

# The Berlin Phonogramm-Archiv Collections

## Legal Framework from an Arab Countries' Perspective

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**Abstract** The digitization of the collections from the Arab world of the Berlin Phonogramm-Archiv launched a debate regarding the rights connected to its recordings and their right holders. This paper discusses the nature and coverage of these rights, and questions their applicability and validity in the Arab countries concerned in light of existing legal frameworks and "problematic" conditions under which they were obtained. The paper concludes with the necessity of adopting the appropriate regime that preserves the recordings and ensures their accessibility to the public, such as through the Convention for the Safeguarding of the Intangible Cultural Heritage to which most Arab countries are members.

## Introduction

The Berlin Phonogramm-Archiv (BPhA) is one of the most important collections of the United Nations Educational, Scientific and Cultural Organization (UNESCO) Memory of the World Register. The archive comprises more than 16,000 original phonograms recorded between 1893 and 1943 in various regions of the world, including the Arab region. Most of the BPhA collections have been digitized. However, very few recordings have been made accessible to the public, including the collections from the Arab world which are rarely available.<sup>1</sup> The recordings of these collections consist mainly of chants, music, spoken words and Quran recitations from Tunisia, Algeria and Libya (including Berber regions), Egypt, Palestine and Syria, as well as various Gulf regions, particularly today's Oman and Yemen (Ziegler 1995).<sup>2</sup> The digitization and open access publication of the collections from the Arab world launched the debate regarding the rights covered by the recordings and their right holders. Who should own the digitized material? Who

has which rights to them and how can digitized recordings be used and licensed?<sup>3</sup> Answering those questions is not an easy task, especially since some of the phonograms were recorded under conditions subject to ethical considerations,<sup>4</sup> while other phonograms do not qualify for protection under applicable legal regimes, and others enjoyed protection in the past but are now in the public domain and, hence, free to be used without the right holder's authorization. The phonograms that still enjoy a certain form of protection under applicable laws in specific countries and whose digitization would require the prior authorization of their right holders are the most important.

The recordings of the collections from the Arab world are of different natures and categories. They were recorded by European scholars in different circumstances, times and places.<sup>5</sup> The collections are rich not only in the various recorded materials but also in their uniqueness. Some of the language varieties and dialects recorded, for instance, no longer exist today (Tilmatine 2005).<sup>6</sup> Some are part of the Prussian Phonograph Commission recordings of World War I prisoners of war conducted between 1915 and 1918. The recordings made in 1932 and 1933 by the composer and ethnomusicologist Brigitte Schiffer in the oasis Siwa in the Egyptian Sahara include various chants, music and street noise. Other recordings include Quran recitations, live scenes in Arab souks, merchants' talks, folk songs and chants by children, fieldworkers and many others. Therefore, the protection of the phonograms might vary from one recording to another depending on the content of each phonogram, the applicable jurisdiction and the circumstances under which the phonogram was recorded.

From a legal point of view, the protection of phonograms involves different intellectual property (IP) rights, namely, copyright and related rights (also known as neighboring rights). In addition to the recorded materials, the protection covers the producers of phonograms and the performers of the recorded materials, provided the conditions for such protection are met. In the case of the collections from the Arab world, some of the recordings qualify for IP protection while others do not. The nature of the recorded materials and their eligibility for IP protection will be dealt with in the sec-

ond section of this paper; the third section will address the complexity of the IP regime to protect the collections and the challenges faced considering the specificity of the recorded materials and the date of their creation. The fourth section suggests a more appropriate mode of protection based on the uniqueness of the collections from the Arab world and their importance to the world's cultural heritage. The paper concludes with the necessity of adopting a protection system that preserves the recordings and ensures their accessibility to the public.

It is important to note that it is beyond the scope of this paper to analyze the copyright and related rights regimes in each of the countries concerned, the purpose of this paper being to shed light, within the limits of available information, on the legal regimes that may govern the BPhA collections in light of the legislation in force in the Arab countries concerned.

## **Nature of rights covered and applicable regime**

The first international instrument to protect phonograms is the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (known as the Rome Convention).<sup>7</sup> The Rome Convention was concluded in 1961 with the aim of establishing international regulations in related or neighboring rights, a field in which few national laws existed at the time. The concept of related rights is to protect the rights of those who assist intellectual creators in communicating and disseminating their works to the public. The Rome Convention defines "phonogram" as "any exclusively aural fixation of sounds of a performance or of other sounds."<sup>8</sup> The protection under this convention is provided to the producer of phonograms, who is defined as "the person who, or the legal entity which, first fixes the sounds of a performance or other sounds"<sup>9</sup> and given the right to authorize or prohibit the direct or indirect reproduction of his/her phonograms.<sup>10</sup> The protection of related rights in most national laws is based on the Rome Convention and subsequent related treaties.<sup>11</sup> The international conventions and treaties set minimum standards of protection for the rights covered. However, member states may adopt a higher level of protection.

The protection of phonograms involves different IP rights and various right holders, particularly the performers whose performances and the authors whose works are embodied in the phonograms. While authors and works are subject to copyright protection,<sup>12</sup> performers and their performances fall under the related rights protection.<sup>13</sup> As a general rule of IP laws, the incorporation of protected works and performances in phonograms requires the prior authorization of their right holders.

In the case of the collections from the Arab world, the different types of recorded materials are also subject to different IP rights. Chants, music and lyrics, for instance, are covered by copyright as literary and artistic works; singers, musicians, Quran reciters<sup>14</sup> and other performers are covered by related rights. Some of the recordings may qualify as traditional cultural expressions (TCEs) or expressions of folklore, such as the folk songs; and some copyrighted works may be considered as orphan works when their authors are unknown or untraceable. The collections also include recordings that are not subject to IP rights, such as merchants' talks, spoken words and prisoners' recordings, which are ethically questionable.<sup>15</sup>

It is worth mentioning that the concept of related rights did not exist at the time when the recordings were created. Moreover, IP rights are limited in time, with the exception of the moral rights of authors which are perpetual and inalienable<sup>16</sup> in many jurisdictions, including Arab countries.<sup>17</sup> It is also the case of performing artists who enjoy moral rights due to the personal nature of their creations.<sup>18</sup> The question here is whether the BPhA collections enjoy protection under today's applicable IP regimes in the countries concerned.

