



LEGAL PROTECTION OF DERIVATIVE WORKS COMPARATIVE STUDY

A research submitted by
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Article history:	Abstract:
Received: 7 th February 2025 Accepted: 6 th March 2025	Derivative works are one of the basic and traditional subjects of literary and artistic property, along with original works, so most of the latter concepts can be applied to them. The method of creating derivative production and its complex nature is perhaps one of the most important foundations on which intellectual property laws have been based to justify the protection of these works. Because their creation is based on the works of others, this in turn has affected the relationships and rights of authors, which jurisprudent, judiciary, and legislation have tried to reconcile. Despite the generalization of copyright provisions to all intellectual works, derivative works are always considered to have a subordinate relationship to the original works, which requires their authors to respect the rights related to them.
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INTRODUCTION

Perhaps the idea of the development of intellectual creativity and the advancement of culture is what made copyright legislation recognize and protect the use of existing works, especially allowing the use of public domain works and traditional cultural heritage works that countries undertake to protect. The legislation has provided non-exhaustive lists of intellectual works for the possibility of accommodating new works in the future. It is noted that this legislation protects, in addition to these original intellectual creations, other works called derivative works, which are works that assume the existence of a pre-existing original production to create them.

What helped in the development of the fields of intellectual property and the works it protects is the technological progress of the means of transferring and publishing information and works, which led to the development of the supports for storing works and methods of exploiting them. Modern technologies have influenced the existence and continuity of intellectual production, contributing to the emergence of new and previously unknown works as a result of utilizing and re-exploiting earlier works. However, the use of previous works led to the ramification of relations between the various users and exploiters, and to the intervention of specialists from other fields, which led to the difficulty of identifying the author of the work, as identifying the author of the work and the owner of the right to it is one of the basic difficulties that those who use the work may face. In principle, the author is the natural person who created the work and put it in his name and is the owner of the right to it, but he can assign to another person a part of the rights to exploit the work, and the author can also delegate a company of authors or a specific body to manage his rights and use his work. The broad concept of copyright has contributed to the existence of modern practical applications and new intellectual innovations that have enabled intermediaries and specialists to benefit financially from these works more than the authors sometimes. On the other hand, practical reality has somewhat prevailed over legal texts by creating modern techniques that allow free and broad participation in the author's recognized monopoly over his work.

A key question that arises is why legislation grants legal protection to derivative works, given that they exist solely due to their reliance on pre-existing works. And why does it grant their author rights like the rights of the author of the original work, even though the second author used his creativity?

If the creator of the derivative work is granted a right, is this right granted absolutely or within certain limits, and are these rights identical to the rights of the author of the original work or is there a difference between the two? If the author of the derivative work has the freedom to be creative in his work, is this freedom similar to the freedom of the author of the original production over his work? The difficulty lies in determining the rights of both the author of the

original work and the author of the work derived from that original, and the extent of legal protection granted to any of these works. All of these questions require knowing the nature of derivative works and the scope of protection granted to them.

Preliminary requirement

The concept of derivative works

Legal protection seeks to safeguard specific rights and prevent infringement. The law has granted the author of the derivative work the means to protect his rights from infringement, but he cannot exercise them until his intellectual production acquires the status of a "derivative work". Therefore, we will clarify the concept of the derivative work subject to protection by discussing its definition in (the first section) and the conditions that must be met for it to be subject to protection in (the second section).

Section One

Definition of derivative works

Despite the keenness of copyright laws and their emphasis on the necessity of protecting intellectual works, it is noticeable that most of these laws did not provide a specific definition of the meaning of "work", and were satisfied with giving a non-exhaustive list of works, leaving the jurisprudence to care for defining the concept of work. Perhaps the purpose of not restricting the concept of works is due to the absorption of what is produced from new intellectual innovations.

Part of French jurisprudence⁽¹⁾ attributes the reason for its legislator not defining the work to reasons specific to it, because when preparing the first French copyright law of 1957, the French legislator did nothing more than codify previous judicial rulings on the subject of copyright, as it was satisfied with collecting the initial and basic principles on this subject. This legislative vacuum has allowed jurisprudence to define "the work" with multiple definitions. Some define it as "every mental production, regardless of the form of expression, whether it is written, spoken, drawn, photographed, or animated, and regardless of its subject, whether it is literature, art, or science"⁽²⁾. It has also been defined as "every product that includes an innovation that comes into existence, regardless of the method of expression, purpose, color, or type"⁽³⁾.¹

Therefore, the intellectual product that is true to the description of the work, and which is worthy of protection, is the one that is based on an innovative idea, even if these ideas are formulated in a tangible material form. Whenever the work appears in the form of a material support, it enjoys protection regardless of its type, method of expression, or purpose.

As for what is meant by the derivative work, which is the subject of our research, Article (101) of the US Copyright Act of 1976 defined it as (that new work that depends on one or more previous works, which appears in translation or musical arrangement, or artistic photography, or revision or summary, or other forms of works that can be reformulated, changed, or quoted from).

The Egyptian legislator defined it in Article (138/6) of the Intellectual Property Protection Law No. 82 of 2002 as (a work that derives its origin from a previously existing work, such as translations, musical arrangements, and compilations of the work, including databases readable by computer or otherwise, and collections of folklore expressions, as long as they are innovative in terms of their arrangement or selection of their contents).

The World Intellectual Property Organization (WIPO) also defined the derivative work as (an innovative work based on a previous work, and its originality lies either in the quotation of the previous work, or in the creative elements of its translation into a different language, and the derivative work enjoys protection without prejudice to the author's right in the previous work). As for the Iraqi legislator, he did not provide a specific definition of the derivative work in the Iraqi Copyright Law No. 3 of 1971, and in Article 4 thereof they were satisfied with providing a non-exhaustive list of derivative works protected by law without referring to its concept.

Examples of derivative works mentioned by some legislations, including the Iraqi legislator, are translations, quotations, distributions, musical changes, editorial reviews, original modifications of literary and artistic works, cultural and traditional heritage works, and databases⁽¹⁾.²

However, the term derivative works is not the only one to indicate this type of production, due to the large number of creations of these works, the development of their system, and the increasing complexity of the methods of creating them as a result of scientific development and the diversity of intellectual works. Jurisprudence has given other names to indicate them, and they are sometimes called "second-hand works" in relation to the works from which they were

1- F. POLLAUD -DULIAN, *le droit dauteur*, Economica, 2005, n102, p81.

