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A Pragmatic Approach to Intellectual Property and Development: A Case Study of the Jordanian Copyright Law in the Internet Age

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A PRAGMATIC APPROACH TO INTELLECTUAL PROPERTY AND DEVELOPMENT: A CASE STUDY OF THE JORDANIAN COPYRIGHT LAW IN THE INTERNET AGE

*Rami Olwan*¹

ABSTRACT

On October 4, 2004, Brazil and Argentina requested that WIPO adopt a development-oriented approach to IP and to reconsider its work in relation to developing countries. In October, 2007, WIPO member States adopted a historic decision for the benefit of developing countries, to establish a WIPO Development Agenda. Although there have been several studies related to IP and development that call for IP laws in developing countries to be development-friendly, there is little research that attempts to provide developing countries with practical measures to achieve that goal. This article takes the copyright law in Jordan as a case study and shows how, in practical terms, a pro-development-oriented approach could be implemented in the copyright laws of developing countries. It provides specific recommendations for developing countries to ensure that their IP laws are aligned with and serve their social and economic development objectives.

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“For too long IPRs have been regarded as food for the rich countries and poison for poor countries.... [I]t is not as simple as that. Poor countries may find them useful provided they are accommodated to suit local palates.”²

I. INTRODUCTION

Since 2004, the WIPO Development Agenda has renewed interest in the role of intellectual property (IP) in development.³ While “development” is a term contested by scholars, organizations and development experts throughout the world, it is generally understood to mean improving the lives of people socially and economically.⁴

The value of an IP system to a developing country (or for that matter a developed country) is the subject of increasing debate. On one side, IP evangelists argue that IP laws can stimulate untold innovation and provide a foundation for economic progress. On the other side, IP skeptics or abolitionists question whether IP laws really incentivize innovation or simply represent a burden on social and economic development. Too often, an uninformed adoption of international IP systems is seen as a “shortcut” to development. For development to be

² JOHN BARTON ET AL., COMM’N ON INTELLECTUAL PROP. RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY, (2002), *available at* http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf.

³ In 2004, Brazil and Argentina presented a comprehensive proposal on behalf of developing countries to establish the Development Agenda in the World Intellectual Property Organisation (WIPO). They put forward a view that IP laws in their current form are not helping those countries in their development, as is constantly being suggested by developed countries, and that there is a need to rethink the international IP system and the work of WIPO. *See* GEN. ASSEMBLY, WIPO, PROPOSAL BY ARGENTINA AND BRAZIL FOR THE ESTABLISHMENT OF A DEVELOPMENT AGENDA FOR WIPO (2004), *available at* http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_31/wo_ga_31_11_add.pdf.

⁴ There is no single international definition of what is meant by the term “developing countries.” The United Nations (U.N.) organizations divide developing countries into several groups of countries based on their income, education, healthcare and life expectancy. The following criteria have been used to determine if a country is a developing country:

- small Gross National Product (GNP) relative to the major players in the trade arena;
- limited domestic resources;
- exports are concentrated in terms of products and trading partners;
- high average trade barriers; and
- economic and political dependence on industrial countries.

See HENRIK HORN & PETROS C. MAVROIDIS, REMEDIES IN THE WTO DISPUTE SETTLEMENT SYSTEM AND DEVELOPING COUNTRIES INTERESTS (1999), *available at* <http://www.econ-law.se/Papers/Remedies%20990611-1.pdf>; *see also* *How We Classify Countries*, WORLD BANK, <http://data.worldbank.org/about/country-classifications> (last visited Mar. 21, 2012).

more effective, developing countries need to understand the role of IP and how to shape their IP laws according to their best interests.⁵

Although there have been several studies related to IP and development that call for IP laws in developing countries to be development-friendly, there is little research that attempts to provide developing countries with practical measures to achieve that goal. This article takes the copyright law in Jordan as a case study and provides specific recommendations for developing countries to ensure that their IP laws are aligned with and serve their social and economic development objectives.

II. CONTEXT: WHY LOOK AT JORDAN?

Jordan is a country with limited oil resources, which makes it more similar to most developing countries than its oil-rich neighbours Saudi Arabia and Iraq. Although developing countries lacking significant resource endowments vary in their concerns and needs, they all aspire to develop socially and economically. They aim to be as innovative as possible in their approach to development and do what is required and necessary to face impediments to development and move forward despite limited resources.

Jordan is a good example of a developing country that is using human to make necessary changes for social and economic development, in spite of its limited oil resources. Jordan considers its people to be the heart of its development and its future strength. The country has adopted a human-centred approach to development that enhances its people's prospects within social, economic and cultural spheres.⁶

Like many developing countries, Jordan recognizes the importance of trade and investment to its economic future and has embarked upon major economic reforms to make it a more attractive environment for foreign direct investment (FDI). Jordan signed an Association Agreement with the European Union (E.U.) on November 24, 1997; became a member of the World Trade Organization (WTO) on April 11, 2000; and on October 24, 2000, became the second Middle Eastern country (after Israel) to sign an FTA with the U.S. It has also entered into FTAs with other countries including Canada, Singapore, Malaysia and Turkey.

Jordan upholds a high level of IP protection, similar to the IP systems available in developed countries. After joining the WTO,

⁵ See RAMI OLWAN, *INTELLECTUAL PROPERTY AND DEVELOPMENT: THEORY AND PRACTICE* (forthcoming 2012).

⁶ JORDAN MINISTRY OF PLANNING & INT'L CO-OPERATION ET AL., *JORDAN HUMAN DEVELOPMENT REPORT 2004: BUILDING SUSTAINABLE LIVELIHOODS*, available at http://hdr.undp.org/en/reports/national/arabstates/jordan/jordan_2004_en.pdf.

Jordan had to restructure its IP legal system to conform to international standards. Jordan introduced new IP laws and joined major IP treaties, including the WIPO Copyright Treaty (WCT) and the WIPO Performance and Phonograms Treaty (WPPT), in the hope that this would boost development and innovation in the country. Despite these major economic and legal changes, there are concerns that there has been little change in the country and its social and economic development.

III. THE CORRELATION BETWEEN INTELLECTUAL PROPERTY AND DEVELOPMENT

The development of IP systems is imperative for developing countries; however, these systems will not bring social and economic development without the support of proper development policies.⁷ In pursuing economic development, developing countries must ensure the presence of a range of institutions and infrastructures, including efficient and effective governments, coherent economic policies, political stability, qualified human capital, technical infrastructure, rule of law and effective judiciary.⁸

⁷ Scholars working in the field of IP have different views on IP effects on development. Some agree that development could be achieved through the introduction of IP systems in developing countries whilst others are doubtful whether such systems would be sufficient to support development. See Ruth L. Gana (Okediji), *Has Creativity Died in the Third World? Some Implications of the Internationalisation Intellectual Property*, 24 DENV. J. INT'L L. & POL'Y 109 (1995); Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2813, 2877 (2006); Keith E. Maskus, *Intellectual Property and Economic Development* (Feb. 6, 2000) (working paper), available at <http://www.colorado.edu/Economics/mcguire/workingpapers/cwrurev.doc>; see also INTELLECTUAL PROPERTY RIGHTS, DEVELOPMENT, AND CATCH UP: AN INTERNATIONAL COMPARATIVE STUDY 420, 427 (Hiroyuki Odagiri et al. eds., 2010).

⁸ See Keith Maskus, *Incorporating a Globalized Intellectual Property Rights Regime into an Economic Development Strategy*, in INTELLECTUAL PROPERTY, GROWTH AND TRADE 504 (Keith Maskus ed., 2008); Keith E. Maskus & Jerome H. Reichman, *The Globalisation of Private Knowledge Goods and the Privatization of Global Public Goods*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 6 (Keith E. Maskus & Jerome H. Reichman eds., 2005); Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA 214 (Daniel Gervais ed., 2007); YONG-SHIK LEE, RECLAIMING DEVELOPMENT IN THE WORLD TRADING SYSTEM 160 (2006); Ruth L. Gana, *The Myth of Development, the Progress of Rights: Human Rights to Intellectual Property and Development*, 18 LAW & POL'Y 335, 341 (1996); Mikhaelle Schiappacasse, Note, *Intellectual Property Rights in China: Technology Transfers and Economic Development*, 2 BUFF. INTELL. PROP. L.J. 164 (2004); Peter Beattie, *The (Intellectual Property Law &) Economics of Innocent Fraud: The IP & Development Debate*, 38 INT'L REV. INTELL. PROP. & COMPETITION L. 28 (2007); ROBERT M. SHERWOOD, INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT (1990); Carlos Alberto Primo Burga, *The Economics of Intellectual Property Rights and the GATT: A View From the South*, 22 VAND. J. TRANSNAT'L L. 259 (1989).

It is important for the drafters of IP laws in developing countries to increase their understanding of the relationship between IP and the economic realities of their respective countries. While IP may bring FDI, technology transfer, domestic innovation and Research and Development (R&D) to developing countries, economic development will not occur simply through the introduction of IP laws. Rather, policy makers in developing countries need to consider broader development initiatives in the structuring of their IP systems. To this end, every provision that is introduced into IP law should be studied and examined as a part of the broader development plan for that country.⁹

The remainder of this article is divided into 4 parts. Part 4 gives an overview of IP systems in the Middle East, particularly copyright laws in Jordan and the Arab World. Part 5 examines the fundamentals of the copyright law in Jordan, paying particular attention to the Internet and digital issues. As will be discussed later, most of the recent amendments that were made to copyright laws in Jordan relate to digital issues, and it is important to consider how the law needs to be structured in the Internet age to meet the development interests of the country. Part 6 of the article analyses and critiques copyright law in Jordan and Part 7 provides proposals for reform.

IV. THE JORDANIAN IP SYSTEM

On April 11, 2000, after two years of negotiations, Jordan became the 136th member of the WTO.¹⁰ The Jordanian parliament ratified the WTO treaty on February 24, 2000.¹¹ Achieving ratification in a limited period of time was difficult because major economic and legislative reforms were made in order to bring the Jordanian foreign trade regime into conformity with the WTO requirements.¹²

Many important amendments and laws were introduced, particularly in the field of IP.¹³ These laws include: *Patent Law No. 32 of 1999*,¹⁴ *Trademark Law No. 34 of 1999*,¹⁵ *Industrial Design and Model Law No.*

⁹ OLWAN, *supra* note 5.

¹⁰ See *Jordan and the WTO*, WTO, http://www.wto.org/english/thewto_e/countries_e/jordan_e.htm (last visited Mar. 21, 2012); Ghadeer Taher, *Jordan's WTO Accession Bid Held up by Needed Reforms, Business Opposition*, JORDAN TIMES, Apr. 14, 1999, <http://www.jordanembassyus.org/041499005.htm>.

¹¹ The Law of the Accession of Jordan to the WTO, OFFICIAL GAZETTE OF JORDAN, No. 4415/2000 (Feb. 24, 2000).

¹² JORDAN MINISTRY OF INDUS. & TRADE, <http://www.mit.gov.jo> (last visited Mar. 21, 2012).

¹³ *Id.*

¹⁴ Patent Law No. 32 of 1999, OFFICIAL GAZETTE OF JORDAN, No. 4389 (Nov. 1, 1999).

¹⁵ Trademark Law No. 34 of 1999, OFFICIAL GAZETTE OF JORDAN, No. 4389, (Nov. 1, 1999).

14 of 2000,¹⁶ *Plant Varieties Law No. 24 of 2000*,¹⁷ *Geographical Indication Law No. 8 of 2000*,¹⁸ *Unfair Competition and Trade Secret Law No. 15 of 2000*,¹⁹ and the *Protection of Layout-Designs of Integrated Circuit Law No. 10 of 2000*.²⁰ Other amendments were also made to many other laws as well,²¹ but a discussion of those laws is beyond the scope of this article.

Jordan joined the *Berne Convention for the Protection of Literary Works (Berne Convention)* on July 28, 1999, the WCT on April 27, 2004, WPPT on 24 May, 2004.²² As a result, the government adopted new amendments to its IP systems, including the *Copyright Law No. 22 for 1999* as amended in Jordan (the *Copyright Law*). The latest amendments made to the *Copyright Law* in Jordan took place on 2005 when the protection of Rights Management Information (RMI) and Technological Protection Measures (TPMs) were introduced for the first time.²³

V. THE UNITED STATES - JORDAN FREE TRADE AGREEMENT (USJFTA)

The United States Jordan Free Trade Agreement (USJFTA), which entered into force on December 17, 2001, required the Jordanian legislature to enact further amendments to its laws to adequately protect IP. Several economic and political reasons led the U.S. to negotiate this agreement with Jordan.²⁴

¹⁶ Industrial Design and Model Law No. 14 of 2000, OFFICIAL GAZETTE OF JORDAN, No. 4423 (Apr. 2, 2000).

¹⁷ Plant Varieties Law No. 24 of 2000, OFFICIAL GAZETTE OF JORDAN, No. 4443 (July 2, 2000).

¹⁸ Geographical Indication Law No. 8 of 2000, OFFICIAL GAZETTE OF JORDAN, No. 4423 (Apr. 2, 2000).

¹⁹ Unfair Competition and Trade Secret Law No. 15 of 2000, OFFICIAL GAZETTE OF JORDAN, No. 4423 (Apr. 2, 2000).

²⁰ The Protection of Layout-Designs of Integrated Circuit Law No. 10 of 2000, OFFICIAL GAZETTE OF JORDAN, No. 4423 (Apr. 2, 2000).

²¹ Some 160 laws have been promulgated in Jordan. See *Nail-Biting: Jordan's Fairly Fair Election*, ECONOMIST, June 21, 2003. One commentator noted that having these laws is good for economic linearization in the country in the absence of parliament. Bashar Hikmet Malkawi, *Jordan and the World Trading System: A Case Study Submitted for Arab Countries* 232 (Jan. 1, 2006) (unpublished SJD dissertation, American University Washington College of Law) (on file with author), available at http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1007&context=stu_sjd_abstracts.

²² See *Summary Table of Membership of the WIPO and the Treaties Administered by WIPO, plus UPOV, WTO and UN*, WIPO, <http://www.wipo.int/treaties/en/summary.jsp> (last visited Mar. 21, 2012).

²³ The Copyright Law No. 22 of 1992, arts. 54–55, OFFICIAL GAZETTE OF JORDAN, No. 3821 (Apr. 16, 1992).

²⁴ For more information, see Bashar Malkawi, *The Intellectual Property Provision of the United States-Jordan Free Trade Agreement: Template or Not Template*, 2 J. WORLD INTELL. PROP. 213 (2006).

The U.S. has markedly increased aid to Jordan since the mid-1990s to help strengthen the economy, maintain domestic stability and improve its relations with Israel.²⁵ Jordan seeks to benefit as much as possible from joining the USJFTA, as it wants to obtain preferable treatment on goods exported to the U.S. market. The USJFTA contains extensive post-TRIPS (TRIPS-plus) IP law provisions²⁶ that require Jordan to undertake and commit to regulatory changes that go beyond what Jordan had agreed in its accession to the WTO, WPPT and WCT.

Article 4 of the USJFTA, which deals with IP, is considered the largest of all the provisions of the FTA. It contains provisions that protect trademarks and geographical indications,²⁷ copyright and related rights²⁸ and patents.²⁹ The USJFTA concentrates on enforcement of IP, including the availability of injunctions, damages and other remedial measures.³⁰

The USJFTA also contains a Memorandum of Understanding on Issues Related to the Protection of Intellectual Property Rights (MOU), which relates to with patent and copyright law, which Jordan is also required to meet.³¹

There are various TRIPS-plus provisions that are included in the USJFTA. Article 4(1) of the USJFTA requires that Jordan accede to IP treaties that are not part of the Trade Related Intellectual Property Aspects Agreement ('TRIPS Agreement').³² It provides that:

²⁵ Since 2003, Jordan's total assistance package has averaged over \$762 million per fiscal year. See JEREMY M. SHARP, CONG. RESEARCH SERV., RL32260, THE U.S FOREIGN ASSISTANCE TO THE MIDDLE EAST: HISTORICAL BACKGROUND, RECENT TRENDS AND THE FY2011 REQUEST (2010) available at <http://fas.org/spp/crs/mideast/RL32260.pdf>; PAUL RIVLIN, ARAB ECONOMICS IN THE TWENTY-FIRST CENTURY 155–73 (2009).

²⁶ For further explanation of the TRIPS model in Jordan and the Arab World, see Hamed El-Said & Mohammed El-Said, *TRIPS-Plus Implication for Access to Medicine in Developing Countries: Lessons from Jordan-United States Free Trade Agreement*, 10 J. WORLD INTELL. PROP. 438 (2007) [hereinafter El-Said & El-Said]; MOHAMMED EL SAID, THE DEVELOPMENT OF INTELLECTUAL PROPERTY PROTECTION IN THE ARAB WORLD chs. 4–6 (2008) [hereinafter EL-SAID]; DAVID PRICE, THE DEVELOPMENT OF INTELLECTUAL PROPERTY REGIMES IN THE ARABIAN GULF STATES: INFIDELS AT THE GATES chs. 4–6 (2009).

²⁷ Free Trade Agreement, U.S.-Jordan, art. 4, ¶¶ 10–16, Oct. 24, 2000, available at <http://www.jordanusfta.com/documents/textagr.pdf> [hereinafter USJFTA].

²⁸ USJFTA, *supra* note 27, at art. 4, ¶¶ 6–9.

²⁹ USJFTA, *supra* note 27, at art. 4, ¶¶ 17–20.

³⁰ USJFTA, *supra* note 27, at art. 4, ¶¶ 24–28.

³¹ Memorandum of Understanding on Issues Related to the Protection of Intellectual Property Rights Under the Agreement Between the United States and Jordan on the Establishment of a Free Trade Area (Oct. 24, 2000), available at http://www.jordanusfta.com/documents/memo_property.pdf.

³² Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, available at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf [hereinafter TRIPS].

1. Each Party shall, at a minimum, give effect to this Article, including the following provisions:
 - (b) Articles 1 through 22 of the International Convention for the Protection of New Varieties of Plants (1991) (“UPOV Convention”);
 - (c) Articles 1 through 14 of the WIPO Copyright Treaty (1996) (“WCT”); and
 - (d) Articles 1 through 23 of the WIPO Performances and Phonograms Treaty (1996) (“WPPT”).
2. Each Party shall make best efforts to ratify or accede to the Patent Cooperation Treaty (1984) and the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (1989).³³

Article 4(20) also provides a TRIPS-plus provision which addresses compulsory licensing in the case of a health crisis.³⁴ It provides as follows:

- Neither Party shall permit the use of the subject matter of a patent without the authorization of the right holder except in the following circumstances:
- (a) To remedy a practice determined after judicial or administrative process to be anti-competitive;
 - (b) In cases of public non-commercial use or in the case of a national emergency or other circumstances of extreme urgency, provided that such use is limited to use by government entities or legal entities acting under the authority of a government; or
 - (c) On the ground of failure to meet working requirements, provided that importation shall constitute working.³⁵

³³ USJFTA, *supra* note 27, at art. 4, ¶ 1.

³⁴ Rohhit Malpani from Oxfam International’s access to medicine campaign argues that USJFTA has created a public health crisis in Jordan. He notes that there were no benefits from signing the USJFTA as claimed by U.S. officials in relation to the development of the pharmaceutical industry in Jordan. He explains:

[S]ince the FTA was signed, FDI, in the words of most generics manufacturers and government officials, has been a ‘disappointment.’ From 1995 to 2000, there was hardly any investment in Jordanian pharmaceutical manufacturing, and following the passage of the FTA, despite claims by United States Trade Representative (USTR) that FDI would flow to Jordan, it never materialised. Furthermore, local generics companies complained that multinational pharmaceutical companies neither signed more licensing agreements nor transferred technology to local manufacturers. Thus, most new medicines are imported rather than produced locally. According to the Jordanian Association of Pharmaceutical Manufacturers, most licensing agreements that are in effect today were signed before 1999.

Rohhit Malpani, *All Costs, No Benefits: How The US-Jordan Free Trade Agreement Affects Access to Medicine*, 6 J. GENETICS MED. 206, 213 (2009).

³⁵ USJFTA, *supra* note 27, art. 4, ¶ 1.

One Jordanian legal scholar has described the IP provisions in the USJFTA as follows:

The intellectual property provisions of the US–JO FTA are one-sided. They were drafted to protect US intellectual property rights. In great parts, the intellectual property part of the US–JO FTA reflects the laws and views of the USA...³⁶

While the Jordanian scholar is correct in that the agreement is one-sided, it is important to examine the real motivations that led Jordan to draft such restrictive provisions.³⁷ One important question that arises is whether the USJFTA reflects a general pattern with all other FTAs signed between the U.S. and other Arab countries.

It is noted that FTAs signed between the U.S. and other Arab countries contain extensive provisions that deal with all forms of IP, which are not much different from those contained in the Jordanian FTA.³⁸ Furthermore, many go even further than the USJFTA, demanding a higher level of IP protection, particularly in connection with extending the copyright term to be 70 years (instead of 50) after the author's death.³⁹ Jordan was fortunate to sign the FTA with the U.S. in

³⁶ Malkawi, *supra* note 24, at 221.

³⁷ Ahmad Abdel Latif noted that:

It is not always clear if these TRIPS-Plus obligations in national laws are the result of a conscious and deliberate choice by legislators and policy-makers, or are more the result of inadequate legislative advice given to these Arab countries in the process of modernization of their IP laws by certain bilateral donors and international organizations with a vested interest in promoting higher IP standards.

Ahmed Abdel Latif, *A Perspective on Reform in Arab Countries*, in *INTELLECTUAL PROPERTY AND SUSTAINABLE DEVELOPMENT: DEVELOPMENT AGENDAS IN A CHANGING WORLD* 51, 56 (Ricardo Melendez-Ortiz & Pedro Roffe eds., 2010).

³⁸ Free Trade Agreement, U.S.-Bahr., art. 14, Sept. 14, 2004, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/bahrain-fta/final-text> [hereinafter USBFTA]; Free Trade Agreement, U.S.-Morocco, art. 15, June 15, 2004, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text> [hereinafter USMFTA]; Free Trade Agreement, U.S.-Oman, art. 15, Jan. 19, 2006, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Oman_FTA/Final_Text/Section_Index.html [hereinafter USOFTA].