In addition, all Arab countries adopt modern legal systems to protect copyright and related rights. Most national IP laws are based on international treaties, particularly the main treaties administered by the World Intellectual Property Organization (WIPO) and the Agreement of the World Trade Organization (WTO) on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Arab countries are members of the main IP treaties, especially the Berne Convention for the Protection of Literary and Artistic Property (hereinafter the "Berne Convention"), the Rome Convention and the

TRIPS Agreement. Countries involved in the BPhA collections through works and/or performances are all members of the Berne Convention. Tunisia, for instance, was the first Arab country to join the Convention in 1897 and has ratified all the conventions' acts, including the Paris Act in 1975, which is the latest act of the convention.<sup>19</sup> Morocco joined the Berne Convention in 1917 and adhered to the Paris Act in 1987;<sup>20</sup> Syria became a member in 1933 (Rome Act) and joined the Paris Act in 2004;<sup>21</sup> Libya joined the Paris Act in 1976;<sup>22</sup> Egypt in 1977;<sup>23</sup> Algeria in 1998;<sup>24</sup> Oman in 1999;<sup>25</sup> and Yemen in 2008. Algeria<sup>26</sup> and Syria<sup>27</sup> are also members of the Rome Convention. Tunisia, Egypt and Oman are also members of the WTO and, hence, the TRIPS Agreement.

### **a) Copyright and related rights**

International IP conventions are built on the edifice of the principles of territoriality and national treatment (Drahoš 1999:10). Similarly, copyright and related rights are governed by the principle of territoriality, which means that they do not extend beyond the territory of the country where they have been granted (Lundstedt 2016:91–104). In other words, the existence, content and expiration of copyright and related rights are subject to the law of the country in which the use or infringement occurs (Drahoš 1999:5). The principle of territoriality of copyright and related rights is less rigid when combined with the principle of national treatment as enshrined in most IP conventions. National treatment had long been a feature of IP conventions, according to which each contracting state shall grant to the nationals of other member countries the same protection that it grants to its own nationals (Walter 2000). In other words, national treatment means treating nationals and foreigners equally. This meaning is slightly different under the TRIPS Agreement, which obliges each member state to accord to nationals of other members a treatment no less favorable than that which it accords to its own nationals. The implementation of the principle of national treatment is subject to the conditions and limitations provided for in the said conventions and, in some cases, depending on the national laws applicable. The nationality of authors, performers and producers of phonograms, the country of origin, the place of first publication or first fixation, and so on, are all factors to be taken into account when applying the principle of national treatment of copyright and related rights.

In addition to the principles of territoriality and national treatment that are essential factors to assess the applicability of copyright and related rights protection on the recordings of the BPhA collections, it is important to discuss the rights conferred as a result of such protection.

Copyright and related rights confer exclusive rights on the owners or holders of those rights.<sup>28</sup> The Berne Convention is the first international instrument that deals with the protection of works and the rights of their authors. The Berne Convention sets minimum standards of protection regarding works<sup>29</sup> and rights<sup>30</sup> to be protected and the duration of protection.<sup>31</sup> With the exception of moral rights, these minimum standards were incorporated by reference into the TRIPS Agreement as an integral part of its copyright regime.<sup>32</sup> Accordingly, members of the WTO and, hence, the TRIPS Agreement are all bound by this minimum level of protection, which became the starting point for any copyright regime. Countries are, however, free to apply higher standards, provided they do not conflict with the basic principles of the agreement (Drahos 1999:8–10).

In sum, copyright protects every creation of the human mind, whatever the mode or form of its expression may be. The value of the work, its merit or purpose, and its mode or form of expression are irrelevant factors for granting copyright protection.<sup>33</sup> Music, chants, songs and lyrics are copyrightable subject matters provided they are original works<sup>34</sup> as defined by national copyright laws and jurisprudence.<sup>35</sup> Copyright grants exclusive economic rights<sup>36</sup> to right holders which are limited in time,<sup>37</sup> freely transferable or licensable, and subject to limitations and exceptions.<sup>38</sup> Copyright also grants moral rights that are perpetual, imprescriptible and inalienable in certain jurisdictions, including Arab countries.<sup>39</sup>

Economic rights deal with the economic exploitation of the work. The author is the only one to exercise economic rights and can prevent third parties from doing so unless they have his/her authorization.<sup>40</sup>

Moral rights are non-economic rights which protect the author's personal interests in the work, particularly the right of paternity, which is the right to claim authorship of the work, and the right of integrity, which is

the right to object to any mutilation, deformation or other modification of, or other derogatory action in relation to, the work that would be prejudicial to the author's honor or reputation.<sup>41</sup> The moral rights of paternity and integrity constitute a minimum protection that can be exceeded by member states.

Regarding related rights, the Rome Convention is the first international instrument to cover such rights. Related rights protect performers in their performances and producers of phonograms in their phonograms, and consist essentially of economic rights. However, based on national legislation, performing artists may also enjoy moral rights.<sup>42</sup>

When the period of protection of economic rights lapses, the subject matter of protection falls into the public domain and, therefore, can be used by others without the authorization of the rights holders. However, in dualistic civil law systems, such as is the case in Arab countries, moral rights which include the right of paternity<sup>43</sup> and the right of integrity<sup>44</sup> persist in the work.<sup>45</sup> According to the dualist doctrine, moral rights exist independently of the economic rights and remain with the author or his/her heirs even after the transfer of economic rights.<sup>46</sup>

In addition to copyrightable works, the recordings include materials that do not fall under copyright protection, such as Quran verses, the merchants' talks, spoken words and folkloric songs.<sup>47</sup> However, the person who recites the Quran is a performer and enjoys related rights in his/her performance or recitation. The same applies to performances of folkloric songs or works in the public domain, provided that the act qualifies as a protected performance under relevant national laws.