2- Dr. Abdul Rashid Mamoun and Dr. Muhammad Sami Abdul Sadiq, *Copyright and Neighboring Rights*, Dar Al Nahda Al Arabiya, Cairo, 2004, p. 111.

3- Dr. Suhail Hussein Al-Fatlawi, *Moral Copyright in Iraqi Law*, Dar Al-Hurriyah for Printing, Baghdad, 1978, p. 158.

1- We will suffice with mentioning it in this brief form, given that it has been discussed in some detail in many previous researches and studies, including Dr. Ziad Tariq Jassim, *Derivative Works in the Digital Environment*, a research published in the *Sharjah Journal of Humanities and Social Sciences*, Volume 17, Issue 2, 2020, p. 729.

derived, so the previous production is considered "first production" in relation to the production from which the second work was derived. It is also called "subsidiary works" because they are branches of other works, so the latter are the original and the derivative work is the branch that emerged from them ^{(1),3}

It is clear from the above that derivative works are those intellectual works that their authors created based on other works that preceded them, by modifying one or some of the original elements of them, or in other cases without any change in the original work or its elements. The purpose of the work is not important, as it enjoys legal protection regardless of its purpose as long as it meets the legal conditions to be subject to protection, and this will be the focus of our research in the second section of this requirement.

Section Two

Conditions for legal protection of derivative works

For derivative works to receive legal protection, they must satisfy specific legal requirements. Some of these apply universally to all works, while others are exclusive to derivative works. The main conditions are as follows:

First: General conditions for the protection of works

The conditions that must be met in a work to be worthy of protection do not exceed two conditions. First: The work must contain innovation. Second: The work must appear in a material form.

The first condition: that the work includes innovation. Innovation is defined as the personal imprint that the author places on his work, and that it must include originality and seriousness in the work distinguished by the character of its author, whether in composition or expression ⁽¹⁾. A part of jurisprudence defined it as "the mental effort exerted by the author, which results in the creation of an idea characterized by a special personal character in which the imprint of his personality appears clearly on the work" ⁽²⁾. It is also defined as "that the work is distinguished by an original character either in composition or expression" ⁽³⁾. The author's personality in composition means that he exerts a mental effort that gives his work his character and that it stems from his spirit and faculties, and originality in composition means the emergence of the author's personality in the construction or composition of the work, so the composition is the product of his ideas. ⁽⁴⁾⁴

The innovation doesn't need to be of serious value, what is important is that there is innovation without considering its scientific or artistic value or the importance of its purpose, and this is what is stipulated in Article 1 of the Iraqi Authors Law No. 3 of 1971, which states that seriousness is not required in innovation. Whether the work is innovative or not is a matter that is up to the judiciary to assess ⁽⁵⁾, and it may seek the assistance of experts in this field, and the judge does not have the right to examine the scientific, intellectual or literary value of the work, when assessing whether or not it is innovative ⁽⁶⁾.

The second condition: The appearance of the work in a material form. It is not enough for a person to come up with an innovative idea for the law to grant it protection, but rather it is necessary in addition to that that these ideas be formulated in a tangible material form.

It follows from the above that legal protection includes works that appear in the world of existence in their material form, regardless of their type, method of expression, importance or purpose ⁽¹⁾.

The expression "tangible material existence" is consistent with what has been established at the international level when determining and defining the work, which the World Intellectual Property Organization defined as "the method that allows any work to be perceived sensually or mentally, including representation, performance, recitation, physical fixation or any other appropriate method" ⁽²⁾.

Some intellectual property laws do not merely express innovative ideas in a tangible, material form in order to protect works, but rather require a certain formality. Registering a work is one of the most prominent formal procedures adopted by countries and considered a basic condition for protection. The author of the work must register all data related to it in the records prepared for this purpose ⁽³⁾.

Second: Conditions for the protection of derivative works

1 Dr. Naim Mughbghab, previous reference, p. 56, Dr. Abdul Hamid Al-Minshawi, Protection of Intellectual Property and Control of Artistic Works, Dar Al-Fikr Al-Jami'i, 2003, p. 32.

1- Ashwaq Abdul Rasool Abdul Amir, Legal Protection of Works and Their Authors, a study published in Ahl al-Bayt Magazine, Issue 6, 2008, p. 195.

Dr. Khater Lotfy, The Comprehensive Encyclopedia of Copyright Protection Laws and Censorship of Artistic Works, Cairo, 1994, p. 648.

2- Dr. Abdel Moneim Farag al-Sadda, Copyright in Egyptian Law, Research and Studies Institute, Cairo, 1967, p. 98.

3- Dr. Suhail Obaid Al-Fatlawi, the previous source, p. 164.

5- Among this is what the Egyptian Court of Cassation ruled in a ruling, that the method of reciting the Holy Quran involves some innovation, as it is clear from the method of recitation that its inventor has bestowed upon it his personality, faculties, abilities and senses that distinguish it from others..." The ruling of the Egyptian Court of Cassation in Appeal No. 1462/1/1992, Technical Office Collection, referred to by Dr. Nawaf Kanaan, Copyright (Contemporary Models of Copyright and Means of Its Protection), 1st ed., Culture Library for Publishing and Distribution, 2004, p. 200.

6- Dr. Ismat Abdul Majeed Bakr, Legal Protection of Copyright, 1st ed., Legal Library, Baghdad, 2008, p. 17.

First condition: Integration of a previous work into a new work. The content of this condition is that the author of the new (derivative) work uses some of what is contained in a previous work and integrates it into his new work, but it should not be understood from this that the matter is limited to merely the physical integration of a previous work into a new work, because what is important is that the previous work will be included in one way or another in the new work, whether the integration is material or intellectual ^{(4),5}

This is what the New York court went to in the case (Warner Bros entertainment Inc V RDR Books) that references books cannot be banned because they can help readers better understand the original works) ⁽¹⁾

Therefore, when the author of the new work uses some of the ideas contained in a previous work, he has two options: either he transfers the content of a previous work and limits his knowledge to adding some additions to it, and this is "material integration." Or he makes a radical change in the previous work, limiting his work to using the general idea that the author of the work seeks to achieve and convey to the public, and this is what is known as "intellectual integration" ⁽²⁾.