³⁹ Article 14.4, paragraph 4 of the USBFTA provides that:

Each Party shall provide that, where the term of protection of a work (including a photographic work), performance, or phonogram is to be calculated: (a) on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author's death; and (b) on a basis other than the life of a natural person, the term shall be (i) not less than 70 years from the end of the calendar year of the first authorized publication of the work, performance, or phonogram, or failing such authorized publication within 50 years from the creation of the work, performance or phonogram, not less than 70 years from the end of the calendar year of the creation of the work, performance, or phonogram.

2001, before many other Arab countries were obliged to sign onto tougher IP systems.⁴⁰ The USJFTA resembles the language the DMCA

USBFTA, *supra* note 38, art. 14.4, ¶ 4. Article 15.5, paragraph 5 of the USMFTA provides that:

Each Party shall provide that, where the term of protection of a work (including a photographic work), performance, or phonogram is to be calculated: (a) on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author's death; and (b) on a basis other than the life of a natural person, the term shall be (i) not less than 70 years from the end of the calendar year of the first authorized publication of the work, performance, or phonogram, or (ii) failing such authorized publication within 50 years from the creation of the work, performance, or phonogram, not less than 70 years from the end of the calendar year of the creation of the work, performance, or phonogram.

USMFTA, *supra* note 38, art. 15.5, ¶ 5. Article 15.4, paragraph 4 of the USOFTA provides that:

Each Party shall provide that, where the term of protection of a work (including a photographic work), performance, or phonogram is to be calculated: (a) on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author's death; and (b) on a basis other than the life of a natural person, the term shall be (i) not less than 95 years from the end of the calendar year of the first authorized publication of the work, performance, or phonogram, or (ii) failing such authorized publication within 25 years from the creation of the work, performance, or phonogram, not less than 120 years from the end of the calendar year of the creation of the work, performance, or phonogram.

USOFTA, *supra* note 38, art. 15.4, ¶ 4.

⁴⁰ For TRIPS-plus provisions, article 14.3 of the USBFTA provides that:

1. Each Party shall require that the management of its country-code top-level domain (ccTLD) provide an appropriate procedure for the settlement of disputes, based on the principles established in the Uniform Domain-Name Dispute-Resolution Policy (UDRP), in order to address the problem of trademark cyber-piracy.
2. Each Party shall require that the management of its ccTLD provide online public access to a reliable and accurate database of contact information for domain-name registrants.

USBFTA, *supra* note 38, art. 14.3. Article 15.4 of the USBFTA provides that:

1. In order to address the problem of trademark cyber-piracy, each Party shall require that the management of its country-code top-level domain ("ccTLD") provide an appropriate procedure for the settlement of disputes, based on the principles established in the Uniform Domain-Name Dispute-Resolution Policy.
2. Each Party shall require that the management of its ccTLD provide online public access to a reliable and accurate database of contact information for domain name registrants.

Id. art. 15.4. Article 15.3 of the USOFTA also provides that:

1. In order to address the problem of trademark cyber-piracy, each Party shall require that the management of its country-code top-level domain ("ccTLD") provide an appropriate procedure for the settlement of disputes, based on the principles established in the Uniform Domain-Name Dispute-Resolution Policy.

of 1998,⁴¹ but goes even further in demanding a higher level of copyright protection.⁴²

The DMCA-style provisions have been heavily criticised by American and international IP scholars, and various commentators.⁴³ The *Copyright Law* in Jordan has adopted certain provisions from the DMCA verbatim, without assessing their appropriateness to the social and economic development of the country. This approach of legal transplanting has been heavily criticised, as it is not based on a deep understanding of domestic needs or a correct assessment of the cost and benefits of transplanting.⁴⁴

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2. Each Party shall require that the management of its ccTLD provide online public access to a reliable and accurate database of contact information for domain-name registrants.

USOFTA, *supra* note 38, art. 15.3. For TRIPS plus provisions, see article 15.5, paragraph 8 of the USMFTA and article 14.5, paragraph 7 of the USBFTA that do not require knowledge in relation to the act of circumvention. See Gwen Hinze, *Seven Lessons from a Comparison of the Technological Protection Measures Provisions*, ELECTRONIC FRONTIER FOUND., <http://www.eff.org/pages/seven-lessons-comparison-technological-protection-measure-provisions>.

⁴¹ Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of, *inter alia*, 17 U.S.C. §§ 1201–05 (2006)).

⁴² Professor Peter Yu explains:

The DMCA was designed specifically to deal with the threat created by digital technologies under conditions specific to the United States, including the stage of its economic development, the structure of its content and communications industries, the state of available technology, the overall market conditions, and the average living standards of local consumers. Because these conditions are unlikely to be present in less developed countries, the DMCA serves as an inappropriate model for the implementation of the WIPO Internet Treaties.

Peter K. Yu, *Working Together in a Digital World: An Introduction: Article: Anticircumvention and Anti-anticircumvention*, 84 DENV. U. L. REV. 13, 42 (2006).

⁴³ For critiques of the DMCA, see the following: Fred Von Lohman & Wendy Seltzer, *Death by the DMCA*, IEEE SPECTRUM (June 2006), <http://www.spectrum.ieee.org/computing/software/death-by-dmca>; P. Samuelson, *Intellectual Property and The Digital Economy: Why the Anti Circumvention Regulation Needs to be Revised*, 14 BERKELEY TECH. L. J. 519 (1999); Anne Haring, *What's New in the Neighbourhood: The Export of the DMCA in Post-TRIPS FTAs*, 11 ANN. SURV. INT'L & COMP. L. 171 (2005); Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. REV. 1095 (2003). On appraisal of the DMCA, one Jordanian legal scholar notes that the DMCA is a model law for implementing the anti-circumvention provisions of the WCT and WPPT treaties; he further argued that it is a good example in achieving an appropriate balance between the legal rights of authors and users. See Fayad Alqudah, *Legal Protection of Databases: A Study of Jordanian Law*, 22 ARAB L. Q. 378, 381 (2008).

⁴⁴ This has also occurred in other countries, such as China, that based part of their copyright laws on the DMCA model. Professor Hong Xue notes:

A successful legal transplant should be based on the comprehensive study of the legal context of the transplanted law, deep understanding of the domestic need and correct assessment of the cost and benefit of the transplanting. Most importantly, transplanting the norms from the foreign law should be strategic rather than expedient, thoughtful rather than unperceptive, creative rather than

Jordan and the U.S. have also signed a Joint Statement on Electronic Commerce; the statement discusses many issues related to electronic commerce, including electronic authentication, electronic signatures, electronic payment and privacy and consumer protection.⁴⁵

A. Overview of Internet use in the Arab world

Many governments are beginning to realize the benefits of the Internet and are eager to transform their countries into e-societies. Countries within the Arab World are no exception.⁴⁶ The Arab world is currently pursuing a series of important initiatives to take advantage of the digital revolution. In Dubai, an Internet city⁴⁷ and media city⁴⁸ were built to attract global investors and a highly qualified labour force. In Jordan, an ICT-based national development strategy⁴⁹ is being designed and implemented to establish IT industries and services.⁵⁰

In Tunisia, the Five Year Development Plan (Plan) emphasizes the necessity of developing “knowledge economy.”⁵¹ The Plan was developed through a large consultation process and prescribes policy measures in multiple domains, such as education, research, trade, industry, agriculture and regional policies, with the planned creation of ten new technological policies in the coming decade.⁵²

It is estimated that as of June 30 2010, there were over 60 million Internet users in the Middle East,⁵³ accounting for 3.2% of the world’s Internet population. Moreover, the rate of Internet usage grew 185.3%

plagiaristic. Only through the careful cultivation can the healthy, valuable and adaptive flowers bloom in the new legal system.

Hong Xue, *A Critique of the Legal Transplants Chinese Internet Copyright Protection*, 34 RUTGERS COMPUTER & TECH. L. J. 168 (2007).

⁴⁵ See United States-Jordan Joint Statement on Electronic Commerce, available at http://www.jordanusfta.com/documents/joint_statement_on_e-commerce.pdf. The Statement particularly requests Jordan to provide high protection for e-commerce including business- method patents which the *Patent Law* in Jordan does not currently give protection to. *Id.*

⁴⁶ TELECOMM. DEV. BUREAU, INT’L TELECOMM. UNION, INTERNET FOR THE ARAB WORLD (2000), available at <http://www.itu.int/ITU-D/ict/papers/egypt2000/15-e.pdf>.

⁴⁷ DUBAI INTERNET CITY, <http://www.dubaiInternetcity.com/> (last visited Mar. 21, 2012).

⁴⁸ DUBAI MEDIA CITY, <http://www.dubaimediacity.com/> (last visited Mar. 21, 2012).

⁴⁹ JORDAN MINISTRY OF INFO. & COMM. TECHS., http://www.moict.gov.jo/moict/en_index.aspx (last visited Feb. 13, 2012).

⁵⁰ JEAN-ERIC AUBERT, WORLD BANK INST., PROMOTING INNOVATION IN DEVELOPING COUNTRIES: A CONCEPTUAL FRAMEWORK (2004), available at <http://info.worldbank.org/etools/docs/library/137729/0-3097AubertPaper%5B1%5D.pdf>.

⁵¹ Triki Abdelhamid, Presentation, “Knowledge Based Economy in Tunisia” (June 15, 2006), available at <http://www.investintunisia.tn/document/295.pdf>.

⁵² AUBERT, *supra* note 50.

⁵³ The list of countries include, in addition to the Arab countries, Israel and Iran. See *Internet Usage Statistics*, INTERNET WORLD STATES, <http://www.Internetworldstats.com/stats.htm> (last visited Mar. 21, 2012).

between 2000 and 2010.⁵⁴ Interestingly, the number of broadband subscribers in the Arab world grew by 38% in 2006, while the number of those subscribers using DSL access technology grew by 81.9% to 4.3 million.⁵⁵

The Initiative for Open Arab Internet (IOAI) stated, in a study concluded in 2007, that there were (at that time) around 40,000 Arabic blogs in the Arab world, most of which had been created since 2006. The Egyptian bloggers have guided other Arab bloggers.⁵⁶ Despite the novelty of blogging in the Arab world, it has become an effective tool for Arab populations to express themselves and reveal both public and personal grievances.⁵⁷

Most of the countries in the Arab world increased Internet usage to promote economic development and competitiveness; however, they soon realized that the Internet made it more difficult for them to control the flow of information, both within the country and across international borders. The availability and accessibility of information, as well as the ability to create and disseminate information anonymously, has led to a sense of freedom among many Arab Internet users.⁵⁸ Internet users in Jordan are using new types of online media like YouTube,⁵⁹ MySpace,⁶⁰ Facebook,⁶¹ Flickr,⁶² Twitter⁶³ and Wikipedia,⁶⁴ and these platforms continue to raise significant challenges for copyright policies.

The important question is whether copyright laws and policies in Arab countries have led to creativity, innovation and development. The

⁵⁴ *Id.*

⁵⁵ Medilyn Manibo, *DSL Forum Acclaim Middle East and Africa Broadband Growing Faster than any Region in the World*, AME INFO (Apr. 12, 2007, 1:23 PM), <http://www.ameinfo.com/116548.html>. It is interesting to note that Facebook is among the most visited websites in the Middle East and North Africa with nearly 2.5 million users in 2009. See Wael Gouneim, Presentation, *Open Content Arabic Workshop* at the Abdul-Aziz City for Science & Technology, Riyadh, Saudi Arabia: “Google Middle East: Internet Use in the Middle East and North Africa” (Jan. 17–18, 2009).

⁵⁶ *Implacable Adversaries: Arab Government and the Internet*, INITIATIVE FOR AN OPEN ARAB INTERNET, <http://old.openarab.net/en/node/346> (last visited Mar. 21, 2012) [hereinafter IOAI]; Marc Lynch, *Blogging the New Arab Public*, ARAB MEDIA & SOC’Y, Feb. 2007, available at http://www.arabmediasociety.org/articles/downloads/20070312155027_AMS1_Marc_Lynch.pdf; BRUCE ETLING ET AL., BERKMAN CTR. FOR INTERNET & SOC’Y, *MAPPING THE ARABIC BLOGOSPHERE: POLITICS, CULTURE, AND DISSENT* (2009), available at http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Mapping_the_Arabic_Blogosphere_0.pdf.

⁵⁷ IOAI, *supra* note 56.

⁵⁸ *Internet Filtering in the Middle East and North Africa*, OPENNET INITIATIVE (2009), <http://opennet.net/research/regions/mena> (last visited Mar. 21, 2012); RASHA A. ABDULLAH, *THE INTERNET IN THE ARAB WORLD: EGYPT AND BEYOND* 33–39 (2007).

⁵⁹ YOUTUBE, <http://www.youtube.com> (last visited Mar. 21, 2012).

⁶⁰ MYSPACE, <http://www.myspace.com> (last visited Mar. 21, 2012).

⁶¹ FACEBOOK, <http://www.facebook.com> (last visited Mar. 21, 2012).

⁶² FLICKR, <http://www.flickr.com> (last visited Mar. 21, 2012).

⁶³ TWITTER, <http://www.twitter.com> (last visited Mar. 21, 2012).

⁶⁴ WIKIPEDIA, <http://www.wiipedia.org> (last visited Mar. 21, 2012).

challenge for these countries is to adopt a mix of legal and non-legal copyright policies and to design an appropriate model to deal with the rise of digital technologies and the Internet.

If Arab countries want to develop their knowledge-based economy and become a regional hub for information communication technologies, they need to critically examine their existing IP systems. However, the question of what kind of IP systems are required, and on what basis persists.

B. The copyright laws of Arab countries

The first Jordanian copyright law (The Ottoman Copyright Law of 1910) dates back to the beginning of the twentieth century when most Arab countries⁶⁵ were under the governance of the Ottoman Empire.⁶⁶ The first *Egyptian Copyright Law No. 354 for 1954* as amended formed the basis upon which most Arab countries drafted their own copyright laws.⁶⁷

Copyright laws in Arab countries differ to a large extent, but they can be categorized under three distinct groups. Firstly, there are countries with a no or low-levels of implementation, including Palestine,⁶⁸ Somalia,⁶⁹ Comoros,⁷⁰ Iraq⁷¹ and Libya.⁷² The second group is characterised by middle-level implementation and includes those countries that made amendments to their copyright laws in the 1990s

⁶⁵ The 22 Arab countries are: Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates (U.A.E.) and Yemen.

⁶⁶ Morocco remained largely independent of the Ottoman Turkish Empire. See Anahita Bint Abd Al-Karim Al-Hakim Al-Fassi, *A Taste of Maghribi History*, DAR ANAHITA, <http://home.earthlink.net/~lilinah/Library/HistoryMaroc.html#osman>.

⁶⁷ See NOWAF KANAN, *JORDANIAN COPYRIGHT LAW* 44–45 (4th ed., 2004).

⁶⁸ Palestinian copyright laws go back to the Othman Empire (1299–1923) and the British mandate for Palestine (1920–1946). The laws that are applicable are the Law of Copyright and Authorship No. 46 of 1911 (Palestine) and the Law of Copyright and Authorship No. 16 of 1924 (Palestine). See Ihab G. Samaan, *A Historical View of Intellectual Property Rights in the Palestinian Territories* (Dec. 1, 2003) (unpublished L.L.M. thesis, University of Georgia), available at http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1049&context=stu_ll.

⁶⁹ Somalia does not have currently an IP system. It has been a member of WIPO since 1982 and the African Regional Intellectual Property Organization (ARIPO). See WIPO, <http://www.wipo.int> (last visited Mar. 21, 2012).

⁷⁰ Copyright Law of March 11, 1957 on Literary and Artistic Property (Comoros). See *Comoros*, WIPO, <http://www.wipo.int/wipolex/en/details.jsp?id=8839> (last visited Mar. 21, 2012).

⁷¹ The Coalition Provisional Authority has amended the Copyright Law No. 3 of 1971 for the Protection of Copyright (Iraq). See ABU GHZALEH INTELL. PROP., <http://www.agip.com> (last visited Mar. 21, 2012).

⁷² Protection of Copyright (Law No. 9/1968) (Libya). See *Libya*, WIPO, <http://www.wipo.int/wipolex/en/details.jsp?id=10149> (last visited Mar. 21, 2012).

and after; this group consists of Lebanon,⁷³ Syria,⁷⁴ Tunisia,⁷⁵ Qatar,⁷⁶ Saudi Arabia,⁷⁷ Algeria,⁷⁸ Egypt,⁷⁹ Djibouti,⁸⁰ Mauritania,⁸¹ Kuwait,⁸² Sudan,⁸³ Yemen⁸⁴ and the United Arab Emirates (U.A.E).⁸⁵ The last group comprises those countries with a high level of implementation, particularly those countries that entered into FTAs with the U.S. As a result, those countries updated, or are soon to update, their copyright

⁷³ Protection of Literary and Artistic Property (Law No. 75/1999) (Leb.). See *Lebanon*, WIPO, <http://www.wipo.int/wipolex/en/details.jsp?id=2786> (last visited Mar. 21, 2012).

⁷⁴ Copyright Law of Syria (Law No. 12/2001) (Syria). See *Syrian Arab Republic*, WIPO, <http://www.wipo.int/wipolex/en/details.jsp?id=6648> (last visited Mar. 21, 2012).

⁷⁵ Literary and Artistic Property (Law No. 94-36/1994) (Tunis.). See *Tunisia*, WIPO, <http://www.wipo.int/wipolex/en/details.jsp?id=3840> (last visited Mar. 21, 2012).

⁷⁶ Protection of Copyright and Neighbouring Rights (Law No. 7/2002) (Qatar). See *Qatar*, WIPO, <http://www.wipo.int/wipolex/en/details.jsp?id=3567> (last visited Mar. 21, 2012).

⁷⁷ Promulgating the Law of Copyright (Royal Decree No. 65/2008) (Oman). See *Oman*, WIPO, <http://www.wipo.int/wipolex/en/details.jsp?id=5832> (last visited Mar. 21, 2012).

⁷⁸ Copyright and Neighbouring Rights (Order Act No. 03-05/2003) (Alg.). See *Algeria*, WIPO, <http://www.wipo.int/wipolex/en/details.jsp?id=1194> (last visited Mar. 21, 2012).

⁷⁹ Law No. 82 of 2002 (Law on the Protection of Intellectual Property Rights), *Al-Jarida Al-Rasmiyya*, 3 June 2002, (Egypt), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=126540. See *Egypt*, WIPO, <http://www.wipo.int/wipolex/en/details.jsp?id=7296> (last visited Mar. 21, 2012). It is a comprehensive IP law that deals with patents, utility models, integrated circuits, confidential information, trademarks, geographical indications and copyright. See BASSEM AWAD ET AL., ACA2K, COUNTRY REPORT: EGYPT (2009), available at http://www.aca2k.org/attachments/154_ACA2K%20EGYPT%202009%20CR%20WEB-011209.pdf.

The law repealed the Copyright Law No. 354 of 1954 as amended and introduced new sections on copyright and neighbouring rights. Book 3 of the law consists of 50 articles that deal with copyright (articles 138–88). The Egyptian Prime Minister issued later an implementation Decree No. 497 of 2005 for the law that was effective on March 29, 2005. Egypt is currently a member of the WIPO since April 21, 1975, the Berne Convention since June 7, 1977, the WTO since June 30, 1995, but not yet a member of the WCT and WPPT. See *Egypt*, WIPO, <http://www.wipo.int/wipolex/en/profile.jsp?code=EG#a6> (last visited Apr. 19, 2012).

⁸⁰ A new IP Law was passed in Djibouti and that was adopted by the Council of Ministers on January 27, 2009. It repealed the Law No. 114/AN/96/36 for the Protection of Author's Rights. See *New IP Law in Djibouti*, AFRO-IP, (Feb. 4, 2009), <http://afro-ip.blogspot.com/2009/02/new-ip-law-in-djibouti.html>.

⁸¹ Code of Commerce (Law No. 2000/05) (Mauritania). See *Mauritania*, WIPO, <http://www.wipo.int/wipolex/en/details.jsp?id=7477> (last visited Mar. 21, 2012).

⁸² Concerning Intellectual Property Rights (Decree No. 64/1999) (Kuwait). See *Kuwait*, WIPO, <http://www.wipo.int/wipolex/en/details.jsp?id=2784> (last visited Mar. 21, 2012).

⁸³ Copyright Law and Neighbouring Rights Protection Act (No. 54/1996) (Sudan). See *Sudan*, WIPO, <http://www.wipo.int/wipolex/en/details.jsp?id=3605> (last visited Mar. 21, 2012).

⁸⁴ The Unified Intellectual Property Rights Law No. 19 of 1994 (Yemen) was waiting an implementing regulation to be issued, but this did not happen.

⁸⁵ Copyright and Neighbouring Rights (Federal Law No. 7/2002) (U.A.E). See *United Arab Emirates*, WIPO, <http://www.wipo.int/wipolex/en/details.jsp?id=7> (last visited Mar. 21, 2012).

laws significantly, in order to ensure conformity with their treaty obligations. Those countries are Jordan,⁸⁶ Bahrain,⁸⁷ Morocco⁸⁸ and Oman.⁸⁹

Of the 22 Arab Countries, only 12 have joined the WTO,⁹⁰ only 17 have joined the *Berne Convention*,⁹¹ only five have joined the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (*Rome Convention*)⁹² and only six have joined the WCT and WPPT. The Arab countries that joined the WPPT and WCT include Bahrain, Jordan, Oman, Qatar, Morocco and the U.A.E.⁹³ Economic and political goals heavily influenced their decisions to update their copyright laws and enter into international copyright treaties.

It is important to stress that most Arab countries are civil law countries, primarily influenced by the French legal system⁹⁴ and not the English common law system.⁹⁵ There is always confusion as to the role that Islamic law plays in the Arab world. Islamic laws only play a major role in marital and family matters (particularly marriage, divorce and inheritance).

Many of the other laws in the Arab region have been indirectly copied from French laws (such as the Napoleonic Code (Code Napoléon) and other secular legislation) and adopted into Egyptian law with some alterations. Many Egyptian scholars went to study law in France during the 1950s and 1970s and upon their return to Egypt were involved in drafting laws that, as a result, were very similar to the French legislation which they had been exposed to during their studies.

⁸⁶ The Copyright Law No. 22 of 1992, arts. 54–55, OFFICIAL GAZETTE OF JORDAN, No. 3821 (Apr. 16, 1992).

⁸⁷ Protection of Copyright and Neighbouring Rights (No. 22/2006) (Bahrain). See *Bahrain*, WIPO, <http://www.wipo.int/wipolex/en/details.jsp?id=7311> (last visited Mar. 21, 2012).

