

# The Copying of Electronic Works between Deprivation and Permission from the Jordanian Copyright Law Vision of View

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## Abstract

Nowadays, modern technology helps authors to protect their original works which are published electronically. This technology provides them with the ability to restrict copying and distributing their works; quantity and quality. But, this deprives, for example, users from the right of getting a copy for personal usage. Consequently, illegal procedures and conducts have occurred to overcome these restrictions and help illegal users in getting illegal copies of authors' production. However, the Jordanian Copyright Law in its rules regulates all different legal aspects of this issue and offends in its rules this illegal conducts. This research focuses on finding the legal balance between the exclusive right of the creator of an original work in its use and distribution, and the right of users to access this work without limitations and restrictions. To operate this issue; jurisprudence and court judgments, support researchers to discuss this issue from all different legal aspects.

**Keywords:** Copyright law, Ordinary Usage, Personal Usage, Jordan.

## 1. Introduction

The right of author involves exclusive authorities. On the one hand, some of these authorities are intangible, which includes some of those authorities that prove the author's right on his/her mind production and entails him/her the right to protect his/her personality that has illustrated in his/her work. On the other hand, the other kinds of that authorities display as tangible rights which admit him/her the right of utilisation of his/her mind production financially (Otani, 2014, p.108). So, to achieve that, each conduct that aims to violate these exclusive rights – without his/her approval - must be criminalised.

### 1.1. Importance of the Study and it's Problematic

Based on the availability of electronic works via the internet, the exception of a private copy of the protected work for personal usage has a significant importance. However, the indication of personal usage concept, as the right of user to get a single copy for his/her personal purposes, is hazard in the real practice. This is because this conduct becomes as a collective phenomenon when each internet user can get a single copy for his/her personal usage that hurts the originator's work; spiritually and tangibly<sup>(1)</sup>.

In contrast, modern technology supports the author with a mechanism to protect his/her work technically by using technological measures<sup>(2)</sup>. These measures guarantee the author's ability to control copying of his/her work in terms of quantity and quality. Moreover, they could prevent others from copying it at all by prohibiting them from using their legal license of getting a single copy for personal usage.

Accordingly, these new technological measures are innovated to challenge the authors' measures and support users for using their legal license and get a single copy for personal usage.

As a result, national and international policy makers found themselves' obliged for intervene and support authors through legalising the technological measures they use to protect their work. This protection simplifies in stating in the legislations on the incrimination of all conducts and actions that seek to obstruct these measures. But, this protection conflicts with the right of user to benefit from the legal license for getting a single copy for his/her personal usage. This confliction represents the problematic of this study and for more illustration the authors use the Jordanian Copyright Law as model for this study to get in depth look at this issue.

The problematic of the current study could be simplified in this question: How could an author of a particular work prevent users, technologically, to use their legal right stated in the Jordanian copyright No (22) of the 1992 and it's Amendments; particularly, in article (17) sub (b) when stated that:

“In the following cases; the published works may be used without the author's permission provided that the foregone does not conflict with the normal exploitation of the work and does not cause unjustified injury to the legitimate interest of the author:

- b) Employing the work for private use through making one copy thereof by reproduction, recording, photographing, translation or musical distribution.”

<sup>(1)</sup> It is not true – in the case of publishing the electronic works via internet – claiming that the legitimacy of copying a protected work arising little damage, because any user of the internet could get a high quality copy of a protected work.

<sup>(2)</sup> For example, Coding, Watermark. For more discussion back to Alawadi, Legal Aspects of E-mail, p.169

In addition, how could balance; be achieved, between article (17) which entails a right of something prohibited legally in article (55) sub (a/1) when stated that:

“A person shall be considered a violator of the provisions of this law if he/she commits; without author’s permission for commercial purpose or financial gain, circumvent effective technological measures or counteracted them or disabled any part thereof?”

### *1.2. The Scope of the Study and Methodology*

The current study discusses the problematic of copying electronic works, with concentration on the electronic prohibition and legal license in accordance to the Jordanian Copyright Law. So, this study is not interested in studying works which are published in other means.

