in the Berne are capable, by their terms, of a more complete withdrawal of routes to local copyright recognition for authors of the recalcitrant nations. But they are nevertheless of limited effectiveness. First, they all include provisions requiring the nation desiring to exercise the reprisal to do so through a public executive act. *E.g.*, art. 6(3) of the Berne (Paris text) requiring a written declaration directed to WIPO, which declaration is then ciruclated among all Berne members; sec. 35 of the 1956 U.K. Copyright Act, mandating the reprisal be exercised by order in council. Any targeted state would have advance notice, therefore, that her author nationals would lose presently available routes to foreign protection. The Berne reprisal is further limited in that all nations not noticing their intention to retaliate vis-a-vis a given recalcitrant nation must still afford protection so long as the author first publishes in a Berne state not having noticed his country. Art. 6(1), Berne (Paris text). Citizens of non-union states can simply avoid first publishing in those Berne states making declarations against their nations.

More importantly, neither the Berne nor the domestic reprisal clauses can be exercised by U.C.C. nations without being in violation of their obligations under the U.C.C. Because a majority of Berne nations are concurrently parties to the U.C.C., which nations include England, France, India and Australia, the reprisals would seem to be left impotent, remaining in symbolic protest to the non-participating nations.

[70] Some have expressed a fear that continued non-participation in the open copyright unions by developing nations will lead to regression in the progress towards a world copyright community. See, *e.g.*, Ladd, "Copyright and the International Technologic Environment," 17 C.B.Q.R. no. 3, 17, 22—23 (UNESCO 1983).

foreign recognition for their works by first publishing in a Berne or U.C.C. state, or by fulfillment of those conditions set down under the domestic schemes of the non-treaty countries. The reader may still be interested in knowing, however, the extent to which, and manners through which, Malaysia's neighbours, and countries with whom Malaysia shares cultural ties, accord copyright protection to non-local works.

SOUTHEAST ASIA

Like Malaysia, most Southeast Asian nations have refused invitation to join the multinational copyright unions. The exceptions are Thailand, Laos, Kampuchea and the Philippines. Thailand has been a Berne member since 1931, and both Democratic Kampuchea and Laos were original signatories to the U.C.C. in 1955. The current position of Kampuchea with respect to its obligations under this treaty is uncertain, as is the present position of the Philippines, which acceded to the Berne in 1951, and the U.C.C. in 1955.

The Southeast Asian nations having domestic copyright legislation all appear to offer routes for local recognition of foreign copyright.[71] Singapore, retaining the 1911 U.K. statute, recognizes works first published locally, and works published locally within 14 days of a first publication elsewhere.[72] Also, by virtue of the *Butterworth* case, she appears obligated to protect works first published in England, and perhaps elsewhere.[73]

Indonesia, retaining the Dutch Copyright Act, 1912, accords recognition to works first published within her territory, and published there within 30 days of being first published else-

[71] This author was not able to locate copyright legislation for all Southeast Asian nations. Laos, for example, appears to be without a written copyright law, C.L. & T.W., but is nonetheless a member to the U.C.C. It may well be that other nations, without formal copyright laws, still recognize an authors right to remuneration for his work. If this is so, it seems likely that foreign authors might also find protection.

[72] Section 1(1)(a) of the 1911 Act requires protection for works first published, and section 35(3) defines first publication to include publications made within 14 days of a first publication elsewhere.

[73] [1985] 1 M.L.J. 196. See discussion in note 35, *supra*.

where.[74] Thailand's Copyright Act, 1978, provides for recognition for resident foreign authors, and those first publishing inside Thailand.[75]

Copyright in the Philippines is governed by the "Decree on the Protection of Intellectual Property," No. 49 of November 14, 1972. The law provides for the protection of foreign works, complying with a notice formality, which are deposited within three weeks of first publication.[76] That protection has been somewhat weakened by subsequent presidential decrees which authorize compulsory licensing.[77]

EAST ASIA

An examination of copyright regimes of East Asian nations shows Japan and Hong Kong[78] adhering to both the Berne and the U.C.C., while South Korea, the People's Republic of China, and Taiwan are party to neither.

