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Civil Protection of Rights contiguous to Author's Royalty in Iraqi Law
A comparative study

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Abstract

Recently, intellectual property is characterized by legal protection at the national and international levels due to its great legal and economic value. Although protecting copyrights is originally related to the protection of royalty and patent rights, but there is a group of rights that are also worthy of protection. These rights are 'rights contiguous to author's royalty', which are neither completely separated from royalty nor merged with it. Rather, they are both connected by the framework of intellectual property and the goal of spreading intellectual creativity in contemporary society. Figuratively speaking, 'contiguous' means the existence of common and similar features with copyright.

Rights contiguous to the author's royalty is divided according to the International Convention of Protecting Performers, Producers of Phonograms and the Broadcasting Organization of 1961 (Rome Convention) into three rights. They are rights of performers, rights of producers of phonograms, and rights of broadcasting organizations. Furthermore, the Iraqi legislator organized these rights in the Iraqi Copyright Protection Law No. 3 of 1971 under the Coalition Provisional Judiciary Law No. (83) of 2004.

Keywords: copyright, royalty, rights contiguous to author's royalty, performers' rights, broadcasting Authority rights.

Introduction

Some persons practice an activity that has not been considered an innovation for a long time. The singer, actor, player, instrument player, or dancer practice an artistic activity, out of a talent they have. Such activity cannot be described as an innovation because it is a talent that does not involve creation. It is an endowment from birth to some people rather than others. However, outstanding work is connected to physical effort which anyone can do. The basis of protecting the author does not occur in the case of the former activity, and it does not extend to include the latter because equality between the creator and others within the framework of intellectual property will harm the author, who will find someone competing with him in his activity despite his distinction of creativity and innovation.

However, the previous concept has changed due to the need to protect the activity in question, so that changing the concept of intellectual property is no longer based on innovation and creativity. Its purpose has become the legal protection provided by intellectual property.

It is not intended to give a new category of persons the description of the author, but rather to protect people in need of protection. Thus, the idea of rights contiguous to royalty emerged, which is not fully integrated into copyright and, in return, is inseparable from it. It is closely related to the work and leads to giving it an additional value by contributing to its publication. The royalty copyright researched in the current study is summarized by rights of performers, producers of audio and video recordings, and broadcasting organizations. There has been great interest at the international and national levels for these rights represented by conducting many international agreements and the enactment of national legislations that organize them.

In order to study the contiguous royalty of authors, we divided this study into three parts. Part one is specified to explain the concept of rights contiguous to author's royalty. Part two investigates the relationship between royalty and contiguous rights. Part three seeks the effect of the technological development on the way of protecting rights contiguous to author's royalty due to the vast progress in the field of communication and information transmission which facilitates data access via internet.

1. The concept of rights contiguous to author's royalty

Royalty can be defined as "an authority approved by law to a person for his mental product and it gives him an advantage that enables him to achieve a moral and material interest stipulated by law." (Yousif, 2008: p.28). This part is divided into two sections. In the first section we defined the rights contiguous to author's royalty. In the second section we researched types of rights contiguous to author's royalty.

1.1 Definition of rights contiguous to author's royalty

The term 'rights contiguous to author's royalty' was found because of its connection to the author's royalty. It is not separated from author's royalty fully nor integrated into it. They are, rather, united by the framework of intellectual property and have one goal of spreading intellectual creativity in contemporary society. 'Contiguous' means having common or similar features. Saying that, the meaning of 'contiguous rights' will be the same rights which are based on related items with commitments resulting from that relationship (Rushdi: p.62). However, the two terms should not be mixed up.

One of the definitions of contiguous rights states that they are similar to the author's rights or connected to them but usually they are more specific and shorter in duration (Alallaq, 2010: p.124). Others define them as literary rights of performers and financial rights of producers of phonograms and broadcasting organizations (Al-Romi, 2009: p.165).