The second condition: The author of the original work should not have contributed to the derivative work. Because the author of the previous work should participate in the new work, this will make the author of the work one of the joint works, and it will be outside the framework of derivative works, as each of them has its different provisions. This was confirmed by the American Copyright Act in Article (101) where it states that (the author of the previous work should not have contributed to the new work as an essential condition that must be met for the provisions of derivative works to be applied).

If it is true that the author of the derivative work will rely primarily on the ideas adopted by the author of the original work, this does not mean that the latter is considered a partner in the derivative work, as long as he did not take a positive approach in achieving the derivative work ^{(3),6}

On the works of others. This is in contrast to what is the case in the field of works of relative originality, such as the derivative work, the most important thing that distinguishes it is that it is based on works that precede it, but the author of the derivative work relies on his intellectual effort, which is considered his property.

The first topic

The scope of legal protection for derivative works

The legal protection for each intellectual work is represented by the legislator's recognition of the creator's full rights to the author, in view of the intellectual effort exerted by him and the originality of his creativity. Thus, the author has moral and material rights over his creativity, and what requires questioning is the possibility of exercising these rights in the field of derivative works, which are somewhat complex, due to the competing rights of authors over one work, and the desire of each of them to retain his full rights.

What is noted about the existence of two rights for authors on one work is the existence of two types of financial rights and two types of moral rights on the same intellectual production, i.e., the derivative production, which sometimes leads to these rights conflicting with each other, and the stronger right prevailing over the other right, which harms one of the authors. Therefore, it is necessary to search for compromise solutions to continue to exploit the derivative work. Since the moral and material rights of the author are the subject that legislation is concerned with protecting, these two rights are the focus of this protection and its specific scope. Accordingly, examining the scope of legal protection for derivative works requires addressing them, in the following detail:

The first requirement

Moral rights on derivative works

The moral rights of the author are among the most important rights in literary and artistic property. They arise as soon as the author creates his work, and are represented in the author's right to attribute the intellectual production to him. These are eternal rights, but they may be subject to competition in the field of creativity of some works, especially

1- Dr. Abdul Rashid Mamoun and Dr. Muhammad Sami Abdul Sadiq, the previous source, p. 103.

2- See: World Intellectual Property Organization, Dictionary of Copyright and Similar Rights Terms, paragraph 109, p. 111.

3- Dr. Nawaf Kanaan, the previous source, p. 202. Note that the Iraqi Copyright Law No. 3 of 1971 does not require registration.

4- Pul Daniel, General Les Auteurs de oeuvre cineataographique et leurs droits. Paris ,1994,p.27.

1- Warner Bros Entertainment Inc V RDR Books, District Court, SD, New York, No,07 civ9667 (RPP), District Court,2008. Chenxuan Li, Originality to Derivative Works: How to Use "Transformative" Rules to Judge Them, International Journal of Social Science and Humanity, Vol. 12, No. 4, November 2022.

2- The distinction between material and intellectual integration does not give rise to any legal effects. Still, jurisprudence and the judiciary in France use "composite works" to refer to derivative works achieved through material integration. In contrast, they use the term "derivative works" to refer to derivative works achieved through intellectual integration. Henri Desbols, Le droit deauteur en France, Paris, 1999, p. 102

3- Dr. Abdul Rashid Mamoun and Dr. Muhammad Sami Abdul Sadiq, the previous source, p. 149.

derivative works, because the latter are considered an intellectual production composed of two creations. Legal rulings have decided that the rights on the composite work It is owned by the person who creates the work, taking into account the rights of the author of the original work. This shows that there is an overlap between the moral rights of the author of the original work and the author of the derivative work, which requires reconciliation between them. This will be detailed in the following sections:

The first section

The right of ownership over the derivative work

The right over the derivative work is owned by the person who creates the work, i.e., the author of the work ⁽¹⁾, and the author of the original work does not own rights over the combined production because he is not considered its author, but this is considered only the general rule to which some exceptions apply.

First: The general rule for the right of ownership of the work.

Copyright is a type of property right with all the advantages of this right, it is transferable and eternal and has the complete sanctity of ownership, and is an element of the financial liability, so it can be seized and a direct lawsuit can be used to preserve it ⁽²⁾, and the ownership of a person of the product of his mind and thinking and his intellectual innovations is the ownership that is connected to the name of the author and embodied in his personality and is much more deserving of protection than material ownership ⁽³⁾, so the copyright is invoked against all people and it is not permissible for there to be on a work except the copyright alone without the rest of the people and these are the two basic characteristics of the right of ownership ⁽⁴⁾.⁷

The fact that copyright is based on something intangible does not prevent this right from being considered a real right, like the right of ownership, according to modern legislative and jurisprudential trends, which do not differentiate in the legal status between a material thing and an intangible thing, as each of them is suitable to be the subject of a real right, and considering it a real right

Copyright is a temporary right that does not prevent it from being considered a property right, as this right is permanent. It is known that the permanence of the property right is not a requirement of this right, but rather it is only part of its nature. However, the author does not benefit from his work by limiting it to his personal use, which does not conflict with considering his right a property right, as considering a right a property right does not prevent its owner from benefiting from it in one way rather than another ⁽¹⁾⁸.

About derivative works, their ownership is conditional or contingent upon respecting the rights of the author of the original work, i.e. he cannot enjoy the rights to his creativity, especially the financial rights represented in the right to use, exploit and dispose of his derivative creativity if he infringes on the financial and moral rights of the first author. Therefore, his work is not subject to legal protection ⁽²⁾. This is considered a logical matter, as without the first production, the second, which is the production derived from it, would not have existed.

As for the field of application of this rule, it appears from the previous texts that it applies to all types of derivative works without exception, as the translator, the author of musical adaptations, the person who transfers and transforms an artistic work, and the author of databases are all considered the owners of the rights to these creations, without prejudice to the rights of the authors of the original works from which they were derived.

Second: Exception to the general rule

There is nothing to prevent the author of the original work from being the author of the derivative work or sharing his creativity with another author, in two cases.

First case: The author of the original work is the author of the derivative work / Article (8/4) of the Iraqi

Copyright Protection Law states that (the author alone retains the right to benefit from his work, and no one else may, without written permission from the author or his successor, carry out the following actions... 1_ Translate the work or quote or distribute it musically or make any modification to it...), It is clear from this text that the creation of the derivative work can be from the author of the original work, and even more than that, it is considered an exclusive right

1- The World Intellectual Property Organization (WIPO) defined the author as (the person who creates a work), and Article 138/3 of the Egyptian Intellectual Property Law defined him as (the person who creates the work, and the author of the work is considered the one whose name is mentioned on it or who is attributed to him when it is published as an author unless evidence is provided to the contrary).

