

IRAN JOINING THE BERNE CONVENTION? WHY, WHEN, AND HOW?

Gist of the news

Tehrantimes.com reported more than two years ago on April 3, 2012 that:

A bill to join the Universal Copyright Convention has recently been completed by Iranian Ministry of Culture and Islamic Guidance, an official of the ministry said on Tuesday. The bill has been submitted for discussion in the cabinet, the ministry's Legal Department Director Ahmad-Ali Mohsenzadeh told the Persian service of the Iranian Students News Agency.

Almost two years later on April 15, 2014, the website of *yjc.ir* reported that according to Hasan Noushabadi, the Deputy Minister of Culture in Legal and Parliamentary Affairs:

"...Iran is preparing a bill to join the Bern convention as well as the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations."

A heated debate is underway between the proponents and opponents of joining the Berne Convention. This report summarizes and analyzes the main provisions of the Berne Convention because in the context of Iran becoming a member of the WTO, the issue of joining the Berne Convention remains a serious challenge for the copyright law and policy of Iran.

Subjects of copyright protection under the Berne Convention

The subjects of the copyright protection provided by the Berne Convention cover a vast area because under Article 2(1) of the Convention, the expression "literary and artistic works" shall include:

every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

Article 2(3) of the Convention adds that:

Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.

Who is entitled to the legal protection under the Berne Convention?

The general rule is stated by Article 2(6) of the Convention:

The works mentioned in this Article shall enjoy protection in all countries of the Union. This protection shall operate for the benefit of the author and his successors in title.

Article 3 (1) clarifies the scope of the protection by stressing that:

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 purposes of this Convention, be assimilated to nationals of that country.

Scope of legal protection under the Berne Convention

The rights granted to the authors include also:

a) The rights which the respective laws of the countries of the Union do now or may hereafter grant to their nationals, as well as the rights specially granted by the Berne Convention.

b) Apart from the provisions of the Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

c) When the author is not a national of the country of origin of the work for which he is protected under the Convention, he shall enjoy in that country the same rights as national authors.

The following table explains the extra rights granted to the authors of specific works:

Type of the work	Rights granted to the author
Literary and artistic works	1. Exclusive right of authorizing the reproduction of these works, in any manner or form; 2. Right of public recitation and of communication to the public of a recitation.
Dramatic and musical works	Right of public performance and of communication to the public of a performance.
Broadcasting and related rights	1. Broadcasting and other wireless communications, public communication of broadcast by wire or rebroadcast, public communication of broadcast by loudspeaker or analogous instruments; 2. Recording; ephemeral recordings.
Cinematographic and Related Rights	1. Cinematographic adaptation and reproduction; distribution; public performance and public communication

	by wire of works thus adapted or reproduced; 2. Adaptation of cinematographic productions.
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Exceptions to the protection provided by the Berne Convention

I. Legislation in the countries of the Union

The countries of the Union are entitled to:

- a) Determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts;
- b) Determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected;
- c) Determine the term of protection of photographic works and that of works of applied art in so far as they are protected as artistic works;
- d) Permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author; and to
- e) Permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

II. Free use of the works

The term “free use” includes the following activities:

- a) To make quotations from a work that has already been lawfully made available to the public;
- b) To permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved; and
- c) To determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.

III. Public domain

A work may fall into the public domain in the country of origin through the expiry of the term of protection according to the conditions to be determined by the respective country regarding the conditions of expiry of the term of protection.

IV. Special provisions regarding developing countries

The Appendix of the Berne Convention defines the special conditions to be applied to developing countries in order to facilitate their transition to full application of the Convention in their territories. This means that under Article I(1) of the Appendix, by having regard to its economic situation and its social or cultural needs, Iran may not consider itself immediately in a position to make provisions for the protection of all the rights as provided for in the Convention. Therefore, by a notification deposited with the Director General at the time of depositing its instrument of ratification or accession or, subject to Article V(1)(c), at any time thereafter, Iran has two main options: a) to declare that it will avail itself of the faculties provided in Articles II and/or III of the Appendix; or b) to make a declaration under Article V(1)(a).

a) Faculty under Article II(1): Any country which has declared that it will avail itself of the faculty provided for in this Article shall be entitled, so far as works published in printed or analogous forms of reproduction are concerned, to substitute for the exclusive right of translation provided for in Article 8 of the Berne Convention a system of non-exclusive and non-transferable licenses, granted by the competent authority subject to Article IV of the Appendix.

b) Faculty under Article III(1): Any country which has declared that it will avail itself of the faculty provided for in this Article shall be entitled to substitute for the exclusive right of reproduction provided for in Article 9 of the Berne Convention a system of non-exclusive and non-transferable licenses, granted by the competent authority subject to Article IV of the Appendix.