On the legislative level, we find that the Lebanese Literary and Artistic Property Protection Law No. 7 of 1999 understands from the text of Article 35 that what is meant by contiguous rights are rights of artists, performers, producers of audio recordings, and institutions of television and radio broadcasting and publishing houses. The legislator did not set a text to define contiguous rights, but rather referred to the owners of these rights, because the work of the legislator is not to set the definitions, but rather to lay down general rules, as is the case of the Iraqi Copyright Protection Law No. 3 of 1971 amended

pursuant to Coalition Provisional Authority Order No. 83 of 2004. Which did not state a definition for contiguous rights but referred to the owners of these rights in Article 34. Note that this Law did not mention the term 'contiguous rights' except once in the amended Article 49. Likewise, Rome agreement of protecting performers, producers of voice recorders, and Broadcasting Corporation of 1961 stated beneficiaries of the protection in Article 2.

Based on what was stated above, we can define contiguous rights as the rights of persons whose work revolves around the exploitation of literary or artistic work, and they are entrusted to them based on the role they carried out in these works. It is logical for those people to have the right to report broadcasting or recording, or both, without their rights reaching the degree of the author's copyright. Various international and national legislations have recognized their rights according to their roles.

1.2 Types of rights contiguous to the author's royalty

Rights contiguous to the author's royalty are divided according to Rome agreement to three rights: performers rights, the rights of producers of sound recordings, and the rights of broadcasting organization, and each of them will be discussed in a separate section in this study.

1.2.1 Performers' rights

The rights of performers are distinguished from the rest of the contiguous rights in that they include the moral right in addition to the financial right as is the case of the author's royalty.

Performers, according to Act 3/a of Rome Agreement are "Actors, singers, musicians, dancers, and other people who act, sing, recite, chant, or play literary or artistic works, or otherwise perform them." (see also Act 2/a WIPO Agreement). Act 2/a of Beijing agreement of 2012 about audiovisual performances adopted by the Diplomatic Conference on the Protection of Audiovisual Performances in Beijing, defined performers as "Actors, singers, musicians, dancers and others who act, sing, recite, chant, play, or perform literary or artistic works or aspects of folklore expression."

The definition of performers did not differ at the level of national legislation. Act 1-L2012 of the amended French Intellectual Property Law No. 597 of 1992 defined the performer as "A person who performs, sings, recites, or plays in a circus." On the other hand, Act 18/138 of the Egyptian Intellectual Property Protection Law No. 82 of 2002 came with a similar definition, so was the perception of the Iraqi legislator who stated a definition of the performer in Act 5 of Copyright Protection Law No. 3 of 1971. We, in our turn, can define the performer as the person who performs a literary or artistic work, and who has been creative or proven for the first time in the field of his performance.

The previous definition indicates that performers must be normal persons, because performance was described as singing, chanting or acting actions which require normal persons to performed them because abstract people cannot do such actions. The performer does not have to be professional, and to be liable for protection he should be protected according to the law provisions which organize copyright such as the application of Egyptian judiciary. The Qur'an reader Abdul Basit Abdel Samad agreed with a company for phonograms to record his recitation of the Holy Qur'an in exchange of 30% of the value of selling the tapes, provided that the reader refrains from recording the Qur'an with his voice to another party with a commercial purpose. However, he recorded for another company. The first company filed a lawsuit to prevent him from doing so under the contractual clause. However, the

trial court issued a decision to dismiss the lawsuit and it was upheld by the Court of Appeal on the grounds that the Holy Qur'an is not classified and its reading is an established tradition in which there is no innovation and is not restricted to anyone. The court decision was contested on the pretext that recording the recitation and selling it to the public is a right of financial value that its owner can exploit it to himself or transfer it to others. The Egyptian Court of Cassation overturned the decision of the Court of Appeal stating that "It is the right of every human being to benefit legally from what God has endowed him with of the faculties, senses and abilities that distinguish him from others, including his voice, including the right to publish, even if the matter is related to the exploitation of the voice in reciting the Qur'an. The contract issue is not the Holy Qur'an in itself or simply reciting it, but rather the voice of the reader and the extent to which the public hears it. If a person waives his right to financially exploit his voice to others, he will refrain from performing any action that would hinder others from using that right, provided that the court considers that its decision does not prevent the reader from reading the Qur'an with his voice or recording it, but for non-commercial purposes. The condition mentioned in the contract does not prevent him from doing so as long as he does that with a non-commercial intent." (Al-Badrawi, 2004).