Japan's domestic copyright law, No. 48 of 1970, directs recognition for foreign works first published in Japan, or published there within thirty days of first publication elsewhere.[79] The 1956 U.K. Act was extended to Hong Kong, by order in council, in 1972. Hong Kong is thereby obliged to protect

[74] Article 47 of the Dutch Act, effected in Indonesia by Decree no. 58 of the Governor General of the Dutch Indies, on 13 December 1912. In the Netherlands that article would protect works of Dutch citizens, and works first published in Indonesia prior to her independence. It is not known whether the Act as now applied in Indonesia extends protection, or selective protection, to works of Dutch citizens or works first published in the Netherlands.

[75] B.E. 2521, of 11 December 1978, sec. 6(1) & (2). That section also defines what is meant by publication, but the Act does not include a provision for simultaneous first publications.

[76] Section 26 of Decree no. 49 on the Protection of Intellectual Property.

[77] Decree no. 285 of 3 September 1974, as amended by Decree no. 400 of 27 September 1977, sanctioning the compulsory licensing or reprinting of educational, scientific or cultural books and materials as a "temporary emergency measure." The decrees, which appear applicable to local and foreign works alike, have placed in doubt whether the Philippines intends to honour her obligations under the copyright unions.

[78] Hong Kong, still a dependent territory, is protected and obligated by U.K. copyright treaties. The Berne and U.C.C. were both made applicable to Hong Kong through the U.K. Copyright (International Conventions) Order 1972.

[79] Art. 6, Law no. 48 of 1970.

works of resident aliens, works first published, or published within thirty days of first publication, in Hong Kong, as well as works of U.K. nationals and other British subjects, and works first published in the United Kingdom and her territories.[80] South Korea's copyright law of 1957 includes a provision for the protection of alien works which are first published within Korea.[81]

Until most recently, Taiwan would only register and protect foreign works if by a foreign national whose home country would accord recognition to works of Taiwan nationals, and then only "if not in contradiction to the Chinese laws and regulations."[82] This ambiguous law was substantially improved by amendment in 1985. The amended law has retained the censorship provision, though in milder form, as well as the provision according recognition on the basis of reciprocity. Newly added is a provision that protects works first published in the territory.[83] Copyright protection may be limited, however, in the case of translations.[84]

The domestic copyright legislation of the People's Republic of China appears accessible to foreigners and nationals alike,

[80] The Copyright (Hong Kong) Order, 1972, made pursuant to section 31 of the U.K. 1956 Act, Section 2(2) of the Act provides recognition for works first published, or for which the author was a qualified person at the time of its first publication. Qualified person is defined in section 1(5) to include domicilaries and residents, and section 49(2) clarifies that a publication within 30 days of a first publication elsewhere will still be considered a first publication for according the work protection. Note that Hong Kong must also protect works originating in other states to which the U.K. 1956 Act extends. See discussion at note 90, *infra*.

[81] Art. 46, Law no. 432 of 28 January 1957.

[82] The Copyright Law of 1928, as amended in 1964. Article 18 of the 1964 Enforcement Rules placed three conditions upon the recognition of copyright in foreign works: (1) that the works not be in contradiction to local laws or regulations; (2) that they be registered (as with local works); and (3) that they be authored by nationals of countries providing reciprocal recognition to Taiwanese works. See generally, De-Fen Ho, "A Comparative Study of Copyright Protection in the United States and the Republic of China," 28 J. of Social Science 303, 398 (Taipei, April 1980).

[83] Amendment of 10 July 1985. Article 17 provides that works of foreign nationals may be "eligible for copyright registration" if they are either first published locally, or are by authors of nations providing Taiwan works reciprocal protection. Article 6 provides that to be eligible for copyright, the work must not be prohibited from being sold according to relevant laws, but this provision applies to local and foreign works alike.

