Notre Dame University
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Faculty of Political Science, Public Administration and Diplomacy.

Copyright Law

A Comparative Study between the Lebanese and the US Laws.

M.A. Thesis in International Law

By

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December 17, 2004

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Submitted to the Faculty of Political Science, Public Administration and Diplomacy.

In partial fulfillment of the Requirement for the Degree of Master of Arts in International Law.

Notre Dame University- Lebanon
2004

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In memory of my beloved Father,
A source of constant inspiration and support...

Acknowledgements

I would like to thank my parents and brothers, for their constant support and encouragement throughout these two years. I could not have done it without them.

I would also like to thank my colleagues at work: Dr. Selim Sleiman, Me Raymond Ghanem, and Me Maroun Khoury, who were very flexible, and who helped me manage my professional and educational commitments well.

I would also like to express my deepest gratitude to all faculty members in the Department of Political Science and Public Administration at Notre Dame University; for their constant advice, help, and guidance. I would especially like to mention Dr. Michel Nehme and Dr. Chahine Ghais.

My sincerest gratitude to my supervisors, Dr. Georges Labaky, Dr. Youssef Mouawad, and Dr. Akl Keyrouz, for their patience, their very helpful input, and their invaluable advice, suggestions, and comments all through my work on this thesis.

There remain many people I would like to thank – too many to be counted, but whose support I value beyond words…

Talal

Abstract

The global world we're witnessing nowadays has reshaped many or most of the concepts we thought of as indispensable. Globalization has turned the whole world into a small village, cutting down boundaries, and opening channels which were inconceivable just a few years back: free movement of knowledge, thought, inventions, creations, and ideas have become commonplace.

International trade has not been an exception. It too has been radically changed by this phenomenon called globalization. At the essence of international trade lies intellectual property trade. Therefore its protection has become an increasingly urgent issue on the international level.

Given the pressure felt by most governments to comply with International Intellectual Property regulations, the Lebanese government decided to pass a new copyright law that was officially introduced on the 4th of April, 1999. Judicial authorities along with the Lebanese government are trying to implement the provisions of this Law. Five years have passed since its official promulgation, yet little can be said of its effectiveness or even its enforcement. Lebanon is facing lots of problems nowadays in providing effective protection of intellectual property rights. Implementation of this law, though growing at a slow pace, should start by attempting to lay hold of the rapid widespread of pirated optical discs and uncontrolled internet and TV cable piracy. This would promise to be a hopefully good beginning.

The purpose of this thesis is to provide fresh insight into this law and its application, by comparing it to the US copyright law since the US law is one of the best, globally. This is because the USA is the number one producer/exporter of intellectual property and has the most robust copyright protection regulations in place.

As a result of this comparison and analysis, several problems were brought to light. One of the major problems in this new law is the text of the law itself. The text is unclear and insufficient. It needs major modifications and addition of annexes that explain the application of some of its articles in depth. In addition, criminal sanctions mentioned are not preventive enough – they are too insubstantial to deter infringement. This is the main reason for the obvious lack of jurisprudence to date, also due to lack of enforcement and seriousness of pursuit.

Another problem is the unconformity of some articles with the main International Conventions (Bern Convention, TRIPS agreement, and WIPO treaty). Article 25 of the Lebanese Law is out of order, violating the major International Agreements to which Lebanon is a signatory party or intended to be so in the near future.

The thesis ends with certain recommendations to make this new law more comprehensive and applicable, in line with international standards.

Table of Contents.

Introduction:

Ideas and knowledge are an increasingly important part of trade. Most of the value of new medicines and other high technology products lies in the amount of invention, innovation, research, design and testing involved. Films, music recordings, books, computer software and on-line services are bought and sold because of the information and creativity they contain, not usually because of the plastic, metal or paper used to make them. Many products that used to be traded as low-technology goods or commodities now contain a higher proportion of invention and design in their value for example brand named clothing or new varieties of plants.

Creators can be given the right to prevent others from using their inventions, designs or other creations and to use that right to negotiate payment in return for others using them. These are "intellectual property rights". They take a number of forms. For example books, paintings and films come under copyright; inventions can be patented; brand names and product logos can be registered as trademarks; and so on. Governments and parliaments have given creators these rights as an incentive to produce ideas that will benefit society as a whole.

The extent of protection and enforcement of these rights varied widely around the world; and as intellectual property became more important in trade, these differences became a source of tension in international economic relations.[1] New internationally-agreed trade rules for intellectual property rights were seen as a way to introduce more order and predictability, and for disputes to be settled more systematically.

[1] Siwek, Copyright Industries in the US Economy, 3rd Edition 1999, pp 15

The Uruguay Round achieved that The WTO's Trips Agreement is an attempt to narrow the gaps in the way these rights are protected around the world, and to bring them under common international rules. It establishes minimum levels of protection that each government has to give to the intellectual property of fellow WTO members. In doing so, it strikes a balance between the long-term benefits and possible short-term costs to society. Society benefits in the long term when intellectual property protection encourages creation and invention, especially when the period of protection expires and the creations and inventions enter the public domain. Governments are allowed to reduce any short-term costs through various exceptions, for example to tackle public health problems. And, when there are trade disputes over intellectual property rights, the WTO's dispute settlement system is now available.[2]

The agreement covers five broad issues:

1. How basic principles of the trading system and other international intellectual property agreements should be applied.
2. How to give adequate protection to intellectual property rights.
3. How countries should enforce those rights adequately in their own territories.
4. How to settle disputes on intellectual property between members of the WTO.
5. Special transitional arrangements during the period when the new system is being introduced.

[2] www.WTO.org/TRIPS

The TRIPS agreement ensures that computer programs will be protected as literary works under the Berne Convention and outlines how databases should be protected.

It also expands international copyright rules to cover rental rights. Authors of computer programs and producers of sound recordings must have the right to prohibit the commercial rental of their works to the public. A similar exclusive right applies to films where commercial rental has led to widespread copying, affecting copyright-owners' potential earnings from their films.

The agreement says performers must also have the right to prevent unauthorized recording, reproduction and broadcast of live performances (bootlegging) for no less than 50 years. Producers of sound recordings must have the right to prevent the unauthorized reproduction of recordings for a period of 50 years.[3]

In this global world, where the breaking down of frontiers and the free movement and transfer of goods form one place to another without any obstacle, tariff, or strict regulations is encouraged. In this world where laws and regulation tend to be similar among most states due to the multilateral agreements concluded between states under the provisions of international organizations such as WTO (World Trade Organization) previously known as GATT (General Agreement on Tariff and Trade), or WIPO (World Intellectual Property Organization) and ratified by most states. In this new world where the protection of intellectual property is increasingly important than previous ages, due to the great importance and effect of the protection of intellectual property on international trade. With all these challenges the Lebanese government started a workshop in order to

[3] WIPO publication, n. 476 1998, 2nd Edition, pp 4

amend the Copyright Act. The resulting law is much better than the previous one, but still not up to the global challenges.

In the beginning of the year 1999 the Lebanese government started a workshop in order to amend the Lebanese law on Copyright dated back in the 1920's. Many scholars expected a lot from this new project, but the result was divergent from the expectations. The Lebanese law on copyrights (law No 75 dated 4 April 1999) was unsatisfactory in two ways

First, the code by itself was insufficient and ineffective. This new code lacked several main issues such as the protection of Copyrights on the net... and many other things that we will mention in the following chapters.

Second, the application of this new code was almost absent. Walking down the streets, one can easily realize the infringement of copyrights committed everyday. An example of these breaches the copies of Musical CDs that are sold on the streets without any reaction from the government, knowing that these copies are considered as a violation to the Lebanese law. In other words those people who sell these CDs may be considered as criminals.

The certain Articles of the New Lebanese Law on Copyrights must be amended in order for the Law to be in conjunction with the new demands of this Global world.

We will try in this research to point out the weak points of the New Lebanese Law on Copyrights, and provide solutions for the current and possible legal issues regarding this subject. Conclusion of this research includes a proposal of series of amendments that the Lebanese government should take in order for the Lebanese law to be compatible with the International Agreements and the demands of International Trade.

Before starting to analyze the Lebanese law on copyrights dated 4 April 1999 we will expose the Historical evolution of the Lebanese law on Copyright.

Historical Background.

Copyright in the Arab region has a shorter history than Europe and the USA. Influenced by the international conventions, most Arab legislations are similar to each other and to the international legislations. Even so, foreign publishers would not deal easily with Arabian publishers due to the copyright situation in the region, which is considered as a blank region on the international copyright map.

Before starting our discussion, it is beneficial to have a historical background of Lebanese Law on Copyrights.

In order for our study to be accurate and complete it is preferable to have a recall to the French law on copyright. Since Lebanon was under the French Mandate from the year 1918 up to 1945. All the Lebanese laws including the one related to copyrights were put into action under the full supervision of the French authorities if not to say that the French government has set all our laws during the mandate period. The French authorities have even set the Lebanese constitution. In regard to this fact, many Lebanese scholars describe the French legal system as the Natural Father of the Lebanese Legal System.

After independence the Lebanese parliament simply worked on translating all French laws into Arabic. Until now many of our laws are just a copy of the French legal system. This is why the recall that the development of French Copyright Law is an integration of our laws.

In France, the artistic and literary property has walked a great historical path before the notion industrial property came to exist. In fact, in the Antique and middle Ages, the right of the author was not denied, but it was not the object of legal dispositions either.
However, history taught us to distinguish between pecuniary law and moral law (this is what we find in the Antiquity ages).

A. Under the Ancient Regime,

The evolution goes through a slow recognition of the author's right through the positive law:[4]

- In the literary domain, the invention of the printing machine caused a decisive turn. Due to this machine, the work could be largely diffused. Since than it seemed immoral to leave the third forgers to gain wealth on the expense of the author. This contributed to the birth of the privilege of the author in the 16th century. However the right of the author didn't really exist until the 18th century. Before that date the author was obliged to transfer his manuscript to the editor for exercising protection.

At the end of the Ancient regime, in the domain of literary works, a monopole was conferred to the author himself. It was under the form of a privilege and not a right that this protection was manifested.

- In the musical domain, the privileges were first conferred to the Royal Academy of Music: They allowed the Academy not only to have a monopole edition but

[4] Me Armalet, Propriété Intellectuelle, 4eme Année de Droit, Sagesse University, pp 4

also a discretionary right to authorize the representations. In the same period as for the letters, the privileges started to be attributed to the author of music only in the year 1786 that a decree of the King's council affirmed the existence of these privileges that were no longer beneficial to the booksellers unless they could provide proof to the cession that has been made form them by the composers.

- In the domain of plastic arts, and under the ancient regime, the artists; painters, engravers, sculptures were united in corporation. Some artists were directly under the King's protection. At the beginning of the reign of Louis XIV, the Royal Academy was created. On the 15th of May 1777, a royal declaration proclaimed the liberty of art: the artistic property was recognized and the author's liberty was diffused in works without belonging to a corporation but under the condition of being part of the Royal Academy: a condition with do little importance being that the Academy was opened to all.

B. Transitory period

Afterwards, the laws of 1791 and 1793 saw the day: the law of 19 January 1791 consecrated the right of representation. According to the article 5 of the same law, "*the heirs or cessionaries of authors will be owners of the works during a period of 5 years after the death of the author*". From this revolutionary legislation two fundamental ideas emerged:[5]

1- An exclusive right is conferred to the authors because their ownership is the most justified since it is preceded by their intellectual creation.

[5] Op Cit, Armalet, pp 5

2- This is a temporary right: the author will benefit his entire life, but his heirs for only number of years following his death.

C. The legislation of the 19th century and the first half of the 20th century.

4 laws were introduced:

1-The law of 14 July 1866 grants a usufruct on the right of the author to the following chain rule. The same law set an increase up to 50 years after the author's death, in the duration of the heir's monopole to the benefits of the work.

2- The law of 11March 1902 proclaims the essential principle under which the work will be protected whatever his destination or quality.

3-The law of 9 April 1910 increases the rights of the author of a work of art; if he gives up his work, he doesn't alienate by this his right of reproduction.

4-The law of 20may 1920 created the right to follow up, the author benefits from a part of his increase in values, (a kind of royalties).

A- Insufficiency of the Legislation till 1957

The photography, the cinema, the radio fusion, the discs, the television and the magneto phones; each of these new processes lead to the questions which no answers can be found to them in the laconic texts at the end of the 17th century. However from these numerous problems created through the technical evolution, many were settled by the judges.

B- The Law of 11 March 1957

Through this law, there is a try to amount these gaps. Having not foreseen the multiplication of the audiovisual works neither the development of cable or satellite; this

law couldn't have imagined the prodigal ascension of the informatics. It left, under no legal protection, those which are auxiliaries to the creation, but without whom the works would have remained unknown or would not have circulated. This law had not seen the danger, for all those interested, of the private mass reproduction of which originated the necessity to modernize the legislation.

III- The law of 3 July 1985

The first objective of this law was to adapt the dispositions to the development of the audiovisual, in extending to the audiovisual works in general the system applicable to the cinematographic works.

The second is to create, to the profit of the auxiliaries of the creation- the interpret artists, the phonogram and video gram producers and the enterprises of audiovisual communication, new rights, called neighboring right to the right of the author, which weren't until that time but confirmed.

The third was to reestablish, by equitable remuneration, a disrupted economic equilibrium.

The fourth was to fight against piracy, which was partly responsible for the difficulties of control of exploitations and works.

D. The Code of Intellectual Property (1st of July 1992)

The law of 3 July 1985 didn't foresee that a code of right of the author and neighboring right will be prepared. In fact, the legislator was more ambitious for the new

codes of intellectual property that didn't only discuss what was announced by the law but also by the industrial property (drawings and models, patent and trademark). Relatively to the right of the author-and neighboring right- we remark that the codification touched only to the form, and not to the content. But the code was modified many times to affect the content especially in matter of software protection.[6]

In Lebanon, the concept of intellectual property is not new. The first related law was adopted in 1923, one of the first intellectual property laws in the Arab region. Since then, several modifications were made. In 1999, a new law was adopted (law No 75 dated April 4ht 1999). Which is the protection of literacy and artistic property. We should bear in mind that Lebanon is signatory to the Berne Convention for the protection of literary and artistic works, one of the major international copyrights treaties, which sets out ground rules for the protection of copyright at a national level.[7]

[6] Op Cit, Armalet, pp 7
[7] Rany Sader, Al Adel Magazine, Bar of Beirut, 2003 Part 2,3 pp 100

Chapter 1:

Copyrightable Subject Matter.

In this chapter we shall discuss what kind or nature of works is protected under the copyright law. What are the conditions for a work to be considered under the provisions of Art 2 and 3 of the Lebanese law?

Art 2 of the Lebanese law states that "*this law shall protect all the creation of the human mind whether they were written, photographed, sculptured, or orally expressed no matter how much their value importance or aim and notwithstanding their way or method of expression*"[8]

Art 3 states that the right of the author of the **original work** are not prejudiced... [9]

We can conclude form these two articles that the fundamental criterion of copyright protection is **originality.**

Whenever a work is original copyright law protects it. In other words the copyright law protects any work or creation of the human mind no matter in what medium it is expressed on condition that it is original.

Oppositely, the US law on copyright demands **two** fundamental criteria for copyright protection, **Originality and Fixation in a tangible form.** The Lebanese law doesn't require that the work should be expressed in a tangible form. We can deduce this form Art 2 that states "...*whether they were written, photographed, sculptured, or* ***orally expressed.*** If a work is orally expressed thus the requirement of tangible form isn't applicable.

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[8] Abu-Ghazaleh, Intellectual Property Laws of the Arab Countries. pp 409

[9] Ibid, pp 410

Why doesn't the Lebanese law require the expression of the work in a tangible medium? Should we amend the law in order to include the criteria of fixation in a tangible medium the same as the US law? We will try to answer the following questions in the following sections. But before we do this we will explain the meaning of each of the following terms "Originality, and Fixation in a tangible form"

Section 1: Originality.

We will try to point out all requirements demanded in order to consider a work as original. Then we will differentiate between originality (a criteria for copyright protection) and Novelty (criteria for patent protection).

To qualify for copyright protection, a work must be original to the author. Original means that the work was independently created by the author and not copied from other works[10]. The work should posses a minimum degree of creativity. The requisite of creativity is called low requirement. That means a slight amount of creativity will suffice. Any work that presents something creative is protected by copyrights no matter how crude, humble or obvious it might be.[11]

Section 102 of the US Copyright Act provides that copyright protection subsists in "original work of authorship". Art 17 of the same Act states that "*Originality is the one pervading element essential for copyright protection regardless of the form of the work.*

[10] David Bainbridge, Intellectual Property, 5th Edition, Longman, 2002, pp 36
[11] Macintyre, Business Law, 1st Edition, Longman, 2001 pp. 725

The concept of originality posses' two requirements, Independent Creation and minimum degree of creativity." **Originality is a constitutional requirement.**[12]

1. **Independent Creation.**

An original work is one that is independently created, owing its origin to an author. It is a work not copied from another.

2. **The Quantum of Originality: Creative Authorship**

Independent Creation is not sufficient for a work to be protected by Copyright Act. A work must demonstrate a minimal amount of Creative Authorship. The standard is *de minimis* one, any slight difference or distinguishability variation of a prior work will constitute a sufficient quantity of Originality.[13]

Copyrights have been denied to fragmentary words or phrases, slogans, slight variations of musical composition, and paraphrases of standard business forms for not meeting the *de minimis* standard.[14]

In determining whether a work meets the Quantum of Originality, the work must be evaluated as a whole, not dissected as to its individual components. (*Atari Games Corp. Vs Oman, the court held that the Copyright Office* ***improperly*** *denied registration to a video game screen. The office erred because it focused on the independent components of the screens made up of simple geometric shapes. The office should have evaluated the work as a whole because even simple geometric shapes, when selected and combined in a distinctive manner, may meet the modest standard for creative authorship... 979 F. 2d)*[15]

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[12] U.S.C Section 102
[13] Robert Gorman, Copyright: Cases and Materials, 5th Edition, Lexis, 2000 pp 76
[14] Ibid, pp 78
[15] Ibid, pp 79

Why Courts require a quantum of Originality? One justification is the idea of a *quid pro quo* for copyright monopoly. We should reward with a copyright only an author who has contributed to our fund of culture. Judge Kaplan has phrased this idea as follows:

We can... conclude that to make the copyright turnstile revolve, the author should have to deposit more than a penny in the box, and some like measure ought to apply to infringement.[16]

Although the requirement of creative authorship entails a certain *de minimis* amount of originality, it embodies no conception of artistic merit or beauty. In other words a work need not to be an artistic one in order to be protected by copyrights, if a work meets the standard of independent creation and the quantum of Originality, this work is protected by the copyright Act. The Courts will not look to the intended purpose of the work or the audience to whom it is directed.[17]

3. Originality Vs Novelty.

To qualify for a patent, an invention must be **Novel,** not known or previously practiced. Section 102 of the US Patent Code (Lanham Act) defines novelty. A patentee may claim that a product infringes his rights by proving substantial similarity between this product and the patented invention. In patent law, infringement will be found even if the third party had independently created the invention.[18]

By contrast, in copyright law all that is required for protection is independent creation. There is no need to prove uniqueness, Non-obviousness or Novelty. Nothing may prevent

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[16] Macintyre, Op Cit, pp 726
[17] Bainbridge, Op Cit, pp 42
[18] Arthur Miller, Intellectual Property, 3rd Edition, West Group, 2000 pp 21

from granting copyright protection to two similar works as long as they were independently created.

To prove that there exists a copyright infringement, the claimant must prove substantial similarity between the infringing work and the infringed one, and also that there has been an act of copying. One must prove by direct or circumstantial evidence that the infringer actually copied another's work. Proving substantial similarity is not enough to say that there is a copyright infringement. The claimant must prove that there has been copying. Oppositely in the case of a patent, proving substantial similarity alone will be enough to claim patent infringement.[19]

Section 2: Fixation in a Tangible Medium of Expression.

In addition to Originality, a work must be fixed in a tangible medium of expression in order to enjoy copyright protection. This condition (fixation in a tangible medium) is strictly an American criterion for Copyrights protection. The Lebanese law on Copyrights of 1999 states in Article 2: *"this law shall protect all the creation of the human mind, whether they were written, photographed, sculptured, or* ***orally expressed*** *no matter how much their value, importance or aim and* ***notwithstanding their way or method of expression...***"[20] The Lebanese law doesn't require the condition of fixation in a tangible medium; this is clear in the Article stated above especially when the legislator states that the work is protected notwithstanding their way or method of expression. In other words as we stated previously, no matter how the work is expressed even if it is expressed orally this specific work may enjoy copyright protection on condition that it is original.

[19] Ibid, pp 27
[20] Abu-Ghazaleh, Op Cit, pp 409

By contrast, as a basic condition for Copyright protection, the US law states that a work must be fixed in a tangible medium of expression. US law adds that this medium may be one "*now known or latter developed*"[21] and the fixation is sufficient if the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.[22] The US law makes no difference between different mediums of expressions. A work may be fixed in words, numbers, notes, sounds, pictures, or any graphic or symbolic indicia. An unfixed work of authorship, such as an improvisation or unrecorded choreographic work, performance, or broadcast these works may find certain protection under common law but certainly they enjoy no protection under the Copyright Act.[23]

The author should fix his work before hand. This is not always possible especially when the work is created spontaneously.

What is the status of live broadcast, sports, news coverage, and live performance of music... would a simultaneously fixation of the work as it is being performed qualify for Copyright? These works reach the public in unfixed form. Article 101 of the US Act states that these works **which are transmitted** to another place are protected by copyright law on condition that they are **being recorded at the same time**. What about the work that is performed live but is not transmitted to another place? Certainly these works aren't subject to Article 101, even though they are recorded at the same time, because this Article has as a condition the act of transmission. In order to be subject to Article 101 and prohibit any unauthorized recording form the audience, the best solution

[21] Section 102 USC, Op Cit.
[22] Bainbridge, Op Cit, pp 43
[23] Gorman, Op Cit, pp 85

is to have the performance telephoned to another location thus meeting the transmission requirement.[24]

On the other hand the definition of fixation would exclude from the concept purely evanescent or transient reproductions such as ice sculpture, sand castle, or those projected briefly on a screen but are not saved on software, or shown electronically on a television, or captured momentarily in the memory of a computer.[25]

Fixation and Distinction between the Material Object and the Copyright.

The distinction between the Material Object and the Copyright is extremely important. Copyright is an interest in an intangible property right called a work of authorship, that to qualify for statutory protection, must be fixed in a material object. A Copyright exists when both a work of authorship and a material object merge through the act of fixation. An author in the legal sense - means the person to whom anything owes its origin. The creator of the work is its author.[26] Thus a Copyright comes into existence when the author takes an affirmative step of placing his work on a material object such as a piece of paper, magnetic tape, or CD. Unlike Patent (which is created by a government act) a copyright is created by the act of the author in fixing the work in a tangible medium of expression. Afterwards the author may register the copyright. The act of registration does not create the copyright.

The Copyright Act enumerates seven broad categories of works of authorship each of these works may be fixed in different material objects.[27]

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[24] Leaffer, Understanding Copyrights law, 3rd Edition, Lexis Nexis, 1999, pp 46
[25] Ibid, pp 47
[26] Miller, Op Cit, pp 376
[27] Gorman, Op, Cit, pp 75

Although fixation of a work may take place in an infinite variety of material objects, the Copyright Act defines all material objects in terms of two broad categories, Copies and Phonorecords. Phonorecords are objects in which sounds are fixed, whereas copies are residual category consisting of all material objects that are not phonorecords. Thus Copies and Phonorecords constitute all the material object in which works are capable of being fixed.[28]

Section 3: Derivative Works and Compilations.

1. Derivative Works.

Definition.

