

**CHANGES TO BE MADE IN SUDANESE COPYRIGHT AND  
NEIGHBOURING RIGHTS LAW TO COMPLY WITH THE TRIPS  
AGREEMENT 1994**

**A Thesis Submitted to the University of Khartoum in Partial  
Fulfillment of the Requirements of LLM. Degree**

**By: MAGDA ABDELRAHMAN ELMUBARAK ABUSHAMA,  
Bachelor of Laws, University of Khartoum, 1986**

Post Graduate Diploma in Human Rights, University of Khartoum, 2007

**SUPERVISOR: PROFESSOR AKOLDA MAN TIER  
Faculty of Law, Department of International and Comparative Law**

**July, 2010**

## **DECLARATION**

**This thesis is the result of my own work and it has not been submitted for another degree in this or another University.**

**Magda A/Rahman**

## TABLE OF CONTENTS

	<b>Page</b>
CONTENTS	i
DEDICATION	iii
ACKNOWLEDGEMENT	iv
ABBREVIATIONS	v
PREFACE.	vi
TABLE OF CASES	vii
TABLE OF CONVENTIONS	viii
ABSTRACT (IN ENGLISH)	ix
ABSTRACT (IN ARABIC)	x

## CHAPTER ONE

### Copyright

1-The Bases of Protection	1
2- Works Covered by the Protection	10
i- Original works, derivative works.	10
ii- Criteria of Protection	13
a. Originality	13
b. Permanent Form	
iii Unprotected works	14
3- The rights conferred by copyright	16
i. Moral Rights	16
ii. Economic rights	17
4 -Ownership of Copyright, its Duration and its Limitations	23

(i) Ownership of Copyright	23
(ii) Duration:	25
	28
(iii) Limitations on Copyright	
5- Transfer of Copyright	30
6- Registration of Works	31
7- Infringement and Remedies	33
8. Conclusion	35

## **CHAPTER TWO**

### **Neighbouring Rights**

1-Types of Neighbouring Rights	41
( i ) Rights of Performers	41
(ii) Rights of the Producers of Sound and Audiovisual Recordings	43
(iii) Rights of the Broadcasting Organizations:	45
2- Duration and Limitations	47
3. Infringement and Remedies	52
4. Conclusion	58

## **CHAPTER THREE**

Conclusion and Recommendation .....	61
Bibliography .....	70

## DEDICATION

*To:*

*My parents*

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I would like to convey my thanks to the staff of the electronic library of the Faculty of Law, University of Khartoum, and I specially wish to express my gratitude to the staff of the library of the New Partnership for Africa's Development (NEPAD), for their generous support by enabling me to use the library and references through the research period.

Finally I owe special thanks to my colleagues for their extended support and I must give recognition to my husband, children and every member of my family for their unstinting support and encouragement. .

## **ABBREVIATIONS**

TRIPS: Trade- related Aspects of International Property Rights

WTO: World Trade Organization

WIPO: World Intellectual Property Organization

## **PREFACE**

The aim of this thesis is to examine the areas of differences in Sudanese Copyright and Neighbouring Rights Protection Act 1996 and the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement 1994 and make proposals for the necessary changes. These differences are discussed under three chapters: copyright; neighbouring rights; and conclusion and recommendation. The differences are minor and Sudan will make efforts to bring its law in conformity with TRIPS. This is absolutely necessary for admission to the World Trade Organization (WTO).

## **TABLE OF CASES**

1. Anton Pillar v. manufacturing (1976) Ch 55

## **TABLE OF CONVENTIONS**

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

Agreement on Trade Related Aspects of Intellectual Property Rights  
(TRIPS) 1994.

## **ABSTRACT**

**Name:** MAGDA ABDELRAHMAN ELMUBARAK ABUSHAMA

**Title:** CHANGES TO BE MADE IN SUDANESE COPYRIGHT AND NEIGHBOURING RIGHTS LAW TO COMPLY WITH THE TRIPS AGREEMENT 1994.

The purpose of this thesis is to reflect and examine the areas of copyright and neighbouring rights which need some changes in order to make them comply with the TRIPS.

The dissertation is divided into three chapters: copyright; neighbouring rights; and conclusion and recommendations.

This thesis is based on numerous bibliographical references and sources including articles, documents and electronic publications. The ultimate end of this thesis is to make proposals for the necessary changes to be made in Sudanese Copyright and Neighbouring rights Law to comply with the TRIPS

Among the recommendations are the following:

First, the future Sudanese Copyright Law should extend the benefit of the protection to foreign nationals of countries that are members of the WTO as well as to works first published in a WTO country.

Second, Sudan has to take advantage of the Appendix of the Berne Convention in favour of developing countries; the future law should include provisions to that effect.

Third, The Copyright and Neighbouring Rights Act 1996 should be amended to provide for droit de suit.

Fourth, the new copyright and neighbouring rights law should rectify the term of protection in compliance with both Article 7 of the Berne Convention and Article 12 of the TRIPS Agreement.

Fifth, Sections 26 -28 of the Act should be amended, in particular for the purpose of clarifying the economic rights of performers.

Sixth, a transitory measure should be spelled out. The draft of the future Sudanese copyright law should extend the scope of the transitory measures not only to works, but also to the subject matter that is covered by neighbouring rights.

Seventh, at present, the 1996 Copyright Act does not contain a limitation on the exclusive rights of recording musical works and works pertaining there to, through issuing compulsory licenses. Sudan must introduce such a limitation in its new law.

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# **CHAPTER ONE**

## **Copyright**

This chapter explores the copyright protection in Sudan and examines the areas which need some changes in order to comply with the Trade Related Aspects of Intellectual Property (TRIPS) of World Trade Organization "WTO" Agreement 1994. We are surrounded by works of literature, arts and science. Many of these matters are protected by Copyright Law. Copyright in Sudan is governed by the Copyright and Neighbouring Rights Protection Act 1996, which replaced and re enacted with modifications the Copyright Protection Act 1974, the first Sudanese Legislation on this branch of intellectual property .The discussion focuses on those aspects of copyright in need of reform.

### **1-The Bases of Protection**

Copyright law does not protect all of copyright works. To obtain copyright protection in Sudan there must be a connection or link between the authors or copyright works and the Sudan<sup>1</sup>. Protection in Sudan should be based on one of the fallowing grounds under section 4 of the Copyright and Neighbouring Rights Protection Act 1996 which states:

(1) The protection prescribes by this Act shall extend to:

(a) Works of Sudanese authors which are published or otherwise made available to the public for first time in the Sudan; (b) Works of Sudanese nationals which are published abroad (c) Unpublished works if the author is a Sudanese or is an alien domiciled in the Sudan; (d) Joint works if at least one of the co-authors is Sudanese; (e) Sudanese performers and their performances effected, recorded, broadcast or communicated to the public in the Sudan or in a foreign country; (f) Sudanese producers of audiovisual and sound recordings first published in the Sudan; (g) Sudanese broadcasting organizations having their headquarters on the territory of the Sudan and broadcasting with the aid of transmitters located in the Sudan; (h)Works performances, audiovisual and sound

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1. Akolda M. Tier, Protection of Copyright under the Sudanese Law" 6 Arab L.Q.161 (1991)

recordings; and broadcasts which are created or made available to the public; (i) Works which are created or made available to the public

(2) The Director of the Corporation may, by order made by him after consultation with the registrar, extend the protection prescribed by this Act to such works, performances, audio and visual recording and sound recordings, and programs of foreign authors and other beneficiaries which are published or made available to the public in a foreign country on the basis of reciprocal treatment or by virtue of international instruments to which the Sudan is party.<sup>2</sup> The Sudan Copyright and Neighbouring Rights Protection Act complies with Article 1 through 21 of the Berne Convention, with a few exceptions. The Sudan adhered to Berne Convention on 22 August 2000; Sudan is party to the Berne Convention for the Protection of Literary and Artistic Works since December 28, 2000. This shows which commitments Sudan has towards the other 150 members of the Convention. However, a number of works used in Sudan are works of foreign authors. Here comes the question of the copyright protection of foreigners: Section 4(2) of the Sudan Copyright Law 1996 contains provisions on the protection of foreign works. In this respect it is important to note that since Sudan is party to the Berne Convention, foreign works are protected in Sudan. Section 4 (2) of the Act contains provisions which extend the protection to works of foreign authors published or made available to the public in a foreign country on the basis of either a reciprocal treatment or international instruments to which Sudan is party.<sup>3</sup> Copyright protection is based on national law. In Sudan, as in all other countries, the protection of copyright and related rights is provided by national legislation that has effects on the territory of the country. Currently, the Copyright Act protects only the works of foreign authors first published or made available to the public in the Sudan or

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<sup>2</sup> Sudanese Copyright and Neighbouring Rights Protection Act 1996. S 4

<sup>3</sup> Akolda M. Tier, *supra* note 1, at 44

unpublished works of foreign authors who are domiciled in the Sudan. However, Section 4(2) grants power to the Director of the National Corporation for Culture and Arts to extend the protection to foreign authors, whose works have been published or made available to the public in a foreign country, on the basis of bilateral or multilateral treaties to which the Sudan is a party. The power has never been used.

The Sudan should amend the law in accordance with the national treatment and the most-favoured-nation treatment principles provided for in the TRIPS Agreement.

The Berne Convention for the Protection of Literary and Artistic Works 1886, usually known as the Berne Convention, is an international agreement governing copyright and was first accepted in Berne, Switzerland. Sudan became party to it in 2000. Article 3 of the Convention<sup>4</sup> provides:(1) The protection of this Convention shall apply to: (a) authors who are nationals of one of the countries of the Union, for their works, whether published or not; (b) 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 in a country of the Union (2) Authors who are not nationals of one of the countries of the Union but who have their habitual residence in one of them shall, for the purpose of this Convention; be assimilated to nationals of that country. (3) The expression "published works" means works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public having regard to the nature of the work. The performance of a dramatic musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary

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4. The Berne Convention 1886 Article 3

or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication. (4) A work shall be considered as having been published simultaneously in several countries if it has been published in two or more countries within thirty days of its first publication. Under Berne Convention foreign authors are given the same rights and privileges to copyrighted material as domestic authors in any country that signed the Convention. And also, Article 4 of the Convention provides that: the protection of this Convention shall apply, even if the conditions of Article 3 are not fulfilled, to: (a) authors of cinematographic works the maker of which has his headquarters or habitual residence in one of the countries of the Union; (b) authors of works of architecture erected in a country of the Union or of other artistic works incorporated in a building or other structure located in a country of the Union.<sup>5</sup> The Berne Convention requires its signatories to recognize the copyright of works of authors from other signatory countries (known as members of the Berne Union) in the same way it recognizes the copyright of its own nationals. In addition to establishing a system of equal treatment for internationalised copyright amongst signatories, the agreement also required member states to provide strong minimum standards for copyright law.

The basic aim of the Convention is to provide an effective and uniform protection of the rights of authors. For that purpose, the Convention relies on some basic principles.<sup>6</sup> These are essentially the same general principles which are: (a) the principle of national treatment. This means that in each country bound by the Convention works originating in another country also bound by the same Convention shall be given the same protection as the former country grants to its own

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5. id at Article 4

6. Mr. Henry Olsson, Judge at the Court of Appeal, and Special Government Adviser, Ministry of Justice, Stockholm WIPO National Seminar on Copyright, Related right, and Collective Management page 4

author (b) the principle of automatic protection. This means that such national treatment shall not be depending on any formality, such as registration or deposit or special marking of copies of the works (c) The principle of independent protection. This means that the enjoyment and exercise of the rights in a protected work in a certain country is independent of the existence or non-existence of protection in the country of origin or in any other country. (d) The principle of minimum rights. This means that certain rights, which are described fairly in detail in the Convention, always shall be granted to authors who enjoy protection under the Convention. It should be noted in this context the mechanism of the Convention is to provide for protection for works originating in other countries and not to guarantee protection to works originating in that same country.<sup>7</sup>

As we mentioned before, Article 3 of Berne Convention requires protection be provided to the works of authors who are nationals of Berne Union members and to works of nationals of non- union countries if those works are published in a Union member simultaneously with publication in the non- Union country. Article 4 requires that protection be provided to cinematographic works not falling under Article 3 if the maker has a headquarters or habitual residence in a Union member and to works of architecture or artistic works incorporated into a building or structure in a union member. Protection, as prescribed by the 1996 Act, extends to works of an alien author which are published or otherwise made available to the public for the first time in the Sudan and to unpublished works if at least one of the co-authors is a Sudanese national.