I should explain that the Egyptian Court of Cassation did not apply the authors' royalty provisions in the case and resorted to the general rules according to which the contracting party refrained from violating its obligations contained in the contract. This is due to the fact that the Holy Qur'an is not considered an artistic or literary work, but rather the word of God. Thus, the prohibition includes recording for commercial purposes only (Khatir, 2007: p.143). We see that the protected works are stated in the law as an example not as a limitation. That is clear in the text of Article 2 of the Iraqi Copyright Protection Law, which came in general terms and listed some examples of protected works, including the public recitation of the Holy Qur'an, as it stipulated that "this protection includes works expressed by writing, sound, drawing, photography, or movement, and in particular the following.....".

Based on the above, performers have a literary right in addition to a financial right, according to the following:

First: the literary right

The literary right of performers is represented by the right to attribute a live or recorded performance to the artist who performed it, so he has the right to demand that his name be mentioned in evidence of the performance, regardless of vocals, performances, or chants attributed to him. The performer is not obligated to mention his real name, but rather he can use a pseudonym. This right may not be affected except in one case stipulated in the WIPO Treaty (Act 5/1), which is neglecting the ratio of performance to a particular artist in a way that affects the way of its use. In this regard, Article 34/2 of the Iraqi Copyright Protection Law states that "The performer has the right, aside from the performer's financial rights, and even after the transfer of the ownership of these rights, the attribution right of his audio performance or his recorded performance, unless the negligence in attribution of the performance is imposed by the method of using the performance ..."

Furthermore, performers have the right to prevent any distortion of their performance (Act 155 of the Egyptian Intellectual Property Protection Law, Act L212-2 of the French Intellectual Property Law). Literary right is a right that does not transfer between the living but passes to the heirs. Act 212-2 of

the French Property Code stipulates the transferability of the rights in question to the inheritors. The moral rights of performers under the WIPO Treaty shall expire upon the expiration of the financial right of the performer.

Second: financial rights

We can summarize the financial rights of performers according to the texts of international agreements and national legislation as follows:

1- Exclusive right

The artist has an exclusive right to his performance, so he alone has the right to exploit it. He has the right to communicate his performance to the public, license it to others, rent it, or copy it. He also has the right to prevent its confirmation or reproduction, or even prevent its delivery to the public.

2- Financial compensation

The artist can get financial compensation for his performance, whether through a contractual agreement or a fair remuneration if the wage is not agreed upon and the performance was not intended as a donation. In this regard, Act 15/1 of the WIPO agreement states that “performers and producers of voice records have the compensation right in return of direct or indirect benefit of the commercially published voice records.”

3- Duration of financial rights protection

Duration of protecting performers' financial rights according to the Iraqi law is 50 years from the date of the performance (Act 17 of WIPO agreement). Some believe that the period prejudices the copyright of the author, which may end the period of fifty years while he is still alive, so he is deprived in the last years of his life from benefiting from the fruit of his efforts, which calls for the protection to remain throughout the artist's life and continue for 25 years after his death (Abu Haiba, 2003: p.105-106). We do not support the previous view because we think 50 years is sufficient.