Derivative Works are specifically mentioned by Article 103 of the 1976 Act as copyrightable subject matter. They are numerated as one of the seven protected categories of works of authorship set forth in Article 102. The Lebanese law of 1999 doesn't mention Derivative Works. This is certainly a problem that needs a solution because as we all know, a judge will judge according to the law and not according to equity. With the absence of the law, all the Derivative works cannot be registered thus these works will stay out of the protection of the law. With this negative point in the Lebanese law of 1999 let's move now to the definition of Derivative Works under the US law.

Section 101 defines Derivative Works as:

"a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound

[28] Leaffer,Op Cit, pp 49

recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted.

A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a derivative work".[29]

All Derivative Works to a certain degree borrow from other works. Derivative Works is just a substantial copying of another work with slight modifications. In other words a Derivative Work is an infringement to Copyright with two exceptions.

a. If it is based on a work in the public domain. (no one may claim authorship over this work).
b. If the author of the Derivative Work have obtained a permission from the author of the preexisting work.

Any recasting, renewing, or editorial revision can be copyrighted as a Derivative Work on a condition that the new work meets the standard of Originality.[30]

Originality in Derivative Works.

The originality in the derivative work consists of modifying the preexisting work into new one. The elements which are protected in the derivative work are **only** the new elements added to the preexisting work. Moreover there exists a separation between the preexisting work and the derivative work which is based on the fact that the copyright granted to the derivative work does not extend to the preexisting work; accordingly the author of the derivative work has no rights over the preexisting

[29] Section 101 USC, Op Cit.
[30] Miller, Op Cit, pp 325

work.[31] His right is strictly limited to the new original elements added to the underlying work.

A derivative work may be based either on a public domain work or on a copyrighted work provided that the author of the derivative work is granted an authorization from the owner of the underlying work.[32]

An Artistic reproduction would be considered as a derivative work if and only if it meets the standards of originality and all the requirements of a derivative work. If the reproduction makes an exact copy of the underlying work, this act would be considered as an infringement to copyrights. The Artistic reproduction should provide original elements which in their turn are protected separately by the copyrights of derivative works.[33]

Some courts refused to grand a derivative work copyright protection for the labor involved in transferring a work from one medium into another. These courts justified their decision by stating that *"providing copyright protection under these circumstances would in effect confer copyright on the medium itself rather than on the work".*[34]

It is good to note that Derivative works aren't mentioned in the Lebanese law of copyrights, thus the question whether they are protected or not is left to the courts to decide.

The Colorization Controversy.

Colorization is a technological advance which has challenged the fundamental bases of Copyright law. Apart form adding colors to a film originally created in black and

[31] Gorman,Op Cit, pp 184
[32] Miller, Op Cit, pp 298
[33] Leaffer, Op Cit, pp 64
[34] Ibid, pp 65

white by its originator. Many doctrines have wondered whether colorization meets the standard of originality and accordingly awarded copyright protection.[35]

The process of Colorization involves the use of a computer that scans a black and whose film transferred on video tape for its spectrum of gray tones. From these gray tones, an individual versed in this technique must choose an appropriate color corresponding to the object, décor, and the epoch portrayed in the film. The colorization process is time consuming and costly.

The doctrine in the US is divided into two opposing attitudes. The first party finds no difference between colorization and artistic work and thus considers colorization as a derivative work that deserves copyright protection. Whereas the second holds that colorizers are mere computer technicians, whose choices are governed by a predetermined process made possible by a new form of computer technology. For them it is too trivial to meet the standard of originality.[36]

Colorization has not been tested in the courts, but the copyright office has decided that colorized films are entitled to copyright registration as derivative work if the colorized work manifests a sufficient modification of the preexisting work that is more than a trivial variation.

"The author of a derivative work does not, in all instances, require consent of the copyright owner for the creation of a lawful derivative work. His work may be lawful under the fair use doctrine."[37]

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[35] Gorman , Op Cit, pp 185
[36] Ibid, pp187
[37] Ibid, pp 187

2. Compilations.

Compilations are similar to derivative works because they too are substantially based on preexisting materials and data. A compilation is defined under the US law as:

"A *work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term compilation includes collective works"*[38]

The Lebanese law of 1999 does mention compilation but doesn't provide an explanation of what a compilation means. Article 3 of the 1999 law states: "*Provided that the rights of the author of the original work are not prejudiced, all the following sub-works shall also abide by the provisions of this law and benefit from the protection granted thereby:*[39]

2. *Compilations of works or information, whether in an automatically read or any other form, allowed by the copyright holder or his general or appointed successor, provided that the selection or arrangement of the content be innovative."*[40]

Unlike a derivative work author, the creator of a compilation does not recast, reform, or change the underlying materials. The creator of a compilation only complies or assembles

[38] Section 101 USC, Op Cit.
[39] Abu-Ghazaleh, Op Cit, pp 410.
[40] Ibid, pp 410

the materials in his own way. A compilation can include the selection, coordination, and arrangement of facts, data, or materials that are in the public domain.[41]

Compilations also differ from collective work. A collective work is an assembly of a sum of independent works (anthology of poems or articles...), whereas a compilation is the arrangements of data, or facts (telephone books, case reports, catalogs...)

As for derivative works, a compilation is copyrighted if and only if it satisfies the standard of originality.[42]

Originality in Compilations

As stated previously, the compiled materials may consist of individually copyrighted works, or may only include public domain materials such as facts or data.

Copyright law only protects the original work of authorship. How come one may protect data or facts just by assembling them, knowing that data and facts are public domain, materials?

Copyright in compilations consists of the original elements an author has added to the assembled pre-existing materials. In other words, the copyright protection extends only to what the author has added to the pre-existed materials excluding the pre-existed work itself. Copyright in the compilation extends not to the preexisting materials or data themselves, but only to the author's judgment in selecting and arranging the existed materials and organizing them into a unified work. A compilation need not to be novel or unique. It must be independently created and display *de minimis* amount of creative or intellectual labor.[43]

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[41] Miller, Op Cit, pp. 327
[42] Gorman, Op Cit, 197
[43] Leaffer, Op Cit, pp 69

Chapter 2:

Non-Copyrightable Subject Matter.

In this chapter we will discuss what are the matters or works, even though they might enjoy all the criteria for copyright protection, thus they are excluded from this protection.

Article 4 of the Lebanese law on Copyrights states: "*The protection granted by this law shall not extend to the following:*

- *Journals of daily news*
- *Laws and decrees as well as decisions of issued by all authorities or bodies of the state and their official translation.*
- *The judicial rulings with all their types and official translation.*
- *Speeches delivered verbally in public conventions and societies, provided that the speeches and deliberations concerning one person shall not be compiled and published by anyone other than the person in question.*
- *Ideas, assumptions and purely scientific realities.*
- *All artistic works of heritage and folklore, except that works describing folklore are granted protection"*[44]

Article 102 section (b) of the US law on Copyrights states: "... *in no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery,*

[44]Abu-Ghazaleh, Op Cit, pp 410

regardless of the form in which it is described, explained, illustrated, or embodied in such work."[45]

After this description of the two articles (Art 4 of the Lebanese law and Art 102 of the US law section b) it is clear that the works that are excluded from protection is wider in the Lebanese law rather than the US law. The Lebanese law specifies clearly the works excluded from protection. This numeration is exclusive and thus elaborated explanation is forbidden.

Now we will try to explain the non-copyrightable subject matter. We will divide our explanation into two sections. In section one, we will try to analyze an important issue, which is the non-copyrightability of ideas and we will study the leading case concerning this doctrine (Baker Vs Selden).

In section two we will analyze all the rest of matters that are excluded from Copyright protection whether under the Lebanese law or the US law.

Section 1: Ideas and Expressions.

The weirdest principle in Copyright law is that copyright protects the expression of an idea but not the idea itself[46]. Section 102(b) of the US law denies copyright protection to any idea... similarly Art 4(e) of the Lebanese law on Copyrights denies protection to ideas[47]... we can deduce from these two Articles that whenever an author of an Original work injects his idea into the public domain, he can claim copyright protection only to the way he expressed his idea. In other words, if another person

[45] Section 102 USC, Op Cit.
[46] Gorman, Op Cit, pp 90
[47] Abu-Ghazaleh, Op Cit, pp 410

expressed the same idea in a different way, this other person also can claim copyright protection, similarly to the original author, over his way of expression.[48]

Copyright extends only to the specific, concrete, expressive vehicle through which the creator's idea appears, leaving the substance of the idea outside the scope of the author's monopoly.[49]

Ideas, discoveries, principles, and facts are freely accessible to the public. The prohibition from using them will hinder the progress of "science and the useful arts".

The application of the principle of non-copyrightability of ideas is extremely dangerous. It is known that the protection of the human intellectual creation is important to encourage the same author to produce more. What we're trying to say is that whenever an author feels that he cannot enjoy the fruits of his intellectual production this author will deny from producing more.[50] No one would have enjoyed the Beatles if Copyright law didn't exist, because of piracy the Beatles won't be able to benefit (financially) from their production, thus won't produce more...

Here we're facing a paradoxical issue, whether excluding ideas from protection is compatible with the aim of Copyright law.

On one end, some might say that it is not compatible, since the aim of copyright law is to protect the creation of the human mind; keeping in mind that an author might spend lots of money on advertising his new idea. It is unfair to allow another person to benefit from this idea, which was invented and marketed by the original author, just because he presented it in a different way of expression.

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[48] Miller, Op Cit, 306
[49] Leaffer, Op Cit, pp 78
[50] Miller, Op Cit, 307

On the other end, some accept this idea. They believe that with the free accessibility to ideas, the society will benefit from new inventions and discoveries based on the pre existing idea.[51]

In my opinion, there exists a half way solution between the two points of view. I believe that the principle of Non Copyrightability of ideas should be applicable whenever the benefit of society is at concern. In all other cases ideas should be granted protection. The courts must decide whether the benefit of the society is at concern.

Now we will analyze the case of Baker Vs Selden, the leading case regarding the copyrightability of ideas.

Baker Vs Selden.

Plaintiff: *Charles Selden*

Defendant*: Mr. Baker.*

Facts:

- *In the year 1859 Mr. Charles Selden took the requisite steps for obtaining the Copyright of a book entitled "Selden's Condensed Ledger, or Bookkeeping Simplified".*
- *The book of which Mr. Selden claims copyright consists of introductory essay explaining the system of bookkeeping. The book consists of lines, and headings illustrating the system and showing how it is to be used and carried out in practice. This system affects the same result as bookkeeping by double entry; but by a unique arrangement of columns and headings, presents the*

[51] Gorman ,Op Cit, pp 92

entire operation of a day, a week, or a month, on a single page or on two pages facing each other in an account book.

- *Mr. Baker uses a similar but makes a different arrangement of the columns, and uses different headings.*
- *Mr. Selden filed a law suit against Mr. Baker, for an alleged infringement of Copyright concerning his ledger.*
- *A degree was rendered in the benefit of the plaintiff, ruling that the defendant infringed the plaintiff copyright over his ledger.*
- *Mr. Baker, the defendant raised an appeal.*

Defenses:

- *Mr. Baker the appealer denied that Mr. Selden was the author or designer of the books, and denied the infringement charged, and contends on the argument that the matter alleged to be infringed is not a lawful subject of copyright.*
- *Mr. Selden contended that the ruled lines and headings, given to illustrate the system, are part of the book (ledger), thus enjoys copyright protection similarly to the book itself.*

Legal issue: *The point that the court had to solve was the copyrightability of Ideas. In other words, to what extend are ideas protected under the copyright acts?*

Decision: *The Court of Appeal held that since the Appealer account books were arranged differently than those of the original author, it was not infringement to use the*

principles or ideas expounded by the original author. The Supreme Court emphasizes the differences between the "art" subject matter of the book, and the "description of the art", or its expression.

The idea underlying Selden's system of accounting was not copyrightable, although its expression was. Thus if there had been literal copying of the original author's forms of account, it would have been infringement.[52]

The Supreme Court could have decided the case simply by finding that there was an absence of similarity in the expression of the idea promoted by Selden's Book. According to the Supreme Court, the ledger was actually a ***utilitarian object*** *rather than an* ***expressive work.*** *If copyright weren't denied for the protection of utilitarian objects a monopoly will be granted over the underlying idea of the system. Monopolies over systems or processes should be difficult to obtain, and the claimant should have to meet a rigorous examination for novelty and invention used by the Patent Office.*

The Baker Vs Selden case can be summarized as follows: where the use of an idea requires the copying of the work itself, such copying will not constitute an infringement. On the other hand, if the copying does not involve the use of the art but instead its explanation, then such copying consists an infringement.[53]

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[52] Ibid, pp 93

[53] Mr. Weinreb, Copyright, Harvard Law School PIL, pp 30

The Nature of Functional Works: Patents Vs Copyright.

Functional works are found in all varieties of copyrightable subject matter. For example, although computer programs are literary works, and architectural blueprints are pictorial works, both are also functional works because they share a common task-oriented dimension. They differ from a poem or painting because their main aspect is only incidental to their primary purpose to accomplish a given task. Because functional works often closely integrate idea and expression, they tend to conflict with copyright law's protection of original expression.[54] As stated above, both the Lebanese law and the American law deny protection to ideas, systems, processes, and method of operation.

Distinguishing between idea and expression is a difficult and necessary task because of the policies that differentiate copyright from patent law.[55]

Originality, the main criterion for copyright protection is relatively easy to meet. Once obtained, a copyright confers a relatively thin but lengthy term of property. Unlike copyright, a patentable invention must demonstrate considerably more rigorous tests of novelty and nonobviousness.[56] The patent grant provides a more powerful set of exclusive rights although of relatively short duration. In contrast to copyright, the patent grant may confer a powerful economic monopoly in the absence of satisfactory substitutes that compete in the market for the patented product or process. The conflict between copyright and patent policy often arises when a work of utility contains expressive elements.[57]

If the underlying idea system, process, or method of operation can effectively be expressed in only one way, the idea and expression are said to have "*merged*". When this

[54] Miller, Op Cit, pp 292
[55] Abou-Ghazalle, Op Cit, pp 410
[56] Bainbridge, Op Cit, pp 338
[57] Miller, Op Cit, pp 292

occurs, the work cannot receive protection under the copyright law. Only patent protection could be received. [58]

What we're trying to say is that whenever a work is considered as a functional or a utile work, this work cannot enjoy copyright protection. To grant protection, this work should satisfy the standard for patent protection. When idea and expression are inseparable they merge, precluding copyright protection.[59]

According to Professor Nimmer "*separating idea from expression is often a complex task but an unavoidable one. A court in close cases must engage in a delicate balancing process, based on competitive concerns, to determine whether a society should have access to a certain technological solution. In applying the idea-expression doctrine, a court should focus on these competitive considerations more explicitly, rather than framing the debate under the merger doctrine. In effect, they have done so implicitly. On the whole, courts will find merger where the idea at issue constitutes an essential building block as a necessary foundation for creative expression or a method for solving a problem.* [60]

[58] Ibid, pp 293
[59] Leaffer, Op Cit, pp 81
[60] Gorman, Op Cit, pp 250

Section 2: Other Issues on Non-Copyrightable Subject Matters.

A. Fictional Characters.

The protection of fictional literary characters such as James Bond, Superman, or Spiderman, is a crucial and critical issue in copyright law and an interesting variation on the idea-expression dichotomy.[61]

First, some primary distinctions should be made. Here we are concentrating our study on literary characters only, those described in words whether in a novel or a play, and not on cartoon or other pictorial characters that are copyrightable as part of a drawing, painting, or other visual work.

Second, names of characters may be protected under unfair competition law and possibly trademark law, **but not under copyright law**.[62]

As we have deduced from Baker Vs Selden case, the author of an original work can claim copyright protection over the expression of the idea but not over the idea itself. This principle also should be applicable to fictional characters.

Judge Hand suggests that *"there are two aspects of character protection: the infringed character must be sufficiently delineated, and the infringing character must closely imitate the infringed character."*[63] Under this test, the line must be drawn between mere ideas sketching the general nature of the character and more fully developed characterization. In this sense, the protectability of the literary dimension of a character is no different from the protectability of other elements in literary works, such as the details of plot and setting.

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[61] Ibid, pp 254
[62] Miller, Op Cit, pp 322
[63] Weinreb, Op Cit, pp 31

Judge Hand adds that *"the less developed character, the less they can be copyrighted; that is the penalty an author must bear for making them too indistinctly."*[64]

The Lebanese law doesn't mention Fictional Characters.

B. Historical Research.

Copyright protection is denied to historical fact, whether this fact is part of an historical novel, biography, or news story. It was held that the discovery of fact is simply not an original work of authorship, because the discoverer doesn't create the fact, he simply finds it and records it. The discoverer of a fact in no way can be classified as an author of an original work. As a corollary, copyright protection does not extend to the interpretation of historical fact. Two reasons exist regarding the denial of protection to the interpretation of facts. First, an interpretation of fact is simply a fact derived from other facts. Second, an interpretation is very much like an abstract idea, when published, it becomes part of the public domain.[65]

The recent trend in the US law is to refuse copyright protection based on the industrious effort of the researcher. According to the Fifth Circuit, copyright should be based only on the resulting writing and the original work elements of authorship expressed in the work. The court could find no rational basis for distinguishing between facts and the research involved in obtaining facts. To hold that research as copyrightable is the same as holding that the facts discovered by research are entitled to copyright protection.[66]

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[64] Ibid, pp 31
[65] Leaffer, Op Cit, pp 93
[66] Ibid, pp 94

C. Other Issues on Non-Copyrightability Subject Matter.

1. Governments Works.

Section 105 of the US copyright Act Provides: "*Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.*"[67]

Similarly Art 4 (2) of the Lebanese law on Copyrights states that; "*the protection granted by this law shall not extend to the following:*

- *Laws and decrees as well as decisions issued by all the authorities or bodies of the state and their official translations.*"[68]

The government in both states cannot claim copyright in works prepared by employees of the government in the course of their official duties. Thus, all reports, manuals, videotapes, musical or artistic works produced by the government employee pursuant to his official duties are in the public domain.[69]

Section 105 of the US law doesn't preclude the US Government from owning copyright in a work when the copyright is obtained by a transfer. There is no similar text in the Lebanese law. On the other hand, the Lebanese Law adds that all works of the judicial authority are exempted from protection.[70] In other words, a judge cannot claim copyright protection over his judgment even though the judgment took a lot of time and effort because the law is unclear and previous jurisprudence is absent.

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[67] Section 105 USC, Op Cit.
[68] Abou-Ghazalle, Op Cit, pp 410
[69] Gorman, Op Cit, pp 266
[70] Abou-Ghazalle, Op Cit, pp 410

2. Copyright in Immoral, Illegal, and Obscene Works.

Copyright is denied to immoral, illegal, and obscene works. The definition of the terms immoral, illegal, and obscene works may differ from one place to another and from one generation to another. As a result of these differing standards, copyright protection would vary from locality to locality and generation to generation.[71] As an example, one community might allow piracy, while another would enforce the copyright in the same work. To avoid this conflict of standards, a uniform copyright law is required. The goal of the uniform copyright law would be undermined by incorporating the obscenity standard. Lebanese law has no similar restriction on immoral, illegal, and obscene works.[72]

In addition to the restriction on Copyrightability of Governmental works, the Lebanese Law adds other restrictions.

- **Journals of daily news**

  This restriction is only on the news published by the daily journal. To apply this restriction two conditions must be available.

  First, the copied material must be strictly news. That means any other articles published in a newspaper are protected by copyright. For example, if someone wrote an educational article in a Lebanese newspaper, this article is protected by copyright as long as the standard of originality is provided.[73]

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[71] Leaffer, Op Cit, pp 94
[72] Section 106 USC, Op Cit.
[73] Abou-Ghazalle, Op Cit, pp 410

Second, the journal must be daily. If a monthly newspaper publishes news, this news by analogy is protected by copyright because the journal is not daily!!!

- Speeches delivered verbally in public conventions and societies, provided that the speeches and deliberations concerning one person shall not be compiled and published by anyone other than the person in question.[74]

The Lebanese law denies protection to all speeches delivered verbally in public conventions and societies, provided that the speeches and deliberations concerning one person shall not be compiled and published by anyone other than the person in question. It is obvious that the US law has no restriction like this, since the US law demands a criteria which the Lebanese law does not require, fixation in a tangible medium of expression. Of course a verbal speech if not written on a piece of paper or recorded at the same time of delivery (as explained in chapter 1) will not enjoy copyright protection under the US law.[75]

- All artistic works of heritage and folklore, except that works describing folklore are granted protection.

According to the Lebanese law, all artistic works of heritage and folklore are exempted from protection. The Lebanese law differentiates between the artistic works of heritage and folklore and the work describing folklore. Copyright protection is denied for the first and granted for the second.[76]

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[74] Ibid, pp 410
[75] Section 107 USC, Op Cit.
[76] Abou-Ghazalle, Op Cit, pp 410

Chapter 3:

Works of Authorship.

The types of works that may qualify for copyright protection are enumerated in the US law in eight broad, overlapping categories of copyrightable subject matter called "works of authorship". While the Lebanese law divides the works of authorship in eleven categories, in this chapter we will focus on the categories of works that qualify for copyright protection, and while doing so, we will elaborate on the general standards of copyrightability such as originality, fixation in a tangible medium of expression, and idea expression.

Section 1: Categories of Copyrightable Subject Matter.

Section 102(a) of the US law of 1976 sets forth eight illustrative categories of works of authorship:[77]

1. *Literary works;*
2. *Musical works, including any accompanying words;*
3. *Dramatic works, including any accompanying music;*
4. *Pantomimes and choreographic works;*
5. *Pictorial, graphic, and sculptural works;*
6. *Motion pictures and other audiovisual works;*
7. *Sound recordings;*
8. *Architectural works.*

[77] Section 102 (a) USC, Op Cit.

On the other hand, Article 2 of the Lebanese law on Copyrights states that: "*this law shall protect all the creations of the human mind, whether they were written, photographed, sculptured or orally expressed no matter how much their value, importance or aim and not withstanding their way or method of expression. The following works, to cite examples, shall be protected:*[78]

1. *Books, booklets, publications, printouts and all other literary, artistic, and written scientific works.*
2. *Lectures, speeches and other orally delivered works.*
3. *Audio and visual works photographs.*
4. *Musical works whether accompanied by words or not.*
5. *Theatrical works and musicals.*
6. *Compilations relating to choreography and pantomime.*
7. *Drawing, sculptures, engravings, ornaments and weaving.*
8. *Designs and pictures related to architecture.*
9. *Computer programs regardless of their language, including preparatory works.*
10. *Maps, designs, geographical plans and engineering and architectural designs.*

Principle of Separation between the Work of Authorship and Material Object.

The US law of 1976 founded the Principle of Separation between the Work of Authorship and Material Object (the copy or phonorecord in which it is embodied)[79]. For example, a literary work may be embodied in a book or recorded on a tape, a musical work may be fixed on tape or written as sheet music, and a choreographic work may be written in a

[78] Abu-Ghazaleh, Op Cit, pp 409
[79] Gorman, Op Cit, pp 223

specialized notation or filmed on tape. Regardless of the medium in which it is embodied, the work of authorship remains a literary or musical work under section 102(a). The categories set forth in section 102(a) of the 1976 Act are not only broad but also overlapping.[80] For example, a literary work defined in the Act as consisting of words and syllables, overlaps the dramatic work category; lyrics for a song can fit into either the literary work or musical work category.[81]

Importance of How a Work is Categorized.

How a work is categorized can have important legal consequences, particularly as to the scope of the copyright owner's exclusive rights. As an example, an owner of a copyright in a sound recording does not enjoy a performance right; only non-dramatic musical works are subject to compulsory license for reproduction and distribution under section 115; and library reproduction right under section 108 is much wider for literary and dramatic works than for other categories. Thus the classification of a work is more than just a formality. The courts decide whether a work fits into one category or another.[82]

Section 2: Literary Works:

Literary works are defined by the 1976 act as:

"Works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material object, such as

[80] Ibid, pp 75
[81] Leaffer, Op Cit, pp 95
[82] Ibid, pp 95

books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied".[83]

This category includes all works written in words or symbols of any kind, regardless of the material objects in which they are embodied. A literary work can be a computer program, catalog, database, or a poem written on a piece of paper or recorded on cassette.[84] Copyright in computer programs is one form of literary work that has caused much controversy in recent years. Computer programs are now a fundamental part of copyright law.[85]

Computer Programs.