At present, the Sudanese Copyright Law does not adequately protect foreign authors in full conformity with the criteria spelled out in the Berne Convention, in its Article 3.<sup>8</sup>

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7. id at 6

<sup>8</sup> Working Party on the Accession of Sudan" Implementation of the WTO Agreement on Trade- related Aspects of Intellectual Property Rights" TRIPS" WT/ACC/SDN/1123May2003" page 13

Article 3 of the Berne Convention requires protection to be provided to works of authors who are nationals of the Berne Union, and also to works of authors who are not nationals of the Union if those works are first published in a country of the Union or published simultaneously in a country outside the Union and in a country of the Union. Section 4 of the Copyright Act extends the protection to works of foreign authors which are published or otherwise made available to the public for the first time in the Sudan, as well as to unpublished works of foreign authors domiciled in the Sudan. Section 4 also protects works created by Sudanese nationals, whether published or unpublished, and regardless of the place of first publication, as well as works of joint authorship, if at least one of the co-authors is a Sudanese national. Section 4(2) grants power to the Director of the National Corporation for Culture and Arts, after consultation with the Registrar of Copyright, to extend the protection to works of foreign authors which are published or have been made available to the public in a foreign country on the basis of reciprocal treatment, or by virtue of a multilateral instrument to which the Sudan may become a party.

Currently, Section 4 of the Copyright Act does not fully comply with the terms of Article 3 of the Berne Convention. The new law shall rectify this situation by extending protection to foreign authors on the basis of the criteria set out in Article 3 of the Berne Convention. Thus it would grant protection to works of foreign authors who are nationals of the Berne Union, and to works of foreign authors who are not nationals of the Union if those works have been first published in a country of the Union or simultaneously published in countries in and outside the Union.<sup>9</sup> Article 4 of the Berne Convention provides for "subsidiary" criteria of eligibility for protection with regard to cinematographic works, works of architecture and artistic works incorporated in a building or structure.

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9. id to 13

Currently, the Copyright Act does not refer to the "subsidiary" criteria as a basis for the protection of cinematographic works, architectural works or artistic works incorporated into a building or structure. The future law shall, however, incorporate those criteria in accordance with Article 4 of the Berne Convention.

The new Sudanese law should protect foreign authors by the mere fact that they are nationals of a member country as well as protecting works of foreign authors that are either first published in the Sudan or simultaneously published in the Sudan and in a foreign country or territory. Protection of works which are not created by Sudanese authors and not published for the first time in the Sudan are not per se covered by the national law.<sup>10</sup> They are, instead, protected by the fact that Sudan is party to the Berne Convention. The main mechanism of that Convention is the following. Essentially, the same applies to other treaties in the copyright/related rights field the first obligation is that Sudan is obliged to grant protection pursuant to the national law of Sudan to works of authors from all other member states of the Berne Convention. This is generally called the "national treatment." This principle is provided for in Article 4 of Berne Convention. This means that in each country bound by the Convention works originating in another country and bound by the same Convention shall be given the same protection as the former country grants to its own authors. The protection to those foreign authors must not be below a certain level.<sup>11</sup> This means that certain rights which are specified in the Convention must be provided for in respect of those foreign works, The term of protection must not be shorter than that mentioned in the Convention, and the limitations on the rights must conform with what the Convention prescribes. This is called the principle of "minimum rights." Those minimum rights apply only to the foreign

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10. Mr. Henry Olsson, *supra* note 6, at 6

11. *id* at 6

authors and not necessarily to the authors who are protected under the national law itself. This means that certain rights, which are described fairly in detail in the Convention, always, shall be granted to authors who enjoy protection under the Convention.

It should be noted in this context that the mechanism of the Convention is to provide for protection for works originating in other countries and not to guarantee protection to works originating in that same country. Subject matter of copyright `are protected alien authors according to Section 4: a) when their works are published or otherwise made available for the first time in the Sudan. b) If they are domiciled in the Sudan and their works are unpublished. (c) At present, the Sudanese Copyright law does not incorporate the subsidiary criteria spelled out in Article 4 of the Berne Convention as a basis for the protection of cinematographic works, architectural works or artistic works incorporated into a building or structure. Also, regarding Article 1.3 of the TRIPS Agreement, the future Sudanese Copyright Law should extend the benefit of the protection to foreign nationals of countries that are Members of the WTO as well as to Works first published in WTO country.<sup>12</sup> (Section 4), and also extend its protection to cinematographic works the maker of which has a headquarter or habitual residence in a WTO Member and to works of architecture or artistic works incorporated into a building or structure in a WTO Member.<sup>13</sup> The requirements of TRIPS appear under Article 9 (1)"Relation to the Berne Convention". It provides that: (1) Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. Under TRIPS in each state intellectual property laws may not offer any benefits to local citizens which are not available to citizens of other TRIPS signatories by the principles of national treatment (with certain limited exceptions,

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12. Mr. Henry Olsson supra note 6, at 13

13. Victor Nabhan, Consultant Arab Bureau, WIPO - Accession of Sudan (2003) page 2

Articles 3 and 5 [2]). TRIPS also have a most favored nation's clause.<sup>14</sup> As in the main pre-existing intellectual property conventions, the basic obligation on each member country is to accord the treatment in regard to the protection of intellectual property provided for under the Agreement to the persons of other Members. Article 1.3 defines who these persons are. These persons are referred to as “nationals” but include persons, natural or legal, who have a close attachment to other members without necessarily being nationals.

The criteria for determining which persons must thus benefit from the treatment provided for under the Agreement are those laid down for this purpose in the main pre-existing intellectual property conventions of WIPO, A WTO member state shall grant the protection to the nationals of other members of the WTO.<sup>15</sup> A "national" shall be understood as meaning those natural or legal persons who would be eligible for protection if all members of WTO were also bound by the Paris, Berne and Rome Conventions and of the Washington Treaty on Intellectual Property in Respect of Integrated Circuits (generally called "IPIC"). The protection to be given under the TRIPS Agreement is consequently to be given on the basis of nationality. After accession to the WTO, Sudan will consequently have to give protection for all intellectual property rights covered by the Agreement to nationals from all other WTO members.

A general remark for the standards for the protection is that: TRIPS contains very detailed provisions on what the intellectual property legislation of any WTO member must contain. Those provisions are essentially based on the standards in the industrialized world. The effects of this comparatively high standard of protection for intellectual property on developing countries have caused some discussion. One remedy is that there are transitory regimes for developing countries and there are also

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14. id at 3

15. World Trade Organization from Wikipedia [policy about copyright issues \(2004\)](#) page 4

some other specific measures to assist in the implementation of the Agreement. So, the copyright regime under TRIPS, the standards applicable to copyright consist of one general provision and several special provisions.<sup>16</sup> The general provision states that members of WTO shall comply with Articles 1-21 of the 1971 Paris Act of the Berne Convention and, where applicable, with the Appendix to that Act (containing special provisions for developing countries). This means that there is an obligation under TRIPS for the WTO member States to comply with the substantive provisions of Berne Convention. In practical terms most countries carry out this obligation through accession to that text of the Convention (Sudan is party to the Convention).

## **2 - Works Covered by the Protection**

My next area of comparison concerns, works protected by copyright. Under 1996 Act, there are two broad categories of works:

(i) Original works: sub-divided into 10 headings; original intellectual works in the field of literature, science or arts and, derivative works: sub-divides into 2 headings.

Accordingly, section 5 of the Copyright Act protects all original works in the literary, scientific or artistic domain, whatever may be their form or mode of expression and regardless of their value or aim.<sup>17</sup> More specifically, section 5 provides that the protection includes the following works: a) Written works, such as books, magazines, periodicals, articles and works of like nature; b) Works of fine arts whether sculpture, drawing, painting, decoration, works of applied art, works of artistic craftsmanship and other works of like nature; c) Dramatic and dramatic-musical works, musical works with or without lyrics, musical and dancing plays, and shows which are performed by movement or steps; d)

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16. Akolda M. Tier, *supra* note 1, at 6

17. *id* at 54

Audio-visual works; e) Photographic works; f) Computer programs; g) Electronic data banks; h) All kinds of maps and sketches relative to geography, topography or science; i) Translations and derivative works, such as adaptations and other alterations of works; j) Collections of protected works or other material provided they are original by reason of the selection or arrangement of their contents; and k) Other works now known or unknown. section 5 (1) provides for the protection of the authors of any original intellectual work without fulfillment of any formalities. As regards to formality, section 5(1) of the Copyright Act specifies that the protection prescribed in the Act shall apply "without fulfillment of any formality". Copyright protection accrues thus from the creation of the work. Section 5 (1) (c) provides for the protection of the dramatic and dramatic-musical works, musical works and literary and artistic works. According to section 5 (2) (a), derivative works are granted protection provided for in the Act. Derivative works include transformation of protected original intellectual works.

According to Section 5 (1) (g) (h), and (i) of the Copyright Act; computer programs, electronic data banks and other works known or invented in the future are covered . Also, according to Section 5(1) (g) & (h) computer programs and data banks are covered under copyright protection.

(2) Without prejudice to the protection of the original works, the protection granted under this Act shall also extend to derivative works, such as: (a) translations, adaptations, arrangements and transformations of original works; (b) collections of protected works or of non-protected materials provided that by reason of the selection and arrangement of their content they constitute the result of original intellectual effort.<sup>18</sup> Section 5(1) (g) of the Copyright Act enumerates computer programs amongst the works that are subject matter of protection, provided they are

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18. Mr. Henry Olsson, *supra* note 6, at 4

original. It is to be pointed out that computer programs are not protected in the Act explicitly as a subcategory of literary works. However, section 5(1) specifies that "the protection prescribed in this Act shall... apply to any original work in the field of literature, science and arts, whatever the manner of expression, value or object of such work". Therefore, it is clear that computer programs fall in the field of "literature, science and arts". Compilations of data are dealt with in two separate places in Section 5. On the one hand, Section 5(1) (h) enumerates "electronic data banks" amongst the list of works that are protected, provided they are original. On the other hand, Section 5(2) (b) provides that without prejudice to the protection of the original works, the protection granted under this Act shall also extend to derivative works, such as "collections of protected works or non protected material, provided that by reason of the selection and arrangement of their content they constitute the result of original intellectual effort". Section 5(2) shall be amended in order to bring it in complete compliance with Article 10 of the TRIPS Agreement, and compilations of data shall be protected if by reason of the selection or arrangement of their content they constitute the result of an original intellectual effort.<sup>19</sup>

The Copyright Act complies substantially with Articles 1 through 21 of the Berne Convention, with a few exceptions which are referred to below. Article 2 of the Berne Convention defines "literary and artistic works" as "every production in the literary, scientific and artistic domain whatever may be the mode or form of its expression". It also requires protection of derivative works and collections of works. It does not extend protection to news and leaves the matter of protection of official texts to the Members of the Berne Union.

The Berne Convention protects computer programs, whether in source or object code, as literary, works. Compilations of data, whether in

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19. Working Party on the Accession of Sudan supra note 8, at14

machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such .

**ii. Criteria of Protection:** There are two requirements: Permanent Form and Originality

- a. Originality:** This is basic requirement, it means that the author or creator of the work used his skill and labour so that the work can properly be said to originate from him . In other word there is no copying . There are no differences between Sudanese Copyright and Neighbouring Rights Protection 1996 Act and TRIPS Convention under this criterion
- b. Permanent Form:** This criterion is not expressly mentioned in Sudan Copyright legislation but it is implied in the list of protected works, subject matter which requires that the expression of an idea be in writing or otherwise fixed in some tangible form. There is nothing contrary to the Berne Convention in this. That Convention allows member states to require that the protected works be in some tangible form to make it easy to know what is protected. However, Berne and TRIPS protect the work even if it is not fixed in some tangible form. e.g. orally & speech . This is under Article 2 of the Berne Convention 1886 which provides: The general provision also expresses a general principle in copyright law; namely that copyright protection extends only to the expression and not to the ideas, procedures, methods of operation or mathematical concepts as such. (Algorithms, for instance in computer programs, are not mentioned). This provision merely restates that copyright is a protection of individual expression that the author has given to his ideas and not to the ideas as such and not to the facts or the data contained in the work.<sup>20</sup>

### **iii- Unprotected works**

Under Section 6 of the Copyright and Neighbouring Rights Protection Act 1996, certain works are not protected by Copyright, namely: (a) works that have fallen into the public domain; (b) official documents; (c) daily news or occurrences of like nature published in newspapers, magazines or other periodicals or broadcast by radio or television; (d) ideas, methods, state emblems and symbols.<sup>21</sup> The exclusion of these works from copyright protection is not contrary to the Berne Convention 1886. Article 2(4) of that convention leaves it to the law of each Member State to determine the protection to be granted to them. Article 2bis of the Berne Convention leaves the matter to each Contracting Party to decide upon the status of political speeches and speeches delivered in the course of judicial proceedings. It also authorizes Contracting Parties to determine the conditions for the reproduction and communication to the public of speeches and addresses, which are delivered in public. In this regard, Section 14(1) (b) of the Copyright Act authorizes newspapers, magazines, periodicals, radio and television to reproduce essays or lectures or speeches concerning political, economic, scientific, religious or social discussions which were the focus of public opinion at the time such discussions were made. The position in Sudan on national folklore is still unclear. Sudanese lawmaker must ensure protection for the national folklore through enacting a provision to this effect in the law of copyright. The system for the protection must address such issues as identifying the owner of the folklore, the period of protection, how to deal with the problem of the limitation and exceptions.<sup>22</sup>

All of these questions need to be answered by the Sudanese legislative body. The Tunis Model Law on Copyright 1976 defines Folklore as

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21. Akolda M. Tier, *supra* note 1, at 15

22. *id.* at 13

meaning " All literary, artistic and scientific works created on the national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation and constituting one of the basic elements of traditional cultural heritage".