2- Dr. Mukhtar Al-Qadi, Copyright, 1st ed., Cairo, 1978, p. 12.

3- Dr. Abdul Razzaq Ahmed Al-Sanhouri, Al-Wasit fi Sharh Al-Qanun Al-Madani, Vol. 8, p. 227.

4- Dr. Abdul Hay Hijazi, Introduction to the Study of Legal Sciences, Vol. 2, 1970, footnote 286.

1- Dr. Abdul-Hayy Hijazi, the previous source, pp. 285-286.

2- Article (4) of the Iraqi Copyright Law No. 3 of 1971 states that (protection is enjoyed by anyone who has translated or Arabized the work or in any way that shows it in a new form without prejudice to the rights of the original author) and Article (7) of the same law states that (the author alone has the right to decide to publish his work and no one else may exercise this right without prior permission from him or from whomever this right devolves to him)

owned by the author, but in most cases, it is allowed to others based on written permission. Therefore, the creation of the derivative work from the author of the original work will lead to the achievement of the following results:

A_ The author's derivation from his work will lead to him acquiring author's rights distinct from the rights acquired from his first work, as he can waive the rights to exploit his second work without the first.

B_ In this case, the author cannot claim that his reputation is not respected, because he is the creator of the derivative work and he is the only one concerned with respecting his production and personality.

The second case: The case of the author of the original work participating with the author of the derivative work / This case is implicitly inferred from the texts of the Copyright Protection Law, related to the protection of the author of the original work and the protected work, whether it is a joint or collective work ⁽¹⁾⁹. If the author of the original work participates in the actual creation of a second intellectual production with another author, and this production is based on the original work, then this production will be a derivative work on the one hand and joint or collective on the other hand, and thus the author of the original work will combine two rights to this production, which are his private right to the original work and his right to the work derived from it.

Section Two

Moral Rights on Derivative Works

The competing moral rights on the derivative work are represented by both the right to respect the first intellectual production, and the right to enjoy the creative freedom to produce the second work.

First: The author of the derivative work respects the first intellectual production

The author of the original work has the right to declare that the published work is his intellectual and mental product and that he is its creator. This is done either by the author placing his name on the work, declaring this or correcting the name if the work is published without omitting the author's name or published under a pseudonym. This right is expressed by the term "right of paternity", i.e., the author's paternity of his work ⁽¹⁾. The author has the right to have his name written on his work, as well as his family name and academic qualifications. This right is due to the close connection between the author's name and his academic and artistic reputation ⁽²⁾, as an attack on the name is considered an attack on the author's fame and reputation, which is the most important consideration in authorship ⁽³⁾. This is what some legislations have gone to, that the author alone has the right to have his work attributed to him, and he or his representative has the right to prevent any attack on this right ⁽⁴⁾.

The requirement of the right to attribute the work to its author represents an element of moral right, which is distinguished from other rights in that it is linked to the personality of its author, and it is not permissible to dispose of it, seize it, or own it by prescription ⁽⁵⁾. Therefore, the author of the derivative work must mention the name of the author of the derivative work alongside his name in the derivative work to indicate that the latter represents a work derived from an original work, and this obligation applies to all supports and copies of the derivative work, as this procedure is considered a consolidation of respect for the right of the author of the original work and protection of his intellectual rights.

What the author of the derivative work does in this case is to respect the quality of the original production, especially what relates to the meaning and ideas represented by the work and the concepts and character created by the author. Thus, the author of the original work is considered the only one who can determine the idea of his work through the form he took for it and the concepts he expressed through his production ⁽⁶⁾.¹⁰

Second: Respecting the creative freedom of the author of the derivative work

The primary role of the author of the derivative work lies in finding a new expression and a new form for the original work without distorting its nature. Therefore, the author of the original work is required to acknowledge some creative freedom for the author of the derivative work. The work of the author of the derivative work is to transform the original work from one style of expression to another or from one type of intellectual production to another. This author is not considered an ordinary exploiter like the publisher and producer, but rather a second creator, meaning that he must highlight his personality through the derivative creativity, and the first author must respect this creativity.¹¹

1- Article (31) of the Iraqi Copyright Protection Law states that (1- The author of the scenario or the owner of the written idea for the program is considered a partner in the authorship of the cinematic work)

1- Dr. Ismat Abdul Majeed Bakr, the previous source, p. 82.

2- Dr. Abdul Moneim Faraj Al-Sadda, the previous source, p. 44. Dr. Nawaf Kanaan, the previous source, p. 93.

3- Dr. Mukhtar Al-Qadi, the previous source, p. 64.

4- See Article (10) of the Iraqi Copyright Law No. 3 of 1971 and Article (9) of the Intellectual Property Rights Protection Law No. 28 of 2002.

5- Dr. Nawaf Kanaan, the previous reference, p. 72. Dr. Ismat Abdul Majeed Bakr, the previous source, p. 78.

6- F. POLLAUD- DULAN, op.cit, p105.

1- Fatima Zahra Bashikh, Derivative Works in the Law of Literary and Artistic Property, Master's Thesis, University of Oran, Algeria, 2013, p. 196.

Freedom of creativity has been qualified as a personal right, the reason for this qualification is the confusion between creative freedom and the moral right of the author ⁽¹⁾. However, if moral right and creative freedom know a kind of relationship because moral right is viewed as the counterpart of creative freedom left to the author ⁽²⁾, there is a difference between them, which is that the existence of moral right assumes the existence of a moral transfer or ownership to which this right is applied, but the existence of creative freedom is independent of the existence of any element or previous ownership. This is what the French Court of Cassation went to in its decision dated April 7, 1987, regarding the independence of the concept of creative freedom from the concept of moral right of the author ⁽³⁾.

A section of French jurisprudence ⁽¹⁾ believes that moral right differs and is distinguished from creative freedom because the latter seeks and defends the possibility of creativity, while moral right protects the result of creativity, i.e. the work, and the existence of creative freedom does not always require that the result of creativity be a work in the concept of intellectual property rights.