It has already been seen that copyright subsists in computer programs as a form of literary work by the Copyright Act 1976. The same prerequisites of originality and qualification must be present as with other forms of literary works for a computer program to be the subject matter of copyright. At one time it was not at all clear whether computer programs were protected by copyright. The copyright Act 1955 made no mention of computers or computer programs.[86] Although at the time that Act was passed computers had been around for a few years, unauthorized copying of computer programs had not become a serious problem. There were only few computers in existence and they were very expensive and costly to operate and maintain, and there was no black market in application programs.[87] Many such application programs were specially written and maintained by the staff of computer departments for an organization's own particular

[83] Section 102 (a) USC, Op Cit.
[84] Bainbridge,Op Cit, pp 37
[85] Ibid, pp 190
[86] Gorman, Op Cit, pp 197
[87] Ibid, pp 199

needs and would probably have been unsuitable for use by others. However, in spite of the omission of computer programs from the Act 1955 many writers considered that they were protected as literary works.[88]

"... Computer program expressed in writing or other notation on a piece of paper is a literary work within the meaning of Art 2 of the 1955 Act... and if produced as a result of substantial independent skill or useful labor will be 'original' and so qualify for copyright protection"

Well this statement doesn't give us something new because what we are trying to solve is the unauthorized copying of computer programs that are saved on a computer not printed out on a piece of paper.

The copyright remained unchangeable. During the first few years of the 1980's, the problem of computer software piracy became a major concern for the computer industry with the loss attributable to piracy being estimated at some 150 million dollars.[89] There were many cases brought to court during that period. These actions invariably proceeded on the basis that computer programs were protected by copyright and interim relief was invariably granted.

Computer Programs (Software).

The 1976 Act did not recognize computer programs as copyrightable subject matter. The formal recognition of computer programs as copyrightable subject matter did not come

[88] Bainbridge, Op Cit, pp 193
[89] Gorman, Op Cit, pp 200

about until 1980 with the amendment of the 1976 Act. According to the House Report, the definition of literary works included:

"*Computer data bases, and computer programs, to the extent that they incorporate authorship in the programmer's expression of original ideas, as distinguished from the ideas themselves*"[90]

Section 101 of the copyright law defines computer programs as: "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result". [91]

Now we will analyze an important case that has set new horizon for the copyrightability of computer programs. There was a debate in US on whether application programs and operating programs both are protected by copyrights. All scholars had agreed that application programs such as word processing excel... are protected by copyrights, but what about operation programs that have no output?

Apple Computers, Inc Vs Franklin Computer Corp.

714 F. 2d 1240 (3d Cir. 1983)

Judge Mr. Slovtier

Plaintiff: Apple Computers Inc

Defendant: Franklin Computer Corp

Facts: *Apple - one of the computer industry leaders, manufactures and markets personal computers related peripheral equipment such as disk drives and computer programs. It*

[90] Ibid, pp 200
[91] Section 101 USC, Op Cit.

presently manufactures Apple II computers and distributes over 150 programs. Apple has sold over 400,000 Apple II computers employs approximately 3,000 people and had annual sales of $335,000,000 for fiscal year 1981. One of the byproducts of Apple's success is the independent development by third parties of numerous computer programs that are designed to run on the Apple II computer[92].

The defendant manufactures and sells the ACE 100 personal computer. The ACE was designed to be "Apple Compatible" so that peripheral equipment and software developed for use with Apple II computer could be used in conjunction with the ACE 100. Franklin's copying of Apple's operating system computer programs in an effort to achieve such compatibility precipitated this suit.

Computer programs can be categorized by function as either application programs or operating system programs[93]*. Application programs usually perform a specific task for the computer user, such as words processing... In contrast, operating system programs generally manage the internal functions of the computer or facilitate use of application programs.*

The 14 programs at issue in the suit are operating system programs.

Legal Issue: *Does the copying of operating programs consist an infringement of copyright?*

Decision: *the court held that a computer program is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.*

The court didn't differentiate between operating programs and application programs.

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[92] Weinreb, Op Cit, pp 47.
[93] Bainbridge, Op Cit, pp 214.

Franklin was liable for copyright infringement of the 14 computer programs patent infringement, unfair competition and misappropriation. [94]

After this case there is no need to differentiate between operating programs and application programs. The court has considered all programs no matter what their function is, are protected by copyrights on condition that they satisfy the requirement of originality and fixation in a tangible medium of expression.

The Lebanese law of 1999 states in Article 2 that:" *computer programs regardless of their languages, including preparatory works are protected by copyright rules."*[95]
There exist no further explanation of this sub article neither jurisprudence nor writings of scholars exist to elaborate to meaning of *"regardless of their language"* or *"any preparatory work"*. In my opinion, the Lebanese law as many other jurisdictions must follow the American way.
After exposing the works, now in Section 2 we will examine another kind of works of authorship.

Section 3: Pictorial, Graphic, and Sculptural Works:

Section 102(a) of the 1976 Act provides protection to pictorial graphic and sculptural works, a category that:[96]

[94] Gorman, Op Cit, pp 203.
[95] Abou-Ghazalle, Op Cit, pp 407.
[96] Section 102 (a) USC, Op Cit.

"includes two dimensional and three dimensional works of fine graphic and applied art, photographs, prints and art reproductions, maps, globes, charts, technical drawings, diagrams and models."

Article 2(7) of the Lebanese Law on Copyrights states that *"drawings, sculptures, engravings, ornaments and weaving" are protected by copyrights.*[97]

The term "graphic, pictorial, and sculptural works" encompasses works of fine arts as well as applied art and implies no criteria of aesthetic value or taste. The aspect of this category that has engendered the most controversy is the role of copyright in protecting artistic creation embodying utilitarian objects[98].

Works of Applied Art and the Design of Useful Objects.

The designer's art fuses the functional with the aesthetic, producing objects of everyday life (telephones, lighting fixtures, automobiles, tableware) that are both beautiful and useful.[99] Excellence comes at a price, and designers must recoup their investment to stay in business. They wish to protect their designs from free-riding imitators who are able to sell their imitations at a lower price than the originators.

These objects of utility have presented a difficult issue for the law of copyright. The reason for this difficulty lies in their fusion of the utilitarian and the aesthetic. The goal of the law has been to grant protection to the aesthetic features of an object without unduly extending the monopoly to its functional or mechanical features[100]. In other words, the Copyright Act denies protection to utilitarian aspects of industrial designs to save consumers from paying more for unpatented utilitarian articles. It is often impossible,

[97] Abu-Ghazaleh, Op Cit, pp 409
[98] Bainbridge, Op Cit, pp 35
[99] Gorman, Op Cit, pp 215
[100] Leaffer, Op Cit, pp 116

however, to separate in a rational way the aesthetic aspect of the article, the realm of copyright, from its utilitarian dimension, the realm of patent law.[101] Drawing the line between protectable pictorial, graphic, and sculptural works and unprotectable utilitarian elements of industrial design has proven to be one of the most troublesome tasks of copyright law. The leading case in this field is the case of *Mazer Vs Stein.*

Mazer Vs Stein.
347 US 201

Plaintiff: Mazer

Defendant: Stein

Judge: Mr. Reed

Facts:

- *Mazers are partners in the manufacture and sale of electric lamp.*
- *Mazer has created original works of sculpture in the form of human figures by traditional clay-model technique.*
- *From this model that Mazer has created, a production mold for casting copies was made.*
- *The resulting statuettes without any lamp components added, were submitted by the Plaintiff to the Copyright Office for registration as works of art.*
- *Certificate of registration was delivered.*
- *Defendant like plaintiff makes and sells lamps.*[102]

[101] Ibid, pp 116
[102] Weinreb, Op Cit, pp 56

- *Without authorization, they copied that statuettes, embodied them in lamps and sold them.*
- *A law suit was raised based on the infringement of the plaintiff's copyrights over the statuette.*

Defenses:

- *Plaintiff claims that the Defendant has infringed his copyright.*
- *A defendant reply that works of art made as part of mass-produced good is not subject to copyright.*

Legal issue: *Can statuettes be protected by copyright when the copyright applicant intended primary to use the statuettes in the form of lamp bases to be made and sold in quantity?*

Decisions:

Judge Reed states:

"As we have held the statuettes here involved copyrightable, we need not decide the question of their patentability. Though other courts have passed upon the issue as to whether allowance by the election of the author or patentee of one bars a grant of the other, we do not. We do hold that the patentability of the statuettes, fitted as lamps or unfitted, does not bar copyright as works of art. Neither the Copyright Statute nor any other says that because a thing is patentable it may not be copyrighted. We should not so hold[103].

[103] Gorman, Op Cit, pp 221

Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea not the idea itself. Absent copying there can be no infringement of copyright. Thus, respondents may not exclude others from using statuettes of human figures in table lamps; they may only prevent use of copies of their statuettes as such or as incorporated in some other articles.[104] Regulations makes clear that artistic articles are protected in form but not their mechanical or utilitarian aspects. The dichotomy of protection for the aesthetic is not beauty and utility but art for the copyright and invention of original and ornamental design for design patens. We find nothing in the copyright statute to support the argument that the intended use or use in industry of an article eligible for copyright barns or invalidates its registration. We do not read such a limitation into the copyright law.[105]

Nor do we think the subsequent registration of a work of art published as an element in a manufactured article, is a misuse of the copyright. This is not different from the registration of a statuette and its later embodiment in an industrial article.[106]

The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. However it is intended definitely to grant valuable, enforceable rights to authors, publishers, etc without burdensome requirements; to afford greater encouragement to the production of literary works of lasting benefits to the world.

The Supreme Court accepted the idea of granting copyright protection to works embodied in useful objects as to their form, but not as to their mechanical or utilitarian features. In addition, the court also held that protection by design patent did not bar copyright

[104] Op Cit, Leaffer, pp 119.
[105] Ibid, pp 119
[106] Ibid., pp 119

protection.[107] The court justified the overlapping forms of intellectual property protection because the copyright monopoly is of a different nature than patent. It is less exclusive than the patent monopoly and protects originality rather than novelty and invention. [108]

Until the leading case of *Mazer Vs Stein*, it was unclear whether copyright protection was available for works of art embodied in industrial objects or whether protection was limited to the design patent laws. The Copyright Office took the position that copyright protection was limited to works of artistic craftsmanship insofar as their form, but not as to their mechanical or utilitarian aspects, as in jewelry, enamels, glassware, and tapestries.[109]

After *Mazer Vs Stein*, the use to which a work of art was put became irrelevant, but the question remained whether the whole range of industrial design in useful articles could qualify for copyright. From Balinese dancers used as lamp base, courts extended protection to an antique telephone shape used as a pencil sharpener, and a coin bank in the shape of a log. In addition to these mass-produced objects, graphic designs for textiles were also included within a copyrightable subject matter.[110]

If a statuette of a Balinese dancer was copyrightable, why not an automobile, a toaster, or a modernistic lighting fixture? The difference between these useful objects and the *Mazer* statuettes is that their artistic aspects are of an abstract nature often fused with the functional attributes of the object. To deny copyright to these objects, however, would run contrary to the basic tenet of American copyright law, that individual perception of

[107] Gorman, Op Cit, pp 222
[108] Weinreb, Op Cit, pp 57
[109] Gorman, Op Cit, pp 223
[110] Ibid, pp 223

the beautiful is too varied a power to permit a narrow or rigid conception of art. Despite this tradition, which prevented judges and bureaucrats from discriminating against art forms, the Copyright Office wished not to incorporate the entire range of mass-produced objects into copyright law. By regulation, the Copyright Office adopted the separability standard that continues to be the focus of debate under the 1976 Act.[111]

Industrial Design under the 1976 Act.

Section 101 provides that:[112]

"The design of a useful article... shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of the utilitarian aspects of the article."

This section is designed to draw a line between copyrightable works of applied art and uncopyrightable industrial design. The pertinent section of the House Report reads as follows:

"*Unless the shape of an automobile, airplane, lady's dress, food processor, television set, or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of the article, the design would not be copyrighted under the bill. In the following sections we will be dealing with the study of physical and conceptual separability.*"[113]

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[111] Leaffer, Op Cit, pp 120
[112] Section 101 USC, Op Cit.
[113] Leaffer, Op Cit, pp 122

Physical Separability

In *Esquire, Inc Vs Ringer,* the court of Appeal for the District of Columbia held that the overall shape of certain outdoor lightning fixtures was ineligible for copyright as a work of art. The Register of Copyright had denied copyright to the fixtures, based on Office regulations that precluded registration of a design of a utilitarian object when:

The fixture did not contain elements, either alone or in combinations, which are capable of independent existence as a copyrightable pictorial, graphic, or sculptural work apart from utilitarian aspect. Unlike the statuettes in *Mazer*, this could exist independently as a sculptural work removed from the lamp mechanism, the modernistic abstract form of the lightning fixture was inextricably a fuse with its utilitarian function[114]

In short, the *Esquire* court took a narrow view of the separability issue:

First, holding that the overall design of an industrial object is never eligible for copyright and, second, only those aspects removable from the object and that maintain an independent existence as graphic, pictorial, or sculptural work qualify for copyright protection.

Physical separability, as adopted by *Esquire,* has been largely rejected by both courts and commentators as being contrary to the intent of Congress.[115]

Conceptual Separability.

Copyright should be upheld whenever the decorative or aesthetical pleasing aspect of an article can be said to be primary and the utilitarian function can be said to be secondary. Conceptual Separability exists where an article would be marketed as an aesthetic object

[114] Ibid, pp 122
[115] Weinreb, Op Cit, pp 61

even if it had no useful function. For design features to be conceptually separate from the utilitarian aspects of the useful article that embodies the design, the article must stimulate in the mind of the beholder a concept that is entirely separable from the utilitarian functions. The object must cerate in the observer's mind's eye not just a useful object but a work of art as well.[116]

Architectural Works.

Architectural works present many of the same problems similar to the works of applied art. There are two aspects to the copyrightability of architectural works: the plans and models that represent the structure, and the architectural structure itself.

1. Architectural Structure.

The scope of protection in a three dimensional architectural structure is the same as the protection afforded to all pictorial, graphic, or sculptural work embodied in useful objects.[117] Thus as is the case for the design of useful objects, copyrights protection extended only to those elements in a building that were physically or conceptually separable from its overall design.

2. Architectural Plans, Models, and Drawings.

Under the US and Lebanese laws, Architectural plans were included as copyrightable subject matter.[118] Unlike buildings, Architectural plans models or drawings are not useful articles and are not subject to a separability limitation because their purpose is to

[116] Leaffer, Op Cit, pp 120
[117] Gorman, Op Cit, pp 247
[118] Ibid, pp 247

merely portray the appearance of the article or to convey information. Architectural plans could be infringed by simple copying and reproduction.[119]

Maps.

Maps have been recognized as copyrightable subject matter - a higher standard of originality for maps than for other varieties of copyrightable subject matter. US courts held that, to meet the standard of originality, the publisher of a map must engage in some direct observation, that is, some original work of surveying or calculation or investigating the terrain. By this approach, a mere rearrangement of public domain sources would not meet the standard. [120]

Section 4: Other Categories of Copyrightable Subject Matter.

1. Musical Works

The Lebanese and US laws specify that the category of musical works encompasses both the words of a song and its instrumental components. A musical work can be embodied in various material objects such as musical notation written on paper or directly recorded on a phonorecord.[121]

Musical works, like other works of authorship, must display a quantum of originality and creativity, manifested in melody, harmony, or rhythm individually or in some combination. Much music is based on public domain sources, and issues regarding the standard of originality arise with relative frequency for arrangements of these public

[119] Leaffer, Op Cit, pp 121
[120] Ibid, pp 133
[121] Bainbridge, Op Cit, pp 54

domain sources. Originality and not novelty is required, the author need to add very little to the public domain to meet the standard of originality.[122]

2. Sound Recordings.

Sound recordings are defined as "*works that result from the fixation of a series of musical, spoken, or other sounds, but do not include the sounds accompanying a motion picture or other audio visual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.*"[123]

Sound recording is a captured performance. The performance captured in the sound recording may be a musical, literary, or dramatic work. These works of authorship should be distinguished from the copyright in the sound recording. The distinction is more than academic interest because the owner of a sound recording copyright enjoys different exclusive rights than the copyright owner of the musical, literary, or dramatic work captured in a sound recording. Most importantly the owner of a sound recording may not control its performance, while the copyright owner of a musical, literary, or dramatic work enjoys a full performance right.[124]

The sound recording must be distinguished from the material object in which it is embodied.[125]

Originality in Sound Recordings.

The source of originality in sound recording may emanate from the performers whose performance is being captured or from the record producer who sets up the recording

[122] Leaffer, Op Cit, pp 134
[123] Gorman, Op Cit, pp 255
[124] Leaffer, Op Cit, pp 135
[125] Ibid, pp 135

and processes, compiles, and edits the sounds. Performer originality consists of all the choices a performer makes in interpreting a tune, a story, or a literary work, such as tone, inflection of voice, or musical timing. Almost any conscious performance by a human being would add the degree of originality necessary for copyrightability in a sound recording. Of course, the author of the sound recording must add something of his own; a purely mechanical recording (recording of sea sound, bird calls...) involving no authorial choice would fail for lack of originality.[126]

3. **Dramatic Works.**

The Copyright Office defines Dramatic works as:

"*One that portrays a story by means of dialogue or acting and is intended to be performed. It gives directions for performance or actually represents all or a substantial portion of the action as actually occurring, rather than merely being narrated or described.*" [127]

Whether a work is categorized as dramatic work rather than a non-dramatic literary or musical work can be of legal and practical importance. As an example, exceptions for performance and display of works for non-profit or governmental entities apply only in certain instances to non-dramatic literary and non-dramatic musical works. The compulsory license to make sound recording under section 115 of the US law is limited to non-dramatic musical works.[128]

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[126] Bainbridge, Op Cit, pp 54
[127] Gorman, Op Cit, pp 229
[128] Leaffer, Op Cit, pp 137

4. Pantomimes and Choreographic Works.

The Copyright Office has defined Choreographic Works as:

"*The composition and arrangement of dance movements and patterns usually intended to be accompanied by music. Dance is defined as static and kinetic succession of bodily movements in certain rhythmic and special relationship. Choreographic Works need not tell a story in order to be protected by copyrights.*"[129]

The House Report states that the category does not include social dance steps and simple routines. This statement appears to reiterate nothing more than the basic *de minimis standard of originality as it would apply to a* Choreographic Works.

5. Motion Pictures and Other Audiovisual Works.

Audiovisual Works is defined as:

"*Works that consists of a series of related images that are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.* "[130]

Motion pictures are a subcategory of audiovisual works and are defined as:

"*Works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any*"[131].

From the above definition, the essence of motion picture is a series of related images that can be shown in successive order and give the impression of motion. As for any work, the motion picture must be fixed in a tangible medium of expression.

[129] Ibid, pp 138
[130] Ibid, pp 139
[131] Ibid, pp 139

Thus, mere live performances, such as telecasts of live sports events, are not covered unless simultaneously fixed in at least one copy.[132]

[132] Ibid, pp 139

Chapter 4:

Ownership of Copyright.

The Lebanese and US laws state that the copyright vests initially in the author or authors of a work. The key term "author" is left undefined by the two acts, but it is generally accepted that an author is the person who originates the work. The author is most frequently the creator of a work, but this is not always the case. For example, an employer is considered the author of a work made for hire.[133]

Initial ownership of copyright is easy to determine when a person creates a work on his own motivation. Many works of authorship are created pursuant to employment (works made for hire), and others are created by the collaborative efforts of several authors who may contribute their authorship at different times (joint works).[134]

We will divide this chapter into two sections, wherein section one we examine how copyright ownership vests, focusing on two important situations: works made for hire and joint works.

In section two, we will recall to the special nature of contracts transferring some or the entire bundle of rights, which comprise copyright ownership.

Section 1: Initial Ownership: Works Made for Hire and Joint Works.

In copyright law, works created as part of one's job, called "works made for hire," are treated differently than works created by individual authors on their own motivation.[135]

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[133] Miller, Op Cit, pp 376
[134] Ibid, pp 376
[135] Bainbridge, Op Cit, pp 73

For the works made for hire, the employer is considered as the author and not the employee who have created the work.[136]

The classification of a work is extremely important. If a work is classified as works made for hire, the employer - author will enjoy all the rights related to the work. The employee - creator will have no ownership rights.[137]

Because the employer is considered as the author of a work made for hire, the nationality and status of the employer can have important consequences.[138] For example, if the employer is the Lebanese Government, copyright cannot be claimed at all notwithstanding the person who invested time and effort to create the work.

1. Works Made for Hire: An Overview of the Basics Standards.

Section 101 of the US law defines a work made for hire as:

(1) *a work prepared by an employee within the scope of his or her employment; or*

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.[139]

There are two ways in which a work made for hire can be created. Under subdivision (1), a work made for hire may arise from works created within the scope of employment. This subsection must be read in connection with Section 201(b), which provides:

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[136] Ibid, pp 73
[137] Macintyre, Op Cit, pp 726
[138] Ibid, pp 726
[139] Section 101 USC, Op Cit.

" *the employer or other person for whom the work was prepared is considered the author for purposes of this title, and unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright*".[140]

In other words, when a work is created by an employee, it is presumed to be made for hire unless the parties agreed otherwise in a written instrument. Thus, a graphic artist who works full time as an employee for an advertising agency will not own the copyright on his drawings made for a client of the firm unless he had the firm enter into a written contract designating the employee as author.

Subdivision (2) concerns specially commissioned works, those that are created by independent contractors, persons who are not salaried workers of the commissioning party. The Copyright Act imposes two requirements to create a work made for hire for specially commissioned works.

First, subdivision (2) of the Section 101 definition limits the creation of a work made for hire to nine enumerated categories of works.

These nine categories are:[141]

1. *a contribution to a collective work;*
2. *a part of a motion picture or other audiovisual work;*
3. *a translation;*
4. *a supplementary work;*
5. *a compilation;*

[140] Ibid, Section 201 (b) USC.
[141] Ibid, Section 10 (work made for hire) USC.

6. *an instructional text;*
7. *a test;*
8. *answer material for a test;*
9. *an atlas.*

Second, falling into one of these categories is not enough; to qualify as a work made for hire, the parties must "expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. No contract, however explicit, is sufficient if the independent contractor's work product does not fall into one of the nine categories. As an example, if A commissioned B to make a sculpture for his home, a work made for hire cannot be created even if the parties agree in a written contract, because B's creation does not fit into one of the nine categories. Subdivision (2) makes it more difficult to create a work made for hire for a work commissioned from an independent contractor than one created in the scope of employment. [142]

Article 8 of the Lebanese Law on Copyrights states: "*in case the works were created by natural persons working for a natural person under an employment contract to fulfill their occupational or professional commitments, the patron or employer shall be considered to be the owner of the copyright and shall exercise the rights provided for in Article 15 of this law, unless there is written agreement to the contrary*".[143]

The Lebanese Law is quite similar to the US law regarding works made for hire. The Lebanese law - similarly to the US law - considers the employer and (not the employee

[142] Miller, Op Cit, pp 393
[143] Abu-Ghazaleh, Op Cit, pp 411

- creator) as the owner of a work made for hire, unless there is a written agreement to the contrary. The employer is considered the author of the work if and only if there is no **written agreement** stating the contrary. [144]

On the other hand, the Lebanese law oppositely to the US law doesn't state anything regarding special commissioned works. As we have stated, there are two ways to create a work made for hire under the US law: first under an employment contract; second, specially commissioned works. The Lebanese law doesn't mention special commissioned works. The Lebanese Law should be amended in order to organize this issue. A slight amendment without going into specific details is better than being silent.