⁸⁸ The Copyright and Related Rights Amending and Supplementing Law No. 2-00 (Law No. 34-05/2006) (Morocco). It came into force after the signature of the Morocco FTA with the U.S. See *Morocco*, WIPO, http://www.wipo.int/wipolex/en/text.jsp?file_id=181342 (last visited Apr. 19, 2012).

⁸⁹ Royal Decree No. 65/2008, *supra* note 77; see also *Oman*, WIPO, http://www.wipo.int/wipolex/en/text.jsp?file_id=180949 (last visited Mar. 21, 2012).

⁹⁰ These include: Jordan, U.A.E., Bahrain, Djibouti, Kuwait, Morocco, Saudi Arabia, Tunisia, Egypt, Mauritania, Qatar, and Oman.

⁹¹ These include: Algeria, Bahrain, Egypt, Jordan, Lebanon, Oman, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, U.A.E., Morocco, Libya, Comoros, Yemen, and Djibouti.

⁹² These include Algeria, Bahrain, Lebanon, Syria, and U.A.E.

⁹³ See *WIPO-Administered Treaties*, WIPO, <http://www.wipo.int/treaties/en/> (last visited Mar. 21, 2012).

⁹⁴ See EVA STEINER, *FRENCH LAW: A COMPARATIVE APPROACH* part 1 (2010).

⁹⁵ Except Sudan, which follows a legal system based on the English common law in addition to Islamic laws. Gaza also has some limited adoption of the common law, but not the West Bank that partially follows the civil law; this situation is due to historical reasons. See CHIBLI MALLAT, *INTRODUCTION TO MIDDLE EASTERN LAW* chs. 1, 7 (2007).

To date, there has been limited research on Arab copyright laws in Arabic⁹⁶ or English,⁹⁷ which examines the importance of those laws to future social and economic development and how such laws should be restructured in order to deal with digital technologies and the Internet.⁹⁸

⁹⁶ See generally the following research in Arabic: Faisal Al Kandry, Paper, *Computer and Law Conference* at Emirates University, Dubai: “Civil Protection of Computer Software in Kuwaiti Law” (May 1–3, 2000); Mustafa Arjawi, Paper, *Computer and Law Conference* at Emirates University, Dubai: “Civil Protection for Computer Software” (May 1–3, 2000); Nazeh AL Mahdi, Paper, *Computer and Law Conference* at Emirates University, Dubai: “Civil Protection of Computer Software According to Applicable Laws” (May 1–3, 2000); Ahmad Saman, Paper, *Computer and Law Conference* at Emirates University, Dubai: “Legal Protection of Computer Software: Applications in Comparative Laws and in the Gulf States” (May 1–3, 2000); DALA ESSA WASNA, PROTECTION OF COPYRIGHT ON THE INTERNET (2002); NOURI HAMAD KHATER, EXPLANATION OF INTELLECTUAL PROPERTY RULES: AUTHOR’S RIGHTS AND NEIGHBOURING RIGHTS (2008); NAEAM IMGABGAB, PROTECTION OF COMPUTER SOFTWARE: A COMPARATIVE STUDY (2006); EMAD SALAMAH, LEGAL PROTECTION OF COMPUTER SOFTWARE AND SOFTWARE PIRACY PROBLEM (2005); ABD-AL RAZAQ AL SUNHOURI, EXPLANATION OF THE NEW CIVIL CODE 274–436 (3d ed. 1998); NAEAM IMGABGAB, ARTISTIC PROPERTY AND NEIGHBOURING RIGHTS: A COMPARATIVE STUDY (2000); MOHAMAD HOUSAM LOUTFI, LEGAL PROTECTION OF COMPUTER SOFTWARE (1987); ARAB ORG. FOR EDUC., CULTURE AND SCIENCE: COPYRIGHT IN THE ARAB WORLD IN ACCORDANCE WITH ARAB AND INTERNATIONAL LEGISLATION (1999); TOURKI HAMAD SAQAR, PROTECTION OF COPYRIGHT: THEORY AND PRACTICE (1996); MOHAMAD HOUSAM LOUTFI, PUBLIC PERFORMANCE RIGHT IN MUSICAL WORK: A COMPARATIVE STUDY BETWEEN EGYPTIAN AND FRENCH LAW (1987); EDWARD EAD, COPYRIGHT AND NEIGHBOURING RIGHTS IN THE LEBANESE, ARABIC AND FOREIGN LAWS (2001); ABD AL- RASHEED MAMOUN & MOHAMAD SAMI ABD ALSADAK, COPYRIGHT AND NEIGHBOURING RIGHTS (2008).

⁹⁷ Among the limited research on the copyright law in Jordan and Arab countries in English, see generally Fawzi Mulki, *Implementing National Copyright Law: A Jordanian Case Study*, in Proceedings of the 2d International Conference on Theory and Practice of Electronic Governance 191 (Tomasz Janowski & Theresa A. Pardo eds., 2008), available at <http://dl.acm.org/citation.cfm?id=1509134&bnc=1>, one of the few articles that investigates the major challenges including cultural and socio-economic resulting from the implementation of a national copyright law in a country such as Jordan. The author argues that public education; awareness campaigns and training programs are essential to the success of such law. See generally S. Al Sharieh, *The Purpose of Copyright Protection in Jordan and Canada: A Brief Comparison*, 2 INT’L J. INTELL. PROP. MGMT. 97 (2008) (comparing the copyright law in Jordan with the copyright law in Canada and argues that the Jordanian law is not balanced and aligned toward the interests of copyright holders and not users; the author does not offer specific suggestions on how to improve the copyright law in Jordan); Fayad Alqudah, *Legal Protection of Databases: A Study of Jordanian Law*, 22 ARAB L.Q. 338 (2008) (explaining a descriptive study that deals with the legal protection of databases under the copyright law in Jordan and international conventions that Jordan has signed, and arguing that the Jordanian protection of databases is in compliance with international standards in the TRIPS Agreement, and there is no further amendments needed to the law); David Price, Paper, 5th Asian Law Institute Conference in Singapore: “Copyright Protection in Developing States and the Enforcements Dichotomy: The Case of the Arab Gulf States” (May 22–23, 2008); KANAN, *supra* note 67; Makeen F. Makeen, *Moral Rights Protection Under Egyptian Authors’ Rights Law*, 38 INT’L REV. INTELL. PROP. COMPETITION L. 51 (2007); Makeen F. Makeen, *Authorship/Ownership of Copyright Works Under Egyptian Authors’ Rights*, 38 INT’L REV. INTELL. PROP. COMPETITION L. 571 (2007).

⁹⁸ See Housam Dean Al Sageir & Husam al Badrawi, *Copyright Law in the Egyptian Copyright Law: An Analytical Study from a Development Perspective* (2008) (detailing one of the few studies in Arabic that discusses the importance of copyright

The majority of literature on IP and the Arab world focuses on FTAs,⁹⁹ the pharmaceutical sector,¹⁰⁰ TRIPS,¹⁰¹ e-commerce and the Internet.¹⁰² Another category of writing that addresses IP and Arab

from a development perspective and providing a good critique of the Egyptian Intellectual Property Law and suggestions for future improvement of the law).

⁹⁹ See Mohammad Nasour, *Fundamental Facts of the United States-Jordan Free Trade Agreement: E-commerce, Dispute Resolution, and Beyond*, 27 *FORDHAM INT'L L.J.* 742 (2004) (giving a basic overview of the provisions of the FTA without particular analysis of these provisions); Malkawi, *supra* note 24 (outlining the provisions of the USJFTA in connection with IP and arguing that, in its current format, it does not serve as a good template for other Arab countries that want to also sign a FTA); David Price, *The U.S.-Bahrain Free Trade Agreement and Intellectual Property Protection in the Global IPRs Regime*, 7 *J. WORLD INTELL. PROP.* 829 (2004) (arguing that Bahrain's FTA will significantly impact the other Gulf states by establishing the new regional benchmark for IP to which other states will be pressures to accede); Mohammed K. El-Said, *The European TRIPS-Plus Model and the Arab World: From Co-operation to Association—A New Era*, 28 *LIVERPOOL L. REV.* 143 (2007); Paul G. Johnson, *Shoring U.S. National Security and Encouraging Economic Reform in the Middle East: Advocating Free Trade with Egypt*, 15 *MINN. J. INT'L L.* 457 (2006); Peter Drahos, *Bits and Bibs: Bilateralism in Intellectual Property*, 4 *J. WORLD INTELL. PROP.* 791 (2001) (arguing that Jordan's FTA contains several TRIPS-Plus provisions that are "more extensive protection" that is conferred by TRIPS); Ahmed Zahny, *The U.S. Egyptian Free Trade Agreement—Challenges and Prospects*, 16 *ARAB L.Q.* 106 (2001).

¹⁰⁰ El-Said & El-Said, *supra* note 26 (contending that, based on pure interviews, the USJFTA was not useful for the development of the Jordanian pharmaceutical sector).

¹⁰¹ See Mohammed El-Said, *The Road from TRIPS-Minus, to TRIPS, to TRIPS-Plus: Implications of IPRs for the Arab World*, 8 *J. WORLD INTELL. PROP.* 53 (2005) (examining how Jordan, Bahrain, and Morocco, in less than a decade, moved from TRIPS-Minus to TRIPS-Plus, and how that might restrain their ability to implement their agreements and limit their negotiation power multilaterally); EL-SAID, *supra* note 26; PRICE, *supra* note 26.

¹⁰² See Valentina M. Donini, *Bridging the Gap: Privatization Policy, Internet and E-commerce in Jordan* (European Univ. Inst. Schuman Ctr. for Advanced Studies, Working Paper No. RSCAS 37, 2006), available at http://cadmus.iue.it/dspace/bitstream/1814/6317/1/RSCAS_2006_37.pdf (stating the Jordanian e-transaction law and comparing it to other similar laws in the U.A.E and Tunisia; there is no mention of the importance of copyright laws to developments of Jordan and Arab world); Soumitra Dutta & Mazen E. Coury, *ICT in the Arab World*, in *GLOBAL INFORMATION TECHNOLOGY REPORT: READINESS FOR A NETWORKED WORLD* (Soumitra Dutta et al. eds., 2003), available at http://www.weforum.org/pdf/Global_Competitiveness_Reports/Reports/GITR_2002_2003/Arab_World.pdf; Jeker Hamna Anwar et al., *E-Transaction Law and Online Dispute Resolution: A Necessity in the Middle East*, 20 *ARAB L.Q.* 43 (2006); TONI ESA, *LEGAL REGULATION OF THE INTERNET* (2001); Mahmoud Al-Kandri, *Infringements of Copyright and Trademarks in Electronic Commerce: A Kuwaiti and Comparative Approach*, 17 *ARAB L.Q.* 3 (2002); Samer M. Qudah, *Legal Insights on the Dubai Electronic Transaction and Commerce Law*, 17 *ARAB L.Q.* 283, 286 (2002); Marwan Ibraheem & Hisaham Tahat, Paper, *21st BILETA Conference: Globalisation and Harmonization in Technology Law* at the University of Malta: "Regulating Electronic Contracts in Jordan" (April 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1498320; Rami Olwan, *Contracting and Proving Contracts in Cyberspace*, 26 *KUWAIT L.J.* 229 (2002) (in Arabic); Rami Olwan, *Conflicts Over Domain Names*, 22 *SHARIA L.J.* 239 (2005) (in Arabic); RAMI OLWAN, *CRITICAL REVIEW OF THE PROPOSED PALESTINIAN ELECTRONIC COMMERCE LAW* (2006).

countries¹⁰³ concentrates on how Sharia and Islamic jurisprudence protect IP provisions.¹⁰⁴

There has also been research carried out by economists on copyright-based industries in the Arab countries,¹⁰⁵ the economic performance of Arabic book translation industry,¹⁰⁶ the role of Small and Medium Enterprises (SMEs) as copyright owners and copyright users,¹⁰⁷ software piracy¹⁰⁸ and trademarks protection in the Arab

¹⁰³ See Essam Altamimi, *Current U.A.E. Copyright and how it Compares and Contrast with WTO's TRIPS Agreement and the Berne Convention*, 2 J. WORLD INTELL. PROP. 371 (1999); Erica Garduno & Frank J. Pietrucha, *Intellectual Property in the Arab World*, 4 GEO. J. INT'L AFF. 57 (2003), NOURI KHATER, *EXPLANATION OF THE RULES OF INTELLECTUAL PROPERTY—INDUSTRIAL PROPERTY* (2005) (comparing, in Arabic, Emirati, Jordanian, and French laws).

¹⁰⁴ See Heba A. Raslan, *Shari'a and the Protection of Intellectual Property Rights – The Example of Egypt*, 47 IDEA 497 (2007); Muhammad Amaullah, *Author's Copyright: An Islamic Perspective*, 9 J. WORLD INTELL. PROP. 301 (2006) (analyzing how Muslims view copyright according to divergent Islamic jurisprudence schools); Ali Khan, *Islam as Intellectual Property “My Lord! Increase me in Knowledge.”*, 31 CUMB L. REV. 631 (2001); Steven D. Jamar, *The Protection of Intellectual Property Under Islamic Law*, 21 CAP. U. L. REV. 1079 (1992); Richard E. Vaghan, *Defining Terms in the Intellectual Property Protection Debate: Are the North and South arguing past enough other when we say “Property”? A Property Lockean, Confusion, and Islamic Comparison*, 2 J. INT'L & COMP. L. 307 (1996), Amir H. Khoury, *Ancient and Islamic Sources of Intellectual Property Protection in the Middle East: A Focus on Trademarks* 43 IDEA 151 (2003); Ida Madiha bt. Abdul Ghani Azmi, *The Philosophy of Intellectual Property Rights Over Ideas in Cyberspace: A Comparative Analysis Between the Western Jurisprudence and the Shari'ah*, 19 ARAB L.Q. 191 (2004); Jonathan A. Claypool, *Islamic Law and Modern Patent Law*, 14 CASRIP NEWSL. (Ctr. for Advanced Study & Research on Intell. Prop., Seattle, Wash., Spring 2007, available at <http://www.law.washington.edu/Casrip/Newsletter/default.aspx?year=2007&article=newsv14i2Claypool>; Sajjad Chowdhry, *Intellectual Property in Islam*, DINAR STANDARD (Mar. 6, 2006), <http://dinarstandard.com/leadership/intellectual-property-rights-in-islam/>; Noera Ayaz, *Intellectual Property Gaining Protection in the Muslim World*, SCI. DEV. NETWORK (Mar. 2, 2006), <http://www.sciencedev.net/fe/Article.aspx?Aid=592>; M.A. Naser & W.H. Muhaisen, *Intellectual Property: An Islamic Perspective*, 56 J. COPYRIGHT SOC'Y U.S. 571 (2009).

¹⁰⁵ Najib Harabi, *Copyright-Based Industries in Arab Countries* (Univ. of Applied Scis., Paper No. 5181, 2004), available at http://mpra.ub.uni-muenchen.de/5181/1/MPRA_paper_5181.pdf (outlining empirically the economic performance of four key copyright-based industries in Morocco, Tunisia, Egypt and Jordan).

¹⁰⁶ Najib Harabi, *Economic Performance of the Arabic Book Translation Industry in Arab Countries* (Univ. of Applied Scis., Paper No. 4385, 2007), available at http://mpra.ub.uni-muenchen.de/4385/1/MPRA_paper_4385.pdf.

¹⁰⁷ Ahmead F. Ghoneim, *Intellectual Property in Arab Countries: SMEs as Copyright Owners and/or Copyright Users*, CIPE (Ctr. for Int'l Private Enter., Washington, DC), Apr. 16, 2003, available at <http://www.cipe.org/pdf/publications/fs/ghoneim.pdf>.

¹⁰⁸ Samir N. Hamade, *The Legal and Political Aspects of Software Piracy in the Arab World*, in PROCEEDINGS OF THE 3D INT'L CONF. ON INFO. TECH. (2006), available at <http://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=01611583> (arguing that stronger copyright laws and enforcement measures based purely on political preferences are not legal); Bassam Al-Talhouni, *New Tougher Copyright Legislation*, 18 EUR. INTELL. PROP. R. 302 (1996).

countries.¹⁰⁹ It is also important to note that there is a great deal of research that covers access to medicine in developing countries,¹¹⁰ the expansion of IP¹¹¹ and compulsory licensing.¹¹²

In contrast, research that deals with digital copyright has focused only on the interests of developed countries, with limited consideration of the interests of developing countries.¹¹³

Accordingly, the analysis and commentary concerning the *Copyright Law* in Jordan is of importance to many sectors of the economy and will help to provide a clearer picture of the role that copyright law plays in

¹⁰⁹ See Amir H. Khoury, *The Development of Modern Trademark Legislation and Protection in Arab Countries of the Middle East*, 16 TRANSNAT'L LAW. 249 (2003); Fayad Alqudah, *Protection of Well-Known Trademarks Under Jordanian Law*, INTELL. PROP. FORUM. (Intell. Prop. Soc'y of Austl. & N.Z., Melbourne, Austl.), Mar. 2009.

¹¹⁰ See Rosa Castro Bernieri, *Intellectual Property Rights in Bilateral Investment Treaties and Access to Medicines: The Case of Latin America*, 9 J. WORLD INTELL. PROP. 548 (2006).

¹¹¹ David Lea, *The Expansion and Restructuring of Intellectual Property and its Implication for the Developing World*, 11 ETHICAL THEORY & MORAL PRAC. 37 (2008).

¹¹² See Tshimanga Kongolo, *Compulsory License Issues in African Countries*, 7 J. WORLD INTELL. PROP. 185 (2004); Sandra Bartelt, *Compulsory Licensing Pursuant to TRIPS Article 31 in the Light of the Doha Deceleration on the TRIPS Agreement and Public Health*, 6 J. WORLD INTELL. PROP. 283 (2003).

¹¹³ See T. Pistorius, *Developing Countries and Copyright in the Information Age: The Functional Equivalent Implementation of the WCT*, 9 POTCHEFSTROOM ELECTRONIC L.J. 27 (2006), available at http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issues/2006_2__Pistorius_art.pdf; Mia Garlick, *Locking up the Bridge on the Digital Divide—A Consideration of the Global Impact of the U.S Anti-Circumvention Measures for the Participation of Developing Countries in the Digital Economy*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 941 (2004) (arguing that technological measures may not be helpful for developing countries to realize the full potential of digital technologies and Internet networks); Peter Drahos, *Developing Countries and International Intellectual Property Standard Setting*, 5 J. WORLD INTELL. PROP. 765 (2002) (contending that IP standards settings has been dominated predominately by the west (U.S. and E.U.), and hence developing countries can expect very few concessions on IP issues in either bilateral or multilateral agreements, and they should look for self-help); Clemente Forero-Pinda, *The Impact of Stronger Intellectual Property Rights on Science and Technology in Developing Countries*, 6 WORLD INTELL. PROP. 808 (2006) (argues that stronger protection of IP has extended from developed countries, affecting pharmaceuticals, biodiversity and ethnic knowledge); John Feather, *Copyright in Developing Countries: Necessity or Luxury?*, 25 INT'L INFO. & LIBR. REV. 15 (1993) (arguing that copyright is necessary for developing countries and is not regarded as luxury); Weerawit Weeraworawit, Paper, *5th Annual Asian IP Law and Policy Day* in New York, N.Y.: "Why do Developing Countries Fail to Use IP as a Tool for Development?" (Mar. 26, 2008); E.S Nwauche, Paper, *Copyright Workshop for Zimbabwe International Book Fair* in Zimbabwe: "Intellectual Property Rights, Copyright and Development Policy in a Developing Country: Options for Sub-Saharan African Countries" (July 30, 2003), available at <http://www.nigerianlawguru.com/articles/intellectual%20property%20law/INTELLECTUAL%20PROPERTY%20RIGHTS.%20COPYRIGHT%20AND%20DEVELOPMENT%20POLICY%20IN%20A%20DEVELOPING%20COUNTRY%20-%20OPTIONS%20FOR%20SUB-SAHARAN%20AFRICAN%20COUNTRIES.pdf>; Drahos, *supra* note 99; Christophe Antons, *Copyright Law Reform and Information Society in Indonesia*, in COPYRIGHT LAW, DIGITAL CONTENT AND THE INTERNET IN THE ASIA-PACIFIC (Brian Fitzgerald et al., eds., 2008).

the social and economic development in developing countries, particularly Arab countries.

C. Introduction to the copyright law in Jordan

The first *Copyright Law* in Jordan entered to force in 1992¹¹⁴ and has since been revised on several occasions, the latest revision taking effect in 2005.¹¹⁵ The *Copyright Law* in Jordan is primarily based on the “author’s rights” or “droit d’auteur”¹¹⁶ as it has come to be applied in Continental Europe (particularly France), rather than the Anglo-Saxon “copyright system,”¹¹⁷ present in common law jurisdictions, namely the U.S., Canada and the U.K.¹¹⁸

Amongst the differences that exist between the two systems is that the European “copyright system” has been predominantly influenced by the theory of natural law, while the common law “copyright system” is influenced by utilitarian theory.¹¹⁹ The copyright law legislation in civil law countries is principle-based and more abstract; it is shorter and less detailed compared to copyright status under the common law.¹²⁰

The main amendments to the *Copyright Law* in Jordan which have been made to date include:

- 1) The protection of computer software;¹²¹
- 2) Extension of the right of the copyright owners to include the right to control the online distribution of digital material;¹²²
- 3) The inclusion of civil and criminal provision¹²³ for the removal or alteration of RMI;¹²⁴

¹¹⁴ Before the 1992 Jordanian Copyright Law, the Othman Copyright Law of 1906 (Turk) was applicable in Arab countries including Jordan.

¹¹⁵ See Copyright Law No. 22 of 1992, Official Gazette of Jordan, No. 3821 (Apr. 16, 1992); see also Amendments to the Copyright Law No. 14 of 1998, Official Gazette of Jordan, No. 4304 (Oct. 1, 1998); Amendments to the Copyright Law No. 29 of 1999, Official Gazette of Jordan, No. 4383 (Oct. 2, 1999); Amendments to the Copyright Law No. 78 of 2003, Official Gazette of Jordan, No. 4606 (June 16, 2003); Amendments to the Copyright Law No. 88 of 2003, Official Gazette of Jordan, No. 4634 (Dec. 1, 2003); Amendments to the Copyright Law No. 8 of 2005, Official Gazette of Jordan, No. 4702 (Mar. 31, 2005).