Article 9(1) of the Convention clarifies the meaning of the term “exclusive right of reproduction” by stating that:

Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

c) Declaration under Article V(1)(a): Any country entitled to make a declaration that it will avail itself of the faculty provided for in Article II of the Appendix may, instead, at the time of ratifying or acceding to the Berne Convention:

- (i) if it is a country to which Article 30(2)(a) applies, make a declaration under that provision as far as the right of translation is concerned;
- (ii) if it is a country to which Article 30(2)(a) does not apply, and even if it is not a country outside the Union, make a declaration as provided for in Article 30(2)(b), first sentence.

Under Article 30(2)(a), any country of the Union ratifying or acceding to the Berne Convention may, subject to Article V(2) of the Appendix, retain the benefit of the reservations it has previously formulated on condition that it makes a declaration to that effect at the time of the deposit of its instrument of ratification or accession.

Article 30(2)(b) adds that any country outside the Union may declare, in acceding to the Convention and subject to Article V(2) of the Appendix, that it intends to substitute,

temporarily at least, for Article 8 of the Berne Convention concerning the right of translation, the provisions of Article 5 of the Union Convention of 1886, as completed at Paris in 1896, on the clear understanding that the said provisions are applicable only to translations into a language in general use in the said country. Subject to Article I(6)(b) of the Appendix, any country has the right to apply, in relation to the right of translation of works whose country of origin is a country availing itself of such a reservation, a protection which is equivalent to the protection granted by the latter country.

To join or not to join, that's the question!

Two major questions need to be answered before making a final decision about joining the Berne Convention:

- 1) Has Iran adopted the policy to join the international trade community by, *inter alia*, accepting to observe the rules devised and applied internationally?
- 2) If the answer to the above question is on the positive side, what are the policies, strategies and plans that could facilitate Iran's transition to the phase of adopting and applying the Berne Convention provisions?

In answering the first question, the Iranian policy makers need to study and measure the economic, social, and international interests to be affected by joining the Berne Convention. This requires that the policy makers take the following steps: a) to determine the scope of the interests to be affected; b) to measure the interests in the short-term, medium-term and long-term perspectives; and c) to prepare the table of priorities of the interests in order to facilitate their decision-making process. In the current circumstances, Iran is in the first phase of joining the WTO. This means that a preliminary decision to join the Berne Convention has apparently been taken by Iran.

In answering the second question, Iran needs to go through three phases:

a) **Transition policies:** After joining the Berne Convention, the Iranian copyright owners and users (including the Iranian authors who used to benefit from unpaid access to works of foreign authors) shall learn to produce and to compete in a new market. The transition policies to be devised by Iran must take into account the interaction between the IP production and competition policies. Iranian researchers, thankfully, have already carried out few researches in this field.

b) **Transition strategies:** The transition policies to be adopted by Iran must be translated into practical strategies. Under Article 45 of the Fourth Development Plan (FDP), the government of Iran is bound to expand the market for knowledge-based and scientific-based products, commercialization of research and innovative achievements and promoting the role of the private and cooperative sectors. Joining the Berne Convention is a giant step in this direction.

c) **Transition Plans:** Article 45(a) of the FDP adds that the government must take the required measures for designing and setting up a “complete system of intellectual property rights”, both national and international. A complete system of IP rights, especially in its international context, requires joining important IP conventions, including the Berne Convention.

Concluding remarks

Iran is preparing itself to play an important role in the region and internationally. The first prerequisite of this ambitious plan is to respect the international law. Joining the Berne Convention is a major step in this direction. The question is not whether Iran will join the Convention. The real question is when and how this process will start. Before starting the process, though, it is primordial to devise a detailed transition plan to reduce the negative repercussions of the transition process.

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