[84] Provisions found in articles 13 and 17 of the 1985 amended law address translation rights. The provisions are ambiguous, but appear as though perhaps designed to protect national authors more strongly than foreign authors.

without pre-condition, although here too the right is limited in the case of translations.[85]

SOUTH ASIA

India, Pakistan and Sri Lanka are members to both the U.C.C. and Berne unions, Bangladesh holds membership in the U.C.C. only, and Nepal in neither.

Both the Indian Copyright Act of 1957 and Pakistan Copyright Ordinance of 1962 are similar to the U.K. 1956 Act, recognizing foreign works first published locally, or within 30 days of a first publication elsewhere.[86] Nepal's Act of 1966 appears to protect all works, regardless of the nationality of the author or place of first publication, which are registered in accordance with the law.[87]

PACIFIC BASIN COUNTRIES

Among the larger Pacific Basin nations there is a high degree of participation in the international copyright unions. Australia, New Zealand and Fiji are all members to both open copyright conventions, and the U.S.A. and U.S.S.R. are members to the Universal convention.

Australia and New Zealand each have a domestic copyright law patterned after the English 1956 law. As such they agree to

[85]Pursuant to legislation entitled "Provisional Regulations on Remunerations for Book-Writing," of April 1980. See 19 Copyright no. 4, at 137 (1983). Article 2 of the regulations provides for paying authors and translators according to the quality and skill of the work, and the number of prints. Article 3(3) directs that no remuneration is to be paid to the original author for translations from Chinese into a minority national or foreign language, but the original author would be paid diminished remuneration in the case of a translation into Chinese. Book "adaptation or condensation" contemplates payment of a reduced royalty, art. 4, as is the case with payment for educational and teaching materials and books having "massive circulation on account of some objective circumstance." Art. 5. There is a specific provision, in article 12, that "writings or translations by compatriots in Taiwan, Hong Kong, and Macao, and foreign citizens of Chinese origin will be paid at the standard rates . . . ." The precise significance of these various provisions is not known.

[86]The Indian Copyright Act, (no. 14 of) 1957, caps. I (art. 5) & III (art. 13(2)); Pakistan Copyright Ordinance, (no. 32 of) 1962, caps. I (art. 6) & II (art. 10). The Pakistan law includes a provision protecting works of alien domiciliaries, whereas the India act lacks a parallel provision. The Bangladesh Copyright Ordinance, 1962, appears identical to and is the Pakistan law.

[87]Cap. II, sec. 3, Act Relating to Copyright of 13 April 1966.

protect works of resident aliens, and foreign works first published, or published within thirty days of first being published, inside their respective nations.[88] Fiji obtained the U.K. 1956 Act, by order in council, in 1961.[89] Like Hong Kong, she thereby accords recognition to works of foreign residents, works first published locally, and published there within thirty days of publication elsewhere. Unclear is whether this protection also extends, as is the case in Hong Kong, to works of British subjects and works first published in the U.K.[90]

Both the U.S.A.[91] and U.S.S.R.[92] copyright laws mandate recognition for works first published within their respective nations, but not works published there within a short period of time after first publication elsewhere.

CONCLUSIONS

Viewed in the context of the state of modern international copyright law, what the Malaysian Supreme Court did in *Foo Loke Ying*, or perhaps more accurately, what the Malaysian legislature did in 1969, in terms of according recognition to works of foreign origin, is both logical and fair. It does not unilaterally extend recognition of copyright to foreign works.[93]

[88] Australia's Copyright Act, 1968; New Zealand's Copyright Act, (no. 33 of) 1962.

[89] Copyright (Fiji) Order, 1961.

[90] See note 80, *supra*. Unlike Hong Kong, Fiji obtained her independence subsequent to receiving the Act from England. It is unclear, therefore, whether the Act as applied now in Fiji will extend to protect works first published in the U.K. and Hong Kong, and works by U.K. nationals and British subjects. Tonga, like Fiji, retains the 1956 Act after independence. It is also not known how far Tonga may now deem her copyright law to extend. Compare the situation in Singapore, note 35, *supra*, and that in Indonesia, note 74, *supra*.