1.2.2 The rights of producers of sound recordings

Producers of sound recordings have copyrights although they do not have a moral right. Their activity is not characterized by any kind of creativity or innovation like that of the author or performer. The reason behind considering it a contiguous right is financial. The piracy that the produced audio recordings is exposed to, has led to great financial losses. Piracy in France led to producers' loss of large sums of money which created an economic problem, consequences of which the producer bears, which led to the recognition of a contiguous right (Khatir, 2007: p.159).

Act 3/c of Rome Agreement defines the producer of the sound recordings as the normal (or abstract) person who records for the first time the performance or the sound of the performer. The Convention of the Protection of Phonographic Producers of 1971 called him 'producer', and defined him in Act 1/b as the normal or moral person who was the first to record the sounds of a performance. The French legislator defined him in Act 213-1 of the Intellectual Property Code as the normal or moral person who initiates and bears the responsibility for the first confirmation of a series of voices. Act 34 of the Iraqi Copyright Law defines him as “the producer of cinematic, radio or television work. He is the

person who undertakes the implementation of the work or assumes responsibility for this implementation and provides the authors of these works with the material and financial means to ensure the production of the work and the achievement of its output...” Based on the previous definitions, we conclude that the producer of phonograms can be normal or moral person. It is also not required that the recording is a stand-alone work, as there is no correlation between them. The recording output may be a recording of nonperforming sounds, as in the case of bird sound recording. Moreover, the recording must be for the first time.

Furthermore, the French and Iraqi text recommend that the producer should bear the responsibility for recording, in addition to the sequencing requirement in the French text. Sounds recorded must be of value.

Note that the Iraqi text has also included visual recording in the protection unlike the French text which is limited to sound recordings. Act 215-1 of the aforementioned French law states that the producer of visual recording is the normal or moral person who takes the responsibility of fixing a series of images with or without sound.

Producers of audio and visual recordings enjoy, under Iraqi and French law, financial rights, so they have the right of exclusive exploitation of the product and the term of protection is the same as the term of protection for performers in Iraqi law.

1.2.3 The rights of broadcasting organization

Broadcasting means, according to Act 3/w of Rome Agreement, “Sending sounds or pictures and sounds to the public by wireless means.” Act 14/138 of the Egyptian Intellectual Property Protection Law defines broadcasting as “The audio or audiovisual transmission of the work or the performance, in a wireless manner. Moreover, broadcasting is done via satellite.” The same Act in Article 17 defined the broadcasting organization as every person or entity entrusted with the responsibility of the radio, audio, or audiovisual transmission. The French legislator did not define broadcasting, but named the broadcasting organizations in Act 216-1 and indicated that they are audiovisual communication bodies that enjoy the privileges of public service, advertising, or licensing in accordance with the provisions of the law.

A broadcasting organization can be defined as the organization that transmits or broadcasts programs to the public. The Iraqi legislator did not provide a specific definition of broadcasting organizations. Act 34 of the Iraqi Copyright Protection Law gave broadcasting organizations the right to fix and record what they broadcast and to authorize to copy fixations of what they broadcast directly or indirectly and re-broadcast their programming by wireless means and transmit them to the public. It becomes clear that the use of the term ‘organization’ means that it is made up of several people. The organization has the exclusive financial rights of broadcasting – aside from the intangible rights specified for the work – and duration of protection is 50 years determined from the date the program was first broadcasted.

2. The relationship between royalty and contiguous rights

Rights contiguous to the author’s royalty leads to infringing copyright and narrowing its scope. Some have argued that the claim of the existence of contiguous rights could only be at the expense of

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copyright. The rights of assistants, i.e. contiguous rights, are not built except on the rubble of the author's royalty. This is due to the fact that the presence of the contiguous rights next to the author's royalty will lead to the author giving up some of his financial rights because harmonization between them necessitates the loss of each party's right. Contiguous rights grants performers a moral right and transfers the financial right to the producers of audio and visual recordings. Since these are investors are distinguished by economic strength, it will ultimately matter for them to enjoy the privileges of the author (Khatir, 2007: p.129). The previous opinion clearly shows the existence of a conflict between royalty and contiguous rights, and that dispute was a consideration in the eyes of international and national legislations. At the international level, Act 1 of the Rome Agreement states that "The protection provided in this agreement does not affect the protection of the author in literary and artistic works and does not affect it in any way. As a result, it is not permissible to interpret any provision of this agreement in a way that harms that protection." WIPO Treaty stated in Act 2/1 that "The protection, granted according to this treaty, of author's royalty in literary and artistic works, remains unchanged and does not affect it in any way. Therefore it is not permissible to interpret any provision of this treaty in a way that violates that protection."