Positive laws have classified creative freedom as a basic right within the freedom of expression, and the latter has been enshrined in Article 11 of the Universal Declaration of Human Rights of 1789.¹²

The second requirement

Financial rights on derivative works

The right to exploit intellectual production is one of the most important financial rights of the author. This right is represented in approving the use and exploitation of the work and choosing the appropriate exploitation methods and techniques by which the work is published and distributed. This right is one of the basic financial rights recognized for every author, but this right may be subject to some obstacles and restrictions, especially in the field of derivative works, which leads to the author's inability to exploit his work. This result applies to the author of the derivative work and the author of the original work derived from it. Usually, the reason for these restrictions is due to one of the authors exercising one of his legally protected rights such as moral and financial rights, and due to the lack of balance between these rights, sometimes it is not possible to remove or give preference to one of these rights, but under the influence of necessity, one right may prevail over another, and this is in the form of the moral right prevailing over the financial right. To elaborate on the financial exploitation of derivative works and the restrictions imposed on it, we will address it in the following two sections:

The first section

Financial exploitation of derivative works

The financial right of the author gives him the authority to exploit his work in a way that brings him benefit or financial profit, and the right to exploit derivative works, such as translating, modifying, developing, adapting or making any changes to the work, does not prevent the author of the original work from enjoying the financial right from the work arising from this development in his work, and the Berne Convention went to confirm this in Article (2/3) thereof, that derivative works enjoy the same protection guaranteed to original works without prejudice to the rights of the author of the original work.¹³

It is clear from this that the financial right to the derivative work is not limited to the author of the derivative work only, but the author of the original work shares in it, since the author of the original work did not agree to the creation of the second work except to exploit it and obtain a financial return from it. The author of the original work may waive his financial right to exploit his work, including derivation from the original work, for a fee or without a fee. The condition for the conclusion of the disposition of his financial right is that it be in writing, and writing is a pillar of the conclusion. The contract must specify explicitly and in detail each right that is the subject of the disposition, stating its extent,

2-F. POLLAUD-DULIAN, po.sit,p31.

3-The Egyptian Court of Cassation ruled in a ruling in this regard that: There is no dispute that the story (The Merry Widow), which is an international story, has fallen into the public domain, and that the conflict has revolved around it and many have quoted from it and it has been previously shown in various theaters and several foreign films... The late (A.W.) quoted from it, as did (H.Z.). The point of disagreement between them in this regard is whether (A.W.) did a work that is considered an idea that emerged in a new way and deserves legal protection, and whether (H.Z.)'s quotation of the story is nothing more than a theft of that idea, or whether it is a work that has no connection to the work of the former..., since the court sees from examining the quotation of the two parties from the story that is the subject of the dispute that neither of them deserves legal protection since they did not come in any way that shows its quotation in a new form, because it is not enough for the expression or dialogue to be transferred from one form to another or from a Western color to an Eastern color as is the case in the lawsuit, but rather the transformation or dialogue must include a literary idea that has no precedent, and since this was the case, the contested ruling ruled that the work that (A.W.) did was devoid of quotation. From the original novel, the innovation that deserves legal protection. Ruling of the Egyptian Court of Cassation on February 18, 1965, Collection of Cassation Rulings, quoted from Dr. Nawaf Kanaan, previous source, p. 259.

1- Ch. BIGOT, La liberte de creation prevaut, dans certaines limites, sur le droit al image,2009, p470.

1- Dr. Nouri Hamad Khater, Restricting the Freedom of Contract within the Scope of Transactions Concerning Material Copyrights, Journal of Sharia and Law Studies, University of Jordan, Volume 26, Issue 2, 1999, p. 318 and beyond.

purpose, exploitation and place, and the author is obligated to refrain from any action that would disrupt the use of the disposed right ⁽¹⁾.

But the question that arises in this regard is, does the exclusive assignment from the author of the original work to the author of the derivative work lead to the exploitation of the financial right of the author of the derivative work being an obligation on him, or a right for him?

To answer this question, we must address what the WIPO Convention has stated in this regard, as it has confirmed that the author may grant an exclusive right to authorize the representation and public performance of his work ⁽¹⁾, as well as authorize the artistic recitation of the work by all means and methods, in addition to authorizing the translation and financial exploitation of the work exclusively ⁽²⁾.

It is clear from the above that the exploitation of the derivative work resulting from the exclusive assignment is a duty on its author, meaning that the assignee is obligated, in addition to creating the derivative work, to work on delivering the second work to the public for a financial consideration.

This is what some French jurisprudence has gone to ⁽³⁾, that the mandatory nature of the exploitation of the work is more evident when the assignment is exclusive to the assignee alone, and that the assignor in this case is prevented from exploiting the financial right assigned or licensing its exploitation to another author, because the exclusive assignment of rights entitles the assignor alone and no one else to fully exercise the rights assigned to exploit the work permanently.

Section Two

Restrictions on the exploitation of derivative works

The obstruction of the continued exploitation of the derivative work is either a result of the use of the financial rights or moral rights of one of the authors or both together.

First: Restrictions that impede the continued exploitation of the derivative work as a result of the use of the financial right. These restrictions are either time restrictions, i.e., related to the duration of exploitation of the derivative work or restrictions related to the method of exploitation.¹⁴

Time restriction / The derivative work is an intellectual production independent of the original production, therefore the calculation of the duration of its legal protection is independent of the duration prescribed for the original work, but the amount of these periods does not differ from the periods prescribed by law for works in general.

The material rights to these works are therefore legally protected for the benefit of their author throughout his life, and for fifty years for his heirs after his death ⁽¹⁾. They also benefit from protection for fifty years starting from the year the last surviving author of the joint work dies ⁽²⁾, if the derivative production also bears the character of a joint and collective work. The protection period is calculated from the date of publication of the work.

Notably, copyright texts recognize the original work's author as having the right to restrict the duration of exploitation of the derivative work. This does not preclude the duration specified in the contract being the same as the legal protection period or a shorter period. Furthermore, the author of the original work may extend this period if he so desires. In this case, although the legislation has imposed a term in the assignment contract, it has left the scope for determining it to the freedom of the contracting parties.