The 1967 Stockholm Diplomatic Conference for Revision of the Berne Convention made an attempt to introduce copyright protection for folklore at the international level. As a result, Article 15(4) of the Stockholm (1967) and Paris (1971) Acts of the Berne Convention contain the following provisions: "(a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union. (b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General [of WIPO] by means of written declaration giving full information concerning the authority thus designated. The Director General at once communicates this declaration to all other countries of the Union." This article of the Berne Convention, according to the intentions of the revision conference, implies the possibility of granting protection for expressions of folklore.<sup>23</sup>

Article 18 of the Berne Convention deals with the issue of the protection of works already existing on the entry into force in a Union country of the Berne Convention.<sup>24</sup> Currently the Sudanese Copyright Law does not provide for transitory measures as required by Article 18 of the Berne Convention. The new draft of the Copyright Law should have retroactive effect, save works which fall into public domain at the time they come into force. The draft of the future Sudanese Law should extend

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23. Mr. Henry Olsson, *supra* note 6, at 6

24. Victor Nabhan, *supra* note 13, at 15

the scope of transitory measures not only to works, but also to subject matter that is covered by Neighbouring Rights.

Currently, there exists no provision in the Copyright Act that addresses this issue. The future law should contain provisions in accordance with the principles set out in that Article; the obligation to provide for transitory measures is also required in the TRIPS Agreement. Article 70 par. 2<sup>25</sup> Article 19 of the Berne Convention authorizes each country of the Union to provide in its legislation a level of protection that may exceed the minimum that is required in the Berne Convention. The Copyright Act contains provisions that allow for a higher level of protection than is required by the Berne Convention. Under Section 5(1), copyright protection is granted to computer programs as well as to electronic data banks. Also, Section 8(2) (a) provides for the right to commercially distribute the work to the public by way of sale, rental or lending. Section 8(2) (g) also provides the right to commercial exploitation of the work by any means, whether existing or to be developed.

Article 21 of the Berne Convention refers to Special Provisions Regarding Developing Countries that are included in the Appendix. The Copyright Act does not presently contain any provision to that effect. However, the Sudan has the intention to take advantage of the Appendix of the Berne Convention. The future law shall include provisions to that effect.

### **3- The rights conferred by copyright**

Section 8 of the 1996 Act divides the rights comprised in Copyright into moral and economic rights. The moral rights are concerned with the author's honour and reputation, while the economic rights, bring the financial return.<sup>26</sup>

#### **i. Moral Rights**

Section 8 of the Sudanese Act 1996 protects the moral right to disclose

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25..id to 2

26. Akolda M. Tier, supra note 1, at 44

the work, the right to withdraw the work and the general right of distribution, which includes dissemination of the work by way of sale or commercial rental.

## **ii. Economic rights:**

Consist of the rights of the author to do or authorize the doing of any or all of the following : to publish and reproduce the work ; to perform the work publicly; to broadcast the work; to communicate the work publicly by wire including cable, optical fiber and other material carrier; to translate the work; to make adaptation, arrangement or transformation of the work; to exhibit or display the work; and to do any other acts of commercial exploitation of the work by means known or later developed . These are rights which bring financial reward to the author or creator of the work.<sup>27</sup> It can be said that the Sudanese legislation provides for more than the minimum rights that is required under the Berne Convention<sup>28</sup>, for example, Section 8 (2) gives the authors of literary and artistic works the right to authorize adaptation reproduction of their works. In Section 8 (2) (a) the copyright owner has the rights to authorize the leasing or lending of his works (including computer programs and cinema films) on commercial basis. This right applies to all kinds of works, and thus, as worded, should apply to computer programs as well to cinematographic works. The wording of the activities also covers rental.

According to section 8 (2) (b). (c). (d) & (e), the authors of such works are given the right to authorize the public performance of their works including by broadcast and any communication to the public including by the cable. They have the right to communicate their translations. Article 8(2) (f) provides for the rights of authors of literary and artistic

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27. Sudanese Copyright and Neighbouring Right Protection Act Section 8

28. Working Party on the Accession of Sudan supra note 8, page 19

works to authorize adaptation, arrangements and transformation of their works. As required under Article 8 of the Berne Convention, Section 8(2) (e) of the Copyright Act provides the authors the right to authorize translation of their works into other languages.<sup>29</sup>

Article 9 of the Berne Convention provides for authors of literary and artistic works the exclusive right of authorizing the reproduction of their works in any manner or form. It allows Union countries to permit reproduction of works in certain special cases, under certain conditions. Thus Section 8(2) (a) of the Copyright Act provides for the authors the right to authorize reproduction of their works by any means, known or later developed. And Section 14(4) makes it permissible to reproduce, translate or adapt a published work for personal and private use but this shall not apply to computer programs, data banks and scores of musical works. Article 9 of the Berne Convention requires that authors be given the exclusive right to authorize reproduction of the work in any manner or form with only limited exceptions that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.<sup>30</sup> Article 12 of the Berne Convention requires that authors of literary or artistic works have the exclusive right to authorize adaptations, arrangements and other alterations of their works. Article 13 of the Berne Convention authorizes countries to impose reservations and conditions on the exclusive right granted authors of musical works or written works that are recorded.

There is no equivalent in the Sudanese Copyright Law to Article 13 of the Berne Convention. Article 14 of the Berne Convention requires that authors of literary and artistic works have the exclusive right to authorize the cinematographic adaptation, public performance and

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29. id .at 20

30. Working Party on the Accession of Sudan supra note 8, at 19

Communication to the public of the adaptation, without the limitations authorized under Article 13(1) <sup>31</sup> The Berne Convention 1886 "Article 6" for the protection of literary and artistic works grant to the author two moral rights independently of the author's economic rights. (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation. (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained. The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

Articles 11, 11bis and 11ter of the Berne Convention provide for authors of literary and artistic works the exclusive right of authorizing the rights of public performance, broadcasting, communication and recitation to the public. Article 11ter (3) also allows for an "ephemeral recordings" exception under certain conditions. Thus Section 8 of the Copyright Act grants authors, *inter alia*, the rights to authorize the following acts: (a) public performance of the work (Section 8(b)); (b) broadcasting of the work, including through the communication and direct broadcasting satellites (Section 8 (c)); and (c) Communication of the work to the public by wire including cable, optical fibre and other

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31. Sudanese Copyright and Neighbouring Right Protection Act 1996, S. 8

material carriers (Section 8(d)). Furthermore, Section 14(9) of the Copyright Act provides for an "ephemeral exemption". It authorizes broadcasting organizations to make ephemeral recordings of works for their broadcasting purposes; such recordings shall be destroyed within six months after their making but a copy of such recordings may be kept in official archives for documentary purposes.<sup>32</sup> Article 12 of the Berne Convention provides for authors of literary and artistic works the exclusive right of authorizing adaptations, arrangements and other alterations of their works. Section 8(f) of the Copyright Act provides for the right to authorize the adaptation, arrangement or transformation of the work. Article 13 of the Berne Convention allows for the possibility for a Union country of applying a limitation to the exclusive right of recording musical works and words pertaining thereto, through the issuing of compulsory licenses.

At present, the Copyright Act does not contain the equivalent of such a provision. However the Government of the Sudan should consider introducing such a limitation in its new Law. Article 14 of the Berne Convention provides for authors of literary and artistic works the exclusive rights to authorize the cinematographic adaptation of their works as well as the distribution, public performance, communication to the public and adaptation of the works thus adapted. Corresponding Section 8(2) (a), (b), (c), (d) and (g) of the Copyright Act grants exclusive rights corresponding to the rights listed in Article 14 of the Berne Convention. These rights are couched in general terms and would apply to all protected works, regardless of their category. Hence also authors of cinematographic works enjoy the rights referred to in Article 14 of the Berne Convention. Article 14*bis* of the Berne Convention contains special provisions concerning cinematographic works. In particular, it stresses the need to protect the cinematographic work as an original

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32. Working Party on the Accession of Sudan" Implementation of the WTO Agreement on Trade-related Aspects of Intellectual Property Rights" TRIPS"WT/ACC/SDN/14 (2004) page 45

work. It also leaves to each country of the Union to regulate matters related to copyright ownership in cinematographic works.<sup>33</sup> These are dealt with in the Copyright Act as follows: a) Section 5 expressly protects cinematographic works; and b) Section 12(2) provides that unless stipulated otherwise in the contract, the economic rights of the author shall be considered as transferred to the maker or producer of the work. Hence it addresses Article 14*bis* (2) of the Berne Convention, which provides that ownership of cinematographic works shall be a matter for legislation in the country where protection is claimed.<sup>34</sup>

The TRIPs Agreement has replaced the Berne Convention as the primary instrument of international copyright law. While the TRIPs Agreement has superseded Berne in importance, it has not actually replaced the copyright provisions of the earlier Convention. Rather, Article 9.1 of the TRIPs Agreement incorporates the substantive provisions of the Berne Convention.] Among other provisions, Article 9.1 also includes the moral rights protections of Article 6*bis* of the Berne Convention. However, an unusual formula is reserved for incorporating moral rights, alone. Article 9.1 of the TRIPs Agreement states: Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of the Berne Convention or of the rights derived there from. The effect of this provision is, quite simply, that the general dispute settlement mechanism of the TRIPs Agreement will not apply to moral rights. This means that the WTO Dispute Settlement Understanding cannot be invoked to protect moral rights and that any other procedures relating to the implementation of intellectual property rights or their enforcement through the Council for TRIPs will also not apply to moral rights. Member countries cannot expect to claim violations of the moral rights of their authors within the TRIPs system.

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33 .id. at 46

34. Mira Sundara Rajan: Moral Rights and Copyright Harmonization: Prospects for an "International Moral Rig (2002) page 6

The moral rights are inalienable, perpetual and inviolable. They pass to the author's heirs or executor on the author's death, but may not be otherwise transferred or sold under any circumstances, by either the author or his legal successors. Any agreement to waive an author's moral rights is null and void, although the author cannot be forced to protect his work. Under 1996 Act the duration of moral rights is confusing. Article 14ter of the Berne Convention provides for the "droit de suite" with respect to certain works. This right is optional and applicable only if legislation in the country where the author is a national so permits. At present, the Copyright Act does not contain such right. However, the Sudan is considering introducing such right in its new law.<sup>35</sup> An artist or his heir has the right to get a protection of resale price for a work of art or a manuscript. This right is recognized in the Berne Convention 1886 and in the TRIPS Agreement 1994. The value of the work of art increase lies in one original copy rather than in the numbers of copies and the value of this original copy increases with the passage of time, especially after the death of the author.

Article 14ter of the Berne Convention requires "droit de suite" in connection with subsequent sales of works of art and manuscripts. The Copyright and Neighbouring Rights Protection Act 1996 does not provide for the "droit de suite".<sup>36</sup> Amendment of the Copyright and Neighbouring Rights Protection Act should provide for this right. The Sudan is not bound to provide for the droit de suite in its future legislation, and if it does so, it has the choice to limit its application to the Sudanese nationals and to foreign nationals of countries that protect the Sudanese authors i.e. droit de suite is not among the minimum obligatory rights that have to be granted by country which is a Member of the Berne Convention. If and when introduced in

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35. id. at 7

36. Mr. Henry Olsson, *supra* note 6, at 5

the legislation of a Member country, it should be subject to reciprocity.<sup>37</sup>

#### **4-Ownership of Copyright, its Duration and its Limitations**

Part III of the 1996 Act, deals with three issues of copyright: ownership, duration and limitation.