The researchers chose the Doctrinal Legal Research Approach to achieve the goals of this study. This approach is based on analysing the legislations that govern the copyrights. So, the primary source of data will be the Jordanian Copyright Law and other sources found, for example, in adjudications, published in France and Egypt. In addition, due to the international nature of copyright it is important for the researchers to depend on the international efforts in this issue, which help the researchers to focus on the gaps, if existed, in the Jordanian legislation.

### *1.3. The plan of the Study*

To understand the nature of a problematic which the current study is interested in (second section), it is important, initially, to know the signification of the problematic and its results and affects.

## **2. Significance of the Problem**

The past attitude considered the personal copy as a waiver from the author’s side to beneficiaries that grant them – for personal usage – the right to take a copy from the protected work. It was considered copying works as a limited work – with regards to the number of users stand beyond this conduct – due to the long time needed for this action. For example, to make a copy of a handwritten work it was made by hand or simple techniques, so the prejudice on the originator was limited and displays in losing the anticipated financial profit of the work. Moreover, the quality of a copy is bad compared with the quality of the original copy (Alawadi, 2007, p.34. Balqadi, 1997, p.320. Aldla’meh, 2013, pp.1-7). In addition, it is difficult for the author to control all others’ copying actions (Huet, 1999, p.260.); such as copying the musical work on (C.Ds) or (D.V.Ds) and copying the borrowed handwritten works... etc. Therefore, the legislator appreciates that it is wise to legitimate a conduct of user for making a copy of a protected copy instead of considering such actions illegal and leaving them without punishment, specially, such of these conducts are restricted to the characteristics of users stand beyond such conducts.

In spite of the previous logical arguments, nowadays, it is not accepted to circulate the author’s works electronically without arrangement. This is because, compare with the previous actions, most of copied works are not done manually (Balqadi, 1997, p. 321); and in present, technology simplifies such of these actions (Bin Younes, 2005, p.113), which effects on the author spiritually and tangibly. Spiritually, on the one hand, it becomes more difficult on the originator; if he/she decides publishing his/her work on the web, to control the circulation of the work (Alsagheer, 2005 . Abd Alrazaq, 2007, p.99. Jami’l, 2004 p.5. Awashrih, 2014, p.102). Indeed, there are legal drawbacks related to litigation procedures, due to conflict of laws and adjudication (Albidrawi, 2012 .p.6). In another hand, tangibly, the concept of private or personal usage – as an exception that allows the user to copy a single work for personal usage – is not as in the actual atmosphere<sup>(1)</sup>. This is because this action could become a collective action, as the users of internet could get such of these works published electronically (Badr, 2004 ,p.89). So, under the excuse of the legal license, a user could get a high quality of the work without any violation to the author’s right (Wansah, 2002, p.80. Moghegheb, 1996, p.110).

In the past, the defence from the author’s side – to allow making a copy for a personal usage - backs to the absence of techniques that helps him/her to control his/her work, which interpreted in the lack of national legislations for providing the protection on the works published electronically. Recently, with the technological revolution the author get the techniques that support him/her with the ability to control copying of his/her work – quantity and quality – and, moreover, to prevent this action at all (Jami’l, 2004, p.8. Awashrih, 2014, p.102). So, the author can authorise this action as long as he/she gets a financial profit regardless to the right of others benefiting from the legal license and get a single copy for a personal usage without payment.

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<sup>(1)</sup> Article 17 of the Jordanian copyright law states “employing the work for private personal use through making one copy thereof by reproduction, distribution, recording, photographing, translation or musical distribution provided that the foregone does not conflict with the normal exploitation of the work and does not cause unjustified injury to the legitimate interests of the author”

The mentioned techniques support the author with the ability to re-protect his/her work that becomes a public property due to the end of protection period. This is because the electronic copy due to the technological measures, in compare with the published copy via the traditional methods, is not available to the users; at all, only if they pay a price.