As we have stated that both Lebanese and US laws state that the work made for hire may be considered as the employee property if there is a written agreement stating clearly that the employee-creator is the owner of the copyright created under the employment contract. The question that can be raised is: at what point in time must the writing be executed to create a work made for hire?

The US law is silent regarding this point, and the courts are in conflict.[145] One court held that parties must agree that the commissioned work is a work made for hire before the work is created, but agreement may be oral or implied. The writing may date from after creation if it confirms the prior agreement, explicitly or implicitly. Other courts have insisted that the writings requirement necessitates that the written memorandum must precede the creation of the property in order to serve the purpose of identifying the non-creator owner.[146]

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[144] Leaffer, Op Cit, pp 193
[145] Gorman, Op Cit, pp 298
[146] Ibid, pp 298

2. Works Prepared Within the Scope of Employment.

A work made for hire is created if it is prepared by the employee "within the scope" of his or her employment. Thus, even though a work is prepared by an employee, the work must be prepared "within the scope of employment" to be regarded as a work made for hire. Problems may arise when employee creates a work at home related to his job, or creates a work not related to his job during working time. What is the status of these works? Are they considered as works created within the scope of employment?[147] The courts have set certain criteria in order to consider a work created within the scope of employment. These criteria that should be available in order to consider the work created within the scope of employment are:

1. whether the work was of the type the employee was hired to perform;

2. whether the creation of the work in question occurred "substantially" within the authorized time and space limits of the employee's job; and

3. whether the employee was actuated, at least in part, by a purpose to serve the employer's purpose.[148]

3. Joint Works.

Works of authorship are often created by two or more persons and are treated as joint works. Section 101 of the 1976 Copyright Act defines a "joint work" as

"a *work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole*".[149]

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[147] , Miller, Op Cit, pp 377
[148] Ibid, pp 377
[149] Section 101 USC (Joint Works), Op Cit.

The key term in the definition, "inseparable" and "interdependent", are not defined. As an example of inseparable, a novel or a painting, while example of interdependent, a motion picture, opera, or words and music. Whether a work entails interdependent or inseparable elements is irrelevant in determining whether a joint work has been created. What counts is that the authors intended their respective labors to be integrated into one work.[150]

A joint work, however, can also result in several other ways. First, a joint work is created when a copyright owner transfers the copyright to more than one person. Second, a joint work arises when the copyright passes by will or intestacy to two or more persons. Thus, a joint work may be more broadly defined as one in which copyright is owned in undivided shares by two or more persons, whether created by joint authorship or in some other way. [151]

Article 6 of the Lebanese Law states that "*in case of joint work for which it would be impossible to separate the share of any of the contributing parties from that of the others, all parties shall be considered authors by virtue of their contribution and equal owners of the copyrights. If however, it was possible to separate the share of each of the contributing parties from the share of the others, each one of them shall be considered an independent author of the part belonging to him...*" [152]

[150] Gorman, Op Cit, pp 278
[151] Miller, Op Cit, pp 379
[152] Abou-Ghazaleh, Op Cit, pp 411

The Nature of Joint Work Authorship.

What kind of contribution must each author make to create a joint work?

The contributions of the individual authors do not have to be equal in quantity and quality.[153] Thus, a joint work can be created even if the collaborative efforts of the authors are unequal. A joint author must not only intend that his contribution be part of a joint work but must contribute more than *de minimis* authorship to the resulting work. In other words, a hiring party who contributes general ideas, factual matter, or describes to another, what the commissioned work should do or look like, does not become a joint author of the work. To be an author one must supply more that just mere directions or ideas.[154]

Intent to Create a Joint Work.

Even if the collaborating authors contribute copyrightable elements to the resulting work, a joint work was not created unless the authors intended, at the time of writing, that their contributions become part of a joint work. Collaboration is not sufficient; there must be intent to create jointly authored and jointly owned work. The intent is an important element in order to cerate a joint work, but it does not matter when the fulfillment of the intent takes place. As an example: a joint work could be created if A's words were created in 1946 and B's music was created in 1970, with the integration into the final song taking place in 1988. Each composer intent to create a joint work at the **time of creation** is the essential requirement.[155] It is irrelevant that the composers were unknown to each others, nor have the authors collaborated together at

[153] Gorman,Op Cit, pp 285
[154] Ibid, pp 290
[155] Macintyre, Op Cit, pp 726

the same time and place so long as each author intended at the time of creation that his or her contribution would be combined in some way with another's work[156].

Alternatively, a joint work is not created if an author did not intend at the time of creation that his work be merged into an inseparable or interdependent work. If we refer to the previous example, a joint work will be created if A the writer of the words, intended that the words he had created be nothing more than a poem, but later decided that they should be integrated with music into a song. In this case a joint work will not be created because at the moment when the work was created there existed no intent to create a joint work.[157]

Here a question may be raised: Does the joint authorship of an underlying work confer any joint ownership rights in a new work created by one of the joint authors that is substantially based on the underlying work?

Suppose that A and B create a joint work, for example an article in a scientific journal. At a later time after a falling out between the two parties, A uses a substantial portion of the original article but adds substantial original authorship to the new article. Is B a joint author of the second article? Here a joint ownership would not attach to the second work unless there was evidence that the authors intended their joint product to be forever indivisible. Without such evidence a derivative work would be created and B would not be a joint author of the resulting derivative work.[158]

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[156] Ibid, pp 726
[157] Ibid, pp 728
[158] Gorman, Op Cit, pp 304

Consequences of Joint Ownership.

Whenever several authors jointly own a work, each author is considered to be a co-owner of the entire work. In other words, each author has a certain part or percentage of the entire work.[159] Similarly to the Land Law, whenever a real estate is owned by two or more natural persons, every owner owes an undefined and undivided part of the whole. As a result, each co-owner has an undivided ownership in the entire work. Consequently, each co-owner can use or license the whole work as he wishes, and the only obligation is a duty to account for profits to the other joint owner[160]. What a joint owner cannot do is to transfer all interest in the work that is, assign the work or grant an exclusive license in it without the written consent of the other co-owner.[161]

Joint Works and Derivative Works Compared.

There exists a substantial difference between the ownership of a joint work and the ownership of a derivative work. As we have stated above that the owners of a joint work owe an undefined and undivided part of the whole. Oppositely, each owner of a work combined to, form a derivative work enjoys all the rights related to his work only[162]. As an example, the authors of the words and the music to the song discussed above. Assume that neither, A nor B had the intention at the time of creation that their works be integrated into a joint work. The ensuing song would be considered a derivative work. As owner of the derivative work, each author owns nothing more than

[159] Miller, Op Cit, pp 377
[160] Ibid, pp 377
[161] Ibid, pp 378
[162] Leaffer, Op Cit, pp 206, 207

his original contribution. Each author would have to obtain permission for every use of the song from the owner of the underlying work[163].

Other consequences result from joint ownership, as compared with ownership of a derivative work. The entire joint work passes to the heirs or devises of each of the joint author, while the owner of a derivative work or collective work can convey no more than his individual contribution to his heirs or devisees.[164]

4. Ownership of Contribution to Collective Work.

- Distinguishing Between Copyright in the Collective Work and Copyright in a Contribution to the Collective Work.

A collective work is defined in Section 101 as

"... *a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, consisting separate and independent works in themselves, are assembled into a collective whole.*[165]

A collective work is, in effect a species of compilation, but unlike other types of compilations it consists of separate and independent copyrighted works. The distinction is also made between a joint work, where the separate elements merge into a unified whole, and a collective work where they remain separate and distinct. Section 201(c) provides:" *copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is*

[163] Ibid, pp 207
[164] Gorman, Op Cit, pp 300
[165] Section 101 USC (collective work) Op Cit.

presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series."[166]

For example, collective work authorship in an anthology of poetry would extend to the selection and arrangement of the poems and other editing, such as an introduction to the poems, but not to the poems themselves.[167]

In brief, there exists a difference between the author of the collective work and the author of a work contributed to the collective work. As an example, suppose that A is the author of a legal magazine. Many articles were published in this magazine. Every article has its' own author. Thus every single author of each article remains the author of that article. That means the author of the magazine cannot publish an article alone outside the frame of the magazine without the written consent of the author of that article. On the contrary the author of the magazine can edit a new version of the magazine with certain amendments to it as a whole without the consent of every author.[168] Lebanese law has no similar text.

Section 2: Transfer of Copyright Interest.

1. Divisibility of Copyright.

Copyright in a work may be regarded as a bundle of rights that may be transferred in it entirety or individually. The US Act of 1976 in Section 201(d)(2) explicitly recognizes the principle of divisibility of copyright in providing:

[166] Section 201(c) USC, Op Cit.
[167] Leaffer, Op Cit, pp 208
[168] Ibid, pp 208

"Any of the excusive rights comprised in copyright, including any subdivision of any of the rights specified by section 106, may be transferred and owned separately. The owner of any particular exclusive right is entitled, to the extend of that right, to all of the protection and remedies accorded to the copyright owner by this title."[169]

Article 16 of the Lebanese law on Copyrights provides the following:

" *the material rights of the author shall be considered a transferable right that can be relinquished in whole or in part".* [170]

To be effective transfers of copyrights must be written and signed by the copyright owner.

According to both laws the owner of copyright may transfer all his rights regarding the copyright to any other individual whether natural or moral person, on condition that the transfer must be in the form of a written contract, signed by the owner, and stating clearly the transferred rights.[171]

Can the owner of a copyright lease certain rights? Of course, since the owner can sell his rights or transfer them for free, it is logical that he can lease his rights following the French Doctrine *"qui peut le plus peut le moins".*

Consequence of Divisibility: Right to Sue.

The transferee of a copyright right is treated as the author regarding this right. Thus the transferee may refer to all legal methods in order to protect his interest. The right to sue is one of the important rights a transferee may have recall to in order to protect

[169] Section 201(d) (2) USC (transfer of copyright) Op Cit.
[170] Abou-Ghazaleh, Op Cit, pp 412
[171] Bainbridge, Op Cit, pp 93

his right.[172] This right (right to sue) is particularly important to the exclusive licensee who can bring suit on his own behalf to protect his ownership interest in the copyright.

Drafting Licenses: The Problem of New Media.

Transfer and non-exclusive licensee of copyright present a major problem in the legal drafting and interpretation. No set form exists for drafting an assignment or license, but most agreements include provisions, among others, for (1) Royalties, (2) duration of the agreement, (3) its geographical scope, (4) the manner in which the work may be exploited, (5) termination circumstances, (6) the name to be carried on the notice of copyright, and (7) responsibility for maintaining an infringement suit.[173]

A more difficult problem of interpretation is presented when a court has to decide whether new or undeveloped media fall within the grant. In this situation, the traditional quest for the intent of the parties will not work when the issue involves media of which they could not have been aware. This is not a new problem; technology changes more rapidly than our ability to describe it, even in the best-drafted contracts.[174]

When faced with this approach, courts have followed two approaches. A strict approach, which generally favors the licensor, would limit media use to the literal terms of the agreement, sometimes referred to as the unambiguous core meaning of the term. The second approach would apply a reasonable standard in which media use

[172] Miller, Op Cit, pp 384
[173] Leaffer, Op Cit, pp 215
[174] Ibid, pp 215

would include all uses reasonably falling within the scope of the media described in the license. This approach generally favors the grantee and promotes a wider distribution of copyrighted works in new media such as the case of Subafilms Ltd Vs MGM- Pathe Communications.[175]

Subafilms Ltd Vs MGM-Pathe Communications.[176]

Judge D.W. Nelson

Plaintiff: *Subafilms Ltd*

Defendant: *MGM-Pathe Communications.*

Facts: *in 1966, the musical group The Beatles through Subafilms Ltd entered a joint venture with the Hearst Corporation to produce the animated motion picture entitled "Yellow Submarine" (the picture). Over the next year, Hearst Corporation acting on the behalf of the joint venture negotiated an agreement with MGM-Pathe Communications in order to distribute the Picture in theatres around the globe starting from 1968.*

In the early 1980s, with the advent of the home video market, MGM entered into several licensing agreement to distribute a number of its films on videocassette.[177]

Defenses: *The plaintiff considers the production of the Yellow Submarine film on home video as an infringement of the 1968 agreement*

Legal issue*: Whether home Video rights had been granted by the 1968 agreement?*

[175] Bainbridge, Op Cit, pp 92
[176] Weinreb, Op Cit, pp 27
[177] Jackson, Legal Problems of International Economic Relations, 4th edition 2002 pp 935

Decision: *The supreme court of California ruled that the act of MGM is a violation of the 1968 agreement. The defendant had to pay the sum of 2,228,000 Million Dollars as compensation for opportunity lost.*

Chapter 5:

The Exclusive Rights and Their Limitation.

The six exclusive rights of reproduction, adaptation, distribution, performance, display, and sound recording digital audio transmission right create the boundaries of copyright ownership, and their violation constitutes copyright infringement[178]. Each exclusive right is subject to a series of limitation that we will discuss later during this chapter.

Article 15 of the Lebanese Law on Copyrights states:" *the copyrights owner shall have the exclusive right to exploit the work financially. For this purpose, he shall have the quantitative right to allow or to forbid the following:*

- *Copying, printing, recording, and photocopying the work in all available methods including photography, cinematic representation, tapes, video tapes, disks and diskettes, regardless of their type, or in any other method.*
- *Translating the work into another language, its citation, modification, illustration, adaptation or re-distribution of the musical work.*
- *Selling, distributing and leasing the work.*
- *Importing copies of the work made abroad.*
- *Performing the work.*
- *Transmitting the work to the public whether wired or non-wired and whether through Hertz waves or the like or through coded or non-coded satellites. This shall include receiving television and normal radio*

[178] Gorman, Op Cit, pp 415

broadcast or reception through satellite re-transmitting it to the public in any manner allowing the transmission of sound and picture."[179]

Section 1: Exclusive Rights, Limitation, and Compulsory Licenses.

A copyright consists of a bundle of exclusive rights that empower the copyright owner to exclude others from certain uses of his work[180]. The exclusive rights of reproduction, adaptation, distribution, performance, display, and the digital sound recording transmission right enumerated in section 106 define the boundaries of copyright ownership, and their violation constitutes copyright infringement.[181] In short they are the essence of copyright ownership. Exclusive rights can be subdivided infinitely and each can be owned and enforced separately[182]. For example, the copyright owner of a novel may grant exclusive right licenses for the reproduction, distribution, and performance right to different parties, each of whom can sue for infringement in his own rights.

The exclusive rights are cumulative and to a certain extent they overlap. The same act may simultaneously infringe both the reproduction and adaptation rights[183], for example, by making an unauthorized translation of a copyrighted work. Here the infringer has reproduced the work and has also adapted it in a translation. Other than this reproduction adaptation rights overlap, it takes separate acts to infringe the other exclusive rights. If the infringer in the above example sold copies of the translation

[179] Abou-Ghazaleh, Op Cit, pp 413
[180] Macintyre, Op Cit, pp 727
[181] Section 501(a) USC, Op Cit.
[182] Gorman, Op Cit, pp 415
[183] Ibid, pp 415

and authorized readings of it, the distribution and performance rights of the copyright owner would also be infringed.

The exclusive rights of the copyright owner are subject to important limitation. Limitations on the exclusive rights are specified in section 107 through 121.

What is a Compulsory License?

To use a copyrighted work, one must normally obtain a license, the terms of which are determined through negotiation with the copyright owner[184]. If A, for example wishes to reproduce B's copyrighted painting in a poster, he or she must obtain authorization from B, and the terms of the ensuing agreement will depend on market conditions. In five instances, however, the Copyright Act supersedes the normal market mechanism for distributing copyrighted works and allows, the perspective user the right to obtain a compulsory license under which he can use the work without the copyright owner's permission[185]. So long as the licensee compiles with the statutory procedure and pays the established royalties, the compulsory license applies. The five compulsory licenses are:

1. The Cable License of Section 111 which establishes a compulsory license for secondary transmissions by cable television system;[186]
2. The Mechanical License, and Digital Audio Transmission License of Section 115, which establishes a compulsory license for production and distribution of

[184] Miller, Op Cit, pp 323
[185] Bainbridge, Op Cit, pp 94
[186] Section 111 USC, Op Cit.

phonorecords of non-dramatic musical works, and their delivery by digital audio transmission.[187]

3. The Digital Audio Transmission License of Sound Recordings of Section 114 and 115, which establishes a compulsory license for the transmission and delivery of sound recordings.[188]
4. The Public Broadcasting License of Section 118 which establishes a compulsory license for the use of certain copyrighted works by non-commercial broadcasting entities.[189]
5. The satellite Retransmission License of Section 119 which establishes a compulsory license for satellite retransmission to the public for private viewing.[190]
6. The Digital Audio Tape Device License which establishes immunity from liability for copyright infringement by manufacturers and importers of digital recording devices, but imposes a levy on these devices, the proceeds from which are to be distributed to copyright owners.[191]

Compulsory License reflects a political reality and have become and integral part aspect of the way the system functions. Economic relationships and certain copyright industries are organized around the compulsory license. Rather than

[187] Ibid, pp 115
[188] Ibid, pp 114,115
[189] Ibid, pp 118
[190] Ibid, pp 119
[191] Ibid, pp 120

witnessing their demise, we may even see more compulsory licenses created as a result of political expediency.[192]

Section 2: The Reproduction and Adaptation Rights and Their Limitations.

a. The Reproduction Right.

The exclusive right to reproduce a copyrighted work in copies or phonorecords may be regarded as the most fundamental right granted by copyright law[193]. To reproduce a work is to fix it in a tangible and relatively permanent form in a material object.[194] It takes little to infringe the reproduction right. One unauthorized fixation can infringe the reproduction right even though the copy made is not sold or otherwise distributed to others. It is possible to infringe the reproduction right without infringing any other exclusive right.[195] There exists dissimilarity between the concept of reproduction and the broad word "Copying"; from the legal point of view the word reproduction does not mean copying. Reproduction takes place when a work is copied in a material object, as when an artist puts paint on canvas or a singer records a work on phonorecords. Copying, a broader concept, can take place without a fixation, such as by performance or display[196]. In other words, the term copying is much larger than the term reproduction. Copying includes reproduction, but reproduction doesn't include copying. Every reproduction is a copying, but not

[192] Leaffer, Op Cit, pp 287
[193] Miller, Op Cit, pp 324
[194] Section 101 USC, Op Cit.
[195] Gorman, Op Cit, pp 420
[196] Ibid, pp 420

every copying is a reproduction, because there is a restriction in order to be considered as reproduction (work is copied in a material object).

b. The Adaptation Right.

The adaptation right is infringed when a third party makes an unauthorized derivative work in which a pre-existing work is recast, reformed or adapted.[197] Examples include a translation, musical arrangement, or dramatization. The exclusive right to prepare derivative works enables the copyright owner to exploit markets other than the one in which the work was first published. Today, these derivative markets can often be more valuable than the market of first publication.

A derivative work author, however, often does much more than mere copying. By transforming another's work, the derivative work author may add his own substantial authorship to the underlying work. As a result, some derivative works greatly outstrip the value of the underlying work, but without recognition of the adaptation right, the copyright owner would have recourse only against verbatim forms of copying in the same medium.[198] To violate the adaptation right, the infringing work must at least, transform, recast, or adapt a portion of the copyrighted work in some form.

Most often the adaptation right is infringed by acts of reproduction, that is, by acts of fixation in some sort of stable medium. But defendant's derivative work

[197] Leaffer, Op Cit, pp 291
[198] Ibid, pp 291

need not be fixed for purposes of infringement. Thus, a performance could violate the adaptation right.[199]

The adaptation right overlaps the reproduction and performance rights, and, with few exceptions, infringement of the adaptation right infringes either the reproduction right, performance right or both. Thus, if a person writes a play based on a novel without permission from the copyright owner, and if the play substantially embodies the copyrighted work, the copyright owner could bring an action for infringement of both the adaptation and reproduction rights. If the play were then performed, the performance right in the novel would also be infringed.

Although, the adaptation right interacts a lot with the reproduction and performance rights, it can exist alone. In only one case the copyright owner may sue for infringement of his adaptation right independently from the reproduction and performance rights[200]. This could occur when the copyright owner has licensed another to reproduce or perform the work, but has not specifically licensed the right to make a derivative work.

c. Limitations to the Reproduction and Adaptation Rights.

a. Ephemeral Recordings.

"Ephemeral Recordings are copies or phonorecords of a work made for transmission by a broadcasting organization legally entitled to transmit the work".[201] The right to

[199] Miller, Op Cit, pp 326
[200] Leaffer, Op Cit, pp 295
[201] Section 112 USC, Op Cit.

make ephemeral recordings is a narrow limitation on the exclusive reproduction right created to accommodate the needs of the broadcasting industry. A broadcaster may have a right to perform or display a work but may not have the right to make copies of it. Under this section, a broadcaster who has obtained a license to perform the work may make an ephemeral recording of the work[202]. Section 112 may be briefly summarized as follows:

- Licensed Broadcaster: Under Section 112(a), "*a licensed broadcaster may make one copy of a work, provided that the copy is retained and used solely by the organization that made it and is used for the organization's own transmission within its local service area. No further copies or phonorecords can be made of it. In addition, unless the copy is preserved exclusively for archival purposes, it must be destroyed within six months*".[203]

- *Government and Non-Profit: Section 112(b) provides a wider privilege for governmental bodies and non-profit organizations entitled to transmit a performance or display of a work under Section 110(2) or to make sound recordings under Section 114(a). These entities may make up to thirty copies or phonorecords of the transmission embodying the performance or display, provided that no further copies are made. All copies must be destroyed within seven years of the first transmission. However, one copy may be kept for archival purposes."*[204]

[202] Leaffer, Op Cit, pp 298
[203] Section 112 (a) USC, Op Cit.
[204] Ibid, Section 112 (b) USC.

- *Governmental and Non-Profit Religious Broadcasts*[205]*: Section 112(c) covers religious broadcasts. It allows a governmental or non-profit organization to make one copy of a transmitted non-dramatic musical religious work if there is no charge for the copy, and the broadcaster is under a license or transfer of the copyright. All copies, except one for archival purposes, must be destroyed within one year of the first transmission.*

- *Handicapped Audience: Section 112(d) grants the right to governmental or non-profit organizations to make ephemeral recordings for transmissions to handicapped audiences as authorized under Section 110(8).*[206]

- *Statutory License for Sound Recordings: Section 112(e), creates a statutory license for the making of an ephemeral recording of a sound recording by certain transmitting organizations. This new statutory license is intended primarily to benefit entities that transmit performances of sound recording to business establishment pursuant to the limitation on exclusive rights set forth in Section 114.*[207]

[205] Ibid, Section 112(c) USC.
[206] Ibid, Section 112 (d) USC.
[207] Ibid, Section 112 (e) USC.

- *Ephemeral Recordings as Derivative Works: Section 112(f) states that ephemeral recordings are not copyrightable as derivative works unless the copyright owner gives her consent.*[208]

b. Reproduction of Pictorial, Graphic, and Sculptural Works in Useful Articles.

Copyright in a pictorial, graphic, or sculptural work is not affected when the work is used as the design for a useful object. In other words, a work may be protected under copyright law regardless of whether it is embodied in a useful or purely aesthetic object[209]. Thus, statuettes on the hood of a car, a lamp base resembling a Balinese dancer are all copyrightable works of art. That they are embodied in a useful object car lamp... has no bearing on their copyrightability.

Section 113(b) however, limits the reproduction right of useful objects. It provides that: "*the owner of copyright in a work that portrays a useful article as such is not afforded any greater or lesser rights with respect to the making, distribution, or display of the useful article so portrayed...* [210]

A copyright in a pictorial, graphic, or sculptural work portraying a useful object does not extend to the manufacture of the useful object. A drawing or a model of a lighting fixture, building, or automobile is copyrightable as such, but the copyright does not give the artist the exclusive right to make the lighting fixture, building, or automobile[211].