¹¹⁶ See Copyright Law No. 22 of 1992, art. 8 (Jordan) (as amended).

¹¹⁷ See *id.* art. 9 (relating to moral rights that is based on the “author’s rights system” and not “copyright system”).

¹¹⁸ For further explanation of the difference between “droit d’auteur system” and the Anglo-Saxon or Anglo-American “copyright system,” see SILKE VON LEWINSKI, INTERNATIONAL COPYRIGHT LAW AND POLICY 33–63 (2008); S.M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS ch. 14 (2d ed. 1989); ELIZABETH ADENEY, THE MORAL RIGHTS OF AUTHORS AND PERFORMERS ch. 8 (2006).

¹¹⁹ VON LEWINSKI, *supra* note 118, at 38.

¹²⁰ *Id.* at 43.

¹²¹ Copyright Law No. 22 of 1992, art. 3(B)(8) (Jordan) (as amended).

¹²² *Id.* art. 9(A).

¹²³ *Id.* art. 54.

- 4) The inclusion of civil and criminal provision¹²⁵ on prohibiting the circumvention of TPMs;¹²⁶
- 5) Extension of the right of the performers to control distribution of their work in any form including electronic format;¹²⁷ and
- 6) Extension of the right of the producers of phonograms to control distribution of their work in any form including electronic format.¹²⁸

Despite these developments, in its February 2008 submission to the U.S. Trade Representative for the Special 301 Report,¹²⁹ the International Intellectual Property Alliance (IIPA), recommended Jordan for the IP monitored watch list, since piracy is still considered as a serious problem in the country and there are no proper enforcement measures.¹³⁰ Previously, in its 2007 submission for the Special 301 Report, the IIPA urged the U.S. Government to initiate immediate dispute settlement consultations under Article 16 (consultation) and Article 17 (dispute settlement) of the USJFTA to bring Jordan into compliance with its international obligations.¹³¹

The IIPA requested that Jordan amend its *Copyright Law* and fully implement the FTA signed with the U.S. in its 2009 Special 301

¹²⁴ RMI is “a technology such as digital watermarks that includes details about the copyright owners and terms and conditions of use of the copyright materials.” See ATTORNEY GENERAL’S DEP’T, AUSTRALIAN GOV’T, FACT SHEET: US FREE TRADE AGREEMENT IMPLEMENTATION ACT OF 2004 (2005), available at http://www.crimeprevention.gov.au/www/agd/agd.nsf/Page/Publications_Electronicrightsmanagement-Factsheet-March2005 (follow the link under “Downloads”).

¹²⁵ Copyright Law No. 22 of 1992, art. 55 (Jordan) (as amended).

¹²⁶ TPMs are “technical locks that copyright owners use to stop their copyright material from being copied or accessed” (e.g., passwords, encryption software and access codes).” *Copyright Amendment (Technological Protection Measures) Bill 2006 and related Regulations – Exposure Drafts*, AUSTRALIAN GOV’T, [http://www.ag.gov.au/Publications/Pages/CopyrightAmendment\(TechnologicalProtectionMeasures\)Bill2006andrelatedRegulationsExposureDrafts.aspx](http://www.ag.gov.au/Publications/Pages/CopyrightAmendment(TechnologicalProtectionMeasures)Bill2006andrelatedRegulationsExposureDrafts.aspx) (last visited Mar. 21, 2012). The E.U. Copyright Directive 2001/29/EC defines TPMs as “any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorized by the right holder of any of any copyright or any right related to copyright as provided by law or the sui generis right.” See Directive 2001/29 of the Council of May 22, 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L167) 10 (EC) (Information Society Directive); see also Ian Brown, *The Evolution of Anti-Circumvention Law*, 2 INT’L REV. COMPUTERS & TECH. 239 (2006).

¹²⁷ Copyright Law No. 22 of 1992, art. 23(A)(2) (Jordan) (as amended).

¹²⁸ *Id.* art. 23(C)(1).

¹²⁹ INT’L INTELL. PROP. ALLIANCE, 2008 SPECIAL 301 REPORT (2008), available at http://www.iipa.com/2008_SPEC301_TOC.htm.

¹³⁰ *Id.*

¹³¹ *Dispute Settlement: Jordan*, INT’L INTELL. PROP. ALLIANCE, 2007 SPECIAL 301 REPORT 487–92 (2007), available at <http://www.iipa.com/rbc/2007/2007SPEC301JORDAN.pdf>.

submission.¹³² The 2010 and 2011 Special 301 submissions do not mention Jordan.¹³³

VI. FUNDAMENTALS OF THE COPYRIGHT LAW IN JORDAN

This section will give an overview of the *Copyright Law* in Jordan for the purpose of understanding the law, prior to critiquing it in the next section.

A. Copyright subject matter

Copyright subject matter is defined in Article 3(B) of the *Copyright Law* in Jordan. Article 3(B) establishes the kinds of works that are copyright-protected, namely:¹³⁴

- Books, booklets or other written materials;
- Works which are recited orally such as lectures, speeches and sermons;
- Theoretical works, lyrical plays, musical plays and mime;
- Musical works, whether digitized or not, or accompanied with words or without;
- Motion picture works and audio and visual broadcast works;
- Works of art including paintings, photography, sculpture, engraving, architecture and applied and ornamentation arts;
- Illustrative figures, maps, layouts, charts and three-dimensional works related to geography and earth's level maps;
- Computer programs, whether in the source language or in the machine language.¹³⁵

The *Copyright Law* in Jordan does not require any formality for copyright protection including the requirement of registering the work

¹³² Jordan, INT'L INTELL. PROP. ALLIANCE, 2009 SPECIAL 301 REPORT 385–88 (2009), available at <http://www.iipa.com/rbc/2009/2009SPEC301JORDAN.pdf>.

¹³³ INT'L INTELL. PROP. ALLIANCE, 2010 SPECIAL 301 REPORT (2010), available at http://www.iipa.com/2010_SPEC301_TOC.htm; INT'L INTELL. PROP. ALLIANCE, 2011 SPECIAL 301 REPORT (2011), available at http://www.iipa.com/2011_SPEC301_TOC.htm.

¹³⁴ The list of copyrighted subject matter is non-conclusive, which is evidenced by the wording of article 3(B) that provides that “protection shall encompass works which are expressed in writing, sound, drawing, photography or movement and in particular.” Copyright Law No. 22 of 1992, art. 3(B) (Jordan) (as amended); see also *id.* art. 7(D) (expression of folklore); *id.* art. 3(D) (compilation of works); *id.* art. 3(D) (encyclopedias).

¹³⁵ The Jordanian Copyright Law also provides for the protection of related rights namely to performances (article 23(A)), broadcasts and televisions (article 23(B)), and sound recordings (article 23(D)). *Id.* art. 23(A)–(B). These were some of the latest amendments that were made to the law.

with any certain authority. One condition must be met to qualify for protection and that is originality (Article 3(A)).

The *Copyright Law* in Jordan allows reproduction of official documents without authorisation by the author or any form of payment or remuneration. There is no copyright on the official texts of legal, administrative or judicial nature, according to the exclusion made by Article 7(A).¹³⁶ Those documents fall immediately into the public domain.¹³⁷

Some copyright laws around the world have not protected government works and allow their use widely.¹³⁸ There are no clear rules under the *Copyright Law* in Jordan in connection with the status of government work in Jordan.¹³⁹

B. Economic or financial rights

The core exclusive, economic or financial rights of the copyright owner are specified in Article 9 of the *Copyright Law* in Jordan that includes the following:

¹³⁶ Article 7(A) of the Jordanian Copyright Law provides that protection shall not include:

Official documents, whatever the source or target language thereto, including legal text, regulations, decisions, international agreements, judicial rulings, arbitral awards, and judgments issued by administrative committees of judicial competence.

Copyright Law No. 22 of 1992, art. 7(A), OFFICIAL GAZETTE OF JORDAN, No. 3821 (Apr. 16, 1992) (as amended).

¹³⁷ Article 34 contains a specific provision public domain. *See id.* art. 34.

¹³⁸ The U.S. Copyright Act of 1976 defines government works as “a work prepared by an officer or employee of the U.S. government as part of that person’s official duties.” Copyright Act of 1976, § 101, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C. § 101). The term only applies to the work of the federal government, not state or local governments. In general, under section 105 of the Copyright Act, such works are not entitled to domestic copyright protection under U.S. law, sometimes referred to as noncopyright. *Id.* § 105. Section 105 provides that:

Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise

Id.; *see also* ANNE M. FITZGERALD, EUR. PUB. SECTOR INFO. PLATFORM, STATE OF PLAY: PSI REUSE IN AUSTRALIA (2010), *available at* <http://eprints.qut.edu.au/33206/>.

¹³⁹ The Jordanian State Secrets and Documents Law authorizes public officials to protect from public disclosure board categories of information that they designate as state secrets and impose criminal liability on any person who violated its provision under the law. State Secrets and Documents Law No. 150 of 1971, OFFICIAL GAZETTE OF JORDAN, No. 2315 (Aug. 1, 1971). State secrets and documents are categorized as strictly confidential, confidential and restricted. *Id.* These official documents must be protected from tampering or any loss and may not disclose the contents of said documents to anyone other than competent parties unless otherwise authorised.

See id.; *see also* JORDAN MEDIA STRENGTHENING PROGRAM, USAID, AN INTRODUCTION TO NEWS MEDIA LAW AND POLICY IN JORDAN 45–46 (Douglas Griffin & Libby Morgan eds., 2009), *available at* http://www.global.asc.upenn.edu/docs/jordanwebpage/JMSPprimer_eng.pdf.

- The right to reproduce his or her work by any method or form, either temporary or permanent, including photocopying, cinematography or digital recording (the reproduction right);
- The right to translate his or her work into another language, adapt it, orchestrate it or make any alteration thereto (the right of translation and adaptation);
- The right to allow usage of one or more copies of his or her work by persons using the work for rental, lending or other actions related to displaying the work to the public (the right of rental and lending);
- The right of distribution and making copies either, by selling or any other conduct of transfer of ownership (the right of distribution);
- The right of importing copies of a work in commercial quantities, even if the copies were reproduced with an authorisation from the right owner (the right of importation); and
- The right to convey his or her work to the public through recital, display, acting, radio or television broadcasting, cinema or through any other means (the right of communication to the public).¹⁴⁰

C. Moral rights

In many countries copyright law also provides authors with moral rights. The *Copyright Law* in Jordan treats a protected work as an extension of the personality of the author. Article 8 recognizes the following as moral rights:¹⁴¹

- The right to attribute to him or herself a work and to have his or her name listed on all produced copies every time the work is put forward to the public, unless the work is mentioned incidentally during a news representation of the current events (the right of respect or paternity);
- The right to make the decision regarding the publication of his or her work and the specification of the mode and date of publication (the right of divulgation);
- The right to make any amendments to his or her work whether by change, revision, deletion or addition (the right of consideration);

¹⁴⁰ *Id.* art. 23 (outlining the economic or financial rights of copyright owners of related rights (performers, broadcast, television organisations, and producers of sound recordings)).

¹⁴¹ *Compare id.*, with Code de la Propriété Intellectuelle [C.P.I.] L121-129 (Fr.), available at http://www.legifrance.gouv.fr/html/codes_traduits/cpiatext.htm (French Intellectual Property Code No. 92-597 of July 1, 1992, as amended).

- The right to repel any attack on his or her work, to prohibit any distortion, misrepresentation, or any other amendments to the work which may harm to his or her reputation and honour. However, if any deletion, change, addition or other amendments took place in the translation of the work, the author shall not have the right to prevent it unless the translator neglected to refer to the places of this change, or if the translation caused damage to the reputation of the author and his or her cultural or artistic standing or distorted the contents of the work (the right to object to derogatory treatment of the work); and
- The right to withdraw his or her work from circulation in cases where serious and legitimate reasons existed for this withdrawal. In such cases the author shall be obliged to fairly compensate the holder of the financial exploitation rights (the right of retraction).

In some countries, like Australia, moral rights last for the duration of the copyright,¹⁴² while in other countries, such as China¹⁴³ and France,¹⁴⁴ moral rights are “unlimited” or “perpetual”: they last forever.¹⁴⁵ There is no express provision in the *Copyright Law* in Jordan that covers the duration of moral rights.¹⁴⁶ Under the law, moral rights ‘are not liable for prescription or assignment.’ The Jordanian position is similar to the *French Intellectual Property Code* in Article L121 (1).¹⁴⁷

¹⁴² Section 195 AM of the Australian Copyright Act provides that:

(1) An author’s right of integrity of authorship in respect of a cinematograph film continues in force until the author dies. (2) An author’s right of integrity of authorship in respect of a work other than a cinematograph film continues in force until copyright ceases to subsist in the work. (3) An author’s moral rights (other than the right of integrity of authorship) in respect of a work continue in force until copyright ceases to subsist in the work.

See *Australian Copyright Act, 1968*, s 195 AM (Austl.), available at http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/.

¹⁴³ Article 20 of the Chinese Copyright Law, as amended, provides that “[t]he rights of authorship, alteration and integrity of an author shall be unlimited in time.” (中华人民共和国著作权法) [Copyright Law of the People’s Republic of China of 1990] (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990) art. 20 (as amended), available at <http://www.chinaiprlaw.com/english/laws/laws10.htm>.

¹⁴⁴ Code de la Propriété Intellectuelle [C.P.I] L121-1 (Fr.).

¹⁴⁵ Brian Fitzgerald & Rami Olwan, *Copyright in the UAE in the Digital Age*, 32 J. WORLD INTELL. PROP. 565–66 (2010).

¹⁴⁶ In *Mahkamat al-Tamiex [Taimez]* [Court of Cassation-Civil Division], No. 2648/2003, Nov. 11, 2001, the Court mentioned clearly that according to articles 3, 8, and 9 of the Jordanian Copyright Law, as amended moral rights are personal rights protected after the death of the author. Transfer of economic rights will allow the author to object to any derogatory treatment, or any other amendment on his work or abuse that causes damage to his honour and reputation. The latest draft of the copyright law of Jordan of 2010 provides clearly in article 7 that moral rights are unlimited and non-inalienable. See Copyright Law No. 22 of 1992, art. 7, OFFICIAL GAZETTE OF JORDAN, No. 3821 (Apr. 16, 1992) (as amended).

¹⁴⁷ Article L121-1 of the French Intellectual Property Code provides that an “author shall enjoy the right to respect for his name, his authorship and his work,” and that this

The scope of the moral rights as discussed in Article 8 of the *Copyright Law* in Jordan is based upon a literal adaptation of the *Berne Convention*.¹⁴⁸

D. Authors

Under Article 4(A)(1)¹⁴⁹ of the *Copyright Law* in Jordan “the person who publishes the work attributed as his own, whether by indicating his name on the work or by any other way, shall be considered the author unless there is proof to the contrary.” Under Article 4(A)(2), persons publishing their name under a pseudonym or an anonym shall also be deemed as authors. A corporate entity can also be recognized as the author of collective work if it directed its creation (Article 35(C)).

right “shall attach to his person,” “shall be perpetual, inalienable and imprescriptible,” and “may be transmitted to mortis causa to the heirs of the author.” Code de la Propriété Intellectuelle [C.P.I] L121-1 (Fr.).

¹⁴⁸ Article 6bis of the Berne Convention provides that:

- (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.
- (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.
- (3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

Berne Convention for the Protection of Literary and Artistic Works art. 6bis, Sept. 9, 1886, S. TREATY DOC. No. 99-27 (1986) (as amended) [hereinafter Berne Convention]. The 1979 amended version does not appear in U.N.T.S. or I.L.M. Article 9 provides that:

- (1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.
- (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.
- (3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

Id. art. 9.

¹⁴⁹ Article 4 of the Jordanian Copyright Law was amended in 2005. See Amendments to the Copyright Law No. 8 of 2005, OFFICIAL GAZETTE OF JORDAN, No. 4702 (Mar. 31, 2005).

Article 5 of the *Copyright Law*¹⁵⁰ in Jordan determines who is considered an author,¹⁵¹ including translators, performers and creators of encyclopaedias and collections. Protection is given to authors with innovative literary, artistic and scientific works, regardless of their kind, importance or the purpose of their production (Article 3).

E. Ownership and duration/term

Under the *Copyright Law* in Jordan, the author or his successors in title to the work may grant licenses and transfer some or all of his financial or economic rights either to a natural person or a corporate entity provided that the transfer is evidenced in writing. The transfer agreement must specify and detail every right being disposed of by indicating its 'extent, purpose, period and place of exploitation'.¹⁵²

The term or length of protection that copyright law provides will depend on the type of copyright subject matter that is in issue. For example, under the *Copyright Law* in Jordan, copyright in a book or

¹⁵⁰ According to article 5 of the Jordanian Copyright Law the following persons shall also qualify as authors of works:

- (A) A person who translates the work into another language, converts it from one form of the forms of literature, arts or sciences into another form, summarizes it, alters it, amends it, illustrates it, comments on it, catalogues it or performs any other action which makes the work appear appears in a new form;
- (B) The performer which conveys to the public the work of others whether or not this performance was by singing, playing a musical instrument, rhythm, recital, photography, drawing, movement, steps or any other method; and
- (C) Authors of encyclopaedias, collections, compiled data and compilations, which are granted protections by virtue of this law.

Copyright Law No. 22 of 1992, art. 5(A)–(C) (Jordan) (as amended).

¹⁵¹ Joint authorship is occurs under article 35(A) of the Jordanian Copyright Law when:

More than one person contributed to making a single work such that the share contributed by each cannot be separated, they shall be considered as owners of the work with each having an equal share unless they agree to do something different. None of them shall, in this case, exercise the copyrights with respect to this work without the consent of all the authors.

Id. art. 35(A).

¹⁵² Article 28 of the Jordanian Copyright Law provides that:

The author may dispose of any of his rights with respect to the work on the basis of sharing with others in a percentage of the revenues or profits resulting from the financial exploitation of the work by the others. A precondition is that the author shall have the right to obtain an additional share of the said revenues or proceeds, if it is established that the agreement concerning the exploitation of his work was not fair to his interests, or became so for condition and circumstances which were not known at the date of the contracting or which took place afterwards.

Id. art. 28.

software will last for the life of the author plus fifty years after his or her death (Article 30).¹⁵³

F. Treatment of foreign copyright

Pursuant to a series of international conventions starting with the *Berne Convention* and including the *Rome Convention*, the *TRIPS Agreement*, WCT and WPPT, many countries will protect the copyright of a foreigner under their law, as if the foreigner were a citizen of their country. This is known as the principle of “national treatment.”¹⁵⁴

The *Copyright Law* in Jordan protects foreign works in Article 56.¹⁵⁵ In Article 56, “reciprocity” is different from “national treatment” and

¹⁵³ For a performer or producer of phonograms, copyright will last for fifty years from the end of the year where the fixation was made or the performance took place (article 23(E)), for a broadcast organisation, copyright in a broadcast will last for twenty years from the end of the year when the broadcast took place (article 23(E)), and for applied works, copyright will last for twenty five years starting from an arbitrary date for the archiving of the work (being the first of January in the calendar year in which the work was actually archived (article 32).

Id. arts. 23(E), 32; *see also* Berne Convention, *supra* note 148, art. 7, ¶ 1; TRIPS, *supra* note 32, art. 9, ¶ 1.

¹⁵⁴ Edward J. Ellis, *National Treatment Under the Berne Convention and the Doctrine of Forum Non Conveniens*, 36 IDEA 327 (1996). Article 5 of the Berne Convention provides that:

Authors shall enjoy, in respect of works for which they are protected under this convention, in countries of the union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as the rights especially granted by this Convention.

Berne Convention, *supra* note 148, art. 5.

¹⁵⁵ Article 56 of the Jordanian Copyright Law provides that:

- (A) The provisions of this law shall apply to the works of Jordanians and foreigners which are published or not published and which are expressed by any of the means stipulated in paragraph (B) of article 3 inside the Kingdom as well as the works of Jordanians which are published or not published and which are expressed by any of the means stipulated in paragraph (B) of article 3 outside the Kingdom.
- (B) Taking into consideration the provisions of the international agreements concerning copyright and in case of their non-applicability, the principle of reciprocity shall be applied. The provisions of this law shall apply to the works of foreign authors which are published or not published and which are expressed by any of the means stipulated in paragraph (B) of article 3 of this law outside the Kingdom.
- (C) For the purposes of the application of this law, the authors who have regular residence in one of member countries in the international agreements dealing with copyright, which Jordan has acceded to, without being citizen of that country shall be treated as citizen of the Kingdom. This article shall also apply to the holders of the rights stipulated in article 23 of this law.

Copyright Law No. 22 of 1992, art. 56(A)–(C) (Jordan) (as amended). *Compare id.*, with United Arab Emirates Federal Law No. 7 of 2002 Pertaining to Copyright and Neighbouring Rights, art. 44 (as amended) (“Without prejudice to the provisions of International conventions applicable in the State; if disputes arise in respect of the

fails to meet the standards of international copyright agreements of the *Berne Convention*, the *Rome Convention*, TRIPS, WCT and WPPT.¹⁵⁶ Article 56(C) suggests that Jordan has adopted national treatment in respect of foreign authors and that the principle of reciprocity in Article 56(B) is being applied only where the relevant international conventions are not applicable.¹⁵⁷

G. Work for hire

Article 6 of the *Copyright Law*¹⁵⁸ in Jordan provides for the cases of the work created under a contract of employment. If the employee creates a work using the tools and experience of his employer, then the economic rights will be accorded to the latter, unless otherwise agreed in writing.¹⁵⁹

H. Limitations to author's exclusive rights

Under copyright laws throughout the world, the exclusive economic or financial rights of the copyright owner are normally subject to limitations and exceptions. These limitations and exceptions permit various uses of copyright material for no cost and without the permission of the copyright owner in specified circumstances.¹⁶⁰

laws, provisions of the law herein shall apply to the works, performances, phonograms and broadcasts made by foreigners, provided that the principle of reciprocity is applied.”).

¹⁵⁶ See ADRIAN STERLING, *WORLD COPYRIGHT LAW* 151, 605 (2003); VON LEWINSKI, *supra* note 118, at 100–01, 112–13; Fitzgerald & Olwan, *supra* note 145, at 567–68.

¹⁵⁷ Fitzgerald & Olwan, *supra* note 145.

¹⁵⁸ Amended by the latest amendments to the law.