As a counteract, and to use the legal license of getting a private copy for personal usage without payment, new technological techniques were innovated which target of challenging the author's technological techniques. For that, the Jordanian legislator intervened (Albidrawi, 2012, p.4) and stated in article (55) sub (a/b) that "A person shall be considered a violator of the provisions of this law if same commits; without author's permission for commercial purpose or financial gain, circumvent effective technological measures or counteracted them or disabled any part thereof."

As a result of the aforementioned above, a confliction could be raised and summarised in wondering this question: How could the author of a work prevent technologically a user from benefitting from the legal license as protected in article 17/b of the Jordanian copyright? In other words, how could balance be achieved between Article (17/b) which entails a right of something that is prohibited legally in article (55) sub (a/b)? Subsequently, it is important to discuss this issue by surveying the judicial and jurisprudence attitudes in the following section.

### **3. The efforts of Balancing between technological prevention and legal Permissibility:**

Any conduct from the user side which is targeting to violate the technological measures that the originator uses to protect his/her published work on the internet is not considered a trespass crime on that measure. This argue is true according to the article (55/a) of the Jordanian copyright law if, and only if, the work still has a legal protection under the provision of the law. But if the work becomes as a public property due to the end of protection period, this provision does not apply.

The significance of the abovementioned manifests by two sides. Firstly, it is prohibited for the creator of the work to use technological measures to prevent the user from benefitting from his/her work at all if the user attains the work legally. Secondly, it is prohibited for the creator of the work to use these measures after the end of the protection period.

Some scholars emphasise that the ability of the user to get a private copy of others' work is attributed to the use of his legal right, and this displays in the article (17/b) of the Jordanian Copyright Law which states that the user can "employ the work for private personal use through making one copy...". This rule emphasises that the exception of private copy contains a command rule which bypass the author interest to more important and comprehensive interest in its social domains. This comprehensive interest is related to the cultural public interest, such as education which restricts the author's right to use the technological measures, and make these measures lose its illegitimacy (Abd Alrhman, 2008, p.53. Alawadi, 2007, p.36). This is because the society has the right to benefit from the human mind's production in an easy and simple ways, and the absolute right of the author prevents society to reach this target. Thus, the society is a partner in the success of the author's work, because the work does not succeed unless the work reaches to a large amount of population. Therefore, the society has the right to benefit from the mental, literary and scientific creativity of the creator.<sup>(1)</sup>

In addition, the demonstration note of the Egyptian Copyright Law confesses in cultural public considerations, and legalises of generalising the mental production on the students by stating that "leaving a valuable works unpublished is confiscation for students for benefitting from its usefulness."

Furthermore, since the social function of the author task is to encourage culture and develop it among the society members; as the author is a significant partner to the civilised state in drawing the cultural politics and planning its principles and aims (Balqadi, 1997, p.148). So, it becomes more important to the legislator in that civilised state to intervene and guarantee the cultural public interest (Balqadi, 1997, p.11). This could be explained by argument that a modern political legislation confesses the private interest and puts it in the right category, and then follows it by specific restrictions related to the public interest (Ibrahim, 1994, p.99). As a result of this philosophy, it was the right to any member of the society to employ the mental works for academic and cultural purposes and for that the Jordanian legislator ruled of a non-incrimination of the individual usage of such works. This is simply because the usage act is not incriminated in the Jordanian Copyright Law but it is incriminated the financial exploitation for such these works. However, this exception is applied if the usage round about the personal usage and for academic purposes<sup>(2)</sup>.

To follow, the Jordanian appellate court ruled that "...the incriminated conducts are limited in the financial exploitation which manifested in displaying for the purpose of selling or leasing"; and it ruled that "usage without financial exploitation does not constitute an incriminated conduct." This court also ruled that "the protection of the creativity in the field of copyright stands on the basis of balance between the temporarily

<sup>(1)</sup> The Demonstration Note of the Egyptian Copyright Law No 354 for 1954

<sup>(2)</sup> Jordanian bar Association Journal, 84/358, No.7&8, 1985.

creator's needs to protect his work and the society needs to knowledge.”