Section 113 (c) further limits the reproduction right of a work embodied in a useful object. *Under this subsection, the copyright owner cannot prevent the making,*

[208] Ibid, Section 112(f) USC.
[209] Gorman, Op Cit, pp 463
[210] Section 113 (b) USC, Op Cit.
[211] Leaffer, Op Cit, pp 298

distribution, or display of pictures or photographs of such articles in connection with advertisement, commentaries, or news reports relating to the useful object.

c. Sound Recordings.

Section 114 limits the exclusive rights of reproduction, adaptation and performance in sound recordings, illustrating that sound recordings receive much less protection under copyright as compared with other copyrightable subject matter, in particular musical works.[212] Under Section 114 (b), infringement of copyright in sound recording occur either (1) reproducing it by mechanical means, or (2) rearranging, remixing, or altering it in some way by mechanical means[213]. Alternatively, one does not infringe the copyright in a sound recording by making an independent fixation, despite the extent to which the new recording imitates the preexisting sound recording.

As an example suppose a sound recording were made of the New York Philharmonic's rendition of Beethoven's fifth symphony. Under the limitation set forth in Section 114(b), another orchestra could legally imitate the New York Philharmonic's performance down to the least detail so long as the orchestra hired its own musicians and made an independent recording of the subsequent live performance.

The limitation set forth in Section 114 (b) relates to the copyright in the sound recording. One should not confuse the rights in sound recording with the rights in the

[212]Ibid, pp 300
[213] Section 114 USC, Op Cit.

musical work embodied on the same phonorecord. For example, suppose record company A is the owner of the copyright of a sound recording of Irving Berlin's White Christmas. Under Section 114 (b), record company B can imitate, without permission, the style and sound of A's reproduction right or adaptation right in the sound recording. Even though the copyright in the sound recording cannot be infringed in this manner, B could still infringe the copyright, specifically the reproduction and adaptation rights, in musical composition White Christmas by making the unauthorized recording. The point is that one should always distinguish between the copyright in the sound recording and that in the musical work.[214]

d. Computer Uses.

Section 117 creates a limited exception to the reproduction and adaptation rights by allowing the owner (not licensee) of a copy of a computer program to copy it or adapt it if (1) the new copy or adaptation is created as an essential step toward using the program in a computer or (2) the copy or adaptation is for archival purposes and "all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful. In addition Section 117 (b) stipulates that any exact copies prepared in accordance with Section 117 (a) may be leased, sold, or otherwise transferred, along with the copy from which the copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. An adaptation of the program can be transferred only with the authorization of the copyright owner.[215]

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[214] Leaffer, Op Cit, pp 301
[215] Section 117 USC, Op Cit.

e. Architectural Works.

Section 120 (a) of the Copyright Act provides that once an architectural work has been constructed and is publicly visible, no right exits to prevent the making, distributing, or public display of pictures, painting, photographs, or other pictorial representations of the work. Thus, photographers will not only be able to take pictures of publicly visible buildings but will be able to commercialize their photos as well in posters postcards, and slides.

Section 120 (b) operates as a limitation to the adaptation right. Under this section, the owners of a building embodying an architectural work may without the consent of the author or copyright owner of the architectural work, make or authorize the destruction of such building. If the building embodies a work of visual art as defined in Section 101, the owner of the building may be subject to liability under Section 113(d)(2) for failure to procure the required permission from the artist.

f. Reproduction for Blind or Other People with Disability.

Section 121 carves out a narrow exception to the reproduction and adaptation right for non-profit and governmental organizations whose main purpose is to promote access to information by blind or other disabled individuals. Section 121 (a) provides that "it is not an infringement of copyright for an authorized entity to reproduce or to distribute copies or phonorecords of a previously published, non dramatic literary work if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other people with disabilities.

Section 121 (c) defines the exemption's three operative terms. First, an authorized entity is a nonprofit organization or governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities. Second blind or other persons with disability are persons eligible or qualify under the 1931 Act to provide books for the adult blind. Third specialized formats are braille, audio, or digital text which is exclusively used by blind or other persons with disabilities. Section 121 (c) establishes the kind of copies or phonorecords that fall under the exception. First, the copies and phonorecords must exist in specialized formats for the blind or other persons with disabilities. Second, these copies and phonorecords must bear a notice that any further reproduction or distribution in a format other than a specialized format is an infringement. Third, they must also include a copyright notice identifying the copyright owner and the date of the original publication. In addition to these limitations the provisions of Section 121 do not apply to standardized, secure, or non-referenced tests and related testing material, or computer programs except when portions of the above are in conventional human language that are displayed to users in the ordinary use of computer programs.

Section 3: The Distribution Right and its Limitations.

Section 106(3) creates *the exclusive right to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.*[216]

[216] Section 106 (3) USC, Op Cit.

The distribution right gives the copyright owner the right to control the first public distribution of the work. This first public distribution may take place by sale, rental, lease, or lending.[217] It differs from the other right in Section 106 which involves copying in one way or another. Rather than the right to copy the distribution right involves the right to transfer physical copies or phonorecords of the work. Thus, an unauthorized public performance does not infringe the distribution right for two reasons: first a performance is not publication, and second, a performance does not transfer physical copies of the work. On the other hand, a public distribution can occur when only one member of the public receives a copyrighted work.[218]

One who makes available and unauthorized copy of a work on a website available for downloading by the public has infringed the distribution right. The important factor here is that the work is made available to the public. Thus, one who downloads a copyrighted article from the internet and e-mails it to a family member or small circle of friends, may have violated the reproduction right, but would not have made a distribution to the public under statutory definition.[219] On the other hand, sending a single piece of private e-mail to a stranger might well constitute a public distribution of its contents. The distribution right is frequently infringed with reproduction right but can also be infringed alone[220]. Infringement of the distribution right alone commonly occurs in the music industry when unlawfully made audio or video tapes are acquired by a retailer and sold to the public. Although the retail seller may not have copied the work in any way and may not have known that the works were made unlawfully, he nevertheless infringes the distribution right by their sale. The seller's

[217] Miller, Op Cit, pp 327
[218] Macintyre, Op Cit, pp 729
[219] Ibid, pp 729
[220] Ibid, pp 730

innocent intent is not valid defense to an action for copyright infringement, which allows the copyright owner to proceed against any member in the chain of distribution.[221]

Limitation on the Distribution Right: The First Sale Doctrine.

Section 109 (a) states: "*Notwithstanding the provisions of section 106 (3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.*"[222]

Under this provision, once the work is lawfully sold or even transferred, the copyright owner's interest in the material object, the copy or phonorecord, is exhausted; the owner of that copy can then dispose of it as he sees fit. The first sale doctrine entitles the owner of a copy to dispose of it physically.[223] Thus, one who buys a copy of a book is entitled to resell it, rent it out, give it away, rebind it, or destroy it. This same owner, however, would infringe copyright by reproducing it or performing it publicly without the consent of the copyright owner. Alternatively, the first sale doctrine is not triggered when the copyright owner has rented, leased, or loaned the copy without actually transferring ownership of it. The first sale doctrine can be modified by the

[221] Gorman, Op Cit, pp 548
[222] Section 109(a) USC, Op Cit.
[223] Leaffer, Op Cit, pp 310

parties, but any agreement would be enforced under contract law rather than copyright law.[224]

The rationale of the first sale doctrine is to prevent the copyright owner from restraining the free alienability of goods. Without a first sale doctrine, a possessor of a copy or phonorecord of a copyrighted work would have to negotiate with the copyright owner every time he wished to dispose of his copy or phonorecord. This principle sometimes clashes with the copyright owner's reproduction and adaptation rights.

Non-Consensual Transfers.

After we have discussed the first sale doctrine, the issue of non-consensual transfer rises. For instance, if a creditor acquires the work through non-consensual transfer of ownership, for example by a court decision or public auction, is the first sale doctrine applicable to this case?

The US courts held that in these cases the first sale doctrine is not applicable, thus the owner of the copyright still hold all the exclusive rights including the distribution right.[225]

Section 4: The performance and Display Rights and Their Limitations.

Section 106(4) of the Copyright Act provides that "*the owner of the copyright in literary, musical, dramatic, and choreographic works, pantomimes, and other audiovisual works has the exclusive right to perform the copyrighted work publicly.*"[226]

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[224] Miller, Op Cit, pp 328
[225] Leaffer, Op Cit, pp 311
[226] Section 106(4) USC Op Cit.

Not all the categories of copyrightable subject matter under Section 102 enjoy a performance right. Pictorial, graphic, and sculptural works are excluded, as are sound recordings. As defined in Section 101,

"*to perform a work means to recite, render, play, dance, or act it, either directly or by means of any device or process...*"[227]

A performance includes not only the initial rendition but any further act by which that rendition is transmitted to the public. Thus, one performs by reciting a poem, singing a song, playing a cassette on a VCR, or simply turning on a radio. Likewise, a broadcaster performs whenever he transmits a live performance or one captured on a phonorecord.[228]

There are substantial limitations on the performance right. First, the copyright owner can control only public performances of his work. Second, the 1976 Act specifically limits the performance right in Section 107 till 121 through an elaborate set of exemptions and compulsory licenses.

What is a Public Performance?

The exclusive right to perform is limited to public performances. Clearly, the 1976 Copyright Act was not designed to keep people from singing in their bathtubs or playing their favorite records during dinner in their homes.[229] These are essentially private performances that cannot be controlled by copyright owners. What distinguishes a public from a private performance is set forth in two clauses of Section 101:[230]

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[227] Ibid, Section 101 USC.
[228] Bainbridge, Op Cit, pp 273
[229] Miller, Op Cit, pp 330
[230] Section 101 USC, Op Cit.

Under the first clause "Publicly" means:

1. to *perform it at a place open to the public or at any place where substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered, or*
2. *to transmit or otherwise communicate a performance of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance...receive it in the same place or in separate places and at the same time or at different times.*

A public performance is one that takes place in a public setting or before a public group.

Non-Profit and Other Exemptions to the Performance Right.

The copyright owner of a musical or non-dramatic literary work could only control public for profit performances of his work. The rational for encouraging non-profit performances was to allow easy access to musical and non-dramatic literary works, promoting their performances by non-profit entities such as schools and churches.[231] Other examples of these exemptions to the performance right, rather than non-profit performance are:

1. Face to Face Teaching.

Section 110(1) exempts performances of copyrighted works given by instructors or pupils in face to face, live teaching situation. The educational

[231] Leaffer, Op Cit, pp 322

institution must be non-profit, and the performance must occur in a place devoted to teaching.[232] As an example, if a music teacher asks the band of the class to perform a copyrighted song in front of the class here the exemption is applicable thus there exists no infringement of the owner of the copyrighted song; but if this same teacher demands that the band performs the same song in a public concert, here we have an infringement of copyright because the concept of face to face teaching is no longer applicable.

2. Transmission of Instructional Activities.

Section 110(2) also exempts performances during instructional activities. It is both broader and narrower than Section 110(1). It is broader because the performance may be transmitted, rather than limited to face to face situation as in Section 110(1). The Section is narrower because the transmitted performance can only be of non-dramatic literary and musical works. Section 110(2) does not apply, for example, to audiovisual works, motion pictures, plays, or show tunes. As in the previous exemption, the performance must be transmitted to classrooms or other places normally devoted to instruction and be directly related to the systematic teaching activities. [233]

3. Religious Services

Section 110(3) exempts the performance of non-dramatic literary for musical works of any nature and dramatic musical works of a religious nature in the

[232] Section 110(1) USC, Op Cit.
[233] Ibid, Section 110(1) (2), USC.

course of services at a place of worship or other religious assembly. The purpose of the exemption for dramatic musical works of a religious nature was to exempt certain performances of sacred music dramatic in nature, such as oratorios, cantatas, musical settings of a mass choral services and similar works. The exemption however does not cover performances of work such as operas or motion pictures even though they have an underlying religious theme and are performed during religious services. [234]

[234] Ibid, Section 110(3) USC.

Chapter 6:

Fair Use and Other Defenses to Copyright Infringement.

Section 1: Fair Use: The Background

The doctrine of fair use is a judicially created defense to copyright infringement that allows a third party to use a copyrighted work in a reasonable manner without the copyright owner's consent.[235]

The fair use doctrine has been defined as a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without consent, notwithstanding the monopoly granted to the owner.[236]

Section 107(b) reads:" *Notwithstanding the provisions of Section 106, the fair use of a copyrighted work including such use by reproduction in copies or Phonorecords or by any other means specified by that section, for purposes such as criticism, comments, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright".*[237]

Article 23 of the Lebanese law on copyrights reads as follows:

"*in accordance with the provisions of Article 24 of this law, any natural person may, for his private and personal use, record or make one copy of any work protected by this law without the permission or consent of the copyright owner and without paying any compensation to the latter, provided that the work had been legitimately published.*

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[235] Gorman, Op Cit, , pp 609
[236] Section 107 (a) USC, Op Cit.
[237] Ibid, Section 107 (b) USC.

The use of photocopied copy at a company or anywhere else shall not be considered personal and private."[238]

Article 25 of the Lebanese Law states:" *Educational institutions, universities and public libraries not intending to make profit may, without the consent of the copyright holder and without paying him any compensation, copy or photocopy a limited number of computer programs, provided that they possess at least one original copy of these programs for the purpose of making them available for students to borrow free of charge and provided that a mechanism be set to determine those copies and categories which are to be reproduced as well as the number of copies to be allowed; all this through future implementing to be issued by the Ministries of National and Cultural Education, Higher Education and Technical and Professional Education. The student shall also be allowed to copy or photocopy one copy for the sake of his personal use. It may also be allowed, without the consent of the copyright holder and without paying him any compensation, to legally use a specific part of the published work for the purpose of criticizing the work, supporting a view point, citing or for any educational purpose provided that the section used does not exceed what is necessarily and commonly recognized in such cases. However, the name and source of the work must always be cited if the name of the author is included"*[239].

For the purpose of applying the fair use doctrine on one hand the US law on copyrights provides four criteria that must be available in order to apply the fair use doctrine; On the other hand the Lebanese law on copyrights in Article (24) draws the borders of applying the exception to the protection of copyright so called fair use under the US law.

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[238] Abou-Ghazaleh, Op Cit, pp 415
[239] Ibid, pp 416

Section 2: The Four Criteria.

Whether or not the use falls into one of the enumerated categories of Section 107. One must apply the four factors set forth in the second part of Section 107 in order to determine whether the use is fair. The four factors that follow the preamble are the heart of the fair use determination. All of the factors should be available in order to apply the fair use doctrine. The availability of one or more is not enough; all should be available.[240]

The four factors are:[241]

1. The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the potential market for or value of the copyrighted work.

Now we will discuss each of the following factors in a separate section.

First Factor: the Purpose and Character of the Use.

The first factor focuses on the nature and purpose of the use. It provides, however, further guidance about the meaning of fair use by emphasizing the distinction between commercial and non-profit educational use.[242] A non-profit educational use is more likely to be a fair use because it is less inclined to harm the market for the copyrighted work than would a commercial use. The focus on the economic impact of the use shows this

[240] Leaffer, Op Cit, pp 434
[241] Section 107 USC, Op Cit.
[242] Miller, Op Cit, pp 354

factor's obvious connection with the fourth, the effect of the use on the potential market for the copyrighted work.[243]

A commercial use is one that earns a profit, and such does not lose its commercial character even though it is ultimately intended for education, news reporting, or any of the other purposes set forth in Section 107. As one court stated:

"The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance".

Generally, if a challenged use of a copyrighted work is for commercial gain, a presumption against fair use arises. A commercial purpose will not definitely set aside the application of the fair use doctrine, but its presence will lead to a presumption that the act does not fall within the scope of the fair use doctrine. Controversially a clear non-profit educational use would constitute an important indication of fair use.[244]

In considering the first factor courts have examined purposes other than whether the use is a commercial or non-profit educational use. For example a use made in bad faith is less likely to be a fair use because fair use presupposes good faith and fair dealing.[245]

[243] Ibid, pp 354
[244] Leaffer, Op Cit, pp 435
[245] Ibid, pp 435

Second Factor: Nature of the Copyrighted Work.

The basic idea behind this factor is that to support the public interest there should be greater access to some kinds of works than others.[246]

Because the ultimate goal of copyright law is to increase our fund of information, the fair use privilege is more extensive for works of information such as scientific, biographical, or historical works than for works of entertainment. Thus, the second factor would allow wider use of a treatise on physics than a video tape of a rock concert.

The fair use privilege may not be available at all for certain kinds of works particularly susceptible to harm from mass reproduction.[247]

Third Factor: The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole.

This factor properly focuses on whether the defendant has taken more than is necessary to satisfy the specific fair use purpose. Excessive copying not commensurate with the purpose of the use lose the privilege of fair use. The principle is often expressed in parody cases where the issue of fair use invariably focuses on whether the defendant has taken more of the copyright owner's work than is necessary to conjure up the original.[248]

The corollary principle is that verbatim copying invariably exceeds the purpose of the use. For example, a literary critic or a biographer may need to quote form plaintiff's work, but may exceeds fair use by quoting more than is necessary to make a biographical or critical point. Thus, the critical or biographical may not be allowed to quote two pages

[246] Gorman, Op Cit, pp 611
[247] Miller, Op Cit, pp 363
[248] Ibid, pp 363

of the plaintiff's work when two paragraphs would be adequate to support the critic's argument.[249]

Fourth Factor: The Effect of the Use upon the Potential Market for, or Value of, the Copyrighted Work.

This factor is the most important element of the fair use. The reason is easy to understand. If the market for the copyright owner's work is harmed, the incentives for creativity that the copyright monopoly is designed to encourage will not work. The fourth factor is related in a way or another with the other three factors, but perhaps most closely to the first factor where presumption of harm arises from commercial use of the copyright work.[250]

According to Professor Goldstein:" *whether a use will affect the potential market for or value of the copyrighted work necessarily turns on whether the use will be proscribed.*"[251]

Thus, to avoid this circularity, a reviewing court must isolate those uses of a work most directly threatening to the incentive of creativity, which copyright tries to protect. These incentives are most threatened when the infringing use tend to diminish the potential sale of the work, tends to interfere with its marketability, or fulfills the demands for the original.[252]

Potential harm to the market, not actual harm, is the issue. Actual harm need not be shown, although proof of quantifiable harm, such as a lost contract, is the best evidence

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[249] Gorman, Op Cit, pp 620
[250] Leaffer, Op Cit, pp 439
[251] Paul Goldstein, Copyright, Patent, and Trademark , and Related State Doctrines, 2nd Edition, 1981 pp780
[252] Leaffer, Op Cit, pp 441

of harm to the market for the work. But the fact that the copyright owner does not actually market copies of the work does not matter under the potential market language. To prove potential market effect, plaintiff need only show a meaningful likelihood of future harm by a preponderance of the evidence.[253]

Section 3: Special Applications of Fair Use Analysis

A. Videotaping: The Betamax Case

Judge Mr. Blackman

District Court of NYC decision No 542 year 1984

Plaintiff: Betamax Corp.

Defendant: Sony, Inc

Facts:

- *Plaintiff owes a work which is played on the public airwave.*
- *Many home users recorded the copyrighted work by using Sony tape recording.*
- *Plaintiff sued defendant for supplying the means to the principle infringer, the home user, to infringe plaintiff's copyrighted works played on the public airwaves.*

Demands:

- *Plaintiff asked for an injunction against Sony as well as profits and damages.*

[253] Miller, Op Cit, pp 340

- *Defendant claimed that the recording of the work by home users is considered as a fair use since the recording is non commercial, and for educational purposes.*

Legal issue: Whether the recording of the plaintiff copyrighted work by means of Video cassette recording offered by Sony, Inc is considered as Fair Use?

Decision: Judge Blackman considered that off-the-air taping even for non-commercials, educational purposes, cannot sustain fair use defiance if the economic harm to plaintiff is direct and apparent.[254]

B. Photocopying: Williams & Wilkins

Plaintiff: Williams.

Defendant: Wilkins.

Facts:

- *Plaintiff publisher of limited circulation medical and scientific journals.*
- *Defendant, through its National Institutes of Health (NIH) and National Library of Medicine (NLM), photocopied and distributed articles to those requesting them.*
- *The defendant limits requests to no more than one article per journal, no more than fifty pages, and no more than a single copy of an article per request.*

[254] Mr. Weinreb, Op Cit, pp 160

Demands:

- *The plaintiff claimed injury because a relatively few lost subscription could make the difference between a profit and loss.*
- *Defendant asks the court to consider his work under the Fair Use Doctrine.*

Legal Issue: On what grounds is the defendant work considered as fair use?

Decision: the court ruled as follow:

"Even though the NIH had photocopied millions of pages, the court found its activity a fair use because the plaintiff failed to prove future harm adequately. The small and speculative future harm to the plaintiff was outweighed by certain harm to medical science if the photocopying was stopped. Thus the public interest in medical science prevailed over possible damage to the copyright owner."[255]

When confronted with disputes involving the new technologies, courts will use restraint in evoking industry-wide solutions best left to legislatures. One detects fear that a finding of infringement will suppress a new and useful technology.[256] As a result, copyright owners will not fare well when their rights are pitted against a new technological development. In sum, courts are less willing to impose liability when the costs imposed on the public by limiting the use of a copyrighted work are not offset by a correspondingly greater incentive for authors to produce.[257] The courts emphasize on the direct harm suffered by the plaintiff, the commercial nature of the defendant's use,

[255] Gorman, Op Cit, pp 650
[256] Ibid, pp 650
[257] Leaffer, Op Cit, pp 451

the non-productive nature of the defendant use, and relatively low transaction costs in obtaining a license for the use of the copyrighted work.

C. Avoiding Fair Use Determination: Industry-Wide Resolution of the Photocopying Dilemma.

1. Library Photocopying.

To avoid the uncertainties of general fair use doctrine and mindful of the result in Williams & Wilkins, the US Congress has singled out library photocopying for separate treatment under Section 108of the 1976 Act. This provision details the circumstances in which libraries and archives may reproduce and distribute copies of works without infringing copyright. In general, Section 108 allows library photocopying for scholarly purposes, unless it is systematic and is substitute for purchase or subscription.[258]

To qualify for the exemption, the library collection must be open to the public or to researchers in a specialized field in addition to researchers affiliated with the library. Two other initial criteria must be met to qualify for the Section 108 exception. First the copy reproduce must be single copy, second it must be made without any purpose of direct or indirect commercial advantage.[259]

In addition to the right to distribute photocopies to scholars, qualifying libraries can make three copies or phonorecord of a work for preservation or security if "(1) the copy or Phonorecords reproduced is currently in the library collection and (2) such copy or phonorecord reproduced in digital format is not made available to the public in that format outside the premises of the library or archives.[260]

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[258] Ibid, pp 451
[259] Ibid, pp 455
[260] Gorman, Op Cit, pp 352

Section 108 takes into account the controversial issue posed by Williams & Wilkins that of reproducing single copies for distribution to users. Under this section, a library can distribute both small amounts of a work and copies of the entire work if certain conditions are met. For small amounts of a work or an article in a periodical, the copy can be made in response to use request if the copy becomes the property of the user and the library has no reason to believe that the copy will be used for anything other than private scholarship. In addition, the library must prominently display at its copy order desk and in its order form a warning of copyright. The above provisions apply to user copies of an entire work if the library first determines after reasonable investigations that the work cannot be obtained at a fair price.[261]

Section 108 (h) imposes limitations on copying. Section 108 (g) permits the library to distribute isolated, unrelated single copies to users on separate occasions, but prohibits a library form distributing related or concerted reproductions of multiple copies of the same materials. Section 108(g) (2) further prohibits a library form engaging in the systematic reproduction or distribution of single or multiple copies. This subsection allows interlibrary arrangements as well, except when these arrangements involve a distribution in such aggregate quantities as to substitute for a subscription to or purchase of such work.

Finally, Section 108(h) limits reproduction and distribution under all of Section 108 to books and periodicals, not to musical, pictorial, graphic, or sculptural works, or to motion pictures or other audiovisual works other than those dealing with news.[262]

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[261] Section 108 USC, Op Cit.
[262] Ibid, Section 108 USC.

