Copyright Law in the United Arab Emirates in the Digital Age

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Since joining the World Trade Organisation (WTO) and signing the associated Trade Related Aspects of Intellectual Property Agreement (“TRIPS agreement”) many countries throughout the world have amended or passed new laws on copyright. As part of this process, in 2002, the UAE promulgated a new copyright law titled Federal Law No. (7) of 2002 (UAE) Pertaining to Copyrights and Neighbouring Rights (“UAE Copyright Law”).

This article seeks to overview and evaluate the provisions of the UAE Copyright Law especially in the context of an increasingly digital and networked world.2

Copyright Fundamentals

Art 3 of the UAE Copyright Law confirms the fundamental principle that copyright protects the expression of ideas not simply the idea.3 Furthermore the sale of an item

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embodied copyright such as a book does not transfer economic or financial rights but it will transfer ownership of the physical item, namely the book. Pursuant to Art 4 “no prejudice shall be caused to the aspects of protection or the rights prescribed” under the law if the work has not “been filed nor the rights thereof and disposals therein” registered.

Copyright Subject Matter

Copyright subject matter is defined in Art 2 of the UAE Copyright Law in much the same way as in many other countries. It covers literary works such as books, computer software, databases, lectures and speeches, dramatic works, musical works, audio, visual and audio-visual works, architectural works, drawings, paintings, sculptures, works of applied art, photographs, maps and derivative works. This subject matter is extended by later sections to sound recordings (Art 18), broadcasts (Art 19) and performances (Art 17).

Economic and Moral Rights

Economic or Financial Rights

The core financial rights (or exclusive economic rights) of the “author and his successors or the holder of the right of the author” are specified in Art 7 to include the right to grant licences for the exploitation of the work, in any manner, particularly for “reproduction”, electronic storage or downloading, public performance or

3 Under Art 3 copyright protection will not be afforded to:
“1) Official documents, whatever the source or target language thereof, including legal texts, regulations, decisions, international agreements, judicial rulings, arbitral awards, and judgments issued by administrative committees of judicial competence. 2) Reports and news of incidents or current events having the character of mere items of press information. 3) Works that have fallen into public domain. Nevertheless, items 1, 2 and 3 of the present article shall be protected, if characterized by innovation in terms of the collection or arrangement thereof or any other effort exerted therein.”

4 See UAE Copyright Law, Art 13. Things are more complicated when dealing with intangible items such as software and this is why major software companies “licence” (as opposed to “sell”) software. A licence will determine user rights and in many cases will not allow any further selling of the particular software or copies of it. See further B Fitzgerald, “Commodifying and Transacting Informational Products Through Contractual Licences: The Challenge for Informational Constitutionalism” in CEF Rickett and GW Austin (eds), Intellectual Property and the Common Law World, Oxford, Hart Pub, 2000, 35.


6 Art 2 UAE Copyright Law lists 12 types of copyright material to be protected under the law.

7 “National folklore” is defined in Art 1 (and referred to in the definition of “derivative work” in Article 1) but is not mentioned in Art 2 or elsewhere in the UAE Copyright Law.

8 Reproduction means according to UAE Copyright Law, Art 1: “The making of one or more reproductions of a work, phonogram, broadcast or any performance in any manner or form, including
communication, broadcasting, re-broadcasting, acting a play, transmission, translation, alteration, modification, rental, lending and publication by any means including provision of publication through computers or information nets or communication nets or other means.” Rental of software and audio-visual works is narrowed by Art 8. Under Art 8 the right to rental “will not apply to computer software unless such software is the essential subject of a rental” and “will not apply to audio-visual works unless such rental is prejudicial to the normal exploitation of such works.” Art 18 outlines the financial rights of the producers of phonograms or sound recordings which include the right to prevent any exploitation in any manner without authorisation and the right to disseminate recordings via wire, wireless, computer or other means. Third parties are prohibited from “exploiting such sound recordings by reproduction, rental, broadcasting, re-broadcasting and making available to the public through computers or other means”. Under Art 19 broadcasting organisations have the right “to grant licenses for the exploitation of the recordings and broadcast thereof” and to prevent “any communication to the public” without authorisation. Third parties are prohibited from exploiting broadcasts by “recording, copying, rental, re-broadcasting or communication to the public in any manner”. Pursuant to Art 17 performers have financial rights to transmit and communicate unfixed performances, fix the performance on phonograms and the right to reproduce the performance fixed on the phonograms. Third parties are prohibited from the “fixation of such live performance on a phonogram for direct or indirect, commercial revenue, rental, transmission or availability to the public on any medium by others without authorization of the right holder”. Art 17 is expressed to apply “to fixation of performances in audiovisual work, by their performers unless agreed otherwise.” This seems to suggest that use of the sound recording in an audiovisual work will not impact on its level of protection.