##### **(i) Ownership of Copyright**

Initial ownership is under section 9 of the 1996 Act vested in the natural person or persons who created the work. This is a clear reference to the author. Section 2, which so defines the author, adds the words "and under whose name the work has been published by any means known or to be invented in the future unless there is proof to the contrary".<sup>38</sup>

The presumption that the person whose name appears on the work is the owner is clearly inapplicable to anonymous or pseudonymous work. In each the publisher is, in the words of section 10, presumed to be the owner of the economic rights. The Act is silent on who is the owner of moral rights in anonymous or pseudonymous works. Ownership of copyright in a work of a single kind created by two or more persons depends on whether their contributions are indistinguishable or distinguishable. Section 11 gives copyright in the former jointly to the joint authors and in the latter, each contributing author acquires copyright in his respective contribution. The rules are stated correctly. The problem really is one of terminology. Both rules are discussed under the title "Joint Work". It is submitted that a work of a single kind in which the contributions of different authors are distinguishable should be called a collective work. Cinematographic and analogue works are singled out for separate treatment, apparently for economic reasons. Section 12 distinguishes between moral and economic rights.<sup>39</sup>

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37. id. at 6

38 Dr. A kolda M.Tier Professor of Intellectual Law Lecture prepared by him on "Wipo National Seminar on Copyright and Neighbouring rights- Khartoum March 1998.

39 Sudanese Copyright and Neighbouring Right Protection Act 1996,. Article 12

The former belong jointly to the creators of such works: namely the director, the author of the scenario, the author of the musical work and of artistic work specially created for such work. The latter belong to the maker or producer who, prior to the making of a work, is obliged to conclude contracts in writing with all persons whose works are to be used in the making of the audiovisual work. The economic rights are considered transferred to the maker or producer, unless stated otherwise in the contract. The author of a musical work retains, however, the right to authorize its public performance, broadcasting and communication to the public.<sup>38</sup> According to section 3 of 1996 Act, the author is defined as any physical person who created the work and under whose name the work has been published by any means known or to be invented in future unless there is proof to the contrary. Section 9 provides that the moral and economic rights shall be vested in the person or persons who created the work. Under section 10 the publisher is deemed to be the owner of the economic rights in works which are published anonymously or pseudonymously. According to section 35 the owner of copyright or his agent has the right of litigation.

Article 15 of the Berne Convention provides for a number of presumptions of ownership directed at entitling certain persons to institute infringement proceedings. Section 10 of the Copyright Act provides that where a work does not carry the name of an author or carries an unknown pseudonym or is published anonymously, the publisher shall be deemed to be the owner of economic rights of the author for the purposes of exercising rights until the author reveals his identity. As presently worded, Section 10 does not cater to all the situations that are addressed in Article 15 of the Berne Convention. The present law shall hence be amended in order to bring it in line with the requirements of Article 15.<sup>40</sup>

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40. Working Party on the Accession of Sudan, *supra* note 32, at 47

**(ii) Duration:**

Copyright protection has varied. Two factors account for this variation. First, a small percentage of copyright works have commercial and cultural value after 15 or 20 years of their creation. Second, modern technologies in the communication of ideas allow the copyright owners to recoup worldwide within a short period of time. Section 13 of 1996 Act provides for three periods<sup>41</sup>

- a) The life of the author for moral right;
- b) The life of the author and 50 years after his death in the case of economic rights;
- c) 25 years from the date of publication in the case of photographs, cinema films and other audiovisual works, anonymous, pseudonymous and posthumous works.

Section 13(2) provides that the term of protection of 50 years shall be computed from the day of the death of the author. Article 13.3 (a) (b)& (c) of 1996 Act provides that cinematographic works anonymous and pseudonymous works shall be protected for the period of 25 years computed from the date of publication of such works. The new Copyright and Neighbouring Right Law should rectify the situation in compliance with both Article 7 of the Berne Convention and Article 12 of the TRIPS Agreement, Article 12 of the Berne Convention provides a term of protection of 50 years from the death of the author (Berne Article 7.1 and TRIPS 9.1) or, for works the term of which is not measured by the life of the author, a term of 50 years from the end of the calendar year of authorized publication, or, if not published within the fifty years from making, 50 years from the end of the calendar year of making.<sup>42</sup> According to the general rule contained in Article 7(1) of the Berne Convention as incorporated into the TRIPS Agreement, the term of protection shall be the life of the author and 50

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41. Dr. A kolda M.Tier supra note 38,page 11

42. The Berne Convention 1886, Article 12

years after his death.

Paragraphs 2 through 4 of that Article specifically allow shorter terms in certain cases. These provisions are supplemented by Article 12 of the TRIPS Agreement, which provides that whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making<sup>43</sup> Article 7 of the Berne Convention authorizes special terms for cinematographic works, anonymous works or pseudonymous works and photographic works. Article 7(5) also establishes a rule that the term of protection shall be deemed to begin from the first of January of the year following the death or other events referred to in Article 7(2), (3) and (4).

Similarly, Section 13(2) of the Copyright Act provides that the term of protection for economic rights is 50 years following the death of the author. However, Section 13(3) limits the term of protection to 25 years, starting from the date of first publication, for the following works: a) Photographs, cinematographic and audiovisual works; b) Works published for the first time after the death of the author; and anonymous or pseudonymous works. Article 12 of the TRIPS Agreement may be appropriate rather than Article 4 since the first concerns the term of protection, whereas the latter is on the most-Favoured-Nation treatment. Article 12 of the TRIPS Agreement as far as photographic works are concerned, the term of protection remains the same as the one provided for in the Berne Convention, i.e. 25 years from the making of the work.

Article 12 of the TRIPS Agreement maintains the lower term of protection which exists in the Berne Convention on works of applied art and photographic works as it excluded such works from the general rule

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43. Dr. A kolda M.Tier, *supra* note 38 at16

providing for a term of protection of no less than the life of the author plus fifty years after his death . In the light of this section 13 (3) of the Copyright Act of 1996 grants protection of 25 years to photographic works starting from the date of first publication . This term exceeds the minimum term required under the TRIPS Agreement and the Berne Convention, as the publication of the photographic work takes place necessarily after its making. Therefore, we feel that this provision on the term of protection of photographic works is not inconsistent with the TRIPS provision. The term of protection provided to cinematographic and pseudonymous works in the Copyright Act of 1996 is not fully consistent with Article 12 of the TRIPS Agreement. Section 13 (2) of the Copyright Act provides that the term of protection for economic rights is 50 years following the death of the author. But Section 13(3) limits the term of protection to 25 years, starting from the date of the publication, for the following works: (a) photographs, cinematographic and audiovisual works; (b) works published for the first time after the death of the author ;(c) anonymous or pseudonymous works. Furthermore, the current law does not contain any provision equivalent to Article 7(5) of the Berne Convention.<sup>44</sup>

Therefore, the Copyright Act should be amended in order to ensure the minimum duration of protection provided for in Article 7(2) and (3) of the Berne Convention with relation to cinematographic works, anonymous or pseudonymous, and the future law shall incorporate the substance of Article 7(5) of the Berne Convention related to the calculation of the term of protection. No protection of compilation of data or other materials is provided in Sudan's copyright law. Section 13 (3) (a) of the above law does not violate Article 12 of the TRIPS Agreement. But its Section 13(3) (B) (C) differs from Art. 12 of the Agreement in that

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44. Working Party on the Accession of Sudan" Implementation of the WTO Agreement on Trade-related Aspects of Intellectual Property Rights" TRIPS"WT/ACC/SDN/15 (2004) page 45

it gives 25 years protection unlike the Agreement, which gives 50 years protection. Article 7bis of the Berne Convention, provides a special rule concerning the term of protection for works of joint authorship. Accordingly

Section 13(4) of the Copyright Act determines that for works of joint authorship, the term starts running from the date of the death of the last surviving author. In the case of joint works, the termination date of the copyright is 50 years after the death of the last surviving author.

### **(iii) Limitations on Copyright**

Section 14 of 1996 Act restricts the exclusive right of a copyright owner by allowing the use of copyright work without it being necessary to obtain the consent of the owner or pay remuneration. Some restrictions are justified by the purpose of the activity, including education, interest in public affairs or official and non-commercial use; others depend on the proportion of the material used to the whole work.<sup>45</sup> Thus, despite the expression “exclusive right of copyright owner” the rights of users of copyright are also accommodated. Section 14 of 1996 Act discusses the classes of users and their rights. These include the media, official musical bands, educational books, personal and private use, libraries and archive services, educational institutions, private commercial institutions, judicial proceedings, broadcasting organizations, persons who acquire computer programs or data banks. Section 14 limits or restricts the author's exclusive rights. These restrictions are based on educational or non-commercial purposes and if the material used is small in proportion to the whole work. Article 13 of the TRIPS Agreement confines limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the right holder's legitimate interests.<sup>46</sup>

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45. Dr. A kolda M.Tier, supra note 38, at 17

46. World Trade Organization [A more Detailed Overview of the TRIPS Agreement,3 \(2004\)](#)

The provisions of the Berne Convention incorporated into the TRIPS Agreement allow members to provide limitations and exceptions to the exclusive rights of authors in respect of particular acts of exception. In addition, Article 13 of the TRIPS Agreement contains a general clause on exceptions and limitations. The limitations that Members can provide pursuant to the the Berne Convention that have been incorporated into the TRIPS Agreement are of two types: (a) Free uses (that is, uses of protected works without the obligation to ask for authorization and to pay any remuneration); and (b) Non –voluntary licenses (allowing uses of protected works without an authorization but with the obligation to pay remuneration to right holders). Free uses are only allowed for some specified purposes, subject to certain condition. Examples of such uses include quotations, illustrations for teaching purposes, and reporting of current events. Articles 10 and 10 bis of the Berne Convention define certain authorized " free uses of works" <sup>46</sup> Pursuant to Article 9 (2) of the Berne Convention, countries may provide limitation to reproduction right in certain special cases; provided that such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. In addition to the limitations explicitly mentioned in the text of the Convention, there was express agreement at various revision conferences to allow countries to provide "minor exceptions" to the right of public performance.<sup>47</sup>

Article 13 of the TRIPS Agreement, titled" limitations and exceptions", is a clause governing limitations and exceptions generally. It sets out the so-called "three-step test". It permits limitations or exceptions to the exclusive rights only if three conditions are met : (1) the limitation or exceptions are confined to certain special cases; (2) they do not conflict with a normal exploitation of the work; and (3) they do not unreasonably prejudice the legitimate interest of the right holder.<sup>48</sup>

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47. id at 1

48. Working Party on the Accession of Sudan" Implementation of the WTO Agreement on Trade-related Aspects of Intellectual Property Rights" TRIPS"WT/ACC/SDN/11 (2004) page 45

The new Copyright and Neighbouring Right Law will provide for granting compulsory licensing for research and educational purposes in accordance with the Appendix of Berne Convention for the developing countries.<sup>49</sup>

Article 10 of the Berne Convention provides for certain free uses of works, by way of quotations, or by way of illustrations for teaching, provided certain conditions are met. Also, Article 10bis of the Bern Convention provides for certain free uses of works for the benefit of the press or the broadcasters, and it also allows certain free uses of works for the purpose of news reporting.<sup>50</sup> Section 14(6) of the Copyright Act authorizes educational institutions to reproduce short works, articles or a short part of a published work as well as to incorporate them in the school broadcasts or sound recordings for the non-commercial purpose of illustration in the teaching process. In addition, Section 14(1) of the Copyright Act specifies that newspapers, magazines, periodicals, radio and television may: (a).publish a quotation or a summary from a work for the purposes of analysis, study, culture or information; (b). reproduce essays or lectures or speeches concerning political, economic, scientific, religious or social discussions that were the focus of public opinion at the time such discussions were made; and (c). publish or communicate any photograph taken on the occasion of a public event or a photograph concerning an official or famous person; in all such cases referred to in (a), (b) and (c), the title of the work reproduced and the name of its author shall be mentioned.