¹⁵⁹ Article 6 of the Jordanian Copyright Law provides:

- (A) If the work was innovated for the account of another person, the copyrights shall revert to the innovated author unless there is a written agreement stipulating otherwise.
- (B) In spite of the inclusions of paragraph (A) of this article and in any other Law, if an employee created during his employment a work related to the activities or business of the employer, or uses the experiences, information, instruments or articles of the employer under the employee's own disposal in his attempt to create such work, the copyrights shall be to the benefit of the employer, unless otherwise agreed upon in writing.
- (C) The Intellectual property rights shall be to the benefit of the employee, if the intellectual property right created by the same is not related to the business of the employer, and the employee does not use the experiences, information, instruments, or raw materials of the employer in his attempt to conduct such creation, unless otherwise agreed upon in writing.

Copyright Law No. 22 of 1992, art. 6(A)–(C) (Jordan) (as amended).

¹⁶⁰ See Teresa Hackett, *Exceptions and Limitations in Copyright Vital for South Countries*, THIRD WORLD NETWORK (Nov. 3, 2008), http://www.twinside.org.sg/title2/intellectual_property/info.service/2008/twn.ipr.info.0

There are three categories of limitations and exceptions:¹⁶¹ 1) those that safeguard fundamental user rights concerning the individual, 2) those concerning commercial interest, industry practice and competition, and 3) those concerning society at large and aimed towards the promotion and dissemination of knowledge and information.¹⁶²

The *Copyright Law* in Jordan has its roots in the French and the European legal system, which do not use the terms “fair use” or “fair dealing,” but instead make reference to “limitations to an author’s exclusive rights.”

Jordan has followed, through its *Copyright Law*, the limitations and exceptions established by the *Berne Convention*: certain uses of public lectures for information purposes (Article 2 bis(2)); reproduction in general (Article 9(2)); quotation (Article 10(1)); illustration for teaching (Article 10 (2)); certain uses of works on certain events (Article 10 bis (1)); and incidental uses of works when reporting on current event (Article 10 bis (2)).¹⁶³ Any limitation and exception, as specified under the *Copyright Law* in Jordan, should comply with the “three-step test” as follows:

1. The limitation or exception is set under specific cases;
2. There is no conflict with normal exploitation of the work; and
3. The limitation and exception cannot prejudice the author’s interest.¹⁶⁴

81102.htm; FERNANDO DOS SANTOS ET AL., ACA2K, COUNTRY REPORT: MOZAMBIQUE (2009), available at http://www.aca2k.org/attachments/154_Mozambique_ACA2K_Country_Report.pdf; CONSUMERS INT’L, COPYRIGHT AND ACCESS TO KNOWLEDGE: POLICY RECOMMENDATIONS ON FLEXIBILITIES IN COPYRIGHT LAWS (2006), available at http://www.soros.org/initiatives/information/focus/access/articles_publications/publications/copyright_20060602/copyright_access.pdf.

¹⁶¹ Hackett, *supra* note 160.

¹⁶² Examples of the first kind include: the reproduction of public speeches, the right to make quotations, reporting current events, parody, and reproduction for private non-commercial use. *See id.* Examples of the second kind include: press reviews, ephemeral recordings by broadcasting organisations, museum catalogues, and de-compilation/reverse engineering of computer programmes for interoperability. *See id.* Examples of the third kind include provisions for libraries, educators for teaching and research, people with disabilities, reporting of parliamentary and judicial proceedings, and religious celebrations. *See id.*

¹⁶³ *See* VON LEWINSKI, *supra* note 118, at 564; *see also* TRIPS, *supra* note 32, art. 9, ¶ 1.

¹⁶⁴ Article 13 of the *TRIPS Agreement* provides that:

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

TRIPS, *supra* note 32, art. 13.

1. Reproduction for translation purposes (Article 11(A))

Article 11(A) of the *Copyright Law* in Jordan gives any Jordanian who is working in a pre-college or a college for research purposes the right to obtain a non-exclusive and non-assignable licence from the Minister of Culture (or whomever the Minister deputizes) to translate any foreign work to Arabic and to publish that work in any form, provided that three years have passed since the first publication of the work and there is no available Arabic translation of the work or if all existing Arabic translations are out of stock. In the event of the granting of a non-exclusive licence for translation from the Minister of Culture, the author has a right to fair compensation determined in accordance with the law.¹⁶⁵

2. Reproduction of published works (Article 11(B))

Article 11(B) of the *Copyright Law* in Jordan also gives any Jordanian who is working in a pre-college or a college the right to obtain a non-exclusive and non-assignable licence from the Minister of Culture (or whomever the Minister deputizes) to reproduce and publish any published work, provided that certain conditions are met.¹⁶⁶

3. Reproduction for private purposes (Article 17(A) and (B))

The *Copyright Law* in Jordan allows the reproduction of a published work exclusively for the user's private purposes, without the need to

¹⁶⁵ Copyright Law No. 22 of 1992, art. 11(D) (Jordan) (as amended).

¹⁶⁶ These conditions are as follows:

- (1) The passage of three years since the first publication date of any printed work related to technology, physical sciences, physics, or mathematics or the passage of seven years since the first publication of poetry, theatrical or musical works, books of art and fiction or the passage of five years since the first publication of any other printed works.
- (2) The non-availability of enough copies that have been distributed of the works in the Kingdom as to fulfil the needs of the general public, pre-college education or college education by the holder of the reproduction right or through his authorization at a price commensurate with the prices in the Kingdom of similar works.
- (3) The copies published under this item are sold at a price which is equal or less than the price stipulated in item (2) of this paragraph.
- (4) Upon granting a non-exclusive and a non-assignable licence for reproduction from the Minister of Culture, the author of the work shall deserve a fair compensation determined in accordance with the law.

Id. art. 11(B).

obtain permission from the author or any payment or remuneration, provided that certain conditions are met.¹⁶⁷

4. Reproduction for teaching and educational purposes (Article 17(C))

Article 17(C) is one of the most important limitations related to access to knowledge (A2K) and it provides that:

The published works maybe used, without the consent of the author, subject to the following conditions, and in the following cases:

(C) Using the work for illustration in teaching, using publications or programs, audio recordings, and audio-video recordings for educational, cultural or religious purposes or for vocational training within the limits necessary to achieve these goals, provided that using this work does not result in any financial gain and that the name of the work and author are mentioned.

The law does not specify what is considered as a reasonable limit and leaves the matter to the judge who might appoint an expert in cases where a dispute arises, to consider what is “reasonable copying”. Copying should be by all means in accordance with the normal practice of research and should not exceed the main purpose of critiquing, discussion, explanation, educational, cultural, religious and vocational training.¹⁶⁸

¹⁶⁷ Article 17 provides as follows:

The published works maybe used, without the consent of the author subject to the following conditions and in the following cases:

- (A) Presenting, displaying, reciting, acting or playing musically the work in a private family gathering or in an educational. Cultural or social institution by way of illustration for educational purposes. The musical bands of the State may play musical works provided that in all the foregoing no financial gain is achieved and the source and the name of the author, if available, are mentioned.
- (B) Employing the work for private personal usage by making a single copy by reproduction, recording, copyright, translation or musical orchestration, provided that all the foregoing does not interfere with normal exploitation of the work and does not cause unjustified damage to the legitimate interests of the right holder

Id. art. 17.

¹⁶⁸ According to article 17(C), teachers and vocational trainers should not reproduce publications, programs, audio recordings and audio-video recordings for profit making and in all cases must indicate clearly the name of the author and the title of his work. *Id.* art. 17(C).

5. Reproduction in the form of quotation (Article 17(D))

Reproduction in the form of quotation is allowed without the need of any permission by the author or payment of any remuneration, subject to the condition that the source and the author's name are mentioned.¹⁶⁹

The quotation as prescribed in Article 17(D) above has to be in accordance with the normal custom and practice of research and must not exceed what is necessary to achieve its purpose.

6. Reproduction for information purposes (Articles 18 and 19)

To encourage freedom of expression, Article 18 of the *Copyright Law* in Jordan allows for the reproduction of an important public domain article on politics, economics or religion published in a non-Jordanian newspaper, without permission by the author or payment of any remuneration, but subject to the obligation to mention the source where the article has been reproduced.

Article 19 of the *Copyright Law* also gives newspapers and media organizations the right to produce works for publication purposes such as speeches, lectures, interviews and other similar works which are presented openly or are directed to the public, without obtaining the consent of the right holder.¹⁷⁰

7. Reproduction for libraries, non-commercial documentation centers, educational, scientific and cultural institutions (Article 20)

This generic limitation for libraries, non-commercial documentation centres, educational institutions and scientific or cultural institutions in Article 20 of the *Copyright Law*, allows reproduction of partial or entire works through photocopying or otherwise, if the activities of those institutions are not directly profit-making.¹⁷¹ Reproduction is allowed subject to three conditions:

¹⁶⁹ Article 17(D) provides that:

The published works maybe used, without the consent of the author subject to the following conditions and in the following cases:

- (A) Quoting paragraphs of the work into another work for purposes of illustration, explanation, discussion, critique, cultivation, or examination within the limits justified by these purposes and provided that the names of the work and author are mentioned.

¹⁷⁰ Article 7(B) does not protect published, broadcast, or public conveyed news unless it was distinguished by a personal effort involving innovation and arrangement. *See id.* art. 7(B).

¹⁷¹ Article 20 provides:

Public libraries, non-commercial documentation centres, educational institutes and scientific and cultural institutions may reproduce any work by photocopying or otherwise and without the consent of the

- The number of photocopying and copies are limited to the needs of these institutions;
- The photocopying does not lead to damaging the copyright of the author; and
- The photocopying does not interfere with the normal exploitation of the work.

It is worth noting that commercial and private libraries do not qualify for this particular limitation under Article 20 of the *Copyright Law*. The law does not mention commercial or private libraries. Indeed, the majority of the libraries in Jordan are either public libraries or connected to a university.¹⁷² The photocopying quota for public libraries and educational institutions is not clear from the *Copyright Law* in Jordan. This should be determined in accordance with accepted practices in research and the rules of each library.

I. *Infringement and remedies*

Articles 46-55 of the *Copyright Law* contain extensive provisions on infringement and remedies. Usually, judges appoint experts to determine whether a copyright infringement occurred, but the final decision is left to the presiding judge, who is expected to give proper legal justification for the decision. The *Copyright Law* provides the author or copyright owner with various remedies against infringers including precautionary or provisional measures, enforcement measures at the border,¹⁷³ and

author provided that the number of photocopying and the number of the copies are limited to the needs of these institutions, provided that these actions do not lead to damaging the copyright of the author and do not interfere with the normal exploitation of the work.

Id. art. 20.

¹⁷² There are also private libraries such as the Abdul Hameed Shoman Library in Amman. *Library, ABDUL HAMEED SHOMAN FOUND.,* <http://www.shoman.org/en/content/about-library> (last visited Mar. 21, 2012).

¹⁷³ Article 47 provides also the following administrative measures: (1) The destruction of the reproductions of the work or the copies made of it which were illegally published as well material used in its publication; (2) The change of the features of the reproductions, the copies and materials or order that they be made unusable; and (3) The confirmation of the seizure for the settlement of the compensation adjudicated for the author if it is established that the copyright in the work will lapse after two years from the date the ruling become absolute. Copyright Law No. 22 of 1992, art. 47 (Jordan) (as amended). The administrative measures according to article 47 are not applicable on the following:

- (B) [T]he court shall not order the destruction of the reproductions of any work, the copies made thereof or the change of their features if the dispute is related to the translation of the work into Arabic. The ruling of the court should in this case be limited to confirming the seizure of the work, its reproductions, or the copies made thereof as may be required.
- (C) In no case shall buildings and what they have in or on them of engravings, drawings, ornamentations, or geometrical figures

civil and criminal penalties. Article 51 of the *Copyright Law* determines the acts that are considered to be infringement of copyright.¹⁷⁴

Any infringement of Articles 8, 9, 10 and 23 of the *Copyright Law* in Jordan shall be penalized according to Article 51 by imprisonment for a minimum of three months and a maximum of three years and a fine of no less than one thousand Dinars (\$1410.00) and not exceeding six thousands Dinars¹⁷⁵ (\$8463.00), or one of these two sentences.¹⁷⁶

Article 52 punishes any person who violates the provisions of Articles 38, 39, 41 and 42 of the *Copyright Law* in Jordan by a fine of not less than 500 Dinars (\$706.00) and not exceeding one thousands Dinars (\$1410.00).

VII. CRITIQUE OF THE COPYRIGHT LAW IN JORDAN

This section examines the provisions of the *Copyright Law* in Jordan that deal with digital issues. It then analyses these provisions from a developmental perspective and provides recommendations for reform.

A. *The right of reproduction*

The right of reproduction is the most fundamental privacy right in the 21st century and the oldest among all the economic rights.¹⁷⁷ Its

be subject to seizure. Furthermore, no ruling shall order their destruction, the change of their features, or their confiscation for the purpose of safeguarding the architect's rights whose designs were used in the buildings and whose drawings were put in them illegally. This shall not violate his right in obtaining a fair compensation regarding the foregoing.

Id.

¹⁷⁴ The infringing acts are in article 51(A) as follows:

- (1) Any person who exercised without a legitimate reason any of the rights stipulated in the Articles 8, 9, 10 and 23 of this law.
- (2) Any person who offers for sale, circulation or rental any limited work, or reproduction thereof, disseminated it to the public in any way, or used it to obtain financial gain or imported it into the Hashemite Kingdom of Jordan or exported it outside the Kingdom while the knowledge or reasonable grounds to know that it was imitated work.

Id. art. 51(A).

¹⁷⁵ The amount was amended from 3000 JD (\$4230) to 6000 JD (\$8460) in accordance with the Jordanian Copyright Law. *See id.*

¹⁷⁶ Article 51(B) states:

In case of recidivism with respect to any of the crimes stipulated in [articles 8, 9, 10, and 23] the person who committed it shall be sentenced to the maximum term of imprisonment and the maximum fine. In such case the court may also issue a ruling for the closure of the establishment in which the crime was committed for a period not exceeding one year or the suspension of its license for a certain period of time or permanently.

Id. art. 51(B).

¹⁷⁷ WALTER ARTHUR COPINGER & E.P. SKONE JAMES, COPINGER AND SKONE JAMES ON COPYRIGHT 369 (Kevin Garnett et al. eds., 15th ed. 2005).

importance derives from how it critically affects the right of owners to control access to their work, combat piracy and licence legitimate users.

The right of reproduction has been dealt with in earlier copyright treaties such as the *Berne Convention*, but digital technologies raise new questions regarding its scope¹⁷⁸ and applicability over Internet networks.

Among the questions that any legislator must face is whether temporary transient copies made in the computer Random Access Memory (RAM) can be considered a reproduction and an infringement of the copyright law.

The appropriate application of the reproduction right in the case of temporary copies in RAM continues to be a subject of debate at both national and international levels.¹⁷⁹ Some argue that the temporary copying of a computer program into the RAM of the computer in which the program is being used is a reproduction of the program in a material form.¹⁸⁰ Many have criticized this principle in the context of Internet browsing, arguing that it extends copyright protection for digital works too far.¹⁸¹

Article 9 of the Jordanian Copyright Law¹⁸² provides as follows:

The author shall have the right to financially exploit his work in any way he chooses. No other person may exercise this right without his written permission, or the permission of his successors. This right shall include:

(A) The right of reproduction of the work by any means or form whether it is temporary or permanent such as photocopying, cinematography or digital recording.

The *Copyright Law* in Jordan does not allow temporary copies to be made in RAM since Article 9(A) gives the author the right to control all reproduction of his copies, whether they are temporary¹⁸³ or permanent. The result is that browsing the Internet is considered as an infringement

¹⁷⁸ VON LEWINSKI, *supra* note 118.

¹⁷⁹ WORLD INTELL. PROP. ORG., INTELLECTUAL PROPERTY ON THE INTERNET: A SURVEY OF ISSUES (2002) [hereinafter WIPO SURVEY], available at <http://www.wipo.int/export/sites/www/copyright/en/e-commerce/pdf/survey.pdf>.

¹⁸⁰ See *Microsoft Corp. v. Blanch* [2002] FCR 895 (Austl.); *Microsoft Corp. v. Business Boost Pty. Ltd.* [2000] FCR 1651 (Austl.); ANNE FITZGERALD & BRIAN FITZGERALD, INTELLECTUAL PROPERTY IN PRINCIPLE 110 (2005); JAMES LAHORE & WARWICK A. ROTHNIE, COPYRIGHT AND DESIGN 51 (3d ed. 2004); *Copyright Amendment (Digital Agenda) Act 2000* (Cth) (Austl.), available at http://www.austlii.edu.au/au/legis/cth/consol_act/caaa2000294/; ANNE FITZGERALD & DIMITRIOS G. ELIADES, INTELLECTUAL PROPERTY 70–73 (3d ed. 2008).

¹⁸¹ FITZGERALD & FITZGERALD, *supra* note 180, at 110.

¹⁸² Article 9(A) of the *Copyright Law* in Jordan was amended in the *Law No. 9 of 2005* after Jordan signed the WCT and the WPPT.

¹⁸³ “Temporary” is not defined by the Jordanian Copyright Law, the Berne Convention, WCT or the WPPT. It implies that a copy will be deleted, destroyed or will otherwise disappear within some limited, although not necessarily short times. See COPINGER & SKONE JAMES, *supra* note 177, at 479.

of the reproduction right (if it is not subject to any limitation). The *Copyright Law* in Jordan currently does not provide any such limitation to transient or temporary copies.

Article 9(A) differs from some copyright laws in Arab countries that allow temporary copying in the RAM and do not consider it an infringement of the reproduction right.¹⁸⁴ Article 9(A) gives extensive protection to the copyright owner. It has followed the position of Article 4(10) of the USJFTA¹⁸⁵ that does not allow any sort of temporary copying, even if it is not considered infringement.

Many argue that the inclusion of temporary copying within the scope of the reproduction right under Article 9(A) of the *Copyright Law* in Jordan is overly restrictive from the perspective of consumers and Internet users, because it would effectively make temporary reproductions occurring in the course of ordinary usage of electronic devices and digital networks illegal.¹⁸⁶ Furthermore, this provision is criticized for disturbing the flow of information over the Internet, as the law needs to be a facilitator, rather than an inhibitor, of knowledge distribution.¹⁸⁷

One Jordanian copyright scholar suggested that the *Copyright Law* in Jordan should find infringement occurring in the context of temporary copies only when the work is distributed to the public.¹⁸⁸ This means

¹⁸⁴ The Egyptian Intellectual Property Law provides as follows:

Without prejudice to the moral rights of the author under this Law, the author may not, after the publication of the work, prevent third parties from carrying out any of the following acts: . . .

- (9) Ephemeral reproduction of a work where such reproduction is made in relay, during a digital transmission of the work or in the course of a process of reception of a digitally stored work, within the normal operation of the device used by an authorized person.

Law No. 82 of 2002 (Law on the Protection of Intellectual Property Rights), *Al-Jarida Al-Rasmiyya*, 3 June 2002, art. 171(9) (Egypt), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=126540.

¹⁸⁵ Article 4 of the UJSFTA provides as follows:

Each Party shall provide that all reproductions, whether temporary or permanent, shall be deemed reproductions and subject to the reproduction right as envisaged in the provisions embodied in WCT Article 1(4) and the Agreed Statement thereto, and WPPT Articles 7 and 11 and the Agreed Statement thereto.

USJFTA, *supra* note 27. at art. 4, ¶ 10.

¹⁸⁶ *Suggested Revision to the Chairman's Basic Proposal for the Treaty Formerly Known as the Berne Protocol*, AD HOC ALLIANCE FOR A DIGITAL FUTURE, (on file with the author).

¹⁸⁷ See Brian Fitzgerald, *Promoting Creativity and Innovation Through Law*, in CREATIVITY AND INNOVATION IN BUSINESS AND BEYOND 117–31 (Leon Mann & Janet Chan eds., 2011) (providing further explanation of how the law need to be structured to promote the free “flow of information”).

¹⁸⁸ Suhail Hadaden, *Intellectual Property Law* (2010) (class notes for LLB students at the University of Jordan) (on file with author).

that multiple copies which are created within machine, but not distributed to the public would not be considered infringements.¹⁸⁹

In the case of *Infopaq International A/S v. Danske Dagblades Forening*,¹⁹⁰ a UK Court explained the nature and extent of “transient copying” as follows:

An act could be held to be “transient” if its duration was limited to what was necessary for the proper completion of the technological process in question, it being understood that that process had to be automated so that it deleted that act automatically, without human intervention, once its function of enabling the completion of such a process had come to an end.¹⁹¹

It is suggested that Article 9(A) of the *Copyright Law* in Jordan needs to be amended to make it clear that temporary acts of reproduction which constitute an integral and essential part of a technological process, and whose sole purpose is lawful and not infringing, shall be exempted from the application of the scope of the reproduction right.¹⁹²

The Electronic Information for Libraries (EIFL) – a not-for-profit organisation which advocates the wide availability of electronic resources for users in developing countries – recommended that the following provision be included in the copyright laws of developing countries:

Anyone is permitted to make temporary copies of a work:

- 1) Which are transient or incidental;
- 2) Which are an integral and essential part of a technical process;
- 3) The sole purpose of which is to enable a transmission of a work in a network between third parties by an intermediary, or a lawful use of a work; and
- 4) Which have no independent economic significance.¹⁹³

It is suggested that this provision could be adopted into the *Copyright Law* in Jordan in order to recognize transient copyright that occurs when browsing the Internet as a non-infringement of copyright law.

¹⁸⁹ *Id.*

¹⁹⁰ C-5/08, *Infopaq Int'l A/S v. Danske Dagblades Forening* (C-5/08), 2009 FSR 20.

¹⁹¹ *Id.*

¹⁹² COPINGER & SKONE JAMES, *supra* note 177, at 478.

¹⁹³ EMANUELLA GIVARRA & TERESA HACKETT, ELECTRONIC INFO. FOR LIBRARIES, DRAFT LAW ON COPYRIGHT INCLUDING MODEL EXCEPTIONS AND LIMITATIONS FOR LIBRARIES AND CONSUMERS (2009), available at http://www.eifl.net/system/files/201101/modellaw_v16.pdf.