Undoubtedly, granting the author of the original work the authority to restrict the duration of the financial exploitation of the derivative work will put a limit on the publication and communication of the derivative work to the public. This negatively impacts the author of the derivative work, as he is the sole owner of the rights to his intellectual property ⁽³⁾. However, the authority granted to the author of the original work cannot be challenged, as without his consent to the creation of the derivative work, the latter would not have existed. This gives him priority in exercising his financial rights, including determining the duration of exploitation.¹⁵

Restricting the methods of exploitation / The author of the derivative work alone decides the methods of exploitation of the derivative work, especially concluding contracts for publishing and distributing the work. Moreover, the exploitation of the work is considered a type of obligation in the field of derivative production ⁽⁴⁾, since the author of the original work approves of the derivative from his work.

1- See the text of Article (11/3, 2, 1) of the WIPO Convention.

2- See the text of Article (6/second) of the WIPO Convention.

3- F. POLLAUD-DULIAN, op.cit, p593.

1-See the text of Article (8) of the Iraqi Copyright Law No. 3 of 1971, and the text of Article (160) of the Egyptian Intellectual Property Rights Protection Law No. 82 of 2002.

2- See the text of Articles (20-21) of the Iraqi Copyright Law, and Articles (161-162) of the Egyptian Intellectual Property Rights Protection Law.

3- Fatima Al-Zahraa Bashikh, the previous source, p. 212.

4- The same source, p. 213.

It includes consent to disclose and exploit the second work, and it is implicit from the copyright protection laws ⁽¹⁾, that the methods of exploitation are explicitly specified in the derivative consent contract, and thus the author of the derivative work does not have complete freedom to determine the method of exploiting the work, i.e. the author of the original work's consent to the derivative from his work by translation from the French language does not include consent to its translation into the English language, for example, and it is also understood from this that the author of the derivative work does not have the right to conclude contracts with others to derive from his work except with the consent of the author of the original work as well if the work is still protected, and unless this is stipulated in the contract concluded between him and the author of the original work.

Second: Restrictions that hinder the continued exploitation of the work resulting from the exercise of moral rights.

These restrictions may be the result of the author of the original work exercising the right to respect his work. They can obstruct and prevent the disclosure of the derivative work if they believe the derivative work distorts their work. This is done by exercising one of their moral rights, which is the right to respect and not distort their work ⁽²⁾.¹⁶

The author of the derivative work's exercise of one of their moral rights may be a primary reason for not exploiting the combined work. This is particularly evident in their exercise of the right to disclose the work, which also includes the right not to disclose it. They alone have the right to decide not to disclose their authorship if they do not deem the time appropriate. Another restriction on the continued exploitation of the work is the author of the derivative work's use of the work.

He has the right to withdraw his work from circulation, and he exercises this right if his intellectual production no longer conforms to his convictions and he sees that it needs amendments after the work has been published ⁽¹⁾.

Section Two Legal Means for Protecting Derivative Works

Copyright laws and related international agreements are keen to ensure appropriate legal protection for the author's financial and moral rights against infringement. This is done to protect protected works from distortion, mutilation, and anything that might harm them, thereby ensuring the author's rights over these works. These laws do not distinguish between original or derivative works, as these terms cover all intellectual productions that acquire the status of a work. These means vary depending on the nature of the infringed work and the type of infringement. However, the means provided by the law fall into two main categories: one, which targets the infringed work, consists of the legal deposit of the works and some preventive means of protection. The second, which targets the infringer, as they have committed an error that violates the author's rights, appears in the form of civil penalties for infringement of copyright. This will be detailed in the following two sections:

The first requirement: The means for dealing with the infringed works.

The second requirement: The means for dealing with the person who infringed the works.¹⁷

First Requirement Methods for Infringed Works

There are numerous means of protecting copyright in works, whether original or derivative. However, these means differ in their nature, application procedures, and extent.

Its effectiveness in deterring those who violate authors' works. These methods include legal deposit of works and preventative measures to protect those works. These are detailed below:

Section One Legal Deposit of Works

Legal deposit of a work means obligating the copyright holders of a work—whether the author, publisher, printer, or distributor in certain cases—to submit one or more copies of the published work to a government authority or national or private library designated by law for this purpose ⁽¹⁾.

1- Article (38) of the Iraqi Copyright Protection Law states that (the author may transfer to others the rights of use stipulated in this law, except that the transfer of one of the rights does not entail granting the right to exercise it directly to another. The validity of the transaction requires that it be in writing and that it explicitly and in detail specify everything that is the subject of the transaction, stating its scope and purpose...). See, in the same sense, Article (149) of the Egyptian Intellectual Property Rights Protection

2- Law No. 82 of 2002. Dr. Jamal Haroun, previous source, p. 107.

1- Fatima Al-Zahraa Bashikh, previous source, pp. 214-215, Zainab Abdul Rahman Muqallid, previous source, p. 142. Dr. Jamal Haroun, previous source, p. 321.

Legal deposit is the best means of proving copyright. If two parties dispute the right to a particular idea, they can refer to the copies deposited with the relevant official authorities and determine the date of publication of each. Copyright disputes or similar claims may not be accepted for works not deposited with the deposit centers designated by law ⁽²⁾. Depositing includes all derivative works that have been printed, photocopied, recorded, or otherwise circulated among the public, whether for a fee or free of charge, whether the circulation is through sale, rental, or other means of circulation, and whether the work has been printed for the first time or reprinted in new editions. However, it does not include works published in newspapers and periodicals unless they are published separately ⁽³⁾. ¹⁸

Depositing is generally required of all persons working in the field of authorship, publishing, and printing, whether they are legal or corporate persons, affiliated with public or private entities. This includes authors of derivative works, such as translators and editors, those who publish a specific work, and the producer who is responsible for the private deposit.

With audio and visual recordings and films, and the distributor who is responsible for depositing copies of works that are printed and published outside the country ⁽⁴⁾.

Section Two Preventive Measures for Protection

These measures include the following:

First: Prohibiting the publication or cessation of circulation of the counterfeited work. The primary scope of this measure is for works made available to the public through publication. Circulation referred to in this preventive measure includes selling copies of the work, offering them for sale, distributing them, or using any means that makes them available to several people ⁽¹⁾.