But, this balance prevents the creator of a work from controlling his/her work, and at the same time, in specific circumstances, it authorised compulsory its usage. This is attributed to the public interests which is more important than the creator's interest<sup>(1)</sup>.

So, if the criminal penalty function aims to protect the society through incriminating conducts that threaten its fundamental interests, the legislator confesses the right of user to get a free private copy for personal purposes and backs that to the society interests which are more important than private interest (Husni, 1992, p.96). Based on this, the French appellate court ruled that “a right in private copy is related with the public order and so it is not allowed for confliction between this right and the usage of technological measures<sup>(2)</sup>.”

The legal basis for permission is attributed to the absence of incrimination policy due to the lack of conduct that prejudices a protected interest. So, this policy is neglected if the conduct happens in circumstances that prejudice a protected interest. So, if a confliction between two social interests occurs, the legislator stands in the side of interest that is more superior in protection according to the scale of interests as the legislator devotes in the public legal policy of the state (Bilal, 2005, p.143). Therefore, if a confliction happens between a rule that is incriminated and a rule that is permitted; logically, the permission rule is more weight than the incrimination rule.

The permissibility supposes that an act; originally, is incriminated, but the assailant will not be punished because the act he/she committed is permitted by the law; which is neither licit an action nor prohibit it at the same time (Obaid, 1979, p.494. Al ma'jon, 1984, p.140).

Consequently, the beneficiary can allege in exception of the private copy from the scope of the criminal responsibility with regards to the imitation crime if he accused in the copying others works, on the basis of Article (17/b) of the Jordanian Copyright Law.

Article (59) of the Jordanian penal law states that “there is no crime if the act occurs while exercising a legal right and without the misuse of such right.” Thus, adjusting the exception right of the beneficiary from the work as a cause of permission is the way to restrict author's authorities on his/her work and minimize his/her capability on prevention its usage. This adjusting makes the exception of permission closer to the public interest which confronts the absolute author's authorities on his work (Abd Alrhan, 2008, p.51. alghazal, 2003, p.99).

At this side, the French judiciary is convinced that the private copy for personal usage purposes is just an exception to the author's exclusive rights in exploitation of his/her creation and it does not constitute a right for the beneficiary (Alawadi, 2007, p.4). In applying it, the French Appellate Court ruled that the French Copyright Law does not give the user the right to obtain a private copy of the author's work, but it states an exception on the author's exclusive authorities on his work because it is related to the public interest<sup>(3)</sup>.

As a result of considering the private copy as an exception; assures what is agreed upon by the jurisprudence and judicial that exception neither measured based on it, nor elaborated in its interpretation. The French judiciary emphasizes that in the suit of (digital video DVD for the film of Mulholland Drive) which is produced by (Alain Sarde and Studio Canal) and distributed by the Universal Pictures Video France. In this case, the buyer; Mr Stephane, could not make a copy of the bought DVD's copy due to the technological measures that the owner of the right uses for protecting his/her work. This action forced Mr Stephane to sue the producers.

The court rejects Mr Stephane's request on the basis that the legislator's will did not intend to grant the right of copying to any person, but the legislator excludes the private copy from the exclusive authorities of the owner of the right. The court added that making a copy from the film will conflict with the ordinary usage of the work. In a result, the court considered that using such these technological measures does not conflict with the Copyright Law provisions<sup>(4)</sup>.

But, the Paris Appellate Court ruling revoked this ruling when ruled that as the user obtains the copy in a legitimate way; so it is not legal to use technological measures that restrict this right<sup>(5)</sup>. The Paris Appellate Court criticised the court of first instance attitude by stating that this ruling disregards the term of “without a prejudice of ordinary usage of a work.” Therefore, in the case of confliction with the ordinary usage, the author has the right to use technological measures that protect his/her work from misuse.

In another ruling, the French High Court assures that the right of beneficiary in using the legal exception with regard the private copy is ceased at the time he/she receives the original copy from the seller<sup>(6)</sup> even if that copy is protected by technological measures that prevent copying. Therefore, it is illegal from the buyer's side to use

(1) Jordanian bar Association Journal, 207/2001, No.7, 2002.