Most Arab countries apply the term of protection provided by the Berne Convention and the TRIPS Agreement. Accordingly, the general term of copyright protection is the lifetime of the author, plus 50 years after his/her death. Only a few countries, such as Morocco and Oman, grant authors 70 years after their death (post mortem auctoris). The BPhA collections were recorded between 1893 and 1943, which means that many of the protected materials have fallen into the public domain, depending on the year of the

creation of the work, the fixation of the sounds, or the performance of the performer and the year of the death of their right holders. Regarding works that are in the public domain, it is mandatory in those Arab countries concerned to get the prior authorization of the competent authority in order to use the work.

It is worth mentioning that at the moment of the creation of the recordings, very few Arab countries had a copyright protection system or copyright legislation in place. Tunisia and Morocco were among the first countries to have adhered to the Berne Convention.<sup>48</sup> The latter has a retroactive effect, meaning that the provisions of the convention "shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection."<sup>49</sup> This is not the case of the Rome Convention, which has no retroactive effect. The Rome Convention stipulates that "no contracting State shall be bound to apply the provisions of the convention to performances or broadcasts which took place, or to phonograms which were fixed, before the date of coming into force for that State."<sup>50</sup> However, the TRIPS Agreement made it mandatory to WTO members to apply the retroactive effect of the Berne Convention, *mutatis mutandis*, to the rights of performers and producers of phonograms in phonograms.<sup>51</sup> This means that the protection of copyright and related rights in members countries of the TRIPS Agreement has a retroactive effect regarding works and phonograms which have not fallen into the public domain on the date of the application of the TRIPS Agreement for the member in question.

Concerning moral rights for authors, those are perpetual under the legislation of Arab countries. In addition to the right of paternity and the right of integrity, Arab countries provide for the authors' moral rights to first disclosure.<sup>52</sup> The right to the integrity of the work refers to the author's right to oppose any distortion, mutilation or other modification of his/her work that may be detrimental to his/her honor or reputation. The integrity of the work is breached when the way in which the work is published prejudices his/her honor and reputation.<sup>53</sup> Some countries dropped the additional requirements that restrict the scope of moral rights by introducing a



right of integrity without making it subject to the requirement of prejudicing the author's honor and reputation. Accordingly, the integrity of the work is breached by the sole fact of modifying or altering the work. This is the case in Libya, Egypt and Saudi Arabia.<sup>54</sup>

In this context, moral rights may constitute an obstacle to the digitization of the phonograms, because right holders or their heirs can object to the digitization of the collections from the Arab world of the BPhA. Moreover, they can object to the disclosure of the phonograms that have been digitized (Pavis & Wallace 2019). In this case, the digitized phonograms would be considered as infringing the moral rights of the right holders or their heirs.

The same applies to moral rights for performers who are granted perpetual rights of paternity and integrity in the Arab countries concerned.<sup>55</sup> It is interesting to note that Algeria makes the right of integrity subject to the requirement of prejudice to the author's honor and reputation, while it is not the case for Egypt and Yemen.<sup>56</sup>

The Arab legislation on copyright and related rights also stipulates that the competent authority in the country concerned shall exercise moral rights when there are no heirs or successors to the right holder. This would also apply in cases of anonymous works when the author is unknown. This leads us to question: what would be the case if some of the recordings qualify as orphan works?

## **b) Orphan works**

To date, none of the Arab countries has adopted a specific legislation on orphan works. Nevertheless, the notion of an orphan work is not new in Arab countries, as it has been attributed centuries ago in the pre-Islamic era to an Arabic poem "Al-Yatima" or "the Orphan" (also known as "the orphan poem"), whose author is unknown. It was only in the 21st century that this poem gave its name not only to works the authors of which are unknown but also to works whose the authors cannot be located.

The problem of orphan works is that they are still considered to be protected by copyright and, hence, any use of the work should be subject to prior authorization from the right holder who is, in this case, unknown or untraceable.<sup>57</sup> In other words, any use of the work or changes to it, such as digitization, without the prior consent of the right holder would be considered an act of copyright infringement. In 2012, the European Union adopted a Directive on certain permitted uses of orphan works which sets out common rules to make the digitization and online display of orphan works legally possible.<sup>58</sup> Given that the applicability of the Directive is limited to the EU member states, it can be the legal means to digitize some of the recordings of the BPhA collections that meet its requirements. This would address part of the problem but will not resolve it, especially regarding the collections from the Arab world and other recordings that do not fall within the scope of the Directive.

It is important to note that the orphan works system is being revisited<sup>59</sup> by the European Commission, which has initiated a review of the Directive in 2020 through a survey on its application to evaluate its overall efficiency and effectiveness as an instrument to promote the digitization and dissemination of orphan works.<sup>60</sup>

### **c) Traditional cultural expressions or expressions of folklore**

The identity of a community is reflected in its cultural and social expressions. The collections from the Arab world include various types of music that are specific to the region. Songs and chants by workers in the field and children reveal traditional rhythms and melodies that sound like expressions of folklore. Although there is no binding international instrument yet that protects traditional cultural expressions (TCEs), also known as expressions of folklore,<sup>61</sup> most countries have included provisions in their copyright laws to regulate the use of TCEs and protect works inspired by folklore. This is the case of most Arab countries, particularly those to which the recordings of the collections from the Arab world relate. Algeria, Morocco, Saudi Arabia, Tunisia and Yemen, for instance, provide that folklore or folkloric expressions are public property of the state,<sup>62</sup> while Egypt considers national folklore to be part of the public domain.<sup>63</sup> However, all the aforementioned

countries presuppose that the competent authority exercises the economic and moral rights pertaining to expressions of folklore. Certain countries, such as Algeria and Tunisia, require the payment of fees to the relevant authorities for the for-profit use of expressions of folklore or works inspired by folklore.<sup>64</sup> This means that when it comes to digitizing the recordings of the collections from the Arab world containing folkloric works, it is mandatory to get the prior approval of the competent authorities in each of the countries concerned.