B. *The right of communication to the public*

The right of communication to the public under the *Copyright Law* in Jordan is of special significance in the digital age. It was granted to authors under Article 8 of the WCT¹⁹⁴ and to performers and phonograms under articles 10 and 14 of the WPPT respectively.¹⁹⁵

Article 8 of the WCT¹⁹⁶ has been referred to as an “umbrella solution” because it does not order member states to adopt a new right, but rather gives member states the power to decide which exclusive right should be used to cover the act of making works available through the Internet.¹⁹⁷

¹⁹⁴ The agreed statement concerning article 8 of the WCT mentions that:

It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11*bis*(2).

WIPO Copyright Treaty art. 8 n.9, Dec. 20, 1996, S. TREATY DOC. No. 105-17, 36 I.L.M. 65, available at http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P8_189.

¹⁹⁵ Article 10 of the WPPT provides that:

Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

WIPO Performances and Phonograms Treaty art. 10, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997); 36 I.L.M. 76, available at http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html. Article 14 provides that:

Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Id. art. 14.

¹⁹⁶ Article 8 of the WCT provides as follows:

Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing (any communication to the public) of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

WIPO Copyright Treaty, *supra* note 194, art. 8.

¹⁹⁷ MIHALY FISCOR, *THE LAW OF COPYRIGHT AND THE INTERNET* 496 (2002); COPINGER & SKONE JAMES, *supra* note 177, at 438; Press Release, Int’l Fed’n of the Phonographic Indus., *The WIPO Treaties: ‘Making Available’ Right* (Mar. 2003), <http://www.ifpi.org/content/library/wipo-treaties-making-available-right.pdf>; Jane C Ginsburg, *The (New?) Right of Making Available to the Public* (Columbia Pub. Law & Legal Theory Working Papers, Paper No. 0478, 2004), available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1003&context=columbia_pllt.

As a signatory to both the WCT and the WPPT, Jordan decided not to create the right of distribution, but instead create the right of communication to the public.¹⁹⁸

Article 9(F) of the *Copyright Law* in Jordan has been amended based on Article 8(1) of the WCT, to introduce a new right: that of communication to the public.¹⁹⁹ It provides as follows:

The author shall have the right to financially exploit his work in any way he chooses. No other person may exercise this right without his written permission, or the permission of his successors. This right shall include...

E. Conveying his work to the public through recital, display, acting, radio or television broadcasting, cinema or through any other means.²⁰⁰

The *Copyright Law* in Jordan does not mention what constitutes communication to the public and when infringement occurs in the context of the Internet. It is suggested that the law should be amended to provide a precise definition of communication to the public, in order to limit the scope of this right and its application.²⁰¹ This corresponds with Jordan's obligations under the WCT and the WPPT.

C. Protection of technological protection measures (TPMs)

One controversial topic that has been the focus of much copyright research is the inclusion of TPMs and RMI provisions ("anti-circumvention laws") to protect copyrighted materials transferred over Internet networks. Many copyright scholars argue that the copyright law is going too far in protecting anti-circumvention measures,²⁰² and that

¹⁹⁸ See STERLING, *supra* note 156, at 399.

¹⁹⁹ See Copyright Law No. 22 of 1992, arts. 23(A), 23(C)(5), 24, OFFICIAL GAZETTE OF JORDAN, No. 3821 (Apr. 16, 1992) (as amended) (introduced for the first time in the Jordanian Copyright Law).

²⁰⁰ *Id.* art. 9(F).

²⁰¹ The EIFL suggests the following definition for "communication to the public:"

Any communication to the public of a work, sound recording, film or broadcast, by wire or wireless means, including the making available to the public of the work, sound recording, films or broadcasts in such a way that members of the public may access the work, sound recording, film or broadcast from a place and at a time individually chosen by them.

GIVARRA & HACKETT, *supra* note 193, at 10.

²⁰² See LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE* (2004); WILLIAM FISHER, *PROMISES TO KEEP TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* (2004); Peter Biddle et al., *The Darkest and the Future of Content Distributions*, BEARCAVE, http://www.bearcave.com/misl/misl_tech/msdrm/darknet.htm (last visited Mar. 21, 2012); see also THE COMMODIFICATION OF INFORMATION 79–106 (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002); JESSICA LITMAN, *DIGITAL COPYRIGHT* 179 (2001); Urs Gasser & Silke Renst, *From Shakespeare to Dj danger Mouse: A Quick*

there must be serious consideration given to limiting those measures, especially in connection with developing countries.²⁰³ The WCT and the WPPT are the first international copyright treaties that request that signatory countries include anti-circumvention provisions in their domestic laws.²⁰⁴

Look at Copyright User Creativity in the Digital Age (Berkman Ctr. for Internet and Soc'y, Paper No. 2006-05, 2006); Pamela Samuelson, *Preliminary Thoughts in Copyright Reform*, 2007 UTAH L. REV. 551 (2007).

²⁰³ Professor Peter Yu notes:

It is important to remember that many of these countries institute or revamp their intellectual property systems in the first place mainly because of the TRIPs Agreement or external pressure from the developed world, such as what they currently experience in their bilateral and plurilateral trade negotiations. Oftentimes, they introduce reforms in the fear of losing trade benefits, export markets, and development aid. If they had a choice to select the type of innovation systems they wanted to build, an anticircumvention regime would be very unlikely to be a top priority. After all, economists have shown empirically that countries with limited imitative capacity often do not benefit from a strong intellectual property regime.

Yu, *supra* note 42, at 53. CIPR also criticised DRM provisions for developing countries as follows:

For developing countries, where Internet connectivity is limited and subscriptions to on-line resources unaffordable, it may exclude access to these materials altogether and impose a heavy burden that will delay the participation of those countries in the global knowledge-based society.

LADDIE, *supra* note 2, at 106.

²⁰⁴ Professor Ruth L. Okediji noted that:

To date, fifty-two (52) countries are members of the WCT, of which forty-six percent (46%) are developing countries, ten percent (10%) are least-developed countries and 38% (thirty-eight percent) are countries in transition. Only 6% of the members are developed countries. This is not simply a matter of the relative numbers of developing countries; the WCT is not in force in several notable countries such as Canada, Austria, and Germany. Many developing countries have already ratified, or made commitments to ratify, the treaties either as a result of bilateral/regional trade agreements, or by virtue of other economic pressures exerted on them. Nevertheless, it is remarkably ironic that a treaty dealing with digital copyright concerns has a membership comprising mainly of developing countries with limited Internet penetration rates and significant levels of illiteracy and poverty.

Ruth L. Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Consideration for Developing Countries* 32 (Int'l Ctr. for Trade & Sustainable Dev., Paper No. 15, 2006), available at http://www.unctad.org/en/docs/iteipc200610_en.pdf. On Anti-circumvention, see the following: Nicola Lucchi, *Intellectual Property Rights Digital Media: A Comparative Analysis of Legal Protection, Technological Measures and New Business Models Under EU and US Laws*, 53 BUFF. L. REV. 1111 (2005); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519 (1999); Pamela Samuelson & John Browning, *Confab Clips Copyright Cartel*, WIRED, Mar. 1997, available at <http://www.wired.com/wired/archive/5.03/netizen.html>; *Frequently Asked Questions (and Answers) About Anti Circumvention (DMCA)*, BERKMAN CTR. FOR INTERNET AND SOC'Y, <http://www.chillingeffects.org/anticircumvention/faq.cgi#QID91> (last visited Mar. 21,

The WCT and the WPPT do not prescribe precise models for the protection of TPMs and RMI. The treaties are limited to providing national and regional legislation with a general framework for such protection.²⁰⁵ They also leave contracting parties influence over what types of remedies and sanctions they would apply.²⁰⁶

The question is whether it is important for a developing country such as Jordan to have an anti-circumvention law in the first place. What are the elements necessary for effective and balanced anti-circumvention laws?

Article 4(13) of the USJFTA provides as follows:

Each Party shall prohibit civilly and criminally the manufacture, importation or circulation of any technology, device, service or part thereof, that is designed, produced, performed or marketed for engaging in such prohibited conduct, or that has only a limited commercially significant purpose or use other than enabling or facilitating such conduct.

2012); *Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/1201/> (last visited Mar. 21, 2012), Gwen Hinze, *Seven Lessons from a Comparison of the Technological Protection Measure Provisions*, ELECTRONIC FRONTIER FOUND., <http://www.eff.org/pages/seven-lessons-comparison-technological-protection-measure-provisions> (last visited Mar. 21, 2012); Jane C. Ginsburg, *Legal Protection of Technological Measures Protecting Work of Authorship: International Obligations and the US Experience*, 29 COLUM. J.L. & ARTS 1 (2005); Thomas A. Mitchell, Note, *Copyright, Congress, and Constitutionality: How the Digital Millennium Copyright Act Goes Too Far*, 79 NOTRE DAME L. REV. 2115 (2004); Laura N. Gasaway, *Anti-Circumvention: A View From Librarians and Educators* (June 14, 2001) (unpublished manuscript), available at http://www.alai-usa.org/2001_conference/pres_gasaway.doc.

²⁰⁵ Haochen Sun, *Rethinking the Chinese Copyright Law in the Digital Age*, 6 J. INTEL. PROP. 912 (2003).

²⁰⁶ Article 11 of the WCT provides that:

Contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law”.

WIPO Copyright Treaty, *supra* note 194, art. 11. Article 18 of the WPPT also contains a similar article that state as follows:

Contracting parties have to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights, and to restrict acts in respect of their performances or phonograms which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

WIPO Performances and Phonograms Treaty, *supra* note 195, art. 18,

Article 54 of the *Copyright Law*²⁰⁷ in Jordan provides that:

A) A person shall be considered in violating of the provisions of this law if same commits any of the following actions:

1. Deletes or changes any information set in an electronic form without the permission of the holder of the rights
2. Distributes or imports for the purpose of distributions or announcement to the public without permission copies of the works or consolidated performances or audio recordings

B) For the purposes of this Article the term (information that guarantees the administration of rights) shall mean any information provided by the holder of the rights that are defined with the following:

1. The work, audio recording or performance
2. The author or performers or producer of an audio recording
3. The holder of the right in the work or performance or while knowing or if the same has an adequate reason or evidence to know
4. The conditions that must be present to make use of any benefit from any work or performance or audio recording that purport to show this information
5. Any number or encoding that purport to show this information

C) The provisions of Article (46), (47), (50) and (51) of this law shall be applied if a violation of any of the rights stipulated in this Article occurs as the case may be.

Article 55 of the *Copyright Law*²⁰⁸ in Jordan provide as follows:

A) A person shall be considered a violator of the provisions of this law if same commits any of the following actions:

1. Circumvent effective technological measure or counteracted them or disable any part thereof
2. Produced or imported or sold or displayed for the purpose of selling or leasing or possessed for another commercial purpose or distributed or carried out marketing action for selling and leasing any piece or appliance or service or method that was designed or produced or used for the purposes of circumventions any effective technological measures or counteracting them or disabling any part thereof

²⁰⁷ See Copyright Law No. 22 of 1992, art. 54, OFFICIAL GAZETTE OF JORDAN, No. 3821 (Apr. 16, 1992) (as amended).

²⁰⁸ See Copyright Law No. 22 of 1992, art. 55, OFFICIAL GAZETTE OF JORDAN, No. 3821 (Apr. 16, 1992) (as amended).

B) For the purpose of this Article the term (effective technological measures) shall mean any technology or measure or method used such as encoding or controlling the extraction of copies that are used to prohibit or limit carrying out any work unlicensed by the holder of the rights
 C) The provisions of Article (46), (47), (49) and 51 of this Law shall be applied if a violation of any of the rights stipulated in this Article occurs.

Jordan added Articles 54 and 55 to the *Copyright Law* in order to be in conformity with its treaty obligations under USJFTA, WCT and the WPPT. Article 4(13) of USJFTA, addressing TPMs, is overly restrictive and goes beyond Jordan's obligation under the WCT²⁰⁹ and the WPPT.²¹⁰ Article 55(A) of the *Copyright Law* in Jordan prevents all kinds of uses, regardless of whether they are justified under Article 17 (limitations). It does not require intention to infringe upon copyright for a use to amount to circumvention; the activity is criminalised per se, regardless of the scientific importance or research value resulting from such use.²¹¹

Article 55(B) of the *Copyright Law* in Jordan prohibits the manufacturing, importing, and distribution of any device or service which could be used to circumvent digital protection systems. It makes preparatory acts (such as obtaining the circumvention tools and devices) before conducting the actual act of circumvention illegal. This language is overly broad and open-ended and threatens legitimate businesses working in the field of IT and software development.²¹²

In addition, Article 55(C) of the *Copyright Law* in Jordan provides several remedies for the circumvention of TPMs. The remedies include sanctions (temporary measures, administrative, civil and criminal penalties), as explained earlier in Article 51 and Article 52. It does not provide any flexibility to exclude civil and criminal liability for innocent infringers such as non-profit libraries, archives and educational institutions. It also includes a subjective standard for a circumvention of TPMs that would impose liability where a person accidentally circumvents.²¹³

²⁰⁹ See WIPO Copyright Treaty, *supra* note 194, art. 11.

²¹⁰ See WIPO Performances and Phonograms Treaty, *supra* note 195, art. 18.

²¹¹ Al Sharieh, *supra* note 97, at 97–115.

²¹² AD HOC ALLIANCE FOR A DIGITAL FUTURE, *supra* note 186.

²¹³ Compare with article 16.4(7) of the U.S.-Singapore Free Trade Agreement (USSFTA) that provides that:

In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, producers of phonograms, and their successors in interest use in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances, and phonograms, each Party shall provide that any person who: (i) knowingly, or having reasonable grounds to

A general feature of Article 55 of the *Copyright Law* in Jordan is that it does not contain any limitations which make it much more stringent than section 1201 of the DMCA.²¹⁴ The failure of the *Copyright Law* in Jordan to provide any limitations to TPMs demonstrates the extent to which Jordan aligned in favour of copyright owners and neglected users' rights.

Despite the restrictive effect of Article 55, the IIPA has requested that it be amended so that it specifically covers all forms of "circumvention" of circumvention devices, regardless of whether there is a financial benefit or not.²¹⁵ Furthermore, the IIPA wants Jordan to prohibit activities 'primarily designed, produced or used for the purpose of circumvention, deactivating or impairing.'²¹⁶

It is argued that IIPA should stop insisting that Jordan and other developing countries introduce specific wordings on TPMs where the content of such provisions is clearly covered by law.²¹⁷ Such amendments would result in decisional inconsistencies of the local system, leading to new problems²¹⁸ for local judges when this matter is brought before the courts.

It is suggested that the current structure and wording of Article 55 of the *Copyright Law* in Jordan is an insurmountable barrier to the freedom of Jordanians to use works for legitimate purposes that creates a formidable obstacle to access to knowledge (A2K).²¹⁹ The obstacle exists because Article 55 prohibits all forms of circumvention, even if

know, circumvents without authority any effective technological measure that controls access to a protected work, performance, phonogram, or other subject matter.

Free Trade Agreement, U.S.-Sing., art. 16.4, ¶ 7, May 6, 2003, available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf. Compare *id.*, with Free Trade Agreement, U.S.-Chile, art. 17.7, June 6, 2003, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text>.

²¹⁴ The DMCA contains specific narrow statutory exemptions that applies to the act of circumvention. See 17 U.S.C. § 1201. For an explanation of the exceptions under the DMCA that apply to the acts of circumvention and preparatory acts, see Urs Gasser, *Legal Framework and Technology Provisions of Digital Content: Moving Forward, Toward a Best Practise Model* (Berkman Ctr. for Internet and Soc'y, Paper No. 2006-04, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=908998. The U.S. courts appear to have interpreted the DMCA in line with a narrow approach. Accordingly, TPMs will only be reinforced where they are preventing or inhibiting copyright infringement, see BRIAN FITZGERALD ET AL., *INTERNET AND E-COMMERCE LAW: TECHNOLOGY LAW AND POLICY* ch. 4 (2007); see also *Storage Tech Corp. v. Custom Hardware Eng'g & Consulting Inc.*, 421 F.3d 1307 (Fed. Cir. 2005).

²¹⁵ INT'L INTELL. PROP. ALLIANCE, *supra* note 131; see also Directive 2001/31 of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J (L 167) (EC) (Directive on Copyright and Information Society).

²¹⁶ INT'L INTELL. PROP. ALLIANCE, *supra* note 131.

²¹⁷ VON LEWINSKI, *supra* note 118, at 42.

²¹⁸ *Id.*

²¹⁹ Xue, *supra* note 44, at 168, 176, 183.

done for legal purposes including research, security and other legitimate means that are provided for under various international copyright treaties.

The *Copyright Law* in Jordan should include appropriate limitations on TPMs, in order to strike a balance between the right of copyright owners and the general public. Furthermore, it is important to provide limitations on criminal and civil liability for non-profit institutions such as libraries, archives and educational institutions, and flexible sanctions for innocent infringers.²²⁰

D. Limitations to author's exclusive rights

Unlike the U.S. legal system's concept of open-ended fair use, the limitations provided under the *Copyright Law* in Jordan are subject to rigid application and are determined on a case-by-case basis. This approach is too inflexible and stifles innovation,²²¹ because it requires that judges apply strict rules that may not take into consideration the development of copyright law, digital technologies and the Internet.

The limitations are extremely important for developing countries, as they are indispensable strategic and doctrinal tools used to facilitate social and economic development, by providing citizens the basic means to engage in intellectual endeavours and to participate in the global knowledge economy.²²²

Appropriate limitations will continue to safeguard public interest uses. The result will be a benefit to consumers, a benefit to rights holders and a benefit to national cultures.²²³ The WCT and WPPT provide certain flexibilities to developing countries to develop limitations that they can use in appropriate circumstances.²²⁴

Any limitation that was granted should abide by the three-step test under the *Berne Convention* and TRIPS. The three-step test was inserted into the *Berne Convention* only in relation to the reproduction right in Article 9(2).²²⁵ The *TRIPS Agreement* widened the application of the

²²⁰ Gasser, *supra* note 214.

²²¹ *KEI has Filed Comments on the EC's Green Paper on Copyright in the Knowledge Economy*, KNOWLEDGE ECOLOGY INT'L, <http://www.keionline.org/content/view/215/1> (last visited Mar. 21, 2012).

²²² Okediji, *supra* note 204, at 35.

²²³ WORLD INTELL. PROP. ORG., *supra* note 179.

²²⁴ Consumers International, *The statement on Provisional Committee on Proposals Related to A WIPO Development Agenda* (2006), available at <http://bit.ly/HOhBzv> (last visited on April 17, 2012).

²²⁵ Article 9, paragraph 2 of *Berne Convention* provides as follows:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

Berne Convention, *supra* note 148, art. 9, ¶ 2.

three-step test, so that it applies to all exclusive rights granted by the *Berne Convention*.²²⁶

Most commentators agree that the three-step test has a restrictive effect on limitations and therefore should be regarded merely as a guiding principle, rather than a legal standard.²²⁷

The Agreed Statement on Article 10 of the WCT explicitly permits members to devise new limitations appropriate for the digital environment, but does the *Copyright Law* in Jordan contain any specific limitations related to the Internet?

1. Limitations for teaching purposes and libraries

Jordan lacks the domestic institutional capacity to design appropriate limitations and exceptions to advance education and learning in the digital age. This is evidenced in Article 17 of the *Copyright Law* in Jordan, which has been poorly drafted and is inadequate and outmoded.²²⁸ Articles 17(A), 17(C) and 20 contain specific limitations and exceptions for teaching and libraries.

Article 17(A) permits the performance or display of a work for educational purposes within a classroom or educational institution. The requirement that the performance or display be confined to the classroom is an obstacle to remote students who can only view their lectures using the Internet, as they live in rural areas.²²⁹

In addition, it is unclear under Article 20 whether it is possible for libraries to make works that are in an electronic format available online, within the confines of the library premises.

Article 17(A) and (C) of the *Copyright Law* in Jordan do not support distance education.²³⁰ The *Copyright Law* in Jordan should be designed

²²⁶ Wedage Danta Rodrigo, *Copyright Law in the Digital Era: A Comparative Study of Sri Lanka, Australia and the United States* 218 (2007) (unpublished Ph.D. thesis, University of Queensland) (on file with author).

²²⁷ See Okediji, *supra* note 204. A group of European and international IP scholars drafted a Declaration on the “Three-Step-Test” in copyright law. The declaration proposes that “an appropriately balanced interpretation of the Three-Step Test under which existing exceptions and limitations within domestic law are not unduly restricted and the introduction of appropriately balanced exception and limitation is not precluded.”

CHRISTOPHE GEIGER ET AL., MAX PLANCK INST. FOR INTELLECTUAL PROP., DECLARATION: A BALANCED INTERPRETATION OF THE “THREE-STEP TEST” IN COPYRIGHT LAW, available at http://www.ip.mpg.de/shared/data/pdf/declaration_three_steps.pdf.

²²⁸ Pedro Nicoletti Mizukami et al., *Limitations and Exceptions to Copyright in the Brazilian Law: A Need for Reform*, in *ACCESS TO KNOWLEDGE IN BRAZIL* 67, 70–76 (Lea Shaver ed., 2010).

²²⁹ Margaret Ann Wilkinson, *Filtering the Flow from the Fountains of Knowledge: Access and Copyright in Education and Libraries*, in *IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW* 331 (Michael Geist ed., 2005).

²³⁰ With the advent and widespread use of digital technologies, distance education has now developed into a fully-fledged system of education that is capable of even

so as to enable educational institutions to reproduce or to digitize copyright material where necessary for the benefit of remote students. This would be of immense value to students enrolled in distance education programs from remote and underdeveloped areas in Jordan, as it would allow those students to pursue their studies from their hometowns and rural areas.²³¹

2. Limitations for disabled persons

According to the World Health Organization (WHO), more than 90% of visually impaired persons live in developing countries.²³² According to the UN Development Program (UNDP), 4-5 % of the Jordanian population, estimated at 5.9 million²³³ is disabled: 14.8% of males and 2.1% of females.²³⁴

There are currently no limitations and exceptions for people with sensory disabilities (whether blind, visually impaired, or deaf) in the *Copyright Law* in Jordan. This means that any use or adaptation of a work by a disabled person needs permission from the copyright owner, as it constitutes copyright infringement. It is important for the *Copyright Law* in Jordan to permit copies of the work to be made in an accessible format for the benefit of people with disabilities including blind, visually impaired and other reading-disabled people.²³⁵ These limitations and exceptions would help those people to access copyrighted materials as the law does not permit this to happen without the copyright owner's authorisation.