### **5- Transfer of Copyright**

The 1996 Act sections 15-21 deal with transfer of copyright. Two Situations of transfer must be distinguished: in the life time of the author and upon his death. Section 15 (2) of the 1996 Act provides that: the author may transfer to any person all or any of his moral and economic rights, provided that such transfer shall not be valid unless it is made in

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49 Victor Nabhan, supra note ,13 at 15

50. id to 16

writing and signed by the owner of the rights or his agent and is registered in the Registrar's Office; such transfer shall contain expressly and with all the necessary details the right transferred, the period and place of its exploitation, the amount of the author's remuneration and such other conditions as may be necessary for the better execution of copyright ownership. According to Berne Convention a copyright, or aspects of it, may be assigned or transferred from one party to another.

Moral rights generally include the right of paternity and the right of integrity.<sup>51</sup> The right of paternity means the right to have one's name associated as the author of a work, The right of integrity means the right to make sure that the work maintains its artistic integrity and thus is not changed in a way which maligns the work or its author. Other moral rights exist in one degree or another in various countries, which include the right to determine the first publication of a work, and in limited circumstances, accompanied by compensation to the exploiting party, the right to have a work removed from circulation. Moral rights are required in Article 6 bis of the Berne Convention. The moral rights are said to extend even after the transfer of copyright during the author's lifetime and exercisable after death during the term of copyright.

## **6- Registration of Works**

The 1996 Act deals with the establishment of a Registrar's Office where a register of works and contracts is kept. It also deals with the procedure for the registration. Registration is under section 23 optional for a work but obligatory for a contract. Section 24 lays down the procedure for application for registration of a work or contract.<sup>52</sup> Under 1996 Act registration of a work is optional, but registration of contract is compulsory, in every case the application must submit.

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51. Dr. Akolda M. Tier, *supra* note 1, at 167

52. *id* to 17

It can be said that under section 23 of the 1996 Act the formalities of registration are optional; this brings the Copyright Law of Sudan in line with the Berne Convention of 1886.

Of course, registration of contract is still required. The basic aim under Berne Convention is to provide an effective and uniform protection of the rights of authors. For that purpose, the Convention relies on some basic principles. These are essentially the same general principles that were mentioned above. In the context of the Berne Convention, one of the principles is an automatic protection.<sup>53</sup> This means that such national treatment shall not be depending on any formality, such as registration or deposit or special marking of copies of the works. The enjoyment and exercise of the rights in a protected work in a certain country is independent of the existence or non-existence of protection in the country of origin or in any other country. On the other hand, registers may well be kept for other purposes, as is the case with Sudan, but the protection must not depend on whether such a recording has been made or not. A copyright, or aspects of it, may be assigned or transferred from one party to another.<sup>54</sup> The Berne Convention member countries provide for copyright protection without stipulating the observance of any formalities. Some countries, however, require a copyright notice on published works. This notice is necessary on published works under the Universal Copyright Convention. Additionally, a deposit of all or portions of the work and/or registration is required by some jurisdictions in order to secure protection or prior to bringing a lawsuit for copyright infringement. As mentioned before as regards to formality, Section 5(1) of the Copyright Act specifies that the protection prescribed in the Act shall apply "without fulfillment of any formality". Copyright protection accrues thus from the creation of the work. It should be noted that the law provides, in Section 23, the

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53. World Trade Organization from Wikipedia, supra note 15, at 5

54. .id at 2

possibility of registration of works. However, such formality is purely optional and should not be considered to be a prerequisite for the protection of works. As specified in Section 23(1), the legal effect of the registration is to serve as a prima facie proof of creation and authorship of the work in case of conflict. Section 23(2) of the Copyright Act requires registration of contracts of assignment. Its compatibility with Article 5(2) of the Berne Convention is questionable and so this provision is currently under review and that the registration requirement of assignment contracts will be made optional in its future law.<sup>55</sup>

## **7. Infringement and Remedies**

Copyrights and Neighbouring Rights Protection Act 1996 envisages civil and criminal procedures against the infringement of copyrights. The 1996 Act in Part VII focuses on copyright infringement and remedies. The issues may be formulated as follows. Sections 34 and 35 of the 1996 Act proclaim infringement of copyright as a crime and civil wrong respectively.<sup>56</sup> The offence of copyright infringement requires both an infringing act and the intention to infringe. The infringing act may take two forms: either the offender performs any of the rights comprised in copyright without the consent of the owner or he deals in infringing copies, including selling, hiring, importing for commercial purpose and exporting. It must be proved that the offender performed the infringing act knowingly or in the case of dealing with the infringing copies, he must know that it is an infringing work. Once intention and infringing act are established, the offender has committed both a crime under section 34 and a civil wrong under section 35. Section 35 provides that there is civil liability for unintentional infringement, i.e. the doing of an infringing act. Civil remedies for infringement, whether intentional or not, are stated<sup>57</sup> in section 35 as comprising action for damages; injunction;

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55. Working Party on the Accession of Sudan supra note 32, at 65

56. . Dr. Akolda M. Tier , supra note 1, at 164

57. Dr. A kolda M.Tier supra note 38, at 21-22

attachment; rendering an account, and an ex parte order for inspection, popularly known as the Anton Pillior Action, the name of the English case in which this remedy was laid down in 1976. In civil infringement cases, however, the element of knowledge by the defendant is not required. The defendant would be considered as having violated the Copyright Act by the mere fact that he or she has done an act without permission of the copyright owner, and provided that he or she cannot invoke any other means of defense afforded by the law. In addition, Article 35 (1) according to which damages are also available for unintentional infringement clarifies that the plaintiff is not required to furnish proof of intended violations of rights conferred by the copyright Act. According to Section 35(1) and (2), damages may be claimed, and injunctions applied for, in case of willful or unintentional infringement. The entitlement to financial compensation shall include loss of earnings and prejudice to the reputation of the right holder (Section 38). Under Section 35(2), injunctions are also available for "calculation of the revenue resulting from infringing acts and depositing such revenue in treasury of the court, or any other injunction the right holder considers necessary to protect his rights until the case is finally decided."

Furthermore, under Section 35(3), the right holder may apply to the court to obtain an order allowing him to inspect an alleged infringer's premises and to seize any material related to the alleged infringement and requiring the alleged infringer to disclose the names and addresses of his suppliers and customers and the premises where the alleged infringing materials are stored. The criminal penalties are listed in section 36 of the 1996 Act as comprising a fine or imprisonment or both; confiscation of infringing copies and either destroying them or handing them to the owner of infringed work and the publication of the courts judgment in one or more newspapers at the expense of the infringer.<sup>58</sup> Sections 36 (2) (a) and 37 provide that the court may order confiscation or destruction of all copies which are the result of copyright infringement.

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58. Mr. Henry Olsson, *supra* note 6, at 15

According to section 34 (b) imported copies without the permission of the right's owner constitute a copyright infringement. Under the Berne Convention for the Protection of Literary and Artistic Works (Paris Text 1971) infringing copies of a work shall be liable to seizure in any country of the Union (1) where the work enjoys legal protection.

(2) The provisions of the preceding paragraph shall also apply to reproductions coming from a country where the work is not protected, or has ceased to be protected. (3) The seizure shall take place in accordance with the legislation of each country. Article 16 requires that infringing copies of a work be subject to seizure whether domestically produced or imported.

## **8. Conclusion**

Sudan Copyright and Neighboring Rights Protection Act 1996 needs some changes in order to comply with WTO Agreement 1994. This chapter has reflected on and examined the areas which need some changes in order to comply with the WTO Agreement 1994, starting from Section 4 until Section 36.

On bases of protection, the Sudanese Copyright Law does not adequately protect foreign authors in full conformity with the criteria spelled out in the Berne Convention, in its Article 3. The new law should protect foreign authors by the mere fact that they are nationals of a member country as well as works of foreign authors that are either first published in the Sudan or simultaneously published in the Sudan and in a WTO member country or territory. Also, regarding Article 1.3 of the TRIPS Agreement, the future Sudanese Copyright Law should extend the benefit of the protection to foreign nationals of countries that are Members of the WTO as well as to works first published in WTO country. It should be pointed out also that in view of Article 1.3 of the TRIPS Agreement, the future Sudanese Copyright Law should also extend its protection to cinematographic works the maker of which has a headquarter or habitual residence in a WTO Member and to works of

architecture or artistic works incorporated into a building or structure in a WTO Member.

On the scope of copyright protection, Part II of the 1996 Act deals with three related issues: protected works, unprotected works and the rights conferred by copyright. Section 5 (1) provides for the protection of the authors of any original intellectual work without fulfillment of any formalities. Section 23 (1) makes registration of works optional. Referring to Section 4 above, non- Sudanese enjoy the same treatment as Sudanese nationals. The Berne Convention requires that authors enjoy the rights required by Berne Convention and any other rights. A country protects works on a national treatment basis without being subject to any formalities. Copyright under the Berne Convention must be automatic; it is prohibited to require formal registration. There are two criteria of protection: permanent form and originality. Criteria of permanent form is not expressly mentioned in Sudan Copyright legislation but it is implied in the list of protected works, the subject matter of which requires that the expression of an idea be in writing or otherwise fixed in some tangible form.. Under Berne Convention and TRIPS the work is protected even if it is not fixed in some tangible form. e.g. orally and speech.

Article 18 of the Berne Convention requires the copyright protection to be applied to all works which, at the moment Berne becomes effective, have not fallen into the public domain in the country of origin through the expiry of the term of protection. This Article is not included in the Sudanese Copyright and Neighbouring Rights Protection 1996 Act i.e. currently the Sudanese Copyright Law does not provide for transitory measures as required by article 18 of the Berne Convention, The obligation to provide for transitory measures is also required in the TRIPS Agreement, Article 70 par. 2. Section 8 of the Act protects the moral right to disclose the work, the moral right to withdraw the work and the general right of distribution which includes dissemination of the work by way of sale or commercial rental. Article 9 of the Berne Convention requires that authors be given the exclusive right to authorize

reproduction of the work in any manner or form with only limited exceptions that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. Article 12 of the Berne Convention requires that authors of literary or artistic works have the exclusive right to authorize adaptations, arrangements and other alterations of their works. Article 13 of the Berne Convention authorizes countries to impose reservations and conditions on the exclusive rights granted to authors of musical works or written works that are recorded. There is no equivalent in the Sudanese Copyright Law to Article 13 of the Berne Convention that the Sudanese legislation provides for more than the minimum rights that are required under the Berne Convention. Article 14 of the Berne Convention requires that authors of literary and artistic works have the exclusive right to authorize the cinematographic adaptation, public performance and communication to the public of the adaptation, without the limitations authorized under Article 13 (1) the moral rights are inalienable, perpetual and inviolable. They pass to the author's heirs or executor on the author's death, but may not be otherwise transferred or sold under any circumstances, by either the author or his legal successors. Any agreement to waive an author's moral rights is null and void, although the author cannot be forced to protect his work.

Under 1996 Act the duration of moral rights is confusing. Article 14 ter requires "droit de suite" in connection with subsequent sales works of art and manuscripts. The Copyright and Neighbouring Rights Protection Act 1996 does not provide for the "droit de suite". Amendment of the Copyright and Neighbouring Rights Law will provide for this right. The Sudan is not bound to provide for the droit de suite in its future legislation, and if it does so, it has the choice to limit its application to the Sudanese nationals and to foreign nationals of countries that protect the Sudanese authors i.e. droit de suite is not among the minimum obligatory rights that have to be granted by country which is a Member of the Berne Convention, if and when introduced in the legislation of a Member

country, it could be subject to reciprocity. I prefer that the droit de suite be provided for in future Sudanese law.

On ownership of copyright, the presumption that the person whose name appears on the work is the owner is clearly inapplicable to anonymous or pseudonymous work. In each the publisher is, in the words of Section 10 of 1996 Act presumed to be the owner of the economic rights. The Act is silent on who is the owner of moral rights in anonymous or pseudonymous works. Ownership of copyright in a joint work belongs jointly to the joint authors but in a collective work each contributing author acquires copyright in his respective contribution. In Cinematographic and analogues works moral rights belong jointly to the creators of such works: namely the director, the author of the scenario, the author of the musical work and of artistic work specially created for such work. But economic rights belong to the maker or producer who, prior to the making of a work, is obliged to conclude contracts in writing with all persons whose works are to be used in the making of the audiovisual work. The economic rights are considered transferred to the maker or producer, unless stated otherwise in the contract. The author of a musical work retains, however, the right to authorize its public performance, broadcasting and communication to the public. According to Section 35, the owner of copyright or his agent has the right of litigation. Article 15 under the Berne Convention requires that ownership of a work, for purposes of litigation, be presumed to be that which appears on the work in the usual manner.