Yemen's copyright law provides for two limitations on the applicability of the provisions on folklore which do not consider (1) the not-for-profit use of folklore or folkloric expressions within a traditional or customary framework, or (2) the quoting or using of excerpts for the purpose of creating a new work to be a violation.<sup>65</sup> Digitization does not fall under the meaning of those exceptions and, hence, the recordings of collections from the Arab world that qualify as TCEs will still need the prior authorization of the competent authority in Yemen.

It noteworthy that Morocco considers expressions of folklore as literary and artistic works to be protected by copyright.<sup>66</sup> Therefore, any use or digitization of Moroccan TCEs will be subject to copyright legislation in the country and particularly moral rights.

## **Challenges imposed by IP protection**

The protection of the collections from the Arab world by IP rights is not without challenges. Considering the nature and circumstances of the recordings, the IP regime might not be the most appropriate form of protection. The most important challenges are as follows.

### **a) IP rights are territorial rights**

The principle of territoriality of IP rights means that the rights conferred under an IP right are limited to the territory of the state that grants or protects this right. In other words, IP rights are valid in and limited to the territory of the country where they have been granted. Accordingly, pro-

protecting the collections from the Arab world by copyright and related rights necessitates the determination of the country or territory to which each work, performance or phonogram belongs. This is a very difficult mission if we take into consideration that the boundaries of many of the territories concerned have changed since the time of the making of the recordings. Moreover, while the people who recorded the phonograms are all European scholars, the identity of performers and authors of most recorded materials is unknown. This has an implication on the applicable laws which are based on the nationality, country of origin or residence of authors, performers and producers of phonogram. The international geographic boundaries of certain countries were shaped after the recordings had been made.<sup>67</sup> In addition, IP protection did not even exist in certain territories which were under Ottoman or European occupation or mandate. Furthermore, by the time certain Arab countries joined the Berne Convention or the TRIPS Agreement, the retroactivity principle, as it appears in Article 18 of the Berne Convention, could not be applied to certain works or performances of the collections from the Arab world because they had fallen into the public domain.

### **b) Moral rights exist only for works eligible for copyright protection.**

In order for moral rights to exist, there should be a copyrighted work and an author who created the work. This means that the recorded materials should qualify as copyrightable subject matters in order to be protected and enjoy economic and moral rights. One of the conditions of the protection is that the work should be original. In the case of the collections from the Arab world, many of the recorded materials do not qualify as works, such as the merchants' talks, spoken works, folkloric songs or music, the Quran verses, among others. If there is any work that enjoys copyright protection, it is important to determine its author, who will then enjoy moral rights even after his/her economic rights have lapsed. This is a near-impossible mission, as many of the recordings contain music and performances of unknown authors and performers. In the case of recordings whose authors or performers have been identified and which are subject to copyright and related rights protection, it is important to highlight that Arab countries define moral rights to be perpetual, inalienable and imprescriptible. This means that moral rights subsist in the works even after their passing into the public

domain. Accordingly, moral right is a crucial factor to look at when digitizing the collections from the Arab world and making them available to the public. Considering the nature of the recordings and the circumstances under which they were made, demonstrating that the works in these collections are eligible for copyright protection constitutes a major challenge (Pavis & Wallace 2019).<sup>68</sup>

### **c) The use of works in the public domain in the Arab countries concerned still requires the prior authorization of the competent authorities**

The copyright system aims at reaching a balance between the author's interests and those of society by encouraging and guaranteeing creators some exclusivity for a limited time, and making sure that there is a robust public domain of copyright-free material that creators can use and incorporate into new works.<sup>69</sup> In other words, once a work is in the public domain, people are free to use it without the need to get the prior approval of the copyright holder or any other party. However, in certain Arab countries,<sup>70</sup> the use of works in the public domain is subject to a compulsory license from the competent authority.<sup>71</sup><sup>72</sup> This means that in order to digitize the phonograms of the collections from the Arab world the content of which has fallen into the public domain, a license or prior approval should be provided by the competent authorities of the countries concerned before using the phonograms or their materials. This is also another challenge, as the copyright or related right protection should have existed in the phonograms in question in order for the country to claim ownership.<sup>73</sup>

### **The collections from the Arab world in the context of cultural heritage**

Nowadays, cultural heritage is not limited to objects, monuments and sites, but also includes inherited traditions or living expressions, known as intangible cultural heritage, such as oral traditions, folklore, language, rituals, songs, music, social practices and festive events.<sup>74</sup> In addition to maintaining cultural diversity and helping intercultural dialogue, the intangible cultural

heritage enriches humanity with the wealth of knowledge and skills transmitted from one generation to another.<sup>75</sup> This has led UNESCO to adopt the Convention for the Safeguarding of the Intangible Cultural Heritage in 2003, to which eighteen Arab States are members, including Algeria, Egypt, Morocco, Oman, Palestine, Saudi Arabia, Syria, Tunisia and Yemen. Moreover, discussions on safeguarding cultural heritage in Arab countries are ongoing at the Arab League Educational, Cultural and Scientific Organization.