(2) Tribunal de Grande Instance Paris, 10 janv 2006, Légipresse N° 299, mars 2006.

(3) Tribunal de Grande Instance Paris, 10 janv 2006, Légipresse N° 299, mars 2006.

(4) Tribunal de Grande Instance Paris, 3<sup>ème</sup> ch, 30 avril 2004, Juriscom. net, <http://www.juriscom.net/jpt/visu.php?ID=513>

(5) Cour Diappel Paris, 4<sup>ème</sup> ch, 22 avril 2005, [www.legalis.net](http://www.legalis.net)

(6) Cassation Commercial, 27 mai 1991, bulletin Civil, n° 172, Juris-Classeur, Périodique, Général 1992, II, 21792, note Huet. Juris-Classeur Périodique, Entreprise 1992, I, 141, Observations, Vivant et Lucas.

measures that support him/her with the capability to challenge the author's technological measures<sup>(1)</sup>.

#### 4. Conclusion: Research findings

The current research concludes that the author has an exclusive authority's right on his/her work. In addition, it concludes that the user, for personal usage purposes, has the right to get a private copy of that work without author's permission. The researchers find that, in some circumstances, the author's rights and user's rights become unspecific and vague. For example, in the digital era and with regards to electronic publishing, the assaulting on the author's right becomes a significant character. In the past, the acceptance of the author on assaulting acts that gives the user the ability to get a copy for personal usage backs to the lack of technological measures that support him/her with the ability to control his/her work. Nowadays, technological measures are innovated and the author is capable to control the usage of his/her work – quantity and quality, and moreover, he can prevent its usage at all; that restricts the user's ability to use his/her legal rights and get a private copy for personal purposes. To challenge the author's technological measures and to activate the legal permission exception, new technological measures were innovated to counter and overcome the measures that the author adopted to surround his/her work. Therefore, the national legislations incriminate these technological measures that violate the author's copyrights.

However, for balancing between the author's and user's rights, some of jurisprudence; on the one hand, asserts that getting a private copy is an exception on the author's exclusive authorities which is existed for beneficiaries of the work. This right is confirmed as implementation of the public freedoms principles that award the society; on the basis of cultural public interests, the right to benefit culturally from the author's creation without his/her permission. So, the technological measures are conflicted with these considerations and therefore, using these measures is legally prohibited. Consequently, adjusting this exception as a permission instrument is a technique to control the author's exclusive authorities of his/her work, and minimise his/her ability to prevent the user from benefiting from the exception of private copy for personal purposes. This adjusting limits the author's exclusive authorities and makes this adjusting closer to the public interest.

The judiciary; on the other hand, did not consider the exception of the private copy as a public right for the beneficiary from the protected works, but it has a limited value that does not prevent the author from using technological measures to protect his/her work from misuse.

Some of jurisprudence adapts this attitude to specify the legitimacy of technological measures and considers using such of these measures is legal if it does not impede the right of getting a private copy at all. Therefore, if the user practices his/her right and attains the private copy by tricky means to overcome the technological measures that the author uses to protect his/her work from misuse, then the conduct of the user at this case is illegal as the Article (55/a) of the Jordanian Copyright Law considers the infringement crime is proved and the act should be punished.

The French legislator in the amended copyright law – published in 2006 – announced that using technological measures that prevent all copying acts is legal if and only if, the work which is innovated and tangibly expressed is still protected under the provisions of the law.

Therefore, the researchers find that the Jordanian Copyright Law No. 22 for the year 1992 and its amendments regulate the issue of balancing between the author's right for using technological measures to protect his/her work, and the right of the user for benefiting from the exception of private copy of the protected work. The Jordanian legislator is successful as he balances in the Copyright Law between the confliction rights. The legislator states on the right of the user to get a private copy of the original copy without the author's permission provided to unprejudiced of the ordinary usage of the work.

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<sup>(1)</sup> Décision du Conseil constutionnl, n°2006– 540 Recueil critique Dalloz du 27 juillet 2006.

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