The copyright laws that stipulate this preventive measure empower the judge to halt publication of the work and prevent its circulation whenever there is an infringement or violation of the author's rights that cannot be tolerated or tolerated ⁽²⁾. ¹⁹

Second: Amending the work or deleting parts of it in certain cases. This procedure is effective for works that have not yet been published. The publisher (author or publisher) may propose to make an amendment to the work or its texts, or delete some parts that constitute an infringement on the author's moral rights, to avoid an order to stop or prohibit circulation or seize and impound the work and place it under guardianship. This procedure has been applied by the French judiciary in some of its rulings, as the Paris Court of First Instance ruled on June 8, 1970, to reject the ruling to prohibit the publication of the work and to allow the publication of the second edition of the book in dispute, after the author and publisher had introduced some amendments that the court deemed would lead to the elimination of the reasons for stopping it.

Publishing and distributing the book ⁽¹⁾. To ensure the implementation of the order to amend or delete, the judiciary sometimes appoints an expert to monitor whether the court-ordered amendments have been made to subsequent editions and to reconcile the two parties (the author and the publisher) to complete the amendments ⁽²⁾.

Third: Confiscation of imported copies of illegal derivative works. This procedure applies in the event of copying works in a country, if such works were produced outside that country without a license from their author, as such a work is considered an imitation and copies of it may be seized upon entering that country. This procedure is mostly applied to protect folkloric and derivative works, such as quotations, musical arrangements and translations, and their import is prohibited as a measure to protect folkloric works from distortion and mutilation. The legal basis for this procedure is based on the right of the state to prevent the entry of works that its law considers illegal, and this is what the Berne Convention explicitly stipulated about illegal recordings, as it permitted the seizure of illegally imported copies of recordings that are imported without the permission of the parties concerned in a country that considers them to be illegal recordings ⁽³⁾.

These measures are an effective weapon in the hands of the author of a work. He does not wait for the court to decide the original dispute between him and the infringer of his rights. The wait may be prolonged and the opportunity may be lost. Therefore, the law allows him, as soon as the infringement occurs, to request the competent court to take swift and effective precautionary measures ⁽⁴⁾. ²⁰

1- Dr. Nawaf Kanaan, The Previous Source, p. 326.

2- Dr. Ismat Abdul Majeed Bakr, The Previous Source, p. 136.

3- Dr. Nawaf Kanaan, The Previous Source, p. 442.

4- Dr. Ismat Abdel Majeed Bakr, previous source, p. 140.

1- Dr. Nawaf Kanaan, previous source, p. 455.

2- Article (9) of the French Copyright Law of 1957 states that "the judge has the authority to prohibit the publication and circulation of a work."

1- Quoted from Dr. Hossam El-Din Kamel El-Ahwani, The Public Right to Respect for Private Life, The Right to Privacy, Dar Al-Nahda Al-Arabiya, Cairo, 1987, p. 417.

The second requirement

The means that concern the person who infringes on the works.

If the court does not find preventive measures to initially prevent the infringement of the author's rights in his works, or if the competent judicial authority does not see the need to resort to preventive measures and the matter requires taking action Other measures directed at the person who infringed the copyright involve imposing a civil penalty on the infringer, which is either compulsory execution in kind or compensation by the rules of civil liability.

Section One Compulsory Specific Execution

If a dispute regarding an infringed work is brought before the judiciary, the judge may resort to financial coercion to compel the debtor to perform the specific obligation, provided that specific execution is still possible ⁽¹⁾, such as a publisher who is ordered to add certain paragraphs he had deleted from the work ⁽²⁾. Specific execution shall consist of destroying the infringed work or its images that were illegally published. The court may order the modification of the features of the images, all at the expense of the responsible party ⁽³⁾. The destruction of the infringed work includes copies of that work, whether books, recordings, or models. The destruction may include only the infringed part of the work, without the other parts, if it is possible to separate them ⁽⁴⁾.²¹

It is worth noting that, according to the general rules, Anglo-American laws do not take into account the compulsory specific performance except as an exception, unlike the case with Latin laws, in which compulsory specific performance is the rule and compensation is only granted as an exception ⁽⁵⁾. However, in certain cases, such as infringement on copyright, the judiciary has permitted the issuance of an order or judicial warning, which prevents a person from performing an act that conflicts with his obligations. Among the applications of this procedure - in the field of publishing and performance contracts - is the order that the judge may issue to confirm the implementation of the obligation not to compete or to adhere to the limits set by the author of the original production, which is a form of specific performance Which was introduced by justice into English law, which aims to prevent a person from doing anything that would violate his obligations ⁽¹⁾.

There are cases in which a judgment for compulsory specific performance is inconceivable due to its impossibility, as specific performance is required to be feasible and not burdensome to the debtor ⁽²⁾. These cases are:

1. If the copyright will expire after a period of less than two years, in this case, it is sufficient to seize the counterfeit copies instead of destroying or altering their features ⁽³⁾.
2. If the owner of the copyright in the counterfeit work requests the sale of copies instead of destroying them to recover compensation from their price, within the limits of his compensation.
3. Architectural works and the sculptures, drawings, decorations, and geometric shapes appearing on them shall not be destroyed.

Section Two Compensation

The presence of the element of harm is a basic condition for compensation. Harm is any harm that befalls a person in a legitimate right or financial interest. For the element of harm to be present in an infringement of copyright in a work, a set of conditions are required: the harm must be proven to be a work of art, meaning that the infringement takes a tangible form that the court can verify; the harm must be direct, i.e., a natural result of the act committed by the infringer. This is a matter of discretion subject to the oversight of the trial judge; and there must be a causal relationship between the infringer's error and the harm suffered by the work, i.e., the harm must be a natural result of the unlawful act ⁽⁴⁾.²²

2- Dr. Hossam El-Din Kamel El-Ahwani, the previous source, p. 418.

3- Articles (13/3-16/2) of the Berne Convention.

4- Dr. Ismat Abdel-Majeed Bakr, the previous source, p. 146.

1- Article (246) of the Iraqi Civil Code No. 40 of 1951 stipulates that (1_ The debtor shall be compelled to perform his obligation in kind whenever possible. 2_ However, if the specific performance would be burdensome for the debtor, he may limit himself to paying monetary compensation if this does not cause the creditor serious harm). See the text of Article (199/1) of the Egyptian Civil Code No. 131 of 1948.

2- Dr. Abdul Rashid Mamoun and Dr. Muhammad Sami Abdul Sadiq, previous source, p. 466.

3- Article (47) of the Iraqi Copyright Protection Law No. 3 of 1971.

4- Dr. Sahib Ubaid Al-Fatlawi, previous source, p. 299.

5- Dr. Anwar Sultan, A Summary of the Theory of Obligation, Maaref House, Alexandria, no date, 357.