The Convention for the Safeguarding of the Intangible Cultural Heritage works at both national and international levels and has as its objectives:<sup>76</sup>

- to safeguard the intangible cultural heritage;
- to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned;
- to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof; and
- to provide for international cooperation and assistance.

The Convention defines the word "safeguarding" as being

measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage.<sup>77</sup>

The Convention considers that the international community should contribute, together with the states parties, to the safeguarding of such heritage in a spirit of cooperation and mutual assistance. The efforts made by the Arab-German Young Academy of Sciences and Humanities and the Ethnologisches Museum, Staatliche Museen zu Berlin, along with other partners is just an implementation of the Convention's provisions to safeguard the collections from the Arab world of the BPhA as one of the most important collections of early audio documents in the world and part of the UNESCO Memory of the World Register.

Intangible cultural heritage and IP rights are both creations of the human mind with economic values (Shyllon 2015:56). They are both recognized as human rights according to Article 27 of the Universal Declaration of Human Rights,<sup>78</sup> which provides that:

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Intangible cultural heritage and IP rights are interrelated, as works protected today by copyright are tomorrow's cultural heritage.<sup>79</sup> The world's heritage is rich with intangible Arab culture, such as *Al-Mu'allaqat*,<sup>80</sup> *Alf laylah wa Laylah*,<sup>81</sup> *Kalila wa Dimna*,<sup>82</sup> *The Incoherence of Incoherence* by Averroes (Ibn Rushd), *The Prophet* by Gibran Khalil Gibran and *Ilá Ṭughāt al-'Ālam* (To the Tyrants of the World) by Aboul-Qacem Echebbi. The world would not have been the same if it had not inherited and used the culture and sciences of older civilizations. Ancient Egypt, for instance, has left a lasting legacy to the world and humanity. Its art and culture have inspired people from all around the world, including artists, writers and creators. Its sciences have enlightened the world, which continues to draw from the skills and knowledge of the Egyptian civilization.

Although IP economic rights are limited in time, moral rights, however, are perpetual and inalienable. Cultural heritage is also perpetual and inalienable because it is the property not only of the community to which it belongs but also to humanity. It is the duty of each and every person to respect and safeguard the cultural heritage of every people as it is "the cultural legacy which we receive from the past, which we live in the present and which we will pass on to future generations."<sup>83</sup> In other words, cultural heritage has no boundaries, it is eternal and universal (Shyllon 2015:59) and must be preserved by all.

Accordingly, digitizing one of the most important collections of the UNESCO Memory of the World Register becomes a duty for the party that has access to it, firstly, as an act of respect to the people who were involved in those recordings, secondly, to safeguard this cultural legacy and, thirdly, to bring light to some of the recordings that were made in darker times.<sup>84</sup>

One might argue that digitizing the BPhA collections and making them available to the public through an open access online publication platform may deprive the communities to which the content of the phonograms belongs from any remuneration or other benefits (Shyllon 2015:61). Although the digitization and open access projects do not seem to have any commercial objectives, this does not mean that users who freely access the recordings will not generate benefits from such use. Therefore, it is important to foresee a licensing system for those who want to commercially exploit the recordings and make sure that the benefits are returning to the countries of origin.

On the other hand, it could be suggested to return the recordings to their countries of origin so that they can preserve and exploit them. This might be problematic as the countries of origin may not be equipped with the necessary legal and technical tools to preserve and publish them in accordance with the FAIR<sup>85</sup> and CARE<sup>86</sup> principles.

## **Conclusion**

The digitization and publication of the collections from the Arab world of the BPhA face many challenges, particularly those related to the applicable legal regime and the rights covering the phonograms' content and their right holders.

The sensitivity of these collections and the complexity of the IP regime for protecting the recorded materials leave the door open to other means of protection that are more appropriate in terms of preserving the recordings and ensuring their accessibility to the public. This is possible through the framework of the Convention for the Safeguarding of the Intangible Cultural Heritage, to which most Arab countries are members.



Although this might not seem to be the most adequate means for protecting, digitizing and publishing the BPhA collections, it is important to stress the value of those recordings and their contribution to the world cultural heritage. As Victor Hugo, the godfather of the Berne Convention, once said:

The principle is twofold, do not forget. The book, as a book, belongs to the author, but as a thought, it belongs – the word is not too extreme – to the human race. All intelligences, all minds, are eligible, all own it. If one of these two rights, the right of the writer and the right of the human mind, were to be sacrificed, it would certainly be the right of the writer, because the public interest is our only concern, and that must take precedence in anything that comes before us. (Hugo 1878)

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## Notes

1. AGYA, Access to Waxes – Arab Collections of the Berlin Phonogramm-Archiv, Concept Note and Preliminary Program for the Workshop Access to Waxes. Available online at: <https://agya.info/research/research-projects-by-year/access-to-waxes-arab-collections-of-the-berlin-phonogramm-archiv>. Accessed 5 December 2024.
2. Cited in AGYA "Concept Note and Preliminary Program for the Workshop Access to Waxes."
3. The debate raised additional questions which are outside the scope of this paper and deal with the meaning, rules and forms of Open Access in the context of an online publication platform for the Collections. See footnote 1 above.
4. Some of the phonograms were recorded in German prisoner of war camps during World War I.
5. It is important to note in this regard that, at that time, owning the devices that were used to record the sounds was a luxury that not many people could afford.
6. Cited in AGYA "Concept Note and Preliminary Program for the Workshop 'Access to Waxes.'"
7. See Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 26 October 1961 (hereinafter the Rome Convention). Available online at: <https://www.wipo.int/treaties/en/ip/rome/>. Accessed 5 December 2024.
8. See Article 3 of the Rome Convention and Article 1 of the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms (Article 1). Also see the WIPO Perfor-

mances and Phonograms Treaty (WPPT), which deals with the rights of performers and producers of phonograms in the digital environment, and Article 14 of the Agreement of the World Trade Organization (WTO) on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which does not provide for definitions as the other treaties do, however, the definitions are given in the Rome Convention since the latter is the starting point of the TRIPS Agreement on related rights. For further analysis of the topic, see Walter (2000:5-6): <https://unesdoc.unesco.org/search/03539688-3ade-465e-9e34-7becaf15bb28>

9. See Article 3 of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations and Article 1 of the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms (Article 1).