2. Multiple Copies for Classroom Use.

Classroom teachers have always needed to duplicate materials for their students and most have probably done so without considering copyright law. US Congress recognized that need:" multiple copies for classroom use" is listed in the preamble to Section 107 and non-profit educational use is explicitly mentioned in the first factor for determining fair use.[263]

Multiple copying for classroom use must meet four basic criteria: (1) brevity, (2) spontaneity, (3) cumulative effect, and (4) a notice of copyright. The Act of 1976 describes brevity as: "a complete article, story or essay of less than 2,500 words or an excerpt form any prose work of not more than 1,000 words or 10% of the work.

As for spontaneity, the decision to use the work and the moment of its use are to be so close in time that it would be impossible to ask for permission.[264]

As for cumulative effect, the copying must be for only one course in the school in which the copies are made.

One might think that much classroom copying exceeds fair use doctrine.

D. The Problem of Parody.

A parody is an imitation of a serious piece of literature, music, or composition for humorous or satirical effect. A parodist is a critic or commentator who exposes the mediocre and pretentious in art and societies, forcing us to examine a serious text form a comic standpoint.[265]

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[263] Ibid, Section 106 USC.
[264] Leaffer, Op Cit, pp 455
[265] Ibid, pp 456

Parody, by its very nature, makes use of another's work, sometimes extensively, and because the purpose of this use is satire and ridicule, there is a tension between the parodist and the copyright owner.[266] As a result, some copyright owners are less than eager to see their work ridiculed and will not license their work for this purpose. Consequently, the parodist must rely on the defense of fair use where substantial use has been made of a copyrighted work and where biting criticism and ridicule may have offended the sensibility of a copyright owner.[267]

Moreover, the fair use defense is particularly important for the health of this genre because a copyright owner will seldom license a work to be satirized or ridiculed. One could say that the parody defense to copyright infringement exists precisely to make possible a use that generally cannot be bought.[268]

1. Parody and the Four Factors.

The four factors listed in Section 107 are applied to parody just as to any other fair use issue and follow a consistent pattern. For most parodies, application of the first two factors does not favor a finding of fair use because most parodies are commercial in purpose, and the nature of the copyrighted work of which they make use is usually a work of entertainment, not one of information[269]. The close question usually relates to the third and fourth factors, that of the amount and substantiality of the use and the market effect.

The Supreme Court held that a commercial parody may qualify as a fair use. To decide the question of fair use, the court must subject the parody to an overall balancing

[266] Miller, Op Cit, pp 367
[267] Ibid, pp 367
[268] Leaffer, Op Cit, pp 453
[269] Ibid, pp 453

process in which the parody's transformative character is more important than its commercial purpose.[270]

2. How Much Can the Parody Take from the Original?

The third fair use factor, the amount and substantiality of the taking, remains the most controversial issue in determining fair use in the context of parody. The issue arises because the best parodies must take extensively from the original to create humorous effect.[271] A tension is created with the rights of copyright owners because extensive copying on the part of the parodist may supplant the need for the original.

US Courts repeated a familiar principle: "the parody must be able to "conjure up" at least enough of the original to make the object of its critical wit recognized. The amount necessary to conjure up the original will depend on the persuasiveness of a parodist's justification for the particular copying done and will vary with the purpose and character of the use.[272]

Generally the US Courts have not given the parodist Carte Blanche to take indiscriminately from the copyrighted work. The right to make the best parody is balanced against the rights of the copyright owner. The legal standard applied is that the parodist should be allowed to appropriate no greater amount of the original work than necessary to recall or "conjure up" the object of his satire. As a corollary, near verbatim copying will rarely, if ever, be a fair use.[273]

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[270] Campbell Vs Acuff-Rose, 329 F 2d 541, (2nd Circuit) Sup NY 1983.
[271] Gorman, Op Cit, pp 727
[272] Leaffer, Op Cit, pp 452
[273] Miller, Op Cit, pp 368

3. Parody and the Fourth Fair Use Factor: Market Effect.

The fourth factor, the market effect of the use, will be decided in favor of the parodist absent near verbatim copying. The parody will usually not fulfill the demand for the original, and rarely could plaintiff argue that the market for this type of derivative work has been co-opted by the use.[274]

Thus no presumption or interference of market harm is applicable unless the parody simply duplicates the original in its entirety for commercial purposes. However, when the second use is transformative, market substitution is less certain and market harm, is not so readily inferred. In determining market effect, it is not the impact of the parody as criticism but the economic effect of the use in fulfilling the demand for the original that is the issue.[275] Because of its devastating criticism, an effective parody may actually diminish the demand for the original. This is not the kind of market effect that justifies a denial of fair use. The real issue for the fair use determination is whether the parody fulfills the demand for original, that is, whether consumers are likely to purchase the parody rather than the original because it servers the same purpose as the original.[276]

Parody is not mentioned in the Lebanese Law of 1999.

[274] Leaffer, Op Cit, pp 454
[275] Gorman, Op Cit, pp 731
[276] Leaffre, Op Cit, pp 456

Chapter 7:

e-Copyright.

1. Exclusive Rights

In general, as we have seen, copyright provides an author with a tool to protect a work form being taken, used, and exploited by others without permission.[277] The owner of a copyrighted work has the exclusive right to reproduce it, prepare derivative works based on it, distribute copies by sale or other transfer of ownership, to perform and display it publicly, and to authorize others to do so.[278]

For a company that depends upon intellectual property for its livelihood, such as a software company or an Internet-Based publisher, copyright law provides a framework that ensures that the company can compete in the marketplace. The importance of copyright is illustrated by comparing what happens to a software company when its source code is stolen.[279] For example, a refrigerator company will simply have one less item of merchandise to sell and a loss reflected by the refrigerator's price. The software company, however, will suddenly be faced with the prospect of a market flooded with exact copies of its product sold or given away by another. Without the ability to prevent unauthorized copying, sale, and distribution of its product, the software company will not be able to survive.[280]

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[277] Section 106 USC, Op Cit.
[278] Ibid, Section 105 USC.
[279] Richard Staron, Security, 1st Edition, Sybex, 2001 pp 194
[280] Jonathan Rosenoer, Cyber Law, 1st Edition, Springer, 1997, pp 1

2. Infringement.

a. Direct Infringement.

A copyright is infringed when one of the exclusive rights of the copyright holder is violated. These include the right to reproduce a copyrighted work, prepare derivative works based upon it, distribute copies by sale or other transfer of ownership, to perform and display ii publicly, and to authorize others to do so.

In an infringement action, a plaintiff is required to prove ownership of the copyright and copying by the defendant. **Proof of the defendant's intent to infringe is not an element of the plaintiff's case.**[281] A defendant for example, cannot escape liability on the grounds that he didn't know that the work was copyrighted. This point is clarified in the Coming Case, Playboy Vs Frena case:

Playboy Vs George Frena.

District Court of Florida

31st January 1994

Judge Ray Patterson.

***Plaintiff**: Playboy Magazine*

***Defendant**: Mr. George Frena.*

Facts: Mr. George Frena operates a subscription computer bulletin board service named Tech Warehouse BBS. He downloaded high quality copies (around 170 images) of Playboy photographs to the BBS without playboy's authorization. A Bulletin

[281] Rosenoer, Op Cit, pp 3

Board is a page where only subscribers are permitted to sign in; subscribers can upload articles to the bulletin board and download others from the bulletin board.[282]

Playboy sued Mr. Frena for copyright infringement, as well as unfair competition. Mr. Frena defense focused on the fact that he didn't upload the images. The subscribers had uploaded the images and he didn't new about the issue. Mr. Frena went further and said if there was an infringement as the plaintiff declares, it should be categorized as fair use and not as an infringement.[283]

<u>Legal point</u>: *is the bulletin board provider liable for copyright infringements that are committed on his board; whether or not he was aware of it?*

<u>Judgment:</u> *The district court of Florida ruled on 31st of January 1994 the following The bulletin board provider is liable for copyright infringements that are committed on his board; whether or not he was aware of it.*

- *In response to the point that the defendant raised: he didn't new about the issue The court replied that the*

  Intent to infringe is not needed to find copyright infringement. Intent or knowledge is not an element of infringement, and thus even innocent infringer is liable for infringements; rather innocence is significant to a trial court when it fixes statutory damages, which is a remedy equitable in nature.[284]

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[282] Weinreb, Op Cit, pp 108
[283] Ibid, pp 108
[284] Gorman, Op Cit, pp 722

- *In response to the point that the defendant act is classified as a "fair use"*

The court replied:

That this defense is rejected because Mr.Frena use was commercial because only subscribers were permitted to sign in and by infringing playboy's copyright and uploading them on the net the Bulletin Board subscribers has increased... further more if the defendant, as he claims, uploaded the images for his personal use, he didn't do anything to prevent subscribers form downloading the images. The doctrine of Fair use is not applicable to the case.[285]

The Judge ruled that Mr. George Frena is liable for violating Copyright Act of 1967. Mr. Frena was asked to stop immediately the infringing act, and a statutory damage of 265,000$ to be paid to the plaintiff.

In cases of direct copyright infringement, it does not matter whether a direct profit is derived from the infringing works.[286]

b. Contributory Infringement.

Liability for copyright infringement may be imposed on persons who have not themselves engaged in the infringing activity, but where it may be seen as just to hold one individual accountable for the actions of another. Contributory infringement occurs, for example, where a person with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another. Substantial or pervasive involvement is required.[287]

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[285] Ibid, pp 722
[286] Rosenoer, Op Cit, pp 5
[287] Staron, Op Cit, pp 197

The US courts held that even the internet provider may not be found liable for direct copyright infringement where incidental copies are automatically made on its computers using its software as a part of a process initiated by a third party, the provider may still be held liable for contributory infringer. An Internet provider may be liable for contributory infringement, says the court, if it knows or should have known of the infringement and fails to do anything about it.[288] The provider will have a defense, however, where it cannot reasonably verify a claim of infringement, either because of a fair use defense, the lack of copyright notices on the copies, or the copyright holder's failure to provide the necessary documentation to show that there is a likely infringement.[289]

c. Vicarious Liability.

Neither knowledge nor participation is required in cases of vicarious liability. The rule is that a defendant may be held liable for the actions of the primary infringer where the defendant has the right and ability to control the infringer's acts and receive a direct financial benefit form the infringer.[290]

3. **Sources of Risks.**

Online system are vulnerable to infringement liability form at least four different sources. The person creating the system may incorporate unauthorized copies of other people's works. Similarly, those operating and maintaining the system may add unauthorized

[288] Ibid, pp 197
[289] Religious Technology Center Vs Netcom On-Line Communication Serv, 907 F.Supp 1361 (Cal 1995)
[290] Rosenoer, Op Cit, pp 6

copies. Subscribers may also upload infringing copies of works to a system. And infringing copies may be transmitted through the system.[291]

The first three sources of risk may be minimized by contract and license restrictions, as well as education. For example, a contractor may be asked to warrant that no infringing works or parts thereof are incorporated into the new system. The contractor may also be asked to indemnify and hold harmless the online system from any claim or liability related thereto.[292]

Similarly subscribers should be presented with terms and conditions of service that clearly prohibit the uploading of infringing works and confirm subscribers' agreement to hold the online system harmless for acts or omissions that result in claims and liability for copyright infringement. System operators should also be trained on what acts result in liability under copyright law. The issue of whether online systems may be liable for infringing materials that pass across them is a matter of grave controversy, as its resolution will affect the development of the Internet.[293]

4. **World Wide Web (www.)**

A number of important issues arise regarding the creation and maintenance of World Wide Web sites. At the outset, it should be recognized that many Web authors learned their craft by reviewing, and in many cases copying, the way other sites were

[291] Staron, Op Cit, pp 199
[292] Rosenoer, Op Cit, pp 7
[293] Rosenoer, Op Cit, pp 8

constructed. This is particularly easy to do with Mosaic-type Internet browsers (including Netscape Navigator), which form the beginnings have included a menu selection named "View" and a subheading name "Source". After studying the way a site has been constructed, viewers may then copy code they like into their own sites to capture the desired effect.[294]

This whole process is arguably an infringement. Downloading a file form an Internet site onto a viewer's hard disk without permission, express or implied constitutes the making of an unauthorized copy in violation of the exclusive rights of the copyright owner. Such files are protected by copyright law if they contain a requisite of originality. Companies have claimed, and courts enforce, copyright in the nonliteral elements of computer software (structures, sequence, and organization).[295] Even if the viewer alters the code so that is unrecognizable, it still may be argued that an infringement has occurred particularly regarding the intermediate copy of the source code.

Notwithstanding technical copyright arguments to the contrary, it must been recognized that the culture of the Web and its development have encouraged access to and borrowing of the html (hypertext markup language) coding that forms the basis for Web sites. Custom and practice on the Web serve as strong arguments that an implied license exists allowing the viewing, copying, and usage of html code found on sites across the Web.[296]

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[294] Staron, Op Cit, pp 201
[295] Ibid, pp 201
[296] Rosenoer, Op Cit, pp 9

5. **Hypertext Links.**

The strength of the Web derives from the hypertext links that enable viewers to jump from one Internet site to another. Some have claimed that a person constructing an Internet site needs to obtain permission to include a link to another's home page or site. Such an argument might be based on cases such as MAI Systems Corp Vs Peak Computer, which holds that a copy of a work in RAM is a copy for copyright purposes. But because the World Wide Web is, in essence, a protocol that exists only to link sites to each other, it is hard to see how anyone could claim the right to restrict site access only to those receiving specific permission to do so.[297]

The act of implementing and maintaining a public-access Web site (i.e. one that is not protected by password or other security device) implies a license to enter and explore. In the case of real property, a license is permission to do some act or series of acts on the property of the licensor (e.g. cutting wood) without having any permanent interest in the property. The World Wide Web's history, custom, and practice as well as the reasonable expectations of the public, particularly now that there exist Web sites that require a password and a user ID to enter; all support the existence of such an implied license for Web sites visitors. The fact that Web sites are composed of intellectual property, does not bar a license form being implied.[298]

And there is no copyrightable expression in a hypertext link, which merely contains the address of a document on the Web. The link really is nothing more than an unprotected "method of operation".

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[297] Ibid, pp 9

[298] Staron , Op Cit, pp 205

This is not to say that one cannot get into trouble by copying hypertext links. A number of Web sites contain collections of links to other sites as well as indexes to information on the internet, with embedded links. There may be copyrightable expression in the structure, sequence, and organization of those links. A person copying those links into another Web site could well be liable for copyright infringement.[299]

6. **E-Mail.**

E-mail is a tremendously popular feature of private online systems and the Internet. Because it is transmitted in digital form, e-mail is easily copied and retransmitted. There is no reason to suspect, however, that e-mail is free form coverage under copyright law. Unless a message contains an unequivocal commitment to donate the content to the public domain, it should be treated as covered by copyright law even if a copyright notice is not included.

Sending unauthorized copies of copyrighted works via e-mail may result in liability to the sender and the recipient, as well as the online system on which the e-mail is stored.

It should be noted that US Federal Law generally prohibits providers of online systems form reviewing the content of message traffic across their systems. But there is an expression that allows an employee of a provider to intercept and disclose electronic communication in the normal course of employment if done to protect the rights or property of the provider. Whether a provider could successfully utilize this exception to monitor all e-mail traffic across its system will probably depend on whether the provider can be found liable for direct copyright infringement owing to automatic

[299] Ibid, pp 205

copies of messages made incident to its function as an e-mail provider, or whether it can only be held liable for contributory infringement if it has reason to know or actual knowledge of the infringing activity. [300]

7. Postings

An interesting issue is raised by posting of messages to private online services and Internet (Usenet) newsgroups. To the extent such postings exhibit the modicum of originality sufficient to trigger copyright protection; one must assume they are covered by copyright law.[301]

Online services may, of course, provide for a different conclusion by use of contractual agreement with subscribers. For example, subscribers may agree to provide other subscribers with a license to copy postings and use them for noncommercial purposes. If an online service seeks an assignment of copyright in subscriber postings, it will face a hurdle found in the US Copyright Act, which provides that a transfer of copyright ownership is not valid unless it is in writing, signed by the owner of the rights conveyed. Some online services claim a compilation copyright in the materials posted by their subscribers.[302]

It remains to be seen whether an online service may be able to show sufficient selection, coordination, or arrangement to support the claimed copyright. In many cases, subscriber postings are simply responses to postings by other subscribers, with no participation by the online service whatsoever.

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[300] Rosenoer, Op Cit, pp 12
[301] Ibid, pp 12
[302] Leaffer , Op Cit, pp 462

Posting a message to an Internet newsgroup causes it to be copied and stored on computers across the world for their subscribers to review. Similarly, posting a message on an online service causes a copy to be made on the service's computers. In making such postings, is content donated to the public?

At the outset, it should be noted that if a person making the posting does not own its content, and is not authorized to post it, then the posting itself may be a copyright infringement. The act of posting does not immunize others who make a copy. To the contrary, the owner of each computer to which a copy is made is also guilty of copyright infringement. Although there may be support in the US Copyright Act for such a claim extending to all computers on which a copy may be found, placed there through the automatic processes that enables the Internet to function, the result is absurd threatening thousands, if not millions, of persons with liability for the act of an individual over whom they have no control or connection, other than an Internet link.[303]

What are the rights of persons who come across materials online?

The answer depends on the facts of the particular case. There are three common circumstances: (1) the copyright owner states that he is donating the work to the public domain; (2) the owner gives written permission for others to use the work for noncommercial purposes only; (3) the owner says nothing.

In the first case, an issue to consider is, how does an owner donate a work to the public domain via the Internet? Although there is no court decision yet on this point, it may be fair to conclude that a donation to the public domain needs to be in written and signed. When the postings to Internet newsgroup that are archived and searchable? The answer

[303] Leaffer, Op Cit, pp 463

may be that the author has simply donated a copy to the Internet community but has retained the copyright.[304]

If the owner's writing reveals any intent to exert any control over the work in the future, there has probably not been a donation to the public domain. For example, if the owner states that work can be copied by all comers, but not modified, it is arguable that only a license was intended. A donation to the public domain should at the very least be accompanied by words expressing the intent irrevocably to relinquish all right, title, and interest in and to the worldwide copyrights of a work. Since it is virtually impossible to compensate someone for donation of a work to the public domain, there may be a risk that a third party (such as an heir or a creditor) could void the donation.[305]

As for the "signature", may a typed name in an electronic message constitute a signature? There is support for the position that it is sufficient for a person to type his name, intending it to be a signature.

The second case involves permission to use a work for noncommercial purposes only. There is here the same issue of whether the permission, a license, is sufficiently supported by a sign writing. Can a license be made for noncommercial purposes only? Yes. And use in excess of a license may give rise to a suit for both breaches of the license as well as copyright infringement.[306]

In the third case, the author says nothing and there is no expressed intent to relinquish copyright protection. An online system may anticipate these questions by providing

[304] Ibid, pp 463
[305] Rosenoer, Op Cit, pp 11
[306] Ibid, pp 11

some answers in its terms and conditions of usage, to which all subscribers agree.[307]In absence of some type of permission, it is technically arguable that even the simple act of making of a copy of a work in RAM to view the work online constitutes copyright infringement. A very popular graphical Internet browser the Netscape Navigator automatically downloads online images and text onto the viewer's own hard disk. In doing so, the Netscape Navigator facilitates use of the Internet at tolerable speed, using regular phone lines and standard modems. In this case, one might argue that this action is covered by an implied license, but the better view may be that such copying is a fair use. And if it's a fair use to cache in this way, then it's also a fair use simply to browse material in the Internet.

8. **Criminal Liability.**

According to the US law it is a criminal offense to infringe copyright "willfully and for purposes of commercial advantage or private financial gain." Upon convection courts are authorized to order the forfeiture and destruction or other disposition of all infringing copies... and all implements, devices, or equipment used in the manufacture of such infringing copies.[308] Use as well as distribution of an article with a fraudulent copyright notice is a criminal offense, as is fraudulent removal of a copyright notice. It is also a crime to make a false representation in a copyright registration statement, or in a statement connected to the registration.[309]

[307] Rosenoer, Op Cit, pp 15
[308] Section 506 (a) USC, Op Cit.
[309] Ibid, Section 506 (e) USC.

Felony sanctions for copyright infringement were first authorized in 1982, and extended to include computer software. A five-year sentence and a fine may apply to a person who reproduces or distribute, within any 180-day period, at least ten copies of one or more copyrighted works, with a retail value of more than $2,500. For a second or subsequent copyright offense, a ten year prison term is authorized.[310]

9. Fair Use.

As described by the US Supreme Court, "fair use was traditionally defined as a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.[311] The fair use privilege is now codified at Section 107 of the Copyright Act:

"Notwithstanding the provisions of Section 106 and 106(a), the fair use of a copyrighted work, including such use reproduction in copies or Phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright..."[312]

To invoke the fair use defense, a person must have an authorized copy of the work. a fair use claim may be denied where an original work has been copied but then transformed so that it no longer resembles the original. In certain instances, however, such "intermediate" copying may be allowed to provide access to unprotected ideas and processes.

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[310] Ibid, Section 3571, USC.
[311] Harper & Row, Publishers Inc, Vs Nation Enterprises, Supreme Court of NY decision no 471, 4 November 1996.
[312] Section 107. USC, Op Cit.

Now we will study the case of UMG Recording, Inc Vs MP3.com Inc.

UMG Recording, Inc VS MP3.com Inc
Supreme Court of New York
Decision No 92 28 March 2000

***Plaintiff**: UMG Recording, Inc*

***Defendant:** MP3.com Inc*

Facts:

UMG Recordings owes several copyrighted music recording.

In January 1998 MP3.com launched its "My.MP3.com"service which is advertised as permitting subscribers to store, customize and listen to the recordings contained on their CDs from any place where they have access to the internet. To make good on this offer the defendant purchased tens of thousands of popular CDs in which plaintiff held the copyrights, and without authorization copied their recording onto its computer servers so as to be able to replay the recordings for its subscribers.

In order to first access such a recording a subscriber to MP3.com must either prove that he already owns the CD version of the recording by inserting his copy of the commercial CD into his computer CD-Rom for a few seconds or must purchase the CD from one of the defendant's cooperating online retailers. The subscribers can access via internet from a computer anywhere in the world the copy of plaintiff's recording made by the defendant.

***Legal issue:** whether the transformation of music waves into another sort of waves consist a copyright infringement?*

Defense: *defendant argues that such copying is protected for two reasons:*

1. *it is a fair use*
2. *the transformation of waves cannot be considered as copying and thus doesn't fall under the copyright act of 1976 especially Section 17.*

Decision*: According to the 1st defense the judge referred to the 1076 code and state that in order to apply the fair use doctrine there should exists four factors jointly. Thus the absence of one will forbid the application of the doctrine.*

1st the purpose of the use must be for education or a nonprofitable purpose

2nd the nature of the copy righted work

3rd the amount and substantiality of the portion used in relation to copyrighted work as a whole

4th the effect use of upon the potential market for the value of the copyrighted work.

According to the 1st point it is clear that the use is not for education purposes. But is it for a nonprofitable purpose? The defendant doesn't charge any of the subscribers but the source of the profit comes from Adv. The downloading of music will increase subscribers and this will encourage more Adv cooperation to invest in this site.

The judge consider this to be a commercial act and thus with the failure to apply one of the four rules the doctrine of "Fair Use" is not applicable.

According to the 2nd defense the defendant states that if this service was not provided by him it will be provided by pirates. The judge replies that the copyright act is not designed to afford consumer's protection or convenience but, rather to protect the copyright holders' property interest.

The judge states that the complex marvels of cyber spatial communication may create difficult legal issues, but not in this case.