As regards duration of copyright Article 12 of the Berne Convention provides a term of protection of 50 years from the death of the author (Berne Article 7.1 and TRIPS 9.1) or, for works the term of which is not measured by the life of the author, a term of 50 years from the end of the calendar year of authorized publication, or, if not published within the 50 years from making, 50 years from the end of the calendar year of making. According to the general rule contained in Article 7(1) of the Berne Convention as incorporated into the TRIPS Agreement, the

term of protection shall be the life of the author and 50 years after his death. Article 13.3 (a) (b) (c) provides that cinematographic works anonymous and pseudonymous works shall be protected for the period of 25 years computed from the date of publication of such works. The new Copyright and Neighbouring Right Law will rectify the situation in compliance with both Article 7 of the Berne Convention and Article 12 of the TRIPS Agreement, These provisions are supplemented by Article 12 of the TRIPS Agreement, which provides that whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making. In the case of joint works, the termination date of the copyright is 50 years after the death of the last surviving author. In the case of limitations on copyright, Section 14 of the 1996 Act limits or restricts the author's exclusive rights. These restrictions are based on educational or non- commercial purposes and if the material used is small in proportion to the whole work. Article 13 of the TRIPS Agreement confines limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the right holder's legitimate interests. The provisions of the Berne Convention incorporated into the TRIPS Agreement allow members to provide limitations and exceptions to the exclusive rights of authors in respect of particular acts of exception. In addition, Article 13 of the TRIPS Agreement contains a general clause on exceptions and limitations.

On the transfer of copyright: Section 15 (2) of the 1996 Act provides that: the author may transfer to any person all or any of his moral and economic rights, while under the Berne Convention Article 6 bis, moral rights are said to extend even after the transfer of copyright

during the author's lifetime and exercisable after death during the term of copyright.

On the registration of works it is optional under 1996 Act, but registration of contract is compulsory. This brings the copyright law of Sudan in line with the Berne Convention of 1886.

On the infringement and remedies Sections 36 (2) (a) and 37 of the 1996 Act provide that the court may order confiscation or destruction of all copies which are the result of copyright infringement. According to Section 34 (b) imported copies without the permission of the rights' owner constitute a copyright infringement. Article 16 of the Berne Convention requires that infringing copies of a work be subject to seizure whether domestically produced or imported.

## **CHAPTER TWO**

### **Neighbouring Rights**

Neighbouring Rights in Sudan are governed by the Copyright and Neighbouring Rights Protection Act 1996. This chapter deals with the legal protection under this Act, and compares it with the TRIPS 1994.

#### **1. Types of Neighbouring Rights**

There is no single definition of Neighbouring Rights, as the term varies widely in scope from one country to another. Neighbouring rights are, in the words of section 3 of the 1996 Act, the "rights of performers, phonogram producers and broadcasting organizations". These rights are covered and are internationally protected by the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961<sup>1</sup> and are also protected by the TRIPS Agreement 1994. However, the Rome Convention is not incorporated into the TRIPS Agreement and is not a part of Berne Convention. This is the reason why it is not included in this Chapter.

##### **(i) Rights of Performers:**

The rights of performers are both moral and economic. Section 26 of 1996 Act embodies two typical moral rights of performers: the right to be named each time their performances are used and the right to object to any distortion, mutilation or other derogatory action. The economic rights are, under Sections 26 and 27, the right to authorize their performance by wire or other material carrier; the fixation of their unfixed performance and the reproduction or fixation of a

performance in any of the following ways:<sup>2</sup>

- a) the performance was initially fixed without the consent of the performer;
- b) the reproduction is made for purposes other than those for which the performers gave their authorization;
- c) the performance was initially fixed in accordance with the provisions of Section 33, but remuneration is paid for different purposes:
- d) The performance is by broadcast but the communication to the public is on the basis of its fixation.
- e) Section 33 deals with free uses of performances: sound, audiovisual recordings or broadcasts.

The rights of performers are provided for in section 26 and they include fixation of unfixed performance, first broadcasting and re-broadcasting and communication to the public of their performances.

Section 28 specifies that the performers and producers of sound and audiovisual recordings shall be paid an equitable remuneration. The Copyright Act does not provide more clarification as to the kind of use of recordings for which equitable remuneration is due. Sections 26 -28 should be amended, in particular for the purpose of clarifying the economic rights of performers.<sup>3</sup>

It is not clear whether the performers rights are indeed provided for; it would seem that the only rights that Article 26 of the Sudanese Law provides for at present are the right to broadcast unfixed performances in public and the right to fix such performance by any means.

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2. Akolda M. Tier The Sudanese Copyright and Neighbouring Rights Protection Act 1996: An Evaluation , 32 "Copyright Bulletin",43 (UNESCO ,1998 )

3. Working Party on the Accession of Sudan WT/ACC/SDN/14 (2004) page 16

The authorization is, under Section 39, given by the head of a group or other representative in the case of a group of performers, it must be in writing and signed by the parties concerned. Section 28 requires the payment of "equitable remuneration" to the performers.<sup>4</sup>

Under the TRIPS Agreement the provisions on protection of performers, producers of phonograms and broadcasting organizations are included in Article 14. According to Article 14.1, performers shall have the possibility of preventing the unauthorized fixation of their performance on a phonogram (e.g. the recording of a live musical performance). The fixation right covers only aural, not audiovisual fixations. Performers must also be in position to prevent the reproduction of such fixations. They shall also have the possibility of preventing the unauthorized broadcasting by wireless means and the communication to the public of their live performance.<sup>5</sup>

**(ii) Rights of the Producers of Sound and Audiovisual Recordings:**

The producers of sound and audiovisual recordings are, under section 31, granted the right to authorize other persons to directly and indirectly reproduce the recordings; to import the recordings for the purpose of distribution; and to distribute their recordings to the public.

In return for authorization a producer is paid "equitable remuneration"

Sound recording is defined in Section 2 as "any exclusively aural fixation of sounds of a performance or other sounds in a material carrier such as tape, disc, etc."<sup>6</sup>

Section 31 does not provide specifically for a commercial rental right, although one may claim that the right of distribution as mentioned in

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4. Id at 3

5. WTO, A More Detailed Overview of The TRIPS Agreement (2005) page 1

6. Akolda M. Tier supra note 2, at 5

Article 8 (2) (a) includes all commercial operations of rental.<sup>8</sup>

Section 31(2) grants producers of sound recordings a right to equitable remuneration. The same right has also been spelled out in Section 28 of the Act. The Act is mute upon the issue of scope and conditions of application of such right.<sup>9</sup>

The rights of phonograms producers are mentioned in section 31, and they include their rights to authorize others to reproduce their phonograms directly or indirectly, to import their phonograms for the purpose of distribution and to distribute their phonograms to the public. In return for authorization, a producer is paid "equitable remuneration".

At present, the Sudanese Law does not specifically provide for rental rights. The forthcoming law will provide for that.<sup>10</sup>

Under the TRIPS Agreement, the provisions on protection of performers, producers of phonograms and broadcasting organizations are included in Article 14. Article 14.2, Members have to grant producers of phonograms an exclusive reproduction right. In addition to this, they have to grant, in accordance with Article 14.4, an exclusive rental right at least to producers of phonograms. The provisions on rental rights apply also to any other right holders in phonograms as determined in national law. This right has the same scope as the rental right in respect of computer programs. Therefore it is not subject to the impairment test as in respect of cinematographic works. However, it is limited by a so-called grand-fathering clause, according to which a Member, which on 15 April 1994,

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8. Id at 50

9. Working Party on the Accession of Sudan *supra* note 3, at 49

10. Working Party on the Accession of Sudan WT/ACC/SDN/11(2004) page 16

i.e. the date of the signature of the Marrakesh Agreement, had in force a system of equitable remuneration of right holders in respect of the rental of phonograms, may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders.<sup>11</sup>

Article 14.2 of the TRIPS Agreement provides that producers of phonograms are to enjoy the rights to authorize or prohibit the direct or indirect reproduction of their phonograms. Article 14.2 requires that producers of phonograms are to have the right to authorize or prohibit the commercial rental to the public of originals or copies of their phonograms. The term "phonogram" is used to refer to any sound recording composed exclusively of a sound recording, although some national laws protect film soundtracks with the same measures to the extent that they are not also protected by other rights. The producer of phonograms (the person who makes the recording rather than the person who performs) has the right to prevent the direct or indirect reproduction of the recording:

**(iii) Rights of the Broadcasting Organizations:**

The broadcasting organization has, under Section 32, the right to authorize the rebroadcast of its broadcast; the fixation of its broadcast; and the reproduction of a fixation of each broadcast where the fixation from which the reproduction is made was effected without its authorization or was effected in accordance with Section 33 of the Act (on free use of, inter alia, broadcast) but the reproduction is made for different purposes.<sup>12</sup>

Under the TRIPS Agreement 1994 the provisions on protection of

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11. WTO, supra note 5, to 2

12. Akolda M. Tier, supra note 2, at 5

performers, producers of phonograms and broadcasting organizations are included in Article 14. Broadcasting organizations shall have, in accordance with Article 14.3, the right to prohibit the unauthorized fixation, the reproduction of fixations, and the rebroadcast by wireless means of broadcasts, as well as the communication to the public of their television broadcasts. However, it is not necessary to grant such rights to broadcasting organizations, if owners of copyright in the subject-matter of broadcasts are provided with the possibility of preventing these acts, subject to the provisions of the Berne Convention.<sup>13</sup>

The current Sudanese Copyright Law does not in any way refer to the protection of authors, performers, phonogram producers or broadcasting organizations on the basis of their personal or territorial link to member country of the WTO. In view of Article 1.3 of the TRIPS Agreement, which read : "Members shall accord the treatment provided for in this Agreement to the nationals of other Members. In respect of the relevant intellectual property rights, the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971) the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits, were all Members of the WTO members of those conventions. Any Member availing itself of the possibilities provided in paragraph 3 of Article 5 or paragraph 2 of Article 6 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for Trade-Related Aspects of Intellectual Property Rights" (the "Council for TRIPS"). This situation ought to be rectified in the new Sudanese

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13. WTO, *supra* note 5, at 2

Copyright Act.<sup>14</sup>

Article 14.6 of the TRIPS Agreement provides that any Member may, in relation to the protection of performers, producers of phonograms and broadcasting organizations, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention.<sup>15</sup>

## **2- Duration and Limitations**

The 1996 Act specifies limitations on Neighbouring Rights by dispensing with the need to seek and obtain authorization from the performers in cases specified in section 33, namely: personal and private use; the reporting of current events; and the use for teaching and scientific research.<sup>16</sup>

Under Section 39, the term of protection of Neighbouring Rights is 50 years computed from the first of January of the year following the year in which the performance took place in the case of performances.

The rights of performers are provided for in section 26 and they include fixation of unfixed performance, first broadcasting and re-broadcasting, and communication to the public of their performances.<sup>17</sup>

Article 14.5 of the TRIPS Agreement 1994 set a minimum term for the protection of performers' rights of 50 years. TRIPS provide performers with the right for 50 years from the date of performance to prevent unauthorized fixation of their unfixed performances and of productions of

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14. Victor Nabhan Consultant Bureau WIPO World Intellectual Property Organization Comments on Questions concerning Intellectual Property (2003) page 5

15 WTO, supra note 5 at 2

16. Akolda M. Tier, supra note 2, at 5

17. Id at 50

such fixations and to prevent the unauthorized broadcast by wireless means and communication to the public of their live performances, Article 14.1 and 5.<sup>18</sup>

Under Section 39 of 1996 Act, the term of protection of Neighbouring Rights is 50 years computed from the first of the January of the year following the year in which the fixation was made in the case of sound and audiovisual recording.