10. Other treaties, namely, the WPPT and the TRIPS Agreement, provide additional exclusive rights to producers of phonograms regarding their phonograms.

11. The Rome Convention protects the traditional beneficiaries of related rights, namely, performers, producers of phonograms and broadcasting organizations, whereas the Geneva Phonograms Convention Treaty covers only producers of phonograms. The TRIPS Agreement follows the model of the Rome Convention and covers the same neighboring rights as the Rome Convention does. The WPPT deals with the rights of two kinds of beneficiaries, particularly in the digital environment: performers and producers of phonograms. See Walter (2000:5): <https://unesdoc.unesco.org/search/7e62ebc4-580b-4c0f-a343-7d4171add07f>

12. Copyright protects every creation of the human mind in the literary, scientific and artistic domain whatever may be the mode or form of its expression.

13. Related rights are rights related to copyright, in the sense that they protect the legal interests of certain people (natural and legal) who bring their own contribution in making the work available to the public. Traditionally, related rights cover three categories of beneficiaries: (1) performers; (2) producers of phonograms or sound recordings; and (3) broadcasting organizations.

14. The Quran is not subject to copyright protection. However, reciters of the Quran verses are performers who can be entitled to related rights protection if the conditions of such protection are met. The Islamic world counts many reciters whose performances of the Quran are protected by related rights, such as Sheikh Abdul-Basit 'Abdus-Samad (see [https://en.wikipedia.org/wiki/Abdul\\_Basit\\_'Abd\\_us-Samad](https://en.wikipedia.org/wiki/Abdul_Basit_'Abd_us-Samad)) and Sheikh Saad Al-Ghamdi (see [https://en.wikipedia.org/wiki/Saad\\_al\\_Ghamdi](https://en.wikipedia.org/wiki/Saad_al_Ghamdi)). Accessed 5 December 2024.

15. For a detailed analysis about legal obligations and cultural-ethical aspects related to the BPhA collections, see Kirchmair in this themed issue.

16. The Berne Convention for the Protection of Literary and Artistic Property is the first international instrument on the protection of copyright; it provides for exclusive economic and moral rights to authors. While economic rights allow right owners to derive financial reward from the use of their works by others; moral rights allow authors and creators to take certain actions to preserve and protect their link with their work, particularly the right to claim authorship of the work and the right to object to any modification of the work that would be prejudicial to the author's honor and reputation. Economic rights may be waived and transferred and are limited in time, which is not the case of moral rights as many countries do not allow the transfer of moral rights and make them perpetual. See Berne Convention for the Protection of Literary and Artistic Works, Paris Act of 24 July 1971, as amended on 28 September 1979. Available online at: <https://www.wipo.int/treaties/en/ip/berne/>. Accessed 5 December 2024.

17. See Article 6bis of the Berne Convention which states that: "(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. (3) 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." It should be noted that the original text of the Berne Convention of 1886 lacked a specific provision for the protection of moral rights, which were internationally established when the convention was revised in the 1928 Rome Conference.

18. The Rome Convention is silent regarding moral rights for performing artists. However, those rights are granted through national laws and other conventions such as the WPPT (Article 5(1)).

19. See [https://www.wipo.int/directory/en/details.jsp?country\\_code=TN](https://www.wipo.int/directory/en/details.jsp?country_code=TN). Tunisia is also a member of the Beijing Treaty on Audiovisual Performances, ratified on 21 July 2016 and entered into force on 28 April 2020. Accessed 5 December 2024.

20. See [https://www.wipo.int/directory/en/details.jsp?country\\_code=MA](https://www.wipo.int/directory/en/details.jsp?country_code=MA). Morocco also joined the WIPO Copyright Treaty (WCT) and the WPPT in 2011 and the Beijing Treaty on Audiovisual Performances in 2022. Accessed 5 December 2024.

21. See [https://www.wipo.int/directory/en/details.jsp?country\\_code=SY](https://www.wipo.int/directory/en/details.jsp?country_code=SY). Syria also joined the Beijing Treaty on Audiovisual Performances in 2020. Accessed 5 December 2024.

22. See [https://www.wipo.int/directory/en/details.jsp?country\\_code=LY](https://www.wipo.int/directory/en/details.jsp?country_code=LY). Accessed 5 December 2024.

23. See <https://www.wipo.int/wipolex/en/treaties/ShowResults?code=EG>. Egypt also joined the Phonograms Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms in 1978. Accessed 5 December 2024.

24. See [https://www.wipo.int/directory/en/details.jsp?country\\_code=DZ](https://www.wipo.int/directory/en/details.jsp?country_code=DZ). Algeria also joined the WIPO Copyright Treaty (WCT) and the WPPT in 2014 and the Beijing Treaty on Audiovisual Performances in 2020. Accessed 5 December 2024.

25. See [https://www.wipo.int/directory/en/details.jsp?country\\_code=OM](https://www.wipo.int/directory/en/details.jsp?country_code=OM). Oman also joined the WCT and WPPT in 2005. Accessed 5 December 2024.

26. Algeria became a member of the Rome Convention in 2007.

27. Syria joined the Rome Convention in 2006.

28. See the Berne Convention for the Protection of Literary and Artistic Works, available online at: <https://www.wipo.int/treaties/en/ip/berne/>; and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, October 26, 1961, available online at: <https://www.wipo.int/treaties/en/ip/rome/>. Accessed 5 December 2024.