At the national level, we find that the national legislation has also stipulated the previous principle, as Act 211-1 of the French Intellectual Property Code and Act 34 Article 2 of the Iraqi Copyright Protection Law which states that In order to ensure that there is no discrepancy between authors' royalty on the one hand and performers and producers of audio recordings on the other hand, each party must be sure if the license is required of the author of the work recorded and the performer or producer who owns the right to the recording. The need to license the author remains, because a license to the performer or producer is also required. This does not imply granting the author permission to do so.

Some views consider author's royalty superior to contiguous rights, based on the claim that royalty is in the first place a literary right. Then, literary right should be superior to financial right, which is one of the contiguous rights. Therefore, it is not permissible for the owner of the contiguous right to exercise his right if it conflicts with the royalty of the author except with his consent without the author being restricted in exercising his right with the contiguous rights. For example, if a composer has authorized an artist to record his music to perform a song, this does not prevent him from authorizing another artist to record his own music in another song without the artist having the right to claim compensation because of the superiority of royalty over contiguous rights (Abdulrahman, 2008: p.52).

In response to the previous opinion, the rights of performers also have the advantage of literary right. The performer is a creative artist who enjoys a literary right for his performance. Moreover, the superiority of royalty over contiguous rights indirectly means emptying those rights from their content and remaining subject to the author's will.

A second opinion argues that there is no superiority of royalty over contiguous rights. The purpose of legislative regulation is to achieve a balance between the various rights not to suspend the protection of contiguous rights based on the will of the author (Rashad:p.53-54). It has been said, regarding the French legislation which stipulated that the royalty should not be violated, that it does not mean giving superiority to royalty, but rather it is a text left to the judiciary in case of conflict between these rights. A third opinion supports the distinction between literary right and financial right in interpreting the

relationship between royalty and contiguous rights. In case of literary right, royalty is characterized by precedence over the adjacent-superior-moral right. As for financial rights, there is no superiority between royalty and contiguous rights. For example, if the composer wants to exercise his right to withdraw his work and is opposed by the performer who finds his interest in publishing the work, then the requirement of the author's literary right imposes the withdrawal of the work according to the author's will (Khatir, 2007: p.31). This does not mean that the performer should be deprived of any protection vis-à-vis the author. In fact, the owners of contiguous rights are usually investors or those who have economic power, which necessitates the protection of the author against them. If the author acts harmfully to the owners of contiguous rights, then he is obligated to pay compensation as a result of his harm to others in accordance with the tort liability rules. A lawsuit has been brought into the French court regarding the relationship between the author and the producer of the audio recordings. A composer accepted to record his work with a specific producer, but the composer recorded the same music for another product with new words and with another performance. The first producer filed a lawsuit on the grounds that the composer had committed an act of fraud and an act of unfair competition. The court rejected his claim based on the recognition of the producer's contiguous right. It must not affect the royalty of the author, and this solution does not change the author's license or assignment, or the inclusion of a condition in the contract that includes the assignment of the author's literary rights. Although the first producer has spent 30,000 francs for the author - the composer - for the purpose of recording, this does not justify giving the producer the right to monopolize and produce the musical composition. It does not mean either that the author licenses the producer to waive his rights to exploit the work.