Jordan and developing countries should also support IP proposals which empower blind people, visually impaired, and other disabled persons,²³⁶ including the treaty proposed by the World Blind Union (WBU) and WIPO's Standing Committee on Copyright and Related Rights (SCCR) Treaty for the Blind.²³⁷

replacing traditional classroom education. The importance of distance education is that it affords unprecedented opportunities to extend teaching beyond the classroom and campuses. See Rodrigo, *supra* note 226, at 308–09.

²³⁰ *Id.* at 309.

²³¹ See *id.* at 332 (expressing similar views in connection with Least Developing Countries (LDCs)).

²³² GIAVARRA & HACKETT, *supra* note 193.

²³³ WORLD BANK, JORDAN COUNTRY BRIEF (2011), available at <http://siteresources.worldbank.org/JORDANEXTN/Resources/JordanCountryBrief.pdf>

²³⁴ *Towards Better Integration of Persons with Disabilities in Employment*, UNDP JORDAN, http://www.undp-jordan.org/index.php?page_type=projects&project_id=81&cat=1 (last visited Mar. 21, 2012).

²³⁵ *Id.*

²³⁶ KNOWLEDGE ECOLOGY INT'L, *supra* note 221.

²³⁷ See WIPO, Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU) (2009), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_18/sccr_18_5.pdf; Press

E. Public domain

The public domain includes any work that has never been copyrighted or which is no longer within the term of copyright protection under the applicable copyright laws. It is crucial in preserving history, scientific knowledge, technology and inventions and cultural heritage for present and future generations within developing countries.²³⁸ Public access to the public domain fosters learning, innovation and the creation of new works.²³⁹

The main purpose of copyright is to protect the public domain and leave a number of works available, in order to advance knowledge and develop human creativity. The *Copyright Law* in Jordan recognises the public domain in Article 34.²⁴⁰

According to Article 34(B) of the *Copyright Law* in Jordan, any person who is interested in printing, publishing or translating a work that has not already been printed, published or translated in Jordan first needs to apply to the Minister of Culture to obtain a licence to do so. Such a requirement acts as a barrier to A2K by imposing an unnecessary administrative delay and cost on the ability of people to freely and easily use public domain works.²⁴¹

While some countries have extended the term of copyright beyond the *Berne Convention's* requirement for the life of the author plus 50

Release, WIPO, SCCR Commits to Improving Access by Visually Impaired to Copyright-Protected Works (Dec. 18, 2009), available at http://www.wipo.int/pressroom/en/articles/2009/article_0061.html.

²³⁸ AWAD ET AL., *supra* note 79, at 15–16.

²³⁹ IFLA et al., *The Public Domain, Why WIPO Should Care: Provisional Committee on Proposals Related to a WIPO Development Agenda Third Session 19-23, 2007*, IFLA, <http://www.ifla.org/en/publications/the-public-domain-why-wipo-should-care> (last updated Dec. 3, 2009).

²⁴⁰ The Jordanian Copyright Law provides:

- (A) After the lapse of the protection period stipulated in this law of any work upon the nonexistence of heirs or upon the nonexistence of successors before the end of the protection period, the work shall revert to public domain such that any person shall have the right to print it, publish it or translate if it has already been printed, published or translated.
- (B) If the work stipulated in paragraph (A) of this article was not printed, published or translated before reverting to public domain, none of its rights may be exploited including its printing, publication, or translation without a license from the minister. This licence shall be valid for fifteen years. It shall be considered cancelled if not used within one year or if used then stopped afterwards for one whole year.

Copyright Law No. 22 of 1992, art. 34, OFFICIAL GAZETTE OF JORDAN, No. 3821 (Apr. 16, 1992) (as amended).

²⁴¹ See Law No. 82 of 2002 (Law on the Protection of Intellectual Property Rights), *Al-Jarida Al-Rasmiyya*, 3 June 2002, art. 183 (Egypt), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=126540 (expressing a similar position); AWAD ET AL., *supra* note 79.

years,²⁴² there is no compelling reason for Jordan - whether from an economic, creative, or innovative perspective- to extend the term of protection beyond what is currently available under the *Copyright Law* in Jordan.²⁴³

F. Liability of Online Service Providers (OSPs)

The *Copyright Law* in Jordan has no specific provisions dealing with the liability of Online Service Providers (OSPs).²⁴⁴ It contains no

²⁴² Article 26 of the Omani Copyright Law provides that the “term of protection for the economic copyrights, stipulated under this law, shall be the life of the author and seventy years starting from the beginning of the Gregorian calendar year following the year of his death.” Royal Decree No. 65/2008, *supra* note 77, art. 26.

²⁴³ Michael Geist, *The Copyright Consultation: My Submission*, Michael Geist (Sept. 11, 2009), <http://www.michaelgeist.ca/content/view/4377/125/>.

²⁴⁴ Bahrain-, Morocco-, and Oman-U.S. free trade agreements contain provisions and side letters on intermediary liability, safe harbors and notice and taken down. The USBFTA provides that:

For the purpose of providing enforcement procedures that permit effective action against any act of infringement of copyright covered under this Chapter, including expeditious remedies to prevent infringements and criminal and civil remedies, each Party shall provide, consistent with the framework set forth in this Article:

- (a) legal incentives for service providers to cooperate with copyright owners in deterring the unauthorized storage and transmission of copyrighted materials; and
- (b) limitations in its law regarding the scope of remedies available against service providers for copyright infringements that they do not control, initiate or direct, and that take place through systems or networks controlled or operated by them or on their behalf, as set forth in this subparagraph (b).
 - (i) These limitations shall preclude monetary relief and provide reasonable restrictions on court-ordered relief to compel or restrain certain actions for the following functions and shall be confined to those functions:
 - (A) transmitting, routing, or providing connections for material without modification of its content, or the intermediate and transient storage of such material in the course thereof;
 - (B) caching carried out through an automatic process;
 - (C) storage at the direction of a user of material residing on a system or network controlled or operated by or for the service provider; and
 - (D) referring or linking users to an online location by using information location tools, including hyperlinks and directories.
 - (ii) These limitations shall apply only where the service provider does not initiate the chain of transmission of the material, and does not select the material or its recipients (except to the extent that a function described in clause (i)(D) in itself entails some form of selection).
 - (iii) Qualification by a service provider for the limitations as to each function in clauses (i)(A) through (i)(D) shall be considered separately from qualification for the limitations as to each other function, in accordance with the conditions for qualification set forth in clauses (iv)–

provisions that expressly deal with secondary liability (also known in other jurisdictions as contributory, vicarious, inducement or authorisation liability).²⁴⁵ In the absence of a provision in the *Copyright Law*, secondary liability is dealt with under general tort law principles of joint liability under the Jordanian civil legal system.²⁴⁶ The *Jordanian Civil Code No. 43 of 1976 (Jordanian Civil Code)*²⁴⁷ is the primary source of law that should be consulted in cases where there is no specific provision in the *Copyright Law* in Jordan.²⁴⁸ Article 256 of the *Jordanian Civil Code* provides that ‘[e]very injurious act shall render the person who commits it liable for damages even if he is a non-discerning person’. Three elements must be present for tort liability to arise under the *Jordanian Civil Code*: (i) a fault or error (which may be either an act or a failure to act); (ii) damage to another; and (iii) a causal connection between the fault and damage.

“Vicarious liability” is not strictly defined in the *Jordanian Civil Code* as it is in French law.²⁴⁹ The major provisions concerning liability

(vii).

USBFTA, *supra* note 38, art. 14.10.29; *see also* USOFTA, *supra* note 38, art.

15.10.29; USMFTA, *supra* note 38, art. 15.11.28.

²⁴⁵ *See, e.g.,*); MGM Studios Inc. v. Grokster Ltd., 545 U.S. 913 (2005); A & M Records Inc. v. Napster Inc., 239 F.3d 1004 (9th Cir. 2001); *Universal Music Austl. Pty. Ltd. v. Sharman License Holdings Ltd.* [2005] FCA 1242 (Austl.) (“Kazaa”).

²⁴⁶ NOURI KHATER & ADNAN SERHAN, EXPLANATION OF THE JORDANIAN CIVIL CODE, 359–67 (1997); *see also* Edward A. Tomlinson, *Tort Liability in France for Act of Things: A Study of Judicial Lawmaking*, 48 LA. L. REV. 1299 (1988) (providing further explanation of tort law under the continental European systems, particularly France); Al Tamimi, *Law of Tort in the UAE*, available at <http://www.tamimi.com/files/Legal%20Brochures/LawofTort.pdf>. (last visited on November 20, 2011).

²⁴⁷ The Jordanian Civil Code was enacted in 1976 to replace the Ottoman Majallah of 1876, which was highly influenced by Sharia and Islamic Law. *See* KHATER & SERHAN, *supra* note 246, at 5-8.

The Jordanian Civil Code comprises rules derived from the Egyptian Civil Code, Law No. 131 of 1948 (Civil Code), *Al-Jarida Al-Rasmiyya*, 29 July 1948 (Egypt), which in turn was modeled on the French Napoleonic code, Civil Code No. 43 of 1976, OFFICIAL GAZETTE OF JORDAN, No. 2645 (Aug. 1, 1976); *see also* Mahkamat al-Tamiez [Taimez] [Court of Cassation], Case No. 228/1987, July 26, 1987.

²⁴⁸ *See* Commercial Law No. 12 of 1966, art. 2, OFFICIAL GAZETTE OF JORDAN, No. 1910 (Mar. 30, 1966). Article 71, paragraph 20 of the Jordanian Civil Code provides that the “provisions of special laws shall be applicable to the right of the author, Inventor, trademarks and all other rights.” Civil Code No. 43 of 1976, art. 71, ¶ 20 (Jordan).

²⁴⁹ The major provisions concerning liability for another person’s act are to be found in the French Civil Code. Article 1384 of the French Civil Code provides that a “person is liable not only for the damages he causes by his own act, but also for that which is caused by the acts of persons for whom he is responsible, or by things which are in his custody.” CODE CIVIL [C. CIV.] art. 1384 (Fr.) (as amended), *available at* http://lexinter.net/ENGLISH/civil_code.htm. Article 1384 contains a limited list of vicarious liability, but in a famous case in 1991, the Court of Cassation (cour de cassation) decided that the general statement in article 1384 allowed creating new heads of vicarious liability. *See* J. Spier, UNIFICATION OF TORT LAW: LIABILITY FOR DAMAGE CAUSED BY OTHERS 85–88 (2003); *see also* Tomlinson, *supra* note 246; Hannibal Travis, *Opting Out of the Internet in the United States and the European*

for another person's act are to be found in Article 288 of the *Jordanian Civil Code*,²⁵⁰ which provides that:

1. No person shall be liable for the act of another and yet the court may on the application of the injured person and if it finds justifiable hold liable for the awarded damages.

A. Any person who is under a legal or a contractual obligation to supervise a person in need of supervision due to his minority or his mental or physical condition, unless he proves that he has fulfilled his duty of supervision or that damage was to be inflicted even though he fulfilled his duty of supervision or that the damage was to be inflicted even though he fulfilled his duty of exercising the necessary care.

B. Any person who had actual power to supervise and direct the person who had inflicted the damage even though he himself had no free choice if the injurious act was committed by the supervised person while or because of performing the duties of his position.

Article 288 of the *Jordanian Civil Code* is influenced by Islamic jurisprudence. It states a general rule on liability and then provides limitations to it. The judge has limited powers to determine those limitations, subject to the provisions of the law.²⁵¹ It is submitted that it would be difficult to apply Article 288(B) to online service providers, as OSPs might not have any authority, supervision or direction over the person who is infringing copyright works online, especially with the use of second generation peer-to-peer networks.²⁵² To ensure continuous development of copyright law, legislators around the world have introduced "safe harbour" provisions to shelter OSPs from copyright infringement actions. There has been various legislation adopted in countries including Japan,²⁵³ the U.S.,²⁵⁴ and France²⁵⁵ addressing to OSPs.

Union: Copyright, Safe Harbors, and the International Law, 84 NOTRE DAME L. REV. 331 (2008).

²⁵⁰ Article 121, paragraph 7 of the French Penal Code provides that a "person, who knowingly facilitates the preparation or the realisation of a crime or of a tort by providing her help or assistance, is an accomplice for this crime or tort." CODE PÉNAL [C. PÉN] art. 121, ¶ 7 (Fr.); see also Travis, *supra* note 249; Xavier Amadei, *Standards of Liability for Internet Service Providers: A Comparative Study of France and the United States with Specific Focus on Copyright, Defamation, and Illicit Content*, 35 CORNELL INT'L L.J. 189 (2001). Compare CODE PÉNAL [C. PÉN] art. 121, ¶ 7 (Fr.), with Criminal Law No. 16 of 1960, arts. 44–55, 76, OFFICIAL GAZETTE OF JORDAN, No. 1487 (Jan. 1, 1960).

²⁵⁰ The Jordanian Civil Code, art 288(B).

²⁵¹ See KHATER & SERHAN, *supra* note 246, at 489–507.

²⁵² P2P technology is used widely over the Internet to share and distribute files and information between Internet users.

²⁵³ On May 27, 2007, Japan has introduced the Provider Liability Limitation Law, which states under article 3, paragraph 1 that a provider is liable only if:

It is vital to shelter OSPs from liability for copyright infringement suits that could be brought against them for the Internet services that they provide to the public. If this is not done, OSPs would impose practices and policies which would discourage people from using the Internet and this would result in the undermining of innovation and creativity.²⁵⁶

Jordan needs to consider legislating safe harbour provisions (including notice and takedown provisions) that will sensibly protect OSPs, especially if it wants to develop IT industries, which provide electronic information and Internet services.²⁵⁷ The rules under which OSPs operate should be clear, fair and simple to adhere to, and should take into account the OSP laws applicable in other jurisdictions.²⁵⁸ In

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- i. It is technically possible to prevent transmission of the infringing material; and
 - ii. The provider knows of the existence of the material; and
 - iii. Knows that the transmission is infringing copyright; or
 - iv. Reasonably ought to know that the transmission infringes.

See WIPO SURVEY, *supra* note 179. A person whose rights have been infringed can ask a provider to disclose information about the person transmitting the material if the information is necessary for a legal claim or other legitimate reason (Art. 4(1)). *Id.*

²⁵⁴ The U.S. Congress has enacted “safe harbor” provisions as part of the DMCA, the “Online Copyright Infringement Liability Limitation Act,” in order to shelter OSPs from liability for copyright infringement in certain circumstances. See 17 U.S.C. § 512.

²⁵⁵ In France, hosting service providers (technical intermediaries) are defined in the Law on Confidence in the Digital Economy (LCEN) of June 21, 2004 and are protected in certain circumstances from the infringing acts of online users. The Act brings France into compliance with the European Commission Directive 2000/31, on Certain Legal Aspects of Information Society (‘Directive on Certain Aspects of Information Society’), 2001 O.J (L. 178). See Loi N2004-575 du 21 Juin 2004 Pour la Confiance dans L’économie Numérique [Law on Confidence in the Digital Economy of June 21, 2004, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 22, 2004, p. 11168, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000801164&dateTexte>; Kylie Junik, *French Court Finds Daily Motion Liable for Copyright Infringement*, CITIZEN MEDIA L. PROJECT (July 18, 2007), <http://www.citmedialaw.org/french-court-finds-dailymotion-liable-copyright-infringement>.

²⁵⁶ Fitzgerald & Olwan, *supra* note 145, at 570.

²⁵⁷ China has also promulgated the Regulation on the Protection of the Right to Network Dissemination of Information. See (信息网络传播权保护条例) Regulation on the Protection of the Right to Network Dissemination of Information (promulgated by the Exec. Meeting of the State Council, May 18, 2006, effective July 1, 2006) (China), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=182147; see also Lin Xie, Safe Harbors and Joint Liability of the OSPs in China – A Comparative Study Between the US and Australia and China (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1358467; Yiman Zhang, *Establishing Secondary Liability with a Higher Degree of Culpability: Redefining Chinese Internet Copyright Law to Encourage Technology Development*, 16 PAC. RIM L. & POL’Y J. 257 (2007).

²⁵⁸ INDUS. CAN. & CAN. HERITAGE, A FRAMEWORK FOR COPYRIGHT REFORM (2001), available at <http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp01101.html>; INDUS. CAN. & CAN. HERITAGE, CONSULTATION PAPER ON DIGITAL COPYRIGHT ISSUES (2001), available at [http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/vwapj/digital.pdf/\\$FILE/digital.pdf](http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/vwapj/digital.pdf/$FILE/digital.pdf).

the meantime, it is critically important to protect academic institutions from copyright infringements, which might take place through their networks when academics, staff and students use the Internet.²⁵⁹

G. Software Protection

The software industry in Jordan was first developed 1999, in accordance with King Abdullah II's vision to make Jordan a regional ICT center and to develop Jordan as an internationally recognized exporter of ICT products and the world's leading producer of Arabic-language software. The question that remains is how Jordan can turn this ambitious plan into a reality.

Creating a successful software industry in Jordan requires different elements: necessary funding, supporting industries, infrastructure and a supportive legal regime.²⁶⁰ Article 3(8) of the *Copyright Law* in Jordan protects all forms of computer software, whether in the form of object or source code. It provides as follows:

Innovated literary, artistic and scientific works regardless of their kind, importance or the purpose of their production shall enjoy protection by virtue of this law:

8. Computer programs whether in the source or in machine language.

The *Copyright Law* in Jordan does not contain any limitations and exceptions that relate to the use of computer software, even if it was legally obtained. It should not be an infringement of copyright to incidentally reproduce a computer program merely as part of the technical process of running a copy of the program or for the purpose of studying the program, except where the reproduction is made from an infringing copy of the program, or contrary to an express direction or licence of the copyright owner.²⁶¹

The *Copyright Law* in Jordan does not contain any provisions that allow programmers to look at and examine other programs, in order to enable compatible and competing software products to be produced.²⁶² This is known as “interoperability of software”. IT developers in Jordan should be given a narrow limitation and exception to copyright

²⁵⁹ Ida Madieha bt. Abdul Ghani Azmi, *Institutional Repositories in Malaysia: The Copyright Issues*, 17 INT'L J. L. & INFO. TECH. 268, 272 (2009).

²⁶⁰ Ramzi T. Abdel Jaber, *Silicon Wadi: Can Jordan Develop an Internationally Respected and Competitive Software Industry?*, JORDAN TIMES, Apr. 8, 1999, available at <http://www.jordanembassyus.org/040899009.htm>.

²⁶¹ FITZGERALD & FITZGERALD, *supra* note 180, at 111.

²⁶² COPINGER & SKONE JAMES, *supra* note 177, at 540.

infringement of software that allows for reverse engineering.²⁶³ This can result in the development of local IT expertise and the creation of new software programs.

It is noted that the *Copyright Law* in Jordan does not differentiate between the term of protection for a computer program and other works (including books), as it gives the same protection of 50 years after the author's death for all kinds of works. This approach is unrealistic and unjustified because the lifespan of most, if not all, software is shorter²⁶⁴ and not more than 20 years. To this end, one scholar has argued that a suitable term for copyright is 20 years.²⁶⁵ This would allow software developers to recoup his or their investments, while preserving the public interest by facilitating the growth of the public domain.²⁶⁶

It is suggested that any future legislation in Jordan must take into consideration the real needs of its software industry, including the small number of corporations currently developing Free and Open Source Software (FOSS) and small medium enterprises (SMEs).

H. Database protection

Economies are dominated by the creation, manipulation and use of information and the time it takes to do so.²⁶⁷ Many corporations are willing to pay huge sums of money to obtain databases that are useful to their work and business. This is because these databases contain large quantities of important information that significantly reduce the time needed to find and access information.²⁶⁸

Databases are protected under Article 3(D) of the *Copyright Law* in Jordan as follows:

Protection shall also encompass the collections of literary or artistic works such as encyclopaedias, selections and collected data whether or not collected in a machine readable form. Provided that such collections represent as to their selection or the arrangement of their contents innovated intellectual works, protection shall also encompass collections containing selective extracts of

²⁶³ John Abbot, *Reverse Engineering of Software: Copyright and Interoperability*, 14 J. L. & INFO. SCI. 7 (2003).

²⁶⁴ Susanna H.S. Leong, *Legal Protection of Factual Compilations and Databases- Rethinking the Copyright Protection Model in Singapore*, 5 J. WORLD INTELL. PROP. 1047 (2007).

²⁶⁵ See KHATER, *supra* note 103, at 301–03.

²⁶⁶ ICTSD and UNCTAD, *Resource Book on TRIPS and Development*, Cambridge University Press, 2004. Chapter 11, “Copyright: Term of Protection,” available at http://www.iprsonline.org/unctadictsd/docs/RB_2.11_update.pdf (last visited on April 17, 2012).

²⁶⁷ MARK J. DAVISON, *THE LEGAL PROTECTION OF DATABASES* (2003).

²⁶⁸ *Id.*

poetry, prose, music or other material, provided that the sources and authors of the extracts are specified in the said collections and without infringing the copyright of each work which represents a part of these collections.

Article 7 of the *Copyright Law* in Jordan provides as follows:

The protection stipulated in this law shall not encompass the following works unless the collections of these works were distinguished by a personal effort involving innovation or arrangement.

Article 7 does not define what constitutes encyclopaedias, selections and collected data, and treats all works the same. In this regard, the position of the Jordan is similar to the position in other countries such as Singapore and Malaysia.²⁶⁹ But what level of originality, under Article 3 of the *Copyright Law* in Jordan, is required to protect databases in Jordan?

There are two theories on the legal protection of databases: the “sweat of the brow theory” and “the labour/investment theory.” The first requires a low level of originality and minimum efforts to satisfy the law, whereas the second requires a higher level of originality and maximum efforts to gain protection under the law.

There is no case law in Jordan on databases that tells which theory the law refers to. Although Article 3 of the *Copyright Law* in Jordan is not explicit about the level of originality required under the law, it is inferred from the language of “personal effort” used in the law that it requires only minimum effort (“sweat of the brow theory”) to satisfy the law. What is clear is that the copyright protection is limited only to the selection or arrangement of the data and not to the data itself, since information per se is not protected.²⁷⁰ This is consistent with Article 2(5) of the *Berne Convention*.²⁷¹

More studies need to be conducted in Jordan to examine the businesses that are working on creating databases in the country and to

²⁶⁹ Compare Leong, *supra* note 264 (for Singapore), with Azmi, *supra* note 259, at 271–72 (for Malaysia).