[91] 17 U.S.C. sec. 104(b)(2).

[92] Article 97, item 1, of the Fundamentals of Civil Law provides that "copyright in a work first published in the territory of the U.S.S.R., if not published but located in some objective form in the territory of the U.S.S.R., shall be the property of the author and his heirs or successors, irrespective of citizenship." See M. Boguslavsky, *op. cit.*, at 133. But as with copyright law in other socialist countries, *e.g.*, China (note 85, *supra*), the right to remuneration may be limited.

[93] Viewed by itself, a provision which allows recognition to foreign works first published locally may appear to unilaterally extend domestic protection. Once it is appreciated, however, that national laws of all nations provide for this, or an equivalent, route to local copyright protection, the grant can no longer be considered unilateral in any real sense.

On the contrary, had the Court instead adopted appellants' position, Malaysia would find herself at the extreme end of the international spectrum, and maybe the target of copyright reprisals and trade sanctions.

This is not to say that Malaysia should join the ranks of those nations holding membership in the open conventions. Though both conventions were recently revised in an effort to accommodate the needs and concerns of the "have not" countries,[94] many of these nations remain unconvinced that the concessions made by the developed states are useful or sufficient.[95]

While the West prefers to view appropriators of western copyrighted materials as pirates, the East seeks solutions respecting how best to deal with their countries' colonially fostered dependence on western literature.[96]

It is expected there will come a time when the imbalances between nation states, of cultural and technological resources, will be sufficiently small as to permit a world intellectual property community which exchanges these materials on equal bases. The point in time at which each country determines to

[94]The Berne was revised at Stockholm, in 1967, and both the Berne and U.C.C. were revised at Paris in 1971, with the purpose of appending provisions attractive to those developing states having up till then refused treaty membership. The new provisions, normally referred to as the "protocols," allow for non-exclusive, non-assignable, compulsory licensing of educational materials. They can only be used in favour of developing states, from authors of those convention nations adopting the protocols, and only if the user is unable to first negotiate a license. Royalties are still paid under the compulsory licenses. See, *e.g.*, Kaplan & Brown, *op. cit.*, at 719–722; Copinger & Skone, *op. cit.*, at 587–601.

[95]Most consider the Stockholm conference a failure, while the Paris protocols have shown a degree of acceptance. Kaplan & Brown, *op. cit.*, at 719–722. But neither succeeded in attracting into the unions the large number of outsider nations as was hoped. Hansan, *op. cit.*, at 13. Some suggest that the compulsory licensing machinery is too cumbersome and useless. *E.g.*, Ficsor, "Copyright and Transfer of Knowledge," 17 C.B.Q.R. no. 3, 6, 11 (UNESCO 1983); but compare Ladd, *op. cit.*, at 20.

[96]Consider that much of the present demand for western literature may have resulted from historic colonial rule which displaced, to a large extent, national languages from local education, science, culture and the arts. Developing nations have come to view the open conventions as a means by which the former powers can continue to profit from the dependence they created. Ficsor, *op. cit.*, at 8; M. Boguslavsky, *op. cit.*, at 42–45.

join such a community will necessarily differ.[97] And the determination should be a result of informed decision making, not lobbying.

In the meanwhile it is comforting to know that creators of all nations, wherever situated, have the ability to acquire global protection for their works, and that the convention countries appear willing to tolerate the skewed international copyright situation, at least for the immediate future.

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[97]Nor can developing states properly be grouped for purposes of evaluating foreign intellectual property needs. Certain developing states, for historical reasons, would be expected to have less use for European and English language materials than others. The book hunger and resulting import burden, discussed in note 60, *supra*, will vary therefore. The burden would weigh more heavily on nations with populations highly literate in English, as have Malaysia and Singapore, for example.