1- Dr. Suhail Obaid Al-Fatlawi, the previous source, p. 428.

2- For more details, see Dr. Abdul Razzaq Al-Sanhouri, Al-Wasit, Vol. 2, the previous source, p. 711.

It is noted that the attack on works often causes non-material damage that affects the personality of the creator, such as if the attacker publishes the work in a distorted manner that includes modifications that harm the reputation of the creator, or if the quotation involves the quoting person changing words and meanings in a way that distorts the work and harms it, or if the attack causes material damage to the work, such as if the publisher reduces the price of the copy to the lowest possible level. However, the attack is not considered to have caused material or moral damage in the case of actions that do not involve harm to the reputation of the creator, or linguistic errors, or errors in page numbers, and other actions equivalent to them ⁽¹⁾.

The damage that results from an infringement on the moral right of the creator of the work is presumed, as it is impossible to ask the author to prove the damage, because he has discretion over his work that enables him to conclude that the slightest infringement on his work may cause him damage that warrants compensation, and the infringer, on the other hand, cannot prove that the infringement he committed did not cause the author any moral damage, as this is a matter that concerns the author alone due to the paternal bond that connects him to his work ⁽²⁾.²³

Regarding the assessment of compensation, if the competent judicial authority can easily assess compensation for material damage, it is difficult for it to assess compensation for moral damage due to the personal, intangible nature of moral rights, which relate to the author's reputation and prestige. Furthermore, this damage in a derivative work is related to two authors: the author of the original work and the author of the derivative work. This damage may affect them both or have a greater impact on the author of the derivative work than the author of the original work and vice versa ⁽³⁾. Material damage may also be combined with moral damage, and compensation for them is assessed without specification ⁽⁴⁾.

Certain considerations go into assessing compensation for copyright infringement. These considerations are based on the specific nature of copyright and the protected works. These are:

1. Considerations specific to the author whose work has been infringed upon, including the author's diligence in preserving his rights under the legal protection granted to him, and the impact of the infringement on his reputation and social and cultural standing.
2. Considerations specific to the infringed work, such as the scientific, literary, or artistic value of the work, as well as the prevalence of pirated copies and the financial benefit derived from them. The infringer may profit from their imitation of a particular work, and some court rulings have taken this into account when assessing the value of compensation. The Egyptian Court of Cassation has estimated compensation for the profit gained by the infringer based on the number of editions printed and the number of copies of the infringed work sold ⁽¹⁾.

In Anglo-American judiciary, English courts have taken a different ruling, ruling that the plaintiff has no right to obtain the benefits obtained by the imitator in addition to compensation for the damage, since the judge cannot determine the damages that befall the plaintiff as a result of imitating his work and selling it at a price lower than the price he estimated for selling his work, due to the impossibility of counting the copies that were sold of the imitated book and the copies that the author was unable to sell because of the imitation ⁽²⁾.²⁴

CONCLUSION

After we discuss the topic of "Legal Protection of Derivative Works," we must draw the most important conclusions and proposals we have reached, as follows:

First: Conclusions.

- 1_ Legal protection aims to preserve a specific status and prevent infringement. It is based on specific principles. The protection of derivative works is based on the inherent originality of the derivative innovation.
- 2_ Innovation is not the complete creation of the work; rather, it can be relative in terms of presentation, arrangement, and effort expended. The assessment of its existence or nonexistence is subject to the discretion of the judge.

3- Article (47) of the Iraqi Copyright Protection Law No. 3 of 1971.

4- Dr. Abdul Razzaq Al-Sanhouri, the previous source, p. 882; Dr. Abdul Moneim Faraj Al-Sadda, the previous source, p. 541; Dr. Suleiman Marqus, the previous source, p. 350.

1- Dr. Suhail Al-Fatlawi, previous source, p. 310.

2- Dr. Gamal Haroun, Civil Protection of the Author's Moral Rights, 1st ed., Dar Al-Thaqafa, Amman, 2006, p. 211.

3- Zainab Abdul Rahman Aqla, previous source, p. 185. Dr. Gamal Haroun, previous source, p. 212.

4- In a case involving copyright infringement in a book, the North Cairo Court of First Instance ordered a journalist, in a case involving copyright infringement in a book, to pay (20) thousand Egyptian pounds to the researcher to compensate her for the material and moral damages she suffered as a result. Quoted from Dr. Suhail Al-Fatlawi, previous source, p. 318.

1- Dr. Suhail Al-Fatlawi, the previous source, pp. 447-448. Zainab Abdul Rahman Aqla, the previous source, p. 188.

2- Quoted from Dr. Nawaf Kanaan, the previous source, p. 482.

3_ Derivative works are mentioned in comparative legislation, for example, to accommodate new works in the future. These legislations have been correct in this regard, as the development of communication and technology inevitably affects the development and emergence of new works derived from previous works.

The Iraqi legislator is criticized for not specifically addressing these works with legal provisions commensurate with the importance of these innovations. Therefore, the general provisions implicitly made applicable by the legislator to all aspects of the exploitation of works, including the right to derivative works, should have been applied. 5. The financial and moral rights granted by the laws of literary property and copyright for each original work are the same as those granted to derivative works and their authors. Ownership of the rights to this composite production belongs to its authors. However, the legislator requires respect for the rights of the author of the original work to be granted, demonstrating the priority of the prior author in relation to legislation. Although this rule demonstrates a commitment to protecting the author of the original work, it also limits the creative freedom of the author of the derivative work, especially if the primary author abuses his right.

Second: Recommendations.

1_ The Iraqi legislator has remained silent on defining the meaning of "derivative work," despite its importance. Therefore, we call on the Iraqi legislator to define it, in line with comparative legislation, in Article 1 of the Copyright Protection Law, which specifies legal terminology. This definition should be as follows: "Derivative work" (a new work based on a previous work, emerging from works capable of being reformulated, transformed, altered, or adapted).

2_ Innovation is one of the most important conditions for protecting works. However, the Iraqi legislator has not defined the concept of innovation. Therefore, we propose defining it as follows: "It is the creative nature that gives the work its originality."

3_ Call for the formation of a special court for intellectual property rights to handle disputes arising from infringement of these rights, their authors, and related rights. This is due to the specificity and importance of these rights, especially in light of the existence of a draft law to protect intellectual property rights and copyright.

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