29. "Works" means "every production in the literary, scientific and artistic domain, whatever the mode or form of its expression." See Article 2(1) of the Berne Convention.

30. Authors under the Berne Convention enjoy exclusive economic and moral rights, which are subject to certain limitations and exceptions.

31. The general term of protection under the Berne Convention is the lifetime of the author plus 50 years after his/her death. There are, however, exceptions to this general rule related to the type of works.

32. See Article 9 of the TRIPS Agreement.

33. The criteria for protecting a work by copyright is its originality, which is defined differently from one jurisdiction to another. In other words, the work need not be novel or have aesthetic, literary or scientific merit in order to satisfy the originality requirement.

34. "Original" means that the work is of independent human intellect and creativity. The exact meaning of originality differs from country to country. In most jurisdictions, the requirement of originality has been formed by case law (jurisprudence). In common law countries, such as the United States, "original" means that the work must be independently created by the author and possesses at least a minimal degree of creativity. In Germany, it means that the work must be a "personal intellectual creation." In France, it is "the imprint of the author's personality." Cf. the remarks by Czychowski & Riechers about the relation of copyright and originality



in this themed issue.

35. Copyright protects the expression of ideas, and not ideas themselves. Article 2(1) of the Berne Convention states that: "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." Accordingly, the term "literary and artistic works" includes every original work of authorship, irrespective of its literary or artistic merit. The work must be original to qualify for copyright protection. The term originality is not referred to explicitly in the Berne Convention. However, it is derived from the notions of "productions" and "literary and artistic works" found in Article 2(1) of the Berne Convention.

36. The main mandatory economic rights granted to authors under the Berne Convention are the right of reproduction, the right of translation and adaptation, the rights of public performance, broadcast and communication to the public, and an optional right, which is the *droit de suite*. Contracting parties may provide for a wider copyright protection to authors.

37. The Berne Convention sets the minimum term of copyright protection to the lifetime of the author plus 50 years after his/her death (*post mortem auctoris*).

38. There are two types of limitations under the Berne Convention: (1) the non-voluntary licenses allowing the use of protected works without the right holder's consent but with the obligation to pay him equitable remuneration; and (2) the free use allowing the use of a protected work without the obligation to ask for the right holder's consent and without paying any remuneration such as the exclusion of certain categories of works (e.g., laws, news of the day) or particular acts of exploitation (e.g., the right of quotation, the use for teaching purposes). The free use is known as "fair use" or "fair dealing" doctrine under common law jurisdictions.

39. Moral rights are a characteristic of the civil law systems which sees the work of an author as an extension of his/her personality. Therefore, these systems are referred to as "authors' rights" rather than copyright systems. The rights of paternity (the right to be acknowledged as the author of the work) and the right of integrity (the right to control alterations to the work) are the core moral rights. The term 'copyright' is used in common law systems where exclusive rights of authors are referred to essentially in economic terms, such as the rights to reproduce the work, publish it and adapt it. See Drahos (1999:2).

40. The Berne Convention provides for a list of economic rights which constitutes the minimum protection to be provided by each contracting party. See Articles 9, 11 and 14 of the Berne Convention. The TRIPS Agreement added the rental right as a new economic right under which copyright holders may collect royalties from third parties engaged in the commercial rental of their copyrighted works.

41. See Article 6 of the Berne Convention.

42. The WPPT provides performing artists with the right of paternity and the right of integrity regarding their live aural performances or performances fixed in phonograms. See Article 5 of the WPPT.

43. The right of paternity refers to the authors right to have their name on a work, use a pseudonym and remain anonymous.

44. The right to the integrity of the work refers to the author's right to oppose any distortion, mutilation or other modification of his/her work.

45. The moral rights of paternity and integrity constitute a minimum protection that can be exceeded by the contracting states of the Berne Convention.

46. The concept of copyright is governed by two theories: monism and dualism. The dualist doctrine, represented by French legislation, affirms that copyright includes two different types of rights: economic and moral rights, the interests of which are separated. The monist doctrine, represented by German legislation, assumes that copyright is a single right, under which the author's economic and moral interests constitute one structure.

47. Expressions of folklore in some Arab countries, such as Morocco, are copyrightable subject matters.

48. Tunisia is the first Arab country which ratified the Berne Convention in 1887. Morocco joined the Convention in 1917 through France, Libya adhered in 1976 and Egypt in 1977.