The court granted defendant's motion for partial summary judgment holding the defendant liable for copyright infringement. [313]

10. **What is legal what is not.**

"This section gives us a brief version of what's legal what's not. [314]

- *You can create digital files form content in some media for your personal use. If you buy a CD you can legally cerate MP3 files for your personal use* **only**
- *If you hold the right to content, or have been legally granted the right to distribute that content, you can distribute digital files containing it. Such distribution might take many forms, form posting the file on the website or an FTP site, sharing it via Napster or another P2P technology, or physical medium such as CD or a removable disk. For example if you create an original image,*

[313] Weinreb, Op Cit, pp 193
[314] Staron, Op Cit, pp 188

you could post a digital version of the image on your web site or distribute CDs containing copies of a digital file of the image.

- *Unless you hold the right to content, or you have been legally granted the right to distribute that content, you cannot legally distribute digital files containing it. Again such distribution might involve a website, an FTP site, a P2P technology, or a physical media. All means of distribution* ***are illegal*** *if you don't have permission. For example, I mentioned in the first bullet point that you can legally cerate MP3 files form audio CDs you buy, but you can't legally distribute those MP3 files unless you have been granted the right to do so.*
- *If you have legal copies of digital files of content whose copyright is held by other people, you can burn CDs or DVDs containing them for backup or for your personal use* ***only.***
- *Unless you hold the copyright or the copyright holder has explicitly granted you permission to distribute it, you cannot sell digital files of any copyrighted material.*
- *If you have bought a legal copy of copyrighted material in a digital, you can sell it to someone else in much the same way as you would a physical object. After the sale, you must not retain a copyright of the file, so that you have transferred the digital file to the other person and not kept a copy yourself. For example if you purchase an e-book and downloaded as a digital file, you can sell the digital file of the e-book to someone else just as you could a physical copy of the book. But once you've transferred the digital; file to the purchaser; you must not retain a copy of the digital file.*

Internet Stuff

Legally, you can do the following on the internet.[315]

- *View a Web Page in a web browser. (That you can view a web page in a web browser seems to go without saying, because what use is a web page if nobody is allowed to view it?) The problem is that any web page can itself be copyrighted work 'many are' and can contain copyrighted works and when view a web page, your computer is downloading a copy of that page and all its contents.*
- *Publish your own original material and copyrighted material to which you hold the rights on your own web site. This material could be anything: text, photos, and graphics, software, digital audio or digital video.*
- *Access any internet site that doesn't require a password or to which you have a password.*
- *Download legal files from any internet site that you can access without cracking.*

Legally, you can ***probably*** *do the following on the web:* [316]

- *Save Web Page to your hard drive so that you can access them at a different time or in a different place (for example, when you're not connected to the internet)*

Legally, you cannot do the following on the web:[317]

- *Distribute digital files of copyrighted materials unless you hold the copyright to that material or the copyright holder has explicitly granted you permission to distribute it. Such distribution might involve posting the files on your web site or FTP site, on another web site, or making them available directly from your computer via a P2P technology.*

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[315] Ibid, pp 188
[316] Ibid, pp 188
[317] Ibid, pp 188

Software.

Legally, you can do the following with copyrighted software, including games:[318]

- *If the software is freeware, you can use and distribute it freely.*
- *If the software is shareware, you can use it freely during the agreed evaluation period. Beyond that, you are required to register the software. The copyright holders of shareware generally encourage you to distribute the shareware freely.*
- *If the software is copyleft, you can use it freely and distribute it provided that you include the full source code and make available to all subsequent users any modifications or improvements you make.*
- *Create a backup copy of the software.*

Legally, you cannot do the following with copyrighted software:[319]

- *Lend a copy of the software you own to someone else so that they can install it on their computer.*
- *Borrow a copy of software from someone else and install it on your computer.*
- *Copy the software (other than creating a backup of it) unless the copyright holder has granted you the right to do so.*
- *Distribute the software unless the copyright holder has granted you the right to do so".*

[318] Ibid, pp 189
[319] Ibid, pp 189

Conclusion:

Even though the Lebanese Law on Copyrights of 1999 was considered a big jump and improvement towards modernizing the Lebanese legislation concerning the protection of intellectual property, this law is still way behind in comparison with the United States Copyright Act of 1976. There still too many steps to be taken by the Lebanese Government in order for Lebanon to be acceded to the World Trade Organization (WTO).

As noted above, should Lebanon succeed in its attempt to accede to the WTO, it will be bound to comply with the provisions of TRIPS. In addition to ensuring the adequate protection of intellectual property rights, TRIPS also imposes an obligation on member states to implement mechanisms for enforcing these rights and the laws protecting them. More specifically, TRIPS requires that WTO members provide for both civil /administrative remedies and criminal remedies and penalties. With respect to civil remedies, it provides for such procedures as injunctions, imposition of damages, seizure and destruction of infringing goods and other provisional measures aimed at preventing infringement. Of course, the precepts of due process must form the foundation of any such remedies.[320] With regards to criminal remedies, TRIPS requires WTO members to provide criminal procedures for willful, commercial counterfeiting or piracy, at a minimum, with penalties of imprisonment and/or fines. Where appropriate, members may also allow for the seizure, forfeiture and destruction of the infringing items.

[320] www.WTO.org

Lebanon's new Copyright Law attempts to meet these requirements in providing for precautionary measures, civil damages/ remedies and criminal penalties.

First, the law addresses the issue of precautionary measures. Where it is anticipated that an infringement of copyright or related rights might occur, the law allows the Judge of Urgent Matters, the President of the Court of First Instance and/or the Public Prosecutor, at the request of the concerned party, to take all necessary precautionary measures to prevent the occurrence of a violation (Article 81).[321] The Judge of Urgent Matters also has wide powers in the event of a violation to take such measures as seizure of the violation materials, taking stock of the violating materials while maintaining them in the defendant's custody and injunctions (Article 82-83).[322] The law also addresses the issue of civil damages and provides that any person who violates an author's rights or related rights must pay equitable compensation as determined by the court based on the commercial value of the work, the damage cause, profit lost by the author and gains acquired by the violator. (Article 84)[323]

Criminal penalties for violations of the law provide for a fine between approximately $ 3,300- $ 33,000 and/or possible imprisonment ranging from 1 month to 3 years, depending on the violation. More specifically, the law imposes the following penalties.

[321] Abou-Ghazaleh, Op Cit, pp 433
[322] Ibid, pp 433
[323] Ibid, pp 433

Any person who forges or changes a name on a work or deliberately copies a work or deliberately sells a copied or forged work is subject to 1 month- 3 years imprisonment and/or a fine up to LL 5 millions (Approximately $ 3,300) (Article 85).[324]

Any person who deliberately violates an author's rights or related rights is subject to 1 month up to 3 years imprisonment and/or fine ranging from LL 5,000,000 up to LL 50,000,000 (Approximately between $ 3,300 - $ 33,000) as well as the temporary closing of offices and destruction of the infringing materials.(Article 86)[325]

Any person who imports or sells or rents equipment to be used in obtaining illegal transmission of radio or television programs is subject to 1 month – 3 years imprisonment and/or fines ranging form LL 5,000,000 – LL 50,000,000.

Where any of the above violations have occurred, an action may be initiated by the Public Prosecutor *sua sponta*[326] or upon the request of the harmed party or the head of the Copyright Protection Department (Article 89). Moreover, all of the above penalties may be doubled for repeat offenders.

Finally, the law prohibits the importing of any pirated recordings and works that enjoy legal protection in Lebanon. This is most likely in response to the huge pressure Lebanon receives form software and other technology companies seeking to invest in Lebanon but fearful of the unusually high rate of unregulated piracy in the region in

[324] Ibid, pp434
[325] Ibid, pp 435
[326] or meaning on his own responsibility.

general. Various sources suggest that up to 90% of software in Lebanon are pirated. Moreover, according to the International Federal of the Phonographic Industry, the piracy rate for sound recording in Lebanon is estimated at 50% and can be as high as 70% for international productions. Pursuant to the new law, and such works will be seized wherever they are found (Article 91). To this end, the law allows policemen, customs officers, and Copyright Protection Department officers to identify suspected infringing works, take stock of them and take samples and seize items when necessary (Article 92). In doing so, they must complete a report that includes specific information delineated in the law.

With all the positive points that the new law has brought in, parts of the 1999 copyright law fall short of various TRIPS agreement requirements. Further more, much of the 1924 industrial property law which remains in force is rudimentary and based early 20th century legal principles. The law has not been amended to reflect modern trade, technology, and practice.

Moreover, and in a general view, the 1999 copyright law does not define the subject matter of protection of eligibility for protection in accordance with the TRIPS agreement. Protection period for cinematographic works are not clearly defined. The law does not protect compilations and collective work to the extent required under Berne conventions. Authors' rights in their original works of art and original manuscripts are not protected to the extend required under Berne convention.

Although the 1999 copyright law contains some very notable improvements in the area of enforcement, the law does not meet all the enforcement obligations imposed by the TRIPS agreement.

The 1999 law permits lending and unauthorized copying of computer software in a way which violates the TRIPS agreement and which is likely to decrease the availability of authentic, licensed software in Lebanon.

- Article 25 violates Berne convention as well as TRIPS and WIPO treaties.

Article 25 states that Non-profit making educational institutions, universities and public libraries may, without the authorization of the author and without the obligation to pay him compensation, copy or reproduce a limited number of software copies for the purpose of lending them for free to students and universities students, provided that they posses at least an original copy of the work. However, the Ministry of Education, the Ministry of Culture and Higher Education and the Ministry of Technical and Vocational Education shall issue subsequent implementing decisions determining copying mechanism, the categories of computer programs that may be copied and the number of copies allowed. Students may make one copy for their personal use.

It shall also be permitted, without the authorization of the author and without the obligation to pay him compensation, to use a limited part of any legally published work for purposes of criticism, argumentation and citation or for specific educational purposes provided that the size of the part used does not exceed the need and practice

in such situations. However, the name of the author and the source, if it includes the name of the author shall be indicated.

> The software exception created by Article 25 of the Copyright Law of 1999 violates Article 9(2) of the Berne Convention. It is not limited to certain special cases, but appears to allow unauthorized copying for any purpose; it conflicts with a normal exploitation of the prejudices the legitimate interest of right holders, by threatening to eliminate completely a market that many copyrights owner already serve on extremely generous terms. While many modern copyright laws include specific exceptions for the copying of computer programs under narrowly defined circumstances, and/or exceptions allowing the copying of certain kinds of works (but almost never computer programs, except for "back up" purposes) for "personal use", Article 25 sweeps far more broadly than comparable provisions of either kind, to the determinant of copyright owners.

Specifically, Article 25 authorizes "not for profit" educational institutions and public libraries to make copies of original computer programs they have acquired and to lend such copies to students for free. Such copies are made without the copyright owner's authorization and without compensation. The last sentence of Article 25 provides, "the student shall have the right to make one copy for his personal use". This clause does not state whether the student must first have a license to use the software before being allowed to make a copy. It is not clear of this provision is intended to allow a student to make a copy of any computer program regardless of whether he is entitled to use of such program, and regardless of whether he is entitled

to use of such program, and regardless of whether the program in question is itself original or is already a copy. Such a provision could be interpreted to allow the making of limitless copies from a single piece of original software.

Ultimately, Lebanon must delete Article 25 for the 1999 copyright law in order to be compliment with the international treaty obligations (Berne Convention, Paris 1971 text, TRIPS, and WIPO copyright treaty).

- Copyright protection has gained a toehold in Lebanon, with the first judicial injunctions against widespread broadcast piracy. Progress in legal reform, including enactment of a new copyright law to meet world standards is extremely slow. Meanwhile, piracy dominates the market. Placing Lebanon on the special watch list could stimulate greater forward momentum and signal strong U.S interest in improving intellectual property protection throughout the Middle East.

The U.S government urges the Lebanese government to press forward with its recent proposal to draft a law regulating the cable television industry and to mount an aggressive campaign against pirates. End-user piracy of computer software is widespread among large companies, banks, trading companies, and most government ministries. Also troubling is an overly broad software exception for certain educational uses in the new copyright law that seriously undermines the viability of this market for legitimate products.

The fight against copyright piracy in Lebanon continues to inch forward, with implementation of the 1994 Broadcast law raising hopes for real progress in stopping widespread TV piracy. But backlogged and inefficient courts continue to pose a major impediment to effective enforcement of copyright across the board.

Meanwhile, piracy still dominates the video market, book, and software. Piracy losses are increasing. In fact, book piracy remains a serious problem. A 2001 petition by US industry to suspend Lebanon's benefits under GSP trade program is under review by the US government. A committed and vigorous program to enforce intellectual property rights, particularly copyright protection, is essential to the success of the Lebanese Government's efforts to reform its economy, increase trade and foreign direct investment and prepare for accession to WTO.

The US needs to underscore for Lebanon the urgent need to reform judicial processes, to press ahead with broadcast licensing, and to revive the copyright law reform process, now immobilized before a parliamentary committee.

- Given the infancy of this law, it still remains to be seen how effective the Lebanese government and judicial authorities will be at enforcing the provisions of this law. To date, enforcement of the law has been minimal and has been limited to a few surprise raids and fines against infringing music and computer stores. The hope is, however, that this new copyright law will help to encourage foreign investment in Lebanon, open the door to technology transfer, and ultimately increase international confidence in Lebanon as it tries

to rebuild itself to its prewar status as a leading business center in the Middle East.

- Lebanon has taken major steps in improving his laws regarding the protection of intellectual property. The new Copyright Law of 1999 is a very important economical achievement for the country and an important step towards modernizing with International Standards.

However, further efforts will be required to ensure that these legal changes are meaningful in a practical sense. A copyright office should be empowered to administer rights of copyright and neighboring rights, including receiving deposits, rulemaking, and compulsory licensing.

Workshops examining WTO requirement and complaint legislation are useful for legislator and other rulemaking bodies. Seminars directed to private sectors an industry representatives are important, as are public awareness campaigns explaining general rights and responsibilities created under new legislation.

Table: Comparative Study between the Lebanese and the US Laws.

	US Law.	**Lebanese Law.**
General Requirements For Protection.		
Criteria For Copyright Protection.	- Originality - Fixation in a tangible medium of Expression.	Originality.
Works.		
Compilations.	Protected.	Protected.
Derivative Works.	Protected.	Not Protected.
Architectural Works.	Protected.	Protected.
Ideas.	Not Protected	Not Protected
Governmental Works.	Not Protected	Not Protected
Judicial Rulings.	Not Protected	Not Protected
Joint Works.	Protected	Protected
Fictional Characters.	Protected.	Not Protected.
Historical Research	Not Protected.	Not Mentioned in the Law.
Copyright in Immoral, Illegal, and Obscene Works.	Not Protected.	Not Mentioned in the Law.
Literary Works	Protected.	Protected.
Pictorial, Graphic and Sculptural Works.	Protected.	Protected.
Musical Recordings	Protected.	Protected.
Sound Recordings	Protected.	Protected.
Dramatic Works	Protected.	Protected.
Pantomimes and Choreographic Works.	Protected.	Protected.
Motion Pictures	Protected.	Protected.
Speeches Delivered Verbally.	Protected if Transmitted.	Protected.
Work of Folklore	Not Mentioned in the Law.	Protected.
Rights of Author.		
Rights of the Author	-Reproduction. -Adaptation. - Distribution. - Performance.	-Reproduction. -Adaptation. - Distribution. - Performance.
Pecuniary Rights.	Protected.	Protected.
Moral Rights.	Protected.	Protected.
Neighboring Rights.	Protected	Protected
Transferability of Rights.	Admitted by the Law.	Admitted by the Law.

Defense to Copyright Infringement.		
Defense to Copyright Infringement.	Fair Use Doctrine.	Articles 23-34
Copying for Judicial and Administrative Work.	Not Mentioned in the Law.	Accepted. (Art 29)
Copying for Archival purpose.	Accepted.	Accepted.
Ownership of Copyrighted Works		
Ownership under Employment Contract.	Employer is the Owner unless agreed to the opposite.	Employer is the Owner unless agreed to the opposite.
Commissioned Works.	Commissioner is the Owner unless agreed to the opposite.	Not Mentioned in the Law.
Copyright in Immoral, Illegal, and Obscene Works.	Not Protected.	Not Mentioned in the Law.
Copyright on the Net	Protected.	Not Mentioned.
Parody	Protected.	Not Mentioned.

LEBANON

Law on the Protection of Literary and Artistic Property*
(No. 75 of April 3, 1999)

TABLE OF CONTENTS**

Chapter I
Definitions

1. For the purpose of applying the provisions of this Law, the meaning of the terms and expressions hereinafter shall be as follows, unless otherwise indicated in the context. These definitions apply also to related rights.

"Performance of work" means the execution of a work through exhibition, playing music, reciting, narrating, acting, dancing or any other means whether directly or through any means or device.

"Public performance" means a performance which is given in a place or places where the number of persons present exceeds the members of one family and their direct acquaintances.

"Broadcasting" means the transmission of the work for public reception by wireless means including transmission by satellite.

"Computer program" means a set of orders expressed in words or symbols or in any other form which when entered into a matter readable by a computer shall enable the computer to perform or execute a certain task or give a certain result.

"Phonogram/sound recording" means every fixation by any physical means of the sounds of a performance or of other sounds, whether resulting from the performance of a work or not, other than a fixation incorporated in an audiovisual work.

"Reprographic reproduction" means making copies from the original of a work by means other than printing, such as photocopying, and includes enlarged or reduced copies of the work.

"Related rights" means the rights that performers, producers of phonograms, television and radio broadcasting organizations and publishing houses enjoy.

"Work" means every work within the meaning of Articles 2 and 3 of this Law.

"Collective work" means a work in which more than one natural person participates under the initiative and supervision of a natural person who, or legal entity which, undertakes to publish it under his/its own name.

"Audiovisual work" means every work consisting of a set of consecutive images related to each other, whether accompanied by sound or not, and that gives the impression of motion if displayed, broadcast or transmitted with special devices.

"Work of joint authorship" means every work created by more than one author on condition that the said work does not constitute a collective work.

"Producer of sound recording/phonogram or audiovisual work" means the natural person who, or legal entity which, takes the initiative and responsibility for producing the audiovisual work or sound recording/phonogram.

"Author" means the natural person who creates a certain work.

"Reproduction" means making one or more copies of any work by any means or in any form, including a permanent or temporary recording on phonogram records, tapes, disks, electronic memory, and this also includes issuing a copy in two dimensions of a three-dimensional work, or a copy in three dimensions of a two-dimensional work.

"Copy" means the product of any copying, recording, printing, or photocopying of the original work.

"Publication" means making copies of the work or of the sound recording/phonogram available to the public in reasonable quantities with the consent of the author or the producer of the sound recording/phonogram, by means of selling, renting, or any other means of property transfer or acquisition of a copy of the work or the sound recording/phonogram or of the right to use them. The word "publication" also means making copies of the work or sound recording/phonogram available to the public by any electronic means.

The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of artistic or literary works, the exhibition of a work of art and the construction of a work of architecture shall not be considered publication.

A sound recording/phonogram is not considered published if received by any device, or means or if broadcast.

"Communication to the public" means making the work available to the public by wire or wireless transmission of sounds and/or images, in such a way as to allow the public to hear or view the work at a distance from the broadcasting center.

This includes making the work available to the public by wire or wireless means (like the internet) in such a way that every person may access it from a place and at a time chosen by them.

Chapter II
Protected Works

2. The protection of this Law shall apply to every production of the human spirit be it written, pictorial, sculptural, manuscript or oral, regardless of its value, importance or purpose and the mode or form of its expression.

The protection of this Law shall apply, among other works, to:

— books, archives, pamphlets, publications, printed material and other literary, scientific and artistic writings;

— lectures, addresses and other oral works;

— audiovisual works and photographs;

— musical compositions with or without words;

— dramatic or dramatico-musical works;

— choreographic works and pantomimes;

— drawings, sculpture, engraving, ornamentation, weaving and lithography;

— illustrations and drawings related to architecture;

— computer programs whatever their language and including preliminary work;

— maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science;

— any kind of plastic art work whether intended for industry or not.

3. The following derivative works shall be subject to the provisions of this Law and shall be protected as original works without prejudice to the rights in the original work:

— translations, adaptations, transformations and arrangements of music;

— collections of literary or artistic works and compilations of data, whether in machine-readable or other form, provided that they are authorized by the copyright holder or his public or private successors and that by reason of the selection and arrangement of their contents they constitute intellectual creations.

4. The following shall be excluded from the protection provided by this Law:

— daily news;

— laws, legislative decrees, decrees and decisions issued by all public authorities and official translations thereof;

— judicial decisions of all kinds and official translations thereof;

— speeches delivered in public assemblies and meetings. The authors of speeches and presentations shall enjoy the sole right of collecting and publishing such lectures and presentations;

— ideas, data and abstract scientific facts;

— artistic folkloric works of all kinds. However, works inspired by folklore shall enjoy protection.

Chapter III
Copyright Holder and Terms of Protection

5. The author of any artistic or literary work shall, as a result of the creation of the work, have an absolute property right over his work and shall reserve all his rights without having to follow any formalities.

6. In the case of a joint work in which each contribution consists of an integral part of the work as a whole, all the contributors shall be considered coauthors and co-owners of copyright in the work. However, if it is possible to distinguish the contribution of each author from the others, each of the joint authors shall be considered the author of his own contribution.

In a joint work, none of the coauthors may, in the absence of any written agreement to the contrary, exercise copyright without the consent of the other authors.

7. In the case of a collective work, the natural person who, or legal entity which, took the initiative to create the work and supervise its execution shall, in the absence of any agreement to the contrary, be considered the copyright holder.

8. In the case of a work created by natural persons working under a work contract for a natural person or legal entity in the course of performing their duties or professional obligations, the employer shall, in the absence of any agreement to the contrary, be the copyright holder and shall exercise the rights provided for in Article 15 of this Law.

9. In the case of an audiovisual work, the producer shall, in the absence of any agreement to the contrary, be considered the copyright holder.

10. In the case of anonymous and pseudonymous works, the natural person who, or legal entity which, published the work shall be considered the author. However should the identity of the author be revealed, he himself shall exercise these rights.

11. The person whose name is shown on a literary or artistic work in the commonly known way shall, unless proved otherwise, be considered the author.

Chapter IV
Criteria of Eligibility for Protection

12. The protection of this Law shall apply to the artistic and literary works of the following:

— Lebanese authors, wherever they reside;

— non-Lebanese authors who are nationals of, or resident in, a State party to the Berne Convention for the Protection of Literary and Artistic Works or the Universal Copyright Convention;

— authors who are nationals of any State that is a member of the Arab League but which is not party to the above-mentioned Conventions, provided reciprocal treatment is applied;

— producers of audiovisual works who have their headquarters or habitual residence in Lebanon or in any State party to the Berne Convention for the Protection of Literary and Artistic Works or the Universal Copyright Convention.

13. The protection of this Law shall apply to:

— literary and artistic works first published in Lebanon;

— literary and artistic works first published in a State party to one of the above-mentioned Conventions;

— literary and artistic works first published outside Lebanon and outside the States party to one of the above-mentioned Conventions, provided that they are published in Lebanon or in a State party to the above-mentioned Conventions within 30 days of their publication in the other country.

Chapter V
Rights Enjoyed by Copyright Holders

14. The copyright holder shall enjoy economic and moral rights.

15. The copyright holder shall have the exclusive right to exploit the work commercially and, accordingly, shall have the right to authorize or prohibit the following:

— any copying, printing, recording and reproduction of the work in any manner or form including photography, cinematography, sound or visual recordings of any kind or any other form;

— any translation, adaptation, alteration, transformation, summarizing, reworking of the work or rearrangement of the music;

— the sale, distribution or rental of the work;

— the importation of copies of the work manufactured abroad;

— the public performance of the work;

— communication to the public of the work by wire or wireless means, whether through hertzian waves or the like or through coded or uncoded satellites, including the rebroadcast of normal television or radio broadcasts or satellite transmissions by any means of diffusion of sounds and images.

16. The economic rights of the author shall be considered as movable rights and may be transferred in whole or in part.

17. Any contract for the exploitation or assignment of economic rights shall, whatever its subject, be drawn up in writing, otherwise it shall entail nullity of the contract. It shall set out in detail the rights covered by the contract and indicate the time and location. The contract shall also require that the author gets a percentage of the exploitation revenues and assignment proceeds. If such a contract does not set a time limit, it shall be valid for 10 years only from the date of signature of the contract.