Section 39(2) provides for protection of phonogram producers rights for a term of 50 years from the first of January of the year following the year in which the recording took place.<sup>19</sup>

The TRIPS Agreement Art. 14.5 sets a minimum term of protection of producers' rights of 50 years from the end of the year in which the phonogram was first published or in which the recording was made. TRIPS provide phonogram producers with the right for 50 years from the date of first authorized fixation to prohibit unauthorized reproduction of their phonograms, directly or indirectly, and to prohibit rental or copies of their phonograms once sold or otherwise distributed Article 14.2,.4,and 5<sup>20</sup>

Under Section 39 of 1996 Act, the term of protection of Neighbouring rights is 50 years computed from the first of the January of the year following the year in which the broadcast took place in respect of broadcasting organizations.<sup>21</sup>

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18. Working Party on the Accession of Sudan, supra not 10, at 16

19. Working Party on the Accession of Sudan, supra note3, at 49

<sup>20.</sup> Working Party on the Accession of Sudan, supra note 10, at 16

<sup>21.</sup> Akolda M. Tier, supra note 2, at 51

According to Section 39 (3) broadcasting organizations enjoy their rights for a term of 50 years starting from the first of January of the year following the year in which the broadcast took place. The rights of the broadcasting organizations, mentioned in Section 32, include their rights to authorize re-broadcasting of their broadcast, fixation of their broadcast, reproduction of fixation of their broadcast.<sup>22</sup>

TRIPS provide broadcasting organizations with the exclusive rights for 20 years of fixation, reproduction of fixations and re-broadcasting by the wireless means of their broadcast and the communication to the public of the broadcasts of their broadcasts or provide to the owners of the copyright in the material broadcast the possibility of exercising such rights. (Article 14.3 and 5).<sup>23</sup>

As mentioned above, the limitations on neighbouring rights according to section 33 of the 1996 Act are:

- a. Personal and private use
- b. The reporting of current events .....etc
- c. The use of teaching and research
- d. Any other limitation applicable to copyright

Article 10 of the Berne Convention provides for certain free uses of works, by way of quotations, or by way of illustrations for teaching, provided certain conditions are met. Also, Article 10bis of the Berne Convention provides for certain free uses of works for the benefit of the press or the broadcasters, and it also allows certain free uses of works for the purpose of news reporting. Section 14 (6) of the 1996 Copyright Act authorizes educational institutions to reproduce short works, articles or a short part of a published work as well as to incorporate them in the school

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22. World Trade Organization from Wikipedia, supra note 1 at 3

23. Victor Nabhan, supra note 14, at 6

broadcasts or sound recordings for the non-commercial purpose of

illustration in the teaching process. In addition, Section 14 (1) of the Copyright Act specifies that newspapers, magazines, periodicals, radio and television may:

- (a) Publish a quotation or a summary from a work for the purposes of analysis, study, culture or information;
- (b) Reproduce essays or lectures or speeches concerning political, economic, scientific, religious or social discussions that were the focus of public opinion at the time such discussions were made; and
- (c) Publish or communicate any photograph taken on the occasion of a public event or a photograph concerning an official or famous person.

In all such cases referred to in (a), (b) and (c), the title of the work reproduced and the name of its author shall be mentioned.<sup>24</sup>

Articles 11, 11bis and 11ter of the Berne Convention provide for authors of literary and artistic works the exclusive right of authorizing the rights of public performance, broadcasting, communication and recitation to the public. Article 11ter (3) also allows for an "ephemeral recordings" exception under certain conditions.

Thus, Section 8 of the Copyright Act grants authors, inter alia, the rights to authorize the following acts: public performances of the work (Section 8 (b)); broadcasting of the work, including through the communication and direct broadcasting satellites (Section 8 (c) and communication of the work to the public by wire including cable, optical fiber and other material carriers (Section 8 (d).

Furthermore, Section 14 (9) of the Copyright Act provides for an "ephemeral exemption". It authorizes broadcasting organizations to make ephemeral recordings of works for their broadcasting purposes; such recordings shall be destroyed within six months after their making but a

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24. World Trade Organization from Wikipedia, supra note 1, at 3

copy of such recordings may be kept in official archives for documentary purposes.

Article 12 of the Berne Convention provides for authors of literary and artistic works the exclusive right of authorizing adaptations, arrangements and other alterations of their works. Section 8 (f) of the Copyright Act provides for the right to authorize the adaptation, arrangement or transformation of the work.<sup>25</sup>

Article 13 of the Berne Convention allows for the possibility for a Union country of applying a limitation to the exclusive right of recording musical works and words pertaining thereto, through the issuing of compulsory licenses. At present, the Copyright Act does not contain the equivalent of such a provision. However the Government of the Sudan should considering introducing such a limitation in its new Law.

Article 14 of the Berne Convention provides for authors of literary and artistic works the exclusive rights to authorize the cinematographic adaptation of their works as well as the distribution, public performance, communication to the public and adaptation of the works thus adapted. Corresponding Section 8 (2) (a), (b), (c), (d) and (g) of the Copyright Act grants exclusive rights corresponding to the rights listed in Article 14 of the Berne Convention. These rights are couched in general terms and would apply to all protected works, regardless of their category. Hence, authors of cinematographic works enjoy the rights referred to in Article 14 of the Berne Convention.<sup>26</sup>

Transitory measures under the Berne Convention: Article 18 requires that copyright protection be applied to all works which, at the moment Berne becomes effective, have not fallen into the public domain in the country of the origin through the expiry of the term of protection".

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25. Working Party on the Accession of Sudan supra note 10, at 16

26. Working Party on the Accession of Sudan supra note 3, at 52

The current Sudanese Law does not contain any mention of transitory measures concerning works, performances, phonogram producers or broadcasting organizations that are covered and protected under the TRIPS Agreement, a transitory measure should be spelled out to this effect. The draft of the future Sudanese Copyright Law should extend the scope of the transitory measures not only to works, but also to the subject matter that is covered by neighbouring rights.<sup>27</sup>

### **3. Infringement and Remedies of Neighbouring Rights**

Copyrights and Neighbouring Rights Protection Act 1996 envisages civil and criminal procedures against the infringement of copyrights but only criminal procedures against the infringement of Neighbouring rights. Sections 34 to 38 of the Copyright Act provide for civil and criminal procedures and remedies in relation to the infringement of copyright and neighbouring rights. Section 34 determines the acts which constitute infringement. Section 34 of the Copyright Act must be incorporated as applying only to criminal liability. The Copyright Act distinguishes between violations or infringements and criminal offenses. Article 34 deals solely with criminal offences and its title, "The Offence of Copyright Infringement"; it also indicates the intention of the legislator to limit the scope of Article 34 to criminal violations.<sup>28</sup>

Therefore, in order for a court to find criminal liability the infringer must commit the violation knowingly and without permission of the copyright owner. In this instance, "knowingly" means the person was aware that he or she was committing a violation of the Copyright Act. This entails that the person indicated to violate the Copyright Act

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27. id at 5

28. Working Party on the Accession of Sudan supra note 3, at 6

furnish proof of intended violations of right conferred by the copyright Act. According to Section 35(1) and (2), damages may be claimed, and injunctions applied for, in case of willful or unintentional infringement. The entitlement to financial compensation shall include loss of earnings and prejudice to the reputation of the right holder (Section 38). Under Section 35(2), injunctions are also available for "calculation of the revenue resulting from infringing acts and depositing such revenue in treasury of the court, or any other injunction the right holder considers necessary to protect his rights until the case is finally decided." Furthermore, under Section 35(3), the right holder may apply to the court to obtain an order allowing him to inspect and alleged infringer's premises and to seize any material related to the alleged infringement and requiring the alleged infringer to disclose the names and addresses of his suppliers and customers and the premises where the alleged infringing materials are stored.<sup>29</sup> Section 36 (1) provides for penal sanctions in case of copyright infringement whereby, contrary to the corresponding provisos in the industrial property laws; no maximum fine has been fixed. In addition, the court may order, in criminal proceedings under Section 36(2), confiscation or destruction of infringing copies and materials and publication of the judgment in one or more daily newspapers at the expenses of the defendant.<sup>30</sup> The same criminal sanctions are available under Section 37 in regard to infringement of neighbouring rights. The 1996 Act goes on to make a single provision on neighbouring rights. Section 37 states that the criminal penalties for copyright infringement apply *mutatis mutandis* to infringement of neighbouring rights. This is not surprising since many remedies are common to all

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29. .id at 65

30. Working Party on the Accession of supra note 3, at 66

types of intellectual property. It is not clear why criminal penalties are singled out.<sup>31</sup>

Sections 36 (2) (a) and 37 provide that the court may order confiscation or destruction of all copies which are the result of copyright infringement. According to section 34(b), imported copies without the permission of the rights owner constitute a copyright infringement. Article 16 of the TRIPS Agreement requires that infringing copies of work be subject to seizure whether domestically produced or imported. Article 41.1 of the TRIPS agreement requires that: Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse. Sections 35 and 38 of the Copyright and Neighbouring Rights Protection Act entitle the proprietor of the copyright and neighbouring rights to search the premises of the alleged infringer and to seize copies and documents.<sup>32</sup>

Anton pillar action in Sections 35 and 38 allow for production of evidence. As a general rule, the courts have the power to order production of evidence. Article 43.1 of the TRIPS Agreement requires that judges be authorized to order production of evidence necessary to substantiate a party's claims where the party has been unable to obtain such evidence from the opposing party. The Copyright and Neighbouring Rights Protection Act 1996 provides for

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31. Id at 65

32. Working Party on the Accession of Sudan supra note 3, at 65

the following civil remedies for infringement of copyright and neighbouring rights under Section 35 and 38: Action for damages, injunctions, Anton pillar action, attachment of duplicates and account for profits.<sup>33</sup>

Sections 35(1) and 38 of the Copyright and Neighbouring Rights Protection Act provide for compensation. Section 35(2) of the Copyright Act provides for preliminary injunctions including the deposit of revenue with the treasury of the court resulting from the infringing acts, and any other injunction as the copyright owner may deem necessary for the protection of his rights until such time when the case is finally decided. The copyright owner or his agent may also apply, under Section 35(3), to the court to obtain an order allowing him to inspect an alleged infringer's premises and to seize copy or photocopy any material relating to the alleged infringement. In addition, he may apply to the court for an order requiring that the alleged infringer disclose the names and addresses of his suppliers and customers regarding the latter entitlement, the rights conferred by Section 35(3) go beyond the right of information provided under Article 50(5) of the TRIPS Agreement and correspond to the rights related to the proceedings on the merits of a case under Article 47 of the TRIPS Agreement<sup>34</sup>

The Copyright and Neighbouring Rights Protection Act of 1996 doubles the term of imprisonment and fines for repeat offenders.

According to Section 34 of the Copyright Act, copyright infringement is an offence if committed knowingly and without permission of the right holder. Sections 36 and 37 of the Copyright Act read as follows:

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33. Id at 66

34. Working Party on the Accession of Sudan *supra* note 10, at 66

Section 36 (1): whoever commits the offence of copyright infringement shall be punished with a fine as determined by the court or imprisonment not exceeding three years or both

Section 36 (2) :The Court may order the confiscation or destruction of all copies of such work if it is of the opinion that such copies were the result of copyright infringement and also of all the materials devised for or used in the commission of such offence; the delivery of such materials to the owner of copyright, or the destruction or disposal of such materials in any other way as the court may think reasonable in the case of recidivism, the doubling of the amount of fine or the term of imprisonment; and the publication of the judgment of the court in one or more daily newspapers at the expense of the defendant.

Section 37. The penalties prescribed in Section 36 of this Act shall apply, mutates mutandis, to infringement of neighbouring rights." Under the Copyright and Neighbouring Rights Protection Act, Sections 36(2)(1) and 37, a court may order the confiscation or destruction of duplicates of such work, where it is of the opinion that such duplicates were the result of copyright infringement, and it may also confiscate all the materials used in committing the offence.<sup>35</sup> The court may order the transfer of such materials to the proprietor of the copyright, or the destruction or disposal of such materials, in such way as the court may deem appropriate. Section 36 (2) of the Copyright Act authorizes the court to order the confiscation or destruction of all infringing copies of a work if it is convinced that the copies resulted from copyright infringement. The court may also order the confiscation or destruction of all materials used in the commission of the offence. The court may

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35. id at 46

require these to be either transferred to the copyright owner, or otherwise destroyed or disposed of in any manner in which the court may deem appropriate. Seizure and destruction of goods and materials infringing rights conferred by copyright and neighbouring rights, will be imposed by the court whenever appropriate including, in particular, in cases in which infringements have been committed willfully on a commercial scale.<sup>36</sup>

### **3. Conclusion**

Sudan Copyright and Neighboring Rights Protection Act 1996 needs some changes in Neighboring Rights in order to comply with WTO Agreement 1994.

The performers and producers of sound and audiovisual recordings must be paid an equitable remuneration. The Copyright Act section 28 does not provide more clarification as to the kind of use of recordings for which equitable remuneration is due. Sections 26 -28 should be amended, in particular for the purpose of clarifying the economic rights of performers. Also the rights of producers of sound recordings do not include the right of rental.

Regarding broadcasting organizations, the TRIPS provides them with the exclusive rights for 20 years of fixation, reproduction of fixations, and re-broadcasting by the wireless means of their broadcast and the communication to the public of the broadcasts of their broadcasts or provide to the owners of the copyright in the material broadcast the possibility of exercising such rights, Article 14.3 and 5.