49. See Article 18 of the Berne Convention.
50. See Article 20 (2) of the Rome Convention.
51. The TRIPS Agreement obliges WTO members to apply the provisions of Article 18 of the Berne Convention (1971), mutatis mutandis, to the rights of performers and producers of phonograms in phonograms (TRIPS Article 14, paragraph 6, second sentence, and Article 70, paragraphs 2 and 3 of the TRIPS Agreement). See Walter (2000:16).
52. See Libya Law No. 9 for 1968, Issuing the Copyright Protection Law (Article 9); Yemen Law No. 15 of 2012 on the Protection of Copyrights and Related Rights (Articles 6 & 7); Algeria Ordinance No. 03–05 of 19 July 2003, on Copyright and Related Rights (Articles 22 to 26); Egypt Law No. 82 of 2002 on the Protection of Intellectual Property Rights (Articles 143 & 146); Tunisia Law No. 94–36 of February 24, 1994, on Literary and Artistic Property as amended in 2009 (Article 9); Saudi Arabia Royal Decree No. M / 41 dated 30 August 2003 as amended in 2018 (Article 8).
53. See Yemen Law No. 15 of 2012 on the Protection of Copyrights and Related Rights (Article 6); Algeria Ordinance No. 03–05 of 19 July 2003, on Copyright and Related Rights (Article 25); and Tunisia Law No. 94–36 of 24 February 1994, on Literary and Artistic Property as amended in 2009 (Article 9).
54. See Libya Law No. 9 for 1968, Issuing the Copyright Protection Law (Article 9); Egypt Law No. 82 of 2002 on the Protection of Intellectual Property Rights (Article 143) and Saudi Arabia Royal Decree No. M / 41 dated 30 August 2003 as amended in 2018 (Article 8).
55. See Egypt Law No. 82 of 2002 on the Protection of Intellectual Property Rights (Article 155); Yemen Law No. 15 of 2012 on the Protection of Copyrights and Related Rights (Article 25); Algeria Ordinance No. 03–05 of 19 July 2003, on Copyright and Related Rights (Article 112).
56. Idem.
57. See <https://euipo.europa.eu/ohimportal/en/web/observatory/orphan-works-db>. Accessed 5 December 2024.
58. See Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works.
59. See Matas, Ariadna, 2020 *Evaluating the Orphan Works Directive*. Available online at: <https://pro.europeana.eu/post/evaluating-the-orphan-works-directive>. Accessed 5 December 2024.
60. The answers to the survey criticized the directive for its limited scope, its cumbersome requirements and some legal uncertainty. Moreover, it seems that the scope of the Orphan Works Directive overlaps with the scope of the Copyright in the Digital Single Market Directive, which was adopted in 2019 and provides a new system to make it easier for cultural heritage institutions to digitize and disseminate out-of-commerce works that they have in their collections. See Matas, Ariadna 2020.
61. It is to be noted that the WIPO has been making efforts among its member states to reach an agreement on an international system for the protection of expressions of folklore. The mandate was given to the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC committee) to finalize an agreement on an international legal instrument(s), without prejudging the nature of outcome(s), relating to IP, which will ensure the balanced and effective protection of genetic resources, traditional knowledge and TCEs. For more information on the topic, see <https://www.wipo.int/tk/en/igc/>. Accessed 5 December 2024.
62. See Yemen Law No. 15 of 2012 on the Protection of Copyrights and Related Rights (Articles 55 to 58 and Article 61); Saudi Arabia Copyright law issued by Royal Decree No. M / 41 dated 2 July 1424 AH (2003) as amended in 2018 (Article 7); Tunisia Law No. 94–36 of 24 February 1994, on Literary and Artistic Property as amended in 2009 (Article 7); Algeria Ordinance No. 03–05 of 19 July 2003, on Copyright and Related Rights (Article 141).
63. See Egypt Law No. 82 of 2002 on the Protection of Intellectual Property Rights (Article 142).

64. See Algeria Ordinance No. 03-05 of 19 July 2003, on Copyright and Related Rights (Article 140) and Tunisia Law No. 94-36 of 24 February 1994, on Literary and Artistic Property as amended in 2009 (Article 7).
65. See Yemen Law No. 15 of 2012 on the Protection of Copyrights and Related Rights (Article 59).
66. See Morocco Law No. 2-00 on Copyright and Related Rights (promulgated by Dahir No. 1-00-20 of 9 Kaada 1420 (15 February 2000), and amended up to Law No. 79-12) (Articles 1, 3, 5, and 7).
67. See <https://www.worldatlas.com/countries> and <https://www.cia.gov/the-world-factbook/countries/>. Accessed 5 December 2024.
68. For an interesting analysis of the digitization of cultural heritage collections, see Pavis and Wallace (2019).
69. See <https://www.wipo.int/en/web/copyright/faq-copyright>. Accessed 5 December 2024.
70. See Algeria Ordinance No. 03-05 of 19 July 2003, on Copyright and Related Rights (Articles 130 and 140); Egypt Law No. 82 of 2002 on the Protection of Intellectual Property Rights (Article 183).
71. Article 183 Egypt Law No. 82 of 2002 requires that the use in this case is for commercial or professional purposes by stating the following: "The competent ministry shall grant license for the commercial or professional exploitation of works, sound recordings, performance or broadcast programs that fall into the public domain, against payment of fees, as prescribed by the Regulations, and not exceeding 1,000 pounds."
72. In this case the rationale of copyright to create a balance is not met.
73. For an analysis regarding the public domain "payant," see Dusollier (2011).
74. See <https://ich.unesco.org/en/what-is-intangible-heritage-00003>. Accessed 5 December 2024.
75. *Idem*.
76. See Article 1 of the Convention for the Safeguarding of the Intangible Cultural Heritage, available online at: <https://ich.unesco.org/en/convention>. Accessed 5 December 2024.
77. See Article 2 of the Convention for the Safeguarding of the Intangible Cultural Heritage.
78. See United Nations Universal Declaration of Human Rights, available online at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights/>. Accessed 5 December 2024.
79. *Idem*.
80. The Mu'allaqāt or the Suspended Odes are a group of seven long Arabic Poems that were hung in the Kaaba in Mecca and considered the primary source of early Arabic poetry.
81. Alf Laylah wa Laylah or the Thousand and One Nights, also known as the Arabian Nights, is a collection of Middle Eastern and Indian stories of uncertain date and authorship.
82. Kalila wa Dimana is a collection of Indian fables translated in the 8th century from Sanskrit into Arabic by Ibn al-Muqaffa. See <https://en.unesco.org/silkroad/content/cultural-selection-classical-arabic-literature>. Accessed 5 December 2024.
83. See <https://en.unesco.org/fieldoffice/santiago/cultura/patrimonio>. Accessed 5 December 2024.
84. The "sensitive" recordings of singers and speakers recorded in German prisoner of war camps during World War I.
85. Ensuring of the Findability, Accessibility, Interoperability and Reusability (FAIR) of the data.
86. Ensuring the Collective Benefit, Authority to Control, Responsibility and Ethics (CARE) for (heirs of) right holders.

## About the author

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