18. The assignment in whole of future works shall be considered as void.

19. The assignment by the author of any of his rights must be limited in all cases to that right only and copyright contracts shall be construed in a restrictive manner.

20. The author and composer of a song shall have equal rights in that work, unless agreed otherwise.

21. Independently of the rights provided for in the previous Article and even after the assignment of the said rights, the author shall enjoy the following moral rights:

— the right to disclose the work and to determine the way and method of such disclosure;

— the right to claim authorship of the work and to have his name mentioned on every copy of the work each time the work is used in public;

— the right to use a pseudonym or to remain anonymous;

— the right to object to any distortion, mutilation or modification of the work which would be prejudicial to his honor, reputation, fame or artistic, literary or scientific position;

— the right to rescind contracts for the assignment of economic rights even after their publication if rescission is necessary to safeguard his person and reputation or is due to a change in his beliefs or in the circumstances, provided that third parties are compensated for damage resulting from such rescission.

22. It shall not be permitted to assign or attach the moral rights of the author but the said rights may be transmitted by testamentary disposition or inheritance laws.

Chapter VI
Exceptions

23. Without prejudice to the provisions of Article 24 of this Law, any natural person may, for his personal and private use, copy, record or make a single copy of any work protected under this Law without the authorization or consent of the copyright holder and

without having to pay him any compensation, provided that the work has been legally published.

The use of a copy copied or reproduced inside a company or at any other work place shall not be considered as personal and private use.

24. The exception provided for in the previous Article shall not apply if it is prejudicial to the other rights and interests of the copyright holder. In particular, it shall be prohibited to:

— execute an architectural work in the form of a complete or partial construction;

— copy, record or reproduce any work of which a limited number of original copies are published;

— reproduce the whole or a significant part of a book;

— record or transmit compilations of data of all kinds;

— record or copy computer programs unless the record or copy is made by the person authorized by the copyright holder to use the program and for the purpose of making a single copy for use in the case of loss or damage of the original copy.

25. Non-profit-making educational institutions, universities and public libraries may, without the authorization of the author and without obligation to pay him compensation, reproduce a limited number of computer programs for the purpose of lending them free of charge to students and university people, provided that they possess at least one original copy of the work and provided that the Ministry of Education, the Ministry of Culture and Higher Education and the Ministry of Technical and Vocational Education subsequently issue decrees determining the copying mechanism, the categories of computer programs that may be copied and the number of copies allowed. Students may make one copy for their personal use.

It shall also be permitted, without the authorization of the author and without obligation to pay him compensation, to use a limited part of any legally published work for purposes of criticism, argumentation or citation or for an educational purpose, provided that the part used does not exceed what is necessary and customary. However, the name of the author and the source shall always be indicated, if the name of the author is included in the work.

26. It shall be permitted, without the authorization of the author and without obligation to pay him compensation, to copy or reproduce articles published in newspapers and magazines or short excerpts of a work, provided that it is done solely for educational purposes and within the necessary limits of such purpose. If the names of the author(s) and the publisher appear on the original work, they shall be mentioned in each and every use of the copy of the article or work.

27. Non-profit-making public libraries may, without the authorization of the author and without obligation to pay him compensation, make an additional copy of a work to be used in case of loss or damage of the original work, provided that they possess at least one copy of the original work.

28. It shall be permitted, by decision of the Minister of Culture and Higher Education, without the authorization of the author and without obligation to pay him compensation, to

copy, reproduce or record an audiovisual work of special artistic value in order to keep it in the Ministry's archives, in case the copyright holder unfairly refuses to authorize the making of the said copy.

29. It shall be permitted, without the authorization of the author and without obligation to pay him compensation, to copy, reproduce or record a specific work for use in judicial or administrative proceedings and within the limits required by such proceedings.

30. The media shall be permitted, without the authorization of the author, without obligation to pay compensation to the author, and within the limits of fair practice, to use short excerpts of works that are displayed or heard during current events in the course of reporting such events in the media, provided that the name of the author and the source are mentioned.

31. The media shall be permitted, without the authorization of the author and without obligation to pay him compensation, to publish pictures of architectural works, visual artistic works, photographic works or works of applied art, provided that such works are available in places open to the public.

32. It shall be permitted, without the authorization of the author and without obligation to pay him compensation, to display or perform a work in public during the following occasions:

— official ceremonies within the limits required for such ceremonies;

— activities carried out by educational institutions during which teachers or students use the work, provided that the audience is limited to the teachers, students, students' parents and persons directly involved in the activities of the said educational institution.

33. It shall be permitted, without the authorization of the author and without obligation to pay him compensation, to display an artistic work in museums or in exhibitions organized inside museums provided that the museum owns the tangible material that contains the work and that such display is not prejudicial to the legal interests of the author.

34. It shall be permitted, without the authorization of the author and without obligation to pay him compensation, to copy or reproduce an artistic work for the purpose of publishing it in catalogues intended to facilitate the sale of the work, provided that such copying or reproduction is not prejudicial to the legal interests of the author.

Chapter VII
Related Rights

35. Producers of sound recordings, radio and television broadcasting organizations, publishing houses and performers such as actors, musicians, singers, members of musical groups, dancers, artists of puppet shows and circus artists shall be considered as holders of related rights.

36. Producers of sound recordings shall enjoy protection in the following cases:

(a) if the producer of the sound recording is Lebanese or a national of a State party to the Rome Convention 1961—International Convention for the Protection of Performers,

Producers of Phonograms and Broadcasting Organizations, done at Rome on October 26, 1961;

(b) if the first fixation of sound is undertaken in a State party to the above-mentioned Convention;

(c) if the sound recording is first published in a State party to the above-mentioned Convention. If the sound recording is first published in a country that is not party to the Rome Convention and published afterwards, within 30 days of the first publication, in a State that is party to the said Convention, the said sound recording shall be considered as first published in the State party to the Convention.

37. Performers shall enjoy protection in the following cases:

(a) when their performance is undertaken in Lebanon or in a State party to the Rome Convention;

(b) when their performance is fixed in a sound recording protected under Article 36 of this Law;

(c) when their unfixed performance is fixed in a sound recording through a program protected under Article 38 of this Law.

38. Broadcasting organizations shall enjoy protection in the following two cases:

(a) if the headquarters of the organization is in Lebanon or in a State party to the Rome Convention;

(b) if the program is broadcast via a transmission device in Lebanon or in a State party to the Rome Convention.

39. Without prejudice to the provisions of Article 15 of this Law, performers shall have the right to authorize or prohibit the following:

— the broadcasting or communication to the public of their unfixed performance unless the broadcasting or communication is a rebroadcast of a previously authorized broadcast;

— the fixation or recording of their unfixed performance on any tangible material;

— the copying, sale or rental of any recordings containing an unauthorized fixation of their performance;

40. Performers participating in a joint work or show shall elect by relative majority one person to represent them in the exercise of their rights stated in Article 39 of this Law.

41. Producers, who are authorized by the performers to undertake the first fixation of an audiovisual work on any tangible matter, shall have the exclusive right to copy, distribute, sell and rent the audiovisual work they have produced and communicate it to the public.

42. The radio and television companies, establishments and corporations referred to in Article 38 of this Law, shall have the right to authorize or prohibit the following:

— the rebroadcasting of their programs by whatever means;

— the showing of their television programs in places where entrance is permitted upon payment of an entrance fee;

— the recording of their programs on tangible material for commercial purposes;

— the copying of unauthorized recordings of their radio and television programs.

43. Producers of sound recordings shall have the right to authorize or prohibit direct and indirect copying as well as the rental of such recordings for commercial purposes.

44. Performers shall have the right, during their lifetime, to claim authorship of, and to object to any alteration or modification of, their performance. This right shall pass to the heirs of the performer after his death.

45. Publishers of written or printed works shall have the right to authorize or prohibit the copying of such works by means of photocopying or commercial exploitation.

46. Any agreement on related rights shall be concluded in writing.

47. The exceptions set forth in Articles 23 to 34 of this Law shall apply to the rights provided for in Articles 35 to 45 of this Law.

48. The protection of related rights shall not affect any of the rights in respect of original and derivative works protected under this Law. Any interpretation of any of the rights granted under this Chapter shall not affect the rights of the original author.

Chapter VIII
Terms of Protection

49. The term of protection granted under this Law to the economic rights of the author, shall be the life of the author and 50 years after his death, to be computed from the end of the year in which the death has occurred.

50. In the case of a work of joint authorship, the term of protection shall be the life of the joint authors and 50 years after the death of the last joint author, to be computed from the end of the year in which the death has occurred. Should one of the authors die without leaving heirs, his share shall pass to the co-authors or to their heirs, unless stated otherwise.

51. In the case of collective and audiovisual works, the term of protection shall be 50 years to be computed from the end of the year in which the work has been made available to the public or, failing such event, 50 years from the making of such work, to be computed from the end of the year in which the work has been completed.

52. In the case of anonymous or pseudonymous works, the term of protection shall expire 50 years after the work has been lawfully made available to the public.

However, if the pseudonym adopted by the author leaves no doubt as to his identity, or if the identity of the author of an anonymous or pseudonymous work is disclosed before the expiration of the 50-year period starting from the end of the year in which the work was lawfully made available to the public, the provisions of Article 49 of this Law shall apply. In the case of posthumous works or works published in the name of a legal person, the term of protection shall be 50 years to be computed from the end of the year in which the work was published.

53. All moral rights of authors or performers shall enjoy perpetual protection that shall not be subject to prescription. They shall be transmitted to third parties by testamentary disposition or under inheritance laws.

54. All economic related rights of performers shall enjoy protection for a period of 50 years to be computed from the end of the year in which the performance has been carried out.

55. The term of protection granted to producers of sound recordings shall be 50 years, to be computed from the end of the year in which the first fixation of sound on tangible material has taken place.

56. The term of protection granted to broadcasting organizations shall be 50 years, to be computed from the end of the year in which the broadcasting of their programs has taken place.

57. The term of protection granted to publishing houses shall be 50 years, to be computed from the end of the year in which the first publication has taken place.

Chapter IX
Collective Management Associations and Companies

58. Authors and holders of related rights or their universal or particular successors may assign the management of their rights and the collection, in whole or in part, of royalties due to civil associations or companies formed among them.

59. Assignment shall be made by way of a written power of attorney drafted before a notary public and explicitly stating all the rights the management of which are assigned to the association or company.

The power of attorney shall be limited in time and may include all or part of the present or future works of the author or the holder of related rights. If there is ground for doubt, all the works shall be considered as covered by the power of attorney.

60. Any association or company willing to undertake the collective management of rights must, before carrying out any activity, deposit with the Ministry of Culture and Higher Education a legal attestation certifying the constitution of the association according to the Law of Associations, or a certificate of registration of the company with the competent registrar, in addition to the following documents:

— a copy of the Articles of Association;

— the name and address of the director in charge;

— the number of authors and holders of related rights that have assigned the management of their rights and the collection of their royalties to the association or company;

— a copy of the proxies granted to the association or company by the authors, the holders of related rights or their universal or particular successors;

— the term of the proxies;

— the mode of distribution of the royalties collected;

— the annual budget of the association or company.

61. The associations or companies for the collective management of rights shall be subject to the authority and control of the Ministry of Culture and Higher Education and they shall provide the Ministry with all necessary records and account books for ministerial control.

62. Each association or company must appoint a certified accountant to audit its records and submit an annual report to the General Assembly. However, the association or company must obtain an annual report from another certified accountant.

63. Each asociation or company must hold at least one general assembly a year to vote on the report of the president, the financial reports, the balance sheet of the previous year and the budget of the following year.

64. Pursuant to the legislation regulating the legal profession, each association or company must appoint a lawyer from the Bar as its legal consultant.

65. If the association or company commits a serious infraction or in the event of a repetition of a legal or regulatory infraction, the Minister of Culture or Higher Education may refer the file to the public prosecutor for action.

66. The Council of Ministers shall, within three months of the publication of this Law in the official gazette and upon the recommendation of the Minister of Culture and Higher Education, issue a decree prescribing the mode of establishment and functioning of the said associations and companies and the manner in which the Ministry of Culture and Higher Education shall monitor their activities and establish violations.

67. The associations or companies for the collective management of rights shall have the following responsibilities:

— to arrange contracts with the parties using the work and to determine the royalties to be collected;

— to distribute the royalties collected among the eligible parties;

— to take all administrative, judicial, arbitral and amicable measures to protect the legitimate rights of their clients and to collect royalties due;

— to obtain from the users of the work all necessary information for the computation, collection and distribution of royalties.

68. The associations or companies for the collective management of rights shall not have the right to refuse to arrange contracts under Article 67 of this Law with the users of the works without a legitimate reason.

69. The user of the work must submit to the association or company a list of the exploitations that he has undertaken such as the copying, sale, rental or television or radio broadcasting of the work and he shall indicate the number of copies, the number of public displays of the work or the number of television or radio broadcasts.

70. Companies and associations shall not have the right to refuse to administer the rights of an author or collect the royalties owed to him without a legitimate reason.

71. Each company or association must submit an annual report to the authors that have empowered it to administer their rights and collect royalties owed to them so that the authors can express their opinions as to the amounts collected, the method of collection and distribution and other administrative issues. The association must take these comments into account when formulating or modifying its methods of collection and administration.

72. The authors, the holders of related rights and their representatives shall have the right to examine the accounts of the company or the association to which they are affiliated whenever they deem it necessary.

73. The authors and the holders of related rights which have empowered a specific association or company to administer their rights and collect their royalties must inform the association or the company in writing of the works they have published or those they intend to publish after the date on which they have authorized the company or the association to administer their rights and collect their royalties.

74. Collected amounts shall, at least once a year, be distributed among right holders in proportion to the actual use of their works.

75. The power of attorney may be cancelled by the author, the holder of related rights or the association or company provided that there is a legitimate reason for such cancellation and that the other party is served notice three months before the end of the year. The cancellation shall have effect as of the end of the year in which the other party has been served notice of the intention to cancel.

Chapter X
Deposit

76. Works, sound recordings, performances, and radio or television programs shall be deposited with the Intellectual Property Protection Office at the Ministry of Economy and Trade.

The deposit shall constitute a presumption as to the ownership by the depositor of the work, the sound recording, the performance or the radio or television program. Such presumption may be refuted by all available means.

77. Copyright holders, holders of related rights or their particular or universal successors who wish to make a deposit must submit to the Intellectual Property Protection Office an application signed by them or their agent containing the following information:

— the title and the type of work, sound recording, performance or radio or television program;

— the name, title and address of the author or the holder of related rights. If the author or the holder of related rights does not make the deposit personally, the foregoing information must be given in respect of the depositor as well;

— if the depositor is a person other than the author or the holder of related rights, the type of document on the basis of which the depositor has submitted the application for deposit;

— where necessary, the name and address of the person responsible for the physical execution of the work (the printer, the molder, etc.).

The application for deposit must be accompanied by:

(a) if the applicant is a person other than the author or the holder of related rights, a copy or a summary of the document on the basis of which the deposit is made (power of attorney, assignment, contract or agreement...);

(b) three copies of the work or the subject of the related right. In respect of pictures, oil paintings, water colors, statues, works of architecture or other works having only one original, a photographic or non photographic reproduction of the work in three dimensions shall be provided showing the shape and form of the work in whole and in detail.

78.—(1) The application for deposit shall not be accepted unless it is accompanied by the prescribed fee set out in this Article.

(2) The fees charged by the Intellectual Property Protection Office shall be as follows:

— deposit of a printed work, LBP 50,000;

— deposit of a motion picture, video film or sound recording, LBP 175,000;

— deposit of a daily or periodic publication, (for one year) LBP 75,000;

— deposit of a picture, drawing, map, post card, photograph or daily or periodic publication, (1 copy), LBP 25,000;

— deposit of any other material not mentioned above, LBP 50,000;

— recordation of a contract of deposit with the Office, LBP 50,000;

— facsimile copy of a certificate of registration, LBP 25,000.

79. The application for deposit shall be registered at the Intellectual Property Protection Office. A certificate shall be delivered to the applicant mentioning the information stated in the application and it shall be accompanied by one of the three copies deposited with the Office.

The certificate shall be dated, sealed and signed by the head of the said Office. The first certificate shall be granted free of charge and the Office shall charge the prescribed fee referred to in the previous Article for subsequent requested copies of this certificate.

80. Any contract concluded with regard to any work, sound recording, performance or radio or television program registered at the Intellectual Property Protection Office may also be recorded with the said Office.

Chapter XI
Provisional Measures, Damages and Sanctions

81. Where there is ground for suspecting an imminent infringement of copyright or a related right, the holder of these rights or his public or private successors, in particular the associations or companies for the collective administration of rights, shall have the right to take all necessary provisional measures to prevent such infringement.

For this purpose, the judge of expedited matters may take all decisions authorized by the law, in particular, ex-parte decisions, in order to ensure the protection of the right or the work that is likely to be infringed and all the other works owned by the author or the holder of related rights. The judge of expedited matters may impose coercive measures to enforce his decisions. In addition, the president of the competent court of first instance or the competent public prosecutor shall have the right to take the provisional measures referred to above.

82. The judge of expedited matters, the president of the court of first instance or the public prosecutor may temporarily seize material constituting evidence of an infringement of copyright or a related right and shall leave it in the custody of the defendant.

83. In case of infringement of copyright or a related right, the holders of these rights may have recourse to the competent judicial authority and seek the cessation of the infringement and the prevention of any future infringement.

84. Any person who infringes copyright or a related right shall be required to pay fair compensation to the right holder for the material or moral injury and damage incurred. The amount of such compensation shall be determined by the court based on the commercial value of the work, the damage and lost profit incurred by the right holder and the material profit realized by the infringer. The court may order the seizure of the subject matter in dispute and the equipment and devices used to commit the infringement.

85. Irrespective of whether the work has fallen into the public domain or not, shall be liable to imprisonment for a term varying from one month to three years and/or to a fine varying from LBP 5 to 50 million, any person who:

— fraudulently puts or instructs another person to put a false name on a literary or artistic work;

— fraudulently imitates the signature or the logo of the author with intent to mislead the buyer;

— knowingly imitates a literary or artistic work;

— knowingly sells, possesses, offers for sale or makes available an imitated or a plagiarized work.

The sanction shall be doubled in the event of a repetition of the offence.

86. Any person who, knowingly and with intent to make a profit, infringes or attempts to infringe copyright or related rights provided for in this Law shall be liable to imprisonment for a term varying from one month to three years and/or to a fine varying from LBP 5 to 50 million. The sanction shall be doubled in the event of a repetition of the offence.

The competent court may order the closure of the premises, the commercial establishment or the radio or television station that infringes copyright for a period varying

from one week to one month and the destruction of all unauthorized copies and all the equipment and the devices used to produce such copies. The court may also order that its decision be published in two local newspapers at the expense of the defendant.

The provisions of Article 200 and subsequent Articles of the Penal Code shall be taken into account when applying this Article.

87. Any person who manufactures or imports for purposes of sale or rental, offers for sale or rental, possesses for the purpose of sale or rental, sells, installs or rents any device, equipment or machine manufactured in whole or in part to receive illicitly any radio or television broadcast or transmission destined to that section of the public that receives the said broadcast or transmission on payment of a set fee, shall be liable to imprisonment for a term varying from one month to three years and/or to a fine varying from LBP 5 to 50 million. The sanction shall be doubled in the event of a subsequent offence.

88. Any person who arranges or facilitates for third parties the reception of the transmission or broadcast referred to in the previous Article shall be liable to imprisonment for a term varying from one month to three years and/or to a fine varying from LBP 5 to 50 million. The sanction shall be doubled in the event of a subsequent offence.

89. With regard to the foregoing violations, legal action may be instituted by the public prosecutor ex officio or at the request of the person suffering damage or the president of the Intellectual Property Protection Office.

90. The court shall communicate any judicial decision issued with regard to the foregoing infringements to the Intellectual Property Protection Office within 15 days of the date of the decision.

91. It shall be strictly prohibited to import, consign to a warehouse or a free zone or transit sound recordings, or works that are imitations of sound recordings or works enjoying legal protection in Lebanon. Such sound recordings and works shall be seized wherever they are found.

92. The persons mentioned below shall have authority to identify, inventory and sample suspect objects. These persons shall be: police and customs officers and employees of the Intellectual Property Protection Office sworn in to that effect. These employees shall perform their duties pursuant to an order or a mandate issued by the public prosecutor or the Intellectual Property Protection Office and they shall notify the Office of all violations of the provisions of this Law that come to their attention. Sworn-in employees of the Intellectual Property Protection Office shall have police powers with regard to the implementation of the provisions of this Law.

Suspect articles may be seized, inventoried and sampled wherever they are found. A report must be drawn up of all sampling and inventorying and it must contain the following information:

1. the name, surname, title and place of residence of the employee who has drawn up the report;

2. the authority that has issued the order and the date it was communicated to the employee;

3. the date, time and location of the operation;

4. the name, surname, nationality, place of residence and profession of the person on whose premises the operation was carried out;

5. a detailed list of the suspect articles stating their number, kind and specifications;

6. the signature of the person in whose possession the articles or goods were found and if he refuses to sign, his refusal shall be mentioned;

7. the signature of the officer who has drawn up the report.

The proprietor of the goods shall have the right to mention in the report all the information and reservations he deems necessary and to obtain copies of the report and inventory if an inventory has been drawn up separately. Civil action or penal proceedings must be filed with the competent court within 15 days of the date of the report otherwise the whole operation will be considered as void.

93. The court may, at the request of the plaintiff and before rendering its final judgment order the seizure of all or some of the articles stated in the report and inventory. In such case, the court may order the plaintiff to deposit with the court, prior to the seizure, a guarantee fixed by the court based on the value of the articles to be seized.

The order shall designate the employee mandated to carry out the seizure, the place where seized articles will be kept and the official receiver of such articles appointed by the court.

94. The officer who has carried out the seizure shall immediately draw up a report in two copies, one of which should be delivered to the person whose goods have been seized. The report shall be drawn up as prescribed in Article 92 and it shall be accompanied by an inventory of the articles seized. The person whose goods have been seized, shall sign both copies and if he refuses or fails to sign, his refusal or failure shall be mentioned in the space provided for the signature.

95. The person whose goods have been seized must be provided with the following documents:

1. the order of seizure;

2. the document that establishes the deposit of the guarantee with the court if the court orders the deposit of such guarantee;

3. the inventory of the articles seized;

4. the report of seizure.

96. If the Intellectual Property Protection Office carries out an investigation at the request of the person suffering damages, it shall charge him a LBP 100,000 fixed fee.

97. The judgment rendered with regard to the above-mentioned proceedings shall provide for the imposition of the following complementary penalties:

1. the judgment shall be posted at the places designated by the court and it shall be published at the expense of the defendant in two local newspapers designated by the court that has rendered the judgment;

2. if the losing party represents a newspaper, a magazine or a radio or television station, the judgment must be published in this newspaper, magazine or radio or television station in addition to the two newspapers mentioned above.

Chapter XII
Transitional and Temporary Provisions

98. All works, whether published or not, created before the entry into force of this Law, shall enjoy the period of protection prescribed in this Law provided that they have not fallen into the public domain by the effective date of this Law. The period of protection that has lapsed before the issuance of this Law shall be deducted from the period of protection provided for in this Law.

99. Any author, producer or publisher of any book or publication must send, free of charge, to the Ministry of Culture and Higher Education five copies of the said work.

100. Articles 137 to 180 inclusive of Decision No. 2385, dated January 17, 1924 (amended), and Articles 722 to 729 inclusive, of the Penal Code shall be repealed.

101. This law shall be published in the official gazette and it shall have effect two months after its publication.

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* *Entry into force:* June 14, 1999.
Source: English text communicated by the Lebanese authorities.
Note: Editing by the International Bureau of WIPO.

** Added by the International Bureau of WIPO.

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