Thus, contiguous rights do not affect, by any means, the author's royalty as a result of his literary right. As for the financial right, the author cannot act in a way that harms the holders of contiguous rights. We can say that royalty is a right that has priority over contiguous rights, as it is the origin of these rights (Al-Sa'eed: p.75).

3. The effect of the technological development on the way of protecting rights contiguous to author's royalty

Technological development in the field of communication, the speed of transmission of information and files, the ease of obtaining them, and the frequent attacks on works via the Internet, increased the fears of authors and holders of contiguous rights about publishing their works on the Internet. At the same moment that a work is published on the Internet, it will be difficult for the owner of the work to obtain financial compensation from Internet users for the work without a license. Moreover, the electronic copying without a license is in itself an infringement of royalty and contiguous rights (Salal, 2020: p. 10374-10375). There is a set of practical difficulties facing the protection of works published on the Internet represented by the lack of an international body specialized in dealing with this type of dispute. The problem of defining the law applicable to the conflict is clarified as the Internet does not know the geographical borders. When the author wants to sue the person who violated his right, assuming that he was able to identify him, a large number of people who used the work without prior authorization will appear from different countries, which makes it difficult to obtain compensation. WIPO Treaty was designed to address the problem of technological development stating "the need to apply new international rules to find appropriate solutions of issues arising from developments in the economic, cultural, social and technological fields." Act 18 of the treaty states obligations regarding

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technological measures. It says "The contracting parties shall stipulate in their laws appropriate protection and effective measures against the circumvention of technological measures used by performers or producers of audio recordings in connection with the exercise of their rights under this treaty." What should be noted is that a set of solutions have emerged in reality through which it is possible to provide protection against unauthorized use through encryption systems so that the work is not available to the Internet user except with a private key provided by the owner of the published work. Also, electronic payment systems were found every time the user wanted to access the work.

An example of difficulty of protecting works on the internet is the issue of Napster website, whose users can easily share songs in (mp3) format (Jumai'i: p.5). Napster has made computer programs that allow copying of the music software that you own available to Internet users so that it can be downloaded to personal computers through their Internet connection. After downloading this software, internet users are able to log into the Napster system directly from their personal computers. Thus, these programs that are installed on the personal computers are interacting with the software on the Napster website as soon as the internet user who wants to download a specific file for a particular music calls. The music files that were obtained by the site users are not installed on the site, but they are installed on other devices belonging to different people. So that as soon as the user finds the music file he is looking for on any site that Napster has helped him to locate, he can download that file directly to his personal computer. It has been estimated that three hundred thousand people around the world have been able to use the site as explained previously. Napster has been prosecuted by recording companies that produce songs, and by several musicians and individual bands, and has been charged with assaulting rights. Napster defended itself, arguing that it did not itself copy the files onto its site. At the appeals stage, the US Court of Appeals found that Napster was responsible for violating copyright and contiguous rights by contributing and assisting the process. The court decided that the activities of Napster users had constituted a direct violation of copyright through redistribution.

Conclusion

We conclude that the concept of the rights contiguous to the author's royalty does not mix up with the 'royalty' and is not fully separated from it. Contiguous rights is the rights of persons who utilize the literary or artistic works based on their role in these work. Contiguous rights has enjoyed legislative regulation at the international and national levels. These rights are summarized by three kinds: performers' rights, audio recordings producers rights, and broadcasting organizations rights. Performers' rights is distinguished by the fact that it combines the literary right and the financial right, unlike the last two which are limited only to financial rights.

Furthermore, contiguous rights do not mean the superiority of royalty concerning moral right, but it does mean that the two rights are equal financially.

Finally, we have investigated the effect of the technological development on contiguous rights concerning publication of works on the internet and WIPO's suggestive solutions for electronic protection issues. Therefore, we encourage the Iraqi legislature and comparative legislation to pay attention to the issue of protecting works via the internet because technological development is continuous and accelerating, and the law must cope with that development because the law is only a reflection of the prevailing conditions in society that it seeks to regulate society and protect social stability.

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