However, under Section 39 (3) of Copyright and Neighbouring Rights Protection Act 1996, broadcasting organizations enjoy their rights

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36. Working Party on the Accession of Sudan supra note 10, at 45

for a term of 50 years starting from the first of January of the year following the year in which the broadcast took place.

The current Sudanese Copyright Law does not in any way refer to the protection of authors, performers, phonogram producers or broadcasting organizations on the basis of their personal or territorial link to member countries of the WTO. In view of Article 1.3 of the TRIPS Agreement, which reads: (Members shall accord the treatment provided for in this Agreement to the nationals of other Members. In respect of the relevant intellectual property right, the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits, were all Members of the WTO members of those conventions. Any Member availing itself of the possibilities provided in paragraph 3 of Article 5 or paragraph 2 of Article 6 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for Trade-Related Aspects of Intellectual Property Rights (the "Council for TRIPS"). This situation ought to be rectified.

Differences can also be seen in relation to transitory measures, Article 18 under the Berne Convention 1886 requires that "copyright protection be applied to all works which, at the moment Berne becomes effective, have not fallen into the public domain in the country of origin through the expiry of the term of protection". The current Sudanese Law does not contain any mention of transitory measures concerning works, performances, phonogram producers or broadcasting organizations that are covered and protected under the TRIPS Agreement. A transitory measure should be spelled out to this effect. The draft of the future Sudanese Copyright Law should extend the scope of the transitory

measures not only to works, but also to subject matter that is covered by neighbouring rights.

For limitations, Article 13 of the Berne Convention allows for the possibility for a Union country to apply a limitation to the exclusive right of recording musical works, and words pertaining thereto, through the issuing of compulsory licenses. At present, the Copyright Act does not contain the equivalent of such a provision. However, Sudan is considering introducing such a limitation in its new Law.

Finally, The Copyrights and Neighbouring Rights Protection Act 1996 envisage civil and criminal procedures against the infringement of copyrights and criminal procedures only against the infringement of neighbouring rights.

This is strange since the issue of neighbouring rights has just only recently been introduced. It is therefore not clear why criminal penalties are singled out.

## **CHAPTER THREE**

### **CONCLUSION AND RECOMMENDATIONS**

The purpose of this chapter is to draw conclusions from the whole thesis, reflecting and examining the areas which need some changes in order to comply with the Trade Related Aspects of Intellectual Property Rights (TRIPS) of World Trade Organization (WTO) Agreement 1994.

Chapter one focuses on aspects of copyright that need reform. Copyright in Sudan is governed by the Copyright and Neighbouring Rights Protection Act 1996. On the bases of protection, the Sudanese copyright law does not adequately protect foreign authors in full conformity with the criteria spelled out in the Berne Convention, in its Article 3, which is incorporated into TRIPS by reference. On the scope of copyright protection, Part II of the 1996 Act deals with three related issues: protected works, unprotected works and the rights conferred by copyright. The Berne Convention requires that authors enjoy the rights required by Berne Convention and any other rights. A country protects works on a national treatment basis without being subject to any formalities. Copyright under the Berne Convention must be automatic; it is prohibited to require formal registration. There are two criteria of protection: permanent form and originality. Criteria of permanent form is not expressly mentioned in Sudan's Copyright legislation but it is implied in the list of protected works, the subject matter of which requires that the expression of an idea be in writing or otherwise fixed in some tangible form.. Under Berne Convention and TRIPS the work is protected even if it is not fixed in some tangible form. E.g. speeches and lectures delivered orally.

Article 18 of the Berne Convention is not included in the Sudanese Copyright and Neighbouring Rights Protection 1996 Act i.e. currently the

Sudanese Copyright Law does not provide for transitory measures as required by article 18 of the Berne Convention. The obligation to provide for transitory measures is also required in the TRIPS Agreement. Article 70 par. 2.

Article 19 of the Berne Convention authorizes each country of the Union to provide in its legislation a level of protection that may exceed the minimum required in the Berne Convention. The Copyright Act contains provisions that allow for a higher level of protection than is required by the Berne Convention. Under section 5(1), copyright protection is granted to computer programs as well as to electronic data banks. Also, section 8(2) (a) provides for the right to commercially distribute the work to the public by way of sale, rental or lending. Section 8(2) (g) also provides for the right to commercial exploitation of the work by any means, whether existing or to be developed.

Article 21 of the Berne Convention refers to Special Provisions Regarding Developing Countries that are included in the Appendix. The Copyright Act does not presently contain any provision to that effect.

Article 9 of the Berne Convention requires that authors be given the exclusive right to authorize reproduction of the work in any manner or form with only limited exceptions that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. Article 12 of the Berne Convention requires that authors of literary or artistic works have the exclusive right to authorize adaptations, arrangements and other alterations of their works. Article 13 of the Berne Convention authorizes countries to impose reservations and conditions on the exclusive rights granted to authors of musical works or written works that are recorded. There is no equivalent in the Sudanese Copyright Law to Article 13 of the Berne Convention that the Sudanese legislation provides for more than the minimum rights that are required

under the Berne Convention. Article 14 of the Berne Convention requires that authors of literary and artistic works have the exclusive right to authorize the cinematographic adaptation, public performance and communication to the public of the adaptation, without the limitations authorized under Article 13 (1) The moral rights are inalienable, perpetual and inviolable. They pass to the author's heirs or executor on the author's death, but may not be otherwise transferred or sold under any circumstances, by either the author or his legal successors. Any agreement to waive an author's moral rights is null and void, although the author cannot be forced to protect his work. Under 1996 Act the duration of moral rights is confusing. Article 14 ter requires "droit de suite" in connection with subsequent sales works of art and manuscripts. The Copyright and Neighbouring Rights Protection Act 1996 does not provide for the "droit de suite". The Sudan is not bound to provide for the droit de suite in its future legislation, and if it does so, it has the choice to limit its application to the Sudanese nationals and to foreign nationals of countries that protect the Sudanese authors i.e. droit de suite is not among the minimum obligatory rights that have to be granted by country which is a Member of the Berne Convention, if and when introduced in the legislation of a Member country, it could be subject to reciprocity.

On ownership of copyright, the presumption that the person whose name appears on the work is the owner is clearly inapplicable to anonymous or pseudonymous work. In each the publisher is, in the words of section 10 of 1996 Act presumed to be the owner of the economic rights. The Act is silent on who is the owner of moral rights in anonymous or pseudonymous works. Ownership of copyright in a joint work belongs jointly to the joint authors but in a collective work each contributing author acquires copyright in his respective contribution. In cinematographic and analogous works moral rights belong jointly to the

creators of such works: namely the director, the author of the scenario, the author of the musical work and of artistic work especially created for such work. But economic rights belong to the maker or producer who, prior to the making of a work, is obliged to conclude contracts in writing with all persons whose works are to be used in the making of the audiovisual work. The economic rights are considered transferred to the maker or producer, unless stated otherwise in the contract. The author of a musical work retains, however, the right to authorize its public performance, broadcasting and communication to the public. According to section 35, the owner of copyright or his agent has the right of litigation. Article 15 of the Berne Convention requires that ownership of a work, for purposes of litigation, be presumed to be that which appears on the work in the usual manner.

According to the general rule contained in Article 7(1) of the Berne Convention as incorporated into the TRIPS Agreement, the term of protection shall be the life of the author and 50 years after his death. Article 13.3 (a) (b) (c) provides that cinematographic works anonymous and pseudonymous works shall be protected for the period of 25 years computed from the date of publication of such works. These provisions are supplemented by Article 12 of the TRIPS Agreement, which provides that whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making. In the case of joint works, the termination date of the copyright is 50 years after the death of the last surviving author. In the case of limitations on copyright, section 14 of the 1996 Act limits or restricts the author's exclusive rights. These

restrictions are based on educational or non-commercial purposes and if the material used is small in proportion to the whole work. Article 13 of the TRIPS Agreement confines limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the right holder's legitimate interests. The provisions of the Berne Convention incorporated into the TRIPS Agreement allow members to provide limitations and exceptions to the exclusive rights of authors in respect of particular acts of exception. In addition, Article 13 of the TRIPS Agreement contains a general clause on exceptions and limitations.

On the transfer of copyright: section 15 (2) of the 1996 Act provides that the author may transfer to any person all or any of his moral and economic rights, while under the Berne Convention Article 6 bis, moral rights are said to extend even after the transfer of copyright during the author's lifetime and exercisable after death during the term of copyright. The TRIPS does not provide for moral rights.

On the registration of works it is optional under 1996 Act, but registration of contract is compulsory. This brings the copyright law of Sudan in line with the Berne Convention of 1886 and also with TRIPS.

On the infringement and remedies sections 36 (2) (a) and 37 of the 1996 Act provide that the court may order confiscation or destruction of all copies which are the result of copyright infringement. According to section 34 (b) imported copies without the permission of the rights' owner constitute a copyright infringement. Article 16 of the Berne Convention requires that infringing copies of a work be subject to seizure whether domestically produced or imported.

Chapter Two focuses on neighbouring rights. It deals with the legal protection under the Copyright and Neighbouring Rights Protection Act

1996, and compares it with the TRIPS 1994 on those areas that need a reform.

Under the 1996 Act the performers and producers of sound and audiovisual recordings must be paid an equitable remuneration. Section 28 of the Act does not provide more clarification as to the kind of use of recordings for which equitable remuneration is due.

Also the rights of producers of sound recordings do not include the right of rental.

Regarding broadcasting organizations, the TRIPS provides them with the exclusive rights for 20 years of fixation, reproduction of fixations, and re-broadcasting by the wireless means of their broadcast and the communication to the public of the broadcasts of their broadcasts or provide to the owners of the copyright in the material broadcast the possibility of exercising such rights, Article 14.3 and 5.

However, under section 39 (3) Copyright and Neighbouring Rights Protection Act 1996, broadcasting organizations enjoy their rights for a term of 50 years starting from the first of January of the year following the year in which the broadcast took place.

The current Sudanese Copyright Law does not in any way refer to the protection of authors, performers, phonogram producers or broadcasting organizations on the basis of their personal or territorial link to member countries of the WTO. In view of Article 1.3 of the TRIPS Agreement, which reads: "Members shall accord the treatment provided for in this Agreement to the nationals of other Members", and as regards the relevant intellectual property right, the nationals of other members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the

Treaty on Intellectual Property in Respect of Integrated Circuits, were all Members of the WTO members of those conventions. Any Member availing itself of the possibilities provided in paragraph 3 of Article 5 or paragraph 2 of Article 6 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for Trade-Related Aspects of Intellectual Property Rights (the “Council for TRIPS”). This situation ought to be rectified.

Differences can also be seen in relation to transitory measures. Article 18 of the Berne Convention 1886 requires that "copyright protection be applied to all works which, at the moment Berne becomes effective, have not fallen into the public domain in the country of origin through the expiry of the term of protection". The current Sudanese law does not contain any mention of transitory measures concerning works, performances, phonogram producers or broadcasting organizations that are covered and protected under the TRIPS Agreement.

For limitations, Article 13 of the Berne Convention allows for the possibility for a Union country to apply a limitation to the exclusive right of recording musical works, and words pertaining thereto, through the issuing of compulsory licenses.

Finally, The Copyright and Neighbouring Rights Protection Act 1996 envisages civil and criminal procedures against the infringement of copyrights and criminal procedures only against the infringement of neighbouring rights. This is strange since the issue of neighbouring rights has just only recently been introduced. It is therefore not clear why criminal penalties are singled out.

In the light of the above findings, the following recommendations may be made. First, the future Sudanese Copyright Law should extend the benefit of the protection to foreign nationals of countries that are

members of the WTO as well as to works first published in a WTO country. Second, Sudan has to take advantage of the Appendix of the Berne Convention in favour of developing countries; the future law should include provisions to that effect. Third, The Copyright and Neighbouring Rights Act 1996 should be amended to provide for droit de suite. Fourth, the new copyright and neighbouring right law should rectify the term of protection in compliance with both Article 7 of the Berne Convention and Article 12 of the TRIPS Agreement. Fifth, Sections 26 - 28 of the Act should be amended, in particular for the purpose of clarifying the economic rights of performers. Sixth, a transitory measure should be spelled out. The draft of the future Sudanese copyright law should extend the scope of the transitory measures not only to works, but also to subject matter that is covered by neighbouring rights. Seventh, at present, the 1996 Copyright Act does not contain a limitation on the exclusive right of recording musical works and works pertaining there to, through issuing compulsory licenses. Sudan must introduce such a limitation in its new law.

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