²⁷⁰ This could be inferred from article 3(A)(D) of the Jordanian Copyright Law. See Copyright Law No. 22 of 1992, art. 3(A)(D), OFFICIAL GAZETTE OF JORDAN, No. 3821 (Apr. 16, 1992) (as amended).

²⁷¹ Article 2(5) of the *Berne Convention* provides that:

5) Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.

Berne Convention, *supra* note 148, art. 2, ¶ 5.

examine their needs, so that the law properly protects their rights and encourages creativity and innovation within the IT sector.

VIII. WHAT NEEDS TO BE DONE?

It is clear that the *Copyright Law* in Jordan was not drafted with development goals in mind. To improve Jordan's IP regime, it will be important to take a developmental perspective when drafting laws. This section provides some recommendations and suggestions that would improve the *Copyright Law* and the Jordanian IP system and render it pro-development.

A. Educate policymakers and the public on IP and development issues

Going forward, it will be important to educate policymakers and those involved in drafting IP laws in Jordan the relationship between IP and development theory.²⁷² IP can no longer be seen as a tool that is used for the sole benefit of inventors and intellectual creators; rather, it is important for many people in Jordan, as it impacts their lives in areas including education, innovation, creativity and health.²⁷³

It would be useful to undertake studies in Jordan that evaluate the economic and cultural impact of industries that rely on IP. Such studies would help policymakers understand the needs of various sectors of the economy and how they can be strengthened by IP systems. These studies would aid them in drafting appropriate IP laws, which correspond with the economic and cultural needs of the country.

Furthermore, IP government organizations (such as copyright and patent offices) in Jordan need to be structured so as to help meet the country's development objectives. These government organizations

²⁷² The following is a primary reading list: AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999); HA-JOON CHANG, *KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE* (2003); INTELLECTUAL PROPERTY RIGHTS, DEVELOPMENT, AND CATCH UP: AN INTERNATIONAL COMPARATIVE STUDY (Hiroyuki Odagiri et al. eds., 2010).

²⁷³ Professor Madhavi Sunder noted that:

Intellectual property is essential to development, not just in the narrow sense of efficiency, but in this broader view of expanding capability for central freedoms. Surely, copyright and patents determine our access to basic needs, from educational material to lifesaving medicines. What is less obvious is that failure to be recognised as an author or inventor may impede one's access to these essential life goods by diminishing one's material wealth and the capability for living a full life. Stated differently, the implications in intellectual property rights go well beyond incentives for innovation: these rights are related to questions of cultural relations, social development, and GDP growth.

Madhavi Sunder, *Intellectual Property and Development As Freedom*, in *THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES* 453, 470 (Neil Weinstock Netanel ed., 2009).

work not only to promote the IP rights of foreign corporations, nor to increase their portfolio of IP registrations, but should also work closely with local inventors and creators, especially those who are keen to protect local culture and indigenous knowledge. This will require government organizations to educate the public on how to use IP for the benefit of the domestic economy. They should also advise the Jordanian government on the proper policies that need to be implemented in order to gain maximum benefits under the international IP systems.

Finally, it is important to teach students in Jordan about IP through a development perspective. Jordan's IP scholars should teach IP to students in a balanced way that takes into consideration the needs of businesses, as well as consumers and the general public. IP scholars in Jordan should also make sure that appropriate educational materials that take a development approach into consideration are made available for the benefit of the students and the greater community.

B. Integrate the development dimension into Jordanian IP laws

It is important to move beyond the view that only IP maximalist would benefit Jordan.²⁷⁴ Jordan could gain from adopting a more balanced view of IP that does not favour only copyright owners, but also gives an equal importance to users and the public. Instead of drafting "stronger IP laws,"²⁷⁵ it is more important to have appropriate laws that correspond with the needs of Jordan and its citizens.²⁷⁶

This could happen by studying the social and economic conditions in Jordan and by enacting laws that accord with its national development goals. Jordanian IP laws should also be drafted in a way that supports public policy objectives, such as those relating to the transfer of technology, public health and the environment.²⁷⁷ These policies should not be imposed from above, but rather should be based on a real assessment of the local contexts.²⁷⁸

²⁷⁴ See TAWFIQ TABBAA, USAID, UPDATE ON COMPLIANCE WITH INTELLECTUAL PROPERTY IN JORDAN (2007), available at http://pdf.usaid.gov/pdf_docs/PNADM871.pdf.

²⁷⁵ *Id.*

²⁷⁶ Mary W.S. Wong, The Next Years in Copyright Law: An Asian Perspective (Feb. 16, 2007) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1017144#PaperDownload; see also Mohammed El-Said, *Access to Knowledge, and Intellectual Property Protection in the Arab World: The Challenges of Development, in THE ACCESS TO KNOWLEDGE MOVEMENT: OPPORTUNITIES, CHALLENGES AND THE ROAD AHEAD*, Bibliotheca Alexandria 53 (Hala Essalmawi ed., 1st ed. 2009), available at <http://www.bibalex.org/a2k/attachments/references/reffileu24bkg55ykgwgc55zysxzq45.pdf>.

²⁷⁷ Abdel Latif, *supra* note 37, at 53.

²⁷⁸ Meeting Report, *ICTSD-UNCTAD Dialogue, 2d Bellagio Series on Development and Intellectual Property*: "Towards Development-Oriented Intellectual

As suggested previously, Jordan already has an IP system and is not in a position to repeal existing laws. However, it needs to re-examine these IP laws to ensure that they are in fact beneficial and are not impeding its social and economic development. Existing IP laws need to be restructured in a way that is ‘pro-development,’ by taking into account Jordan’s domestic context, its international obligations, and the needs of its citizens. IP laws will also need to be amended from time to time to adapt to the changing needs of the country as it grows.

The development of IP laws should not be looked upon as an end, but rather as one of a range of possible tools that Jordan can use to promote innovation, creativity, technological capacity and development.²⁷⁹ It is also important to recognize IP not only from an economic perspective, but also from a cultural perspective. This requires that Jordan design IP systems that not only promote economic development, but also promote local culture and boost local innovation.

The Internet is a powerful tool and a source of opportunities Jordan should use to further its development. Accordingly, it is important to make sure that IP laws in Jordan are structured in a way that does not unreasonably interfere with its citizens’ usage of the Internet, and to ensure that such usage contributes to the country’s social and economic development. IP laws in Jordan therefore need to facilitate A2K and allow citizens to develop their capabilities.

C. Consider seriously alternative approaches to IP

Some observers think that IP laws are overly restrictive when applied in the Internet. They argue that we should be looking for ways to reduce impediments to the use and reproduction of information over Internet networks.²⁸⁰ This approach has not yet been fully explored by academics and researchers in Jordan. It is important to consider alternative approaches to IP including FOSS and open content licensing. These alternatives could be helpful in assisting social and economic development in Jordan.²⁸¹

Property Policy: Advancing the Reform Agenda” (Sept. 18–21, 2003), available at http://www.iprsonline.org/unctadictsd/bellagio/docs/Bellagio2_Report.pdf.

²⁷⁹ *Id.*

²⁸⁰ Jonathan Zittrain, *Alternatives to Intellectual Property*, available at <http://cyber.law.harvard.edu/ilaw/mexico_2006_module_2_alltoip> (last visited on November 20, 2011).

²⁸¹ According to Professor Steven Weber from the University of California at Berkeley, FOSS could be an important tool in helping developing countries in their social and economic development, especially when it has been localised for the benefit of the people working in the government, business and education sectors. As Professor Steven Weber has noted that:

Of course information technology and open source in particular is not a silver bullet for longstanding development issues; nothing is. But the transformative potential of computing does create new

Creative Commons (CC) licenses are also helpful in enabling Jordan and developing countries to increase access to educational materials and research. CC licenses allow researchers in Jordan to access scientific and educational materials from researchers and public institutions in the developed world.²⁸² This does not solve all A2K problems in developing countries, but can help these countries access works available under permissive licences.²⁸³ Scholars, researchers and government officials in Jordan should also explore the use of CC in “licensing out” their work to the general public especially when it is publicly funded. This would allow others to access their work and build on it.

D. Take advantage of the flexibilities of international copyright treaties

There are certain flexibilities within the international copyright treaties (including *Berne* and TRIPS) that could be used to meet the unique needs of developing countries including Jordan. These include: 1) flexibilities in the scope of copyright protection; 2) flexibilities in relation to the duration of the copyright protection term; and 3)

opportunities to make progress on development problems that have been intransigent.

STEVEN WEBER, *THE SUCCESS OF OPEN SOURCE SOFTWARE* 254 (2004). The advantages of adopting FOSS in developing countries are not only economic. As Professor Weber has noted:

The potential leverage on development comes not from software itself, but from the broad organizational changes that the open source process, as a way of making software, will drive. FOSS should not be used to make up for lack of sufficient legal and economic infrastructure, or replace institutions by installing Internet connections. But there are interesting possibilities for building systems of distributed innovation within emerging developing countries and emerging economies that lead to autonomous innovation. This could have a significant impact on development prospects

Id.

²⁸² The Departments of Labor and Education in the U.S. announced on January 20, 2011 that the Obama Administration had granted \$2 billion to create Open Education Resource (OER) materials and provide community colleges and other eligible institutions of higher education with funds to expand and improve their ability to deliver education and career training programs. See Timothy Vollmer, *New Federal Education Fund Makes Available \$2 Billion to Create OER Resources in Community Colleges*, CREATIVE COMMONS (Jan. 20, 2011), <https://creativecommons.org/weblog/entry/26100>. All the resources created using these funds must be released under the CC Attribution 3.0 license (CC BY). This particular license will allow subsequent users to copy, distribute, transmit and adapt the copyrighted work, provided that attribution is given to the author. *Id.*

²⁸³ There are a large number of digital works that are licensed under CC copyright licensing systems including materials available through Flickr, Massachusetts Institute of Technology Open Courseware (MIT Open Courseware), and the Public Library of Science. See FLICKR, <http://www.flickr.com/> (last visited Mar. 21, 2012); MIT OPEN COURSEWARE, <http://ocw.mit.edu/index.htm> (last visited Mar. 21, 2012); PUB. LIBR. OF SCI., <http://www.plos.org/> (last visited Mar. 21, 2012).

flexibilities in relation to the limitations and exceptions.²⁸⁴ Jordan has managed to include some of those flexibilities in the *Copyright Law* in Jordan (including the flexibilities in relation to the duration of the copyright term), but careful review of the provisions of the law reveal that not all of these flexibilities were introduced fully.

A study conducted by Consumers International has found that a number of developing countries and emerging economies including Cambodia, China, Indonesia, Malaysia, Mongolia and the Philippines have not benefited from the flexibilities available under international copyright conventions.²⁸⁵ Jordan in particular has not taken advantage of the degrees of legislative flexibility offered to countries under the *Berne Convention* and the *TRIPS Agreement*.²⁸⁶ Accordingly, it is important to review the *Copyright Law* in Jordan and examine how Jordan could obtain maximum benefits from the flexibilities offered under the international copyright treaties.

It is also important that Jordan and other developing countries closely monitor and become active participants in the WIPO Development Agenda,²⁸⁷ since this agenda could have an important impact upon future developments within the international IP system.

E. Conduct a review of the copyright law in Jordan

Despite the amendments that were made to the *Copyright Law* in Jordan in 2005, it still fails to meet the expectations of consumers and the general public.²⁸⁸ This is because policymakers in Jordan have opted to increase the level of IP protection for copyright owners in exchange for foreign investment and economic assistance. This outlook is short-sighted, because while it might encourage investments to pour into Jordan for a short period, it could have major implications for overall education and developmental goals.

To ensure balanced IP laws, it is essential that consumers and the public at large are included in the legislative debates when amending any IP laws. The Jordanian government needs to be open about its development plans and should engage widely with its citizens, especially in relation to IP and development.

²⁸⁴ See Consumers International, *supra* note 224.

²⁸⁵ *Id.*

²⁸⁶ On the flexibilities contained in the TRIPS Agreement, see generally Alhaj Tejan-Cole, Presentation, "Flexibilities in the TRIPS Agreement and its Impact on National Intellectual Property Policy," available at <http://www.belipo.bz/wp-content/uploads/2011/12/TRIPS-FLEXIBILITIES.pdf> (last visited Mar. 21, 2012).

²⁸⁷ *Development Agenda for WIPO*, WIPO, <http://www.wipo.int/ip-development/en/agenda/> (last visited Mar. 21, 2012).

²⁸⁸ There is a draft of Jordanian Copyright Law in the process of being reviewed by the Parliament and it is not clear when and whether it will be approved.

F. Popularize and promote A2K

A2K is a concept put forward by those who believe that knowledge should be freely accessible to developing countries, with limited legal restrictions. The concept gained momentum with the ever-increasing amount of freely available content distributed through the Internet. Many IP scholars and international organisations, including Consumers International²⁸⁹ and the Library of Alexandria in Egypt,²⁹⁰ support the concept of A2K.

The A2K movement tries to draw attention to another aspect of IP which has long been neglected: that a greater sharing of knowledge could be far more beneficial to overall human development and welfare than having knowledge restricted under the proprietary control of individuals.

The A2K movement not only opposes strong IP laws, but it is also against any restriction on knowledge dissemination that will ultimately obstruct and oppose overall human welfare and social and economic development.

It is submitted that Jordan and developing countries should commit resources towards launching a public awareness campaign to educate people on how best individuals (particularly students, teachers, archivists, academics and librarians) can access and capitalize on copyrighted materials, which they are legally entitled to access freely.²⁹¹

It is also important for Jordan and developing countries to observe the developments taking place in connection with A2K, and ensure that they are engaged with active participants in international organizations that promote it, including Consumers International, Electronic Information for Libraries (EIL),²⁹² African Copyright & Access to Knowledge Project (ACA2K),²⁹³ IFLA Committee for Copyright,²⁹⁴ Knowledge Ecology International²⁹⁵ and others.

²⁸⁹ CONSUMERS INT'L, <http://www.consumersinternational.org/> (last visited Mar. 21, 2012).

²⁹⁰ LIBR. OF ALEXANDRIA, http://www.bibalex.org/Home/Default_EN.aspx (last visited Mar. 21, 2012).

²⁹¹ CONSUMERS INT'L, *supra* note 160.

²⁹² EIFL, <http://www.eifl.net/> (last visited Mar. 21, 2012).

²⁹³ AFR. COPYRIGHT & ACCESS TO KNOWLEDGE PROJECT, <http://www.aca2k.org/> (last visited Mar. 21, 2012).

²⁹⁴ *Committee on Copyright and Other Legal Matters (CLM)*, IFLA, <http://www.ifla.org/clm> (last visited Mar. 21, 2012).

²⁹⁵ KNOWLEDGE ECOLOGY INT'L, <http://keionline.org/> (last visited Mar. 21, 2012).

G. Promote open access and create open access institutional repositories

Open access enables researchers to communicate their results to international researchers widely, quickly and cheaply. This is important for researchers in Jordan and developing countries, helps to connect them global research communities.²⁹⁶ Educational institutions in Jordan should adopt and support open access, in order to benefit the local community and to spread knowledge amongst Jordanian citizens. The Jordanian government should look into the possibility of adopting an open policy across government institutions, as this would bring immense value to researchers and government officials.

Repositories are rich sources of information, data, images and valuable research that would be help serve Jordanian researchers.²⁹⁷ It is not enough to adopt open policies that encourage open access; it is just as important to create repositories that would put these policies into practice. The Jordanian government should give its full support to any initiative, either local or international, that might develop necessary repositories in the country.

H. Expand the range of limitations and exceptions for the Internet environment

Any copyright law in Jordan merits criticism if it does not include proper limitations and exceptions, especially with regard to the Internet environment. Appropriate limitations and exceptions in the digital environment would give Internet users in Jordan the following:

- the right to re-use copyright materials in circumstances where there is no financial detriment to the copyright owner;
- the right to engage in transformative and “fair use;” and
- the right to engage in format shifting, e.g. changing material from analogue to digital format or changing material.²⁹⁸

The Jordanian legislature should adopt a maximalist approach when drafting limitations and exceptions to the *Copyright Law* in Jordan. This means adopting as many limitations and exceptions as possible for the

²⁹⁶ Julie M. Esanu & Paul F. Uhlir, *Open Access and the Public Domain in the Digital Data and Information for Science*, in OPEN ACCESS AND PUBLIC DOMAIN IN DIGITAL DATA AND INFORMATION FOR SCIENCE 124 (2004), available at http://www.nap.edu/catalog.php?record_id=11030.

²⁹⁷ Abdul Ghani Azmi, *supra* note 259, at 277.

²⁹⁸ Fitzgerald & Olwan, *supra* note 145, at 570.

Internet and digital technologies, and making sure that new limitations and exceptions can be added in the future, as technology changes.²⁹⁹

It is also important to permit proper limitations and exceptions for students, regardless of their physical location, and to clarify the library limitations and exceptions to cover any possible electronic use of a work, in order to permit effective research and the gathering and organizing of information.³⁰⁰ Adequate limitations and exceptions for libraries, archives and museums (including provisions for accessing and providing information, digitization, preservation and digital creation (including migration to new technologies as they change)) must be included in the *Copyright Law* in Jordan.

To the extent possible, Jordan should also consult international not-for-profit organizations, when drafting its limitations and exceptions, to help secure necessary legal advice.³⁰¹

I. Give particular consideration to copyright misuse

In the context of copyright law, the balance in the copyright system has shifted dramatically toward copyright owners³⁰² as shown in the *Copyright Law* of Jordan.

Competition or unfair competition laws are particularly important from a developmental perspective,³⁰³ as they guarantee that the monopoly given to IP owners is not misused. These laws are not only important in relation to patent laws, but also in the field of copyright. In Jordan, the *Unfair Competition and Trade Secret Law No. 15 for 2000*³⁰⁴ protects licensees from unfair practices by IP owners.³⁰⁵ One

²⁹⁹ *TIPS for Developing Countries when Reviewing Copyright Laws*, ACA2K (Sept. 9, 2009), http://www.aca2k.org/index.php?option=com_content&view=article&id=229%3Atips-for-developing-countries-when-reviewing-copyright-laws&catid=69%3Aenise&lang=en.

³⁰⁰ Abdul Ghani Azmi, *supra* note 259, at 273–74.

³⁰¹ ACA2K, *supra* note 299; see also GIVARRA & HACKETT, *supra* note 193; WIPO, *STUDY ON LIMITATIONS AND EXCEPTIONS OF COPYRIGHT AND RELATED RIGHTS IN THE DIGITAL ENVIRONMENT* (2003), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf.

³⁰² John T. Cross & Peter K. Yu, *Competition Law and Copyright Misuse*, 56 *DRAKE L. REV.* 427, 430 (2008).

³⁰³ See Shiju Vaghese Mazhuvanchery, *The Indian Competition Act: A Historical and Developmental Perspective*, 3 *L. DEV. REV.* 241 (2010).

³⁰⁴ *Unfair Competition and Trade Secret Law No. 15 of 2000*, OFFICIAL GAZETTE OF JORDAN, No. 4423 (Apr. 2, 2000).

³⁰⁵ Article 9 of the *Unfair Competition and Trade Secret Law* provides that:

(A) Every provision or condition restricting competition included in the license contract related to any of the intellectual property rights, which may have negative effect on commerce, or many hinder the transference or dissemination of the technology shall be void and null, and in particular:

Jordanian commentator has criticised the law for providing very limited protection, which is not adequate to accommodate unfair competition cases.³⁰⁶ Jordanian courts should ensure that its judges are capable of handling cases that relate to copyright abuses.³⁰⁷

IX. CONCLUSION

There are few areas of law which touch so closely upon our everyday activities, yet are as difficult for the average person to comprehend, as copyright law.³⁰⁸ It determines who may use and control the most important assets of the new digital economy.³⁰⁹ Despite this fundamental importance, copyright and its relationship to the social and economic conditions of developing countries, remains poorly understood by policymakers.³¹⁰

Jordan has been a WTO member since April 11, 2000. As part of its membership obligations, it was required to become a signatory to the principle international copyright treaties (*Berne Convention*, WCT and WPPT) – a move which necessitated major amendments to its IP systems and copyright law. More recently, Jordan became the third country and the first Arab state from the Middle East to sign an FTA with the U.S. (the USJFTA), which came into force in Jordan on

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- (1) To prohibit the licensee from transferring modifications done on the technology included in the license contract except for the licensor (Back transferring of technology).
 - (2) Preventing the licensee from arising Juridical or Administrative disputes in respect of the licensed intellectual property right.
 - (3) To compel the licensee to accept the license with number of rights instead of one right only.
 - (B) The intellectual property rights mentioned in paragraph (A) of this article particularly include:
 - (1) Copyrights and neighbouring rights.
 - (2) Trademarks.
 - (3) Geographical indications.
 - (4) Industrial drawings and Industrial designs.
 - (5) Patents.
 - (6) Layout designs of integrated circuits.
 - (7) Trade secrets.
 - (8) New varieties of plant.

Id. art. 9.

³⁰⁶ Haitham A. Haloush, *A Practitioner Guide to the Unfair Competition Law in Jordan*, 2 OPEN L.J. 1 (2009), available at <http://bentham.org/open/tolawj/articles/V002/1TOLAWJ.pdf>; Haitham A. Haloush, *Building a Trade Secrets System in Jordan: A Critique of the Current Legal Framework*, 4 J. INTELL. PROP. L. & PRAC. 425 (2009).

³⁰⁷ Professors John Cross and Peter Yu define copyright abuse as “the use of the rights of copyright owners in any improper way.” It is hoped that IP scholarship would give in depth analysis of the legal issues involved in relation to copyright abuse. See Cross & Yu, *supra* note 302, at 455.

³⁰⁸ Mizukami et al., *supra* note 228, at 7.

³⁰⁹ *Id.*

³¹⁰ *Id.*

December 17 2001. This in turn led to further amendments to its IP system, which were more restrictive than those required by the WCT and WPPT. This experience is similar to that of other countries from the region that have signed bilateral FTAs.

IP is not to be regarded as a magic formula that will solve the problems of any developing country, but rather as “a means to an end.” It is important for Jordan and other developing countries to move beyond the traditional view of IP towards a development-oriented approach, which integrates IP into their wider development policies.³¹¹

This article has suggested various means to achieve that goal. It is important to analyse every provision in the *Copyright Law* from a developmental perspective before introducing it into Jordanian law. This should be done in conformity with the international copyright treaties that Jordan has signed. Undertaking this process promises to not only satisfy its international obligations, but also to assist Jordan on its path to social and economic development.

³¹¹ Abdel Latif, *supra* note 37.