Moral Rights

In many countries copyright law provides authors with the moral rights of integrity and attribution (paternity) and this is the case in the UAE where the additional rights to decide to first publish the work (divulgation) and “to withdraw the work from circulation if serious reasons justifying such have occurred” (retraction) are also protected. Under UAE Copyright Law moral rights “are not liable for prescription or permanent or temporal electronic loading or storage, and whatever the method or device used in reproduction.”

9 Communication to the Public means according to UAE Copyright Law, Art 1: “Wire or wireless transmission of a work, a performance of phonogram or of a broadcast in a manner that enables receiving thereof, through transmission only, to persons other than the family members and close friends, and in any place other than the place of transmission; regardless of the time, place or manner of receiving.”

10 P. Hansen, Intellectual Property Law and Practice of the UAE (2009) OUP Oxford, 220-2. Hansen (at 224) questions whether in relation to the financial rights of neighbouring rights-holders under the UAE Copyright Law the granting of a right to prohibit certain types of exploitation is the same as a the grant of a positive right to authorise those acts.

11 See UAE Copyright Law, Art 5. Under Art 5 the right to withdraw the work from circulation must be exercised through the relevant court of jurisdiction and compensation paid by the author to a party ascribed the financial exploitation rights. Pursuant to Art 16 performers have the moral rights of attribution and integrity. Art 16 also provides in relation to performers moral rights that: “The Ministry after the expiry of the economic rights stipulated in this law shall exercise such literary rights in order to preserve their performance in the shape of its creation.”
The UAE Copyright Law treats protected copyright material as an extension of the personality of the author. In this regard the UAE Copyright Law is similar to Article L. 121-1 of the French Intellectual Property Code which provides:

An author shall enjoy the right to respect for his name, his authorship and his work. This right shall attach to his person. It shall be perpetual, inalienable and imprescriptible. It may be transmitted mortis causa to the heirs of the author.

Authors

An author under Art 1 of the UAE Copyright Law is deemed to be “the person who creates the work.” A person publishing anonymously or under a pseudonym shall also be deemed as an author provided that no doubt is raised in respect of their true identity. Where doubt exists “the publisher or producer of the work, whether a natural or juridical person, shall be deemed representative of the author in exercising the rights thereof, until the true identity of the author is recognized.” Pursuant to Art 26 of the UAE Copyright Law, “[a]ny natural or juridical person who directed the creation of a work of collective-authorship may solely assume the moral and financial copyrights thereon; unless otherwise agreed upon.”

Pursuant to Art 25 of the UAE Copyright Law; “[i]n [the] case of works of joint-authorship, in which the shares of authors may not be separated, all the joint-authors shall be deemed equal authors of the work; unless otherwise agreed upon in writing.” In this case “no author may singularly exercise the copyrights” unless there is a written agreement stating otherwise.

Licensing and Transfer

Under the UAE Copyright Law, the author or their successors may grant licenses and transfer some or all of their financial rights either to a “natural or juridical person” provided that the transfer is memorialised in writing. The transfer agreement must include “specification of each right that has been subject to transfer, and a statement of the purpose of each right and the exploitation period and place.”

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12 See UAE Copyright Law, Art 5.

13 “Creativity” is defined as “the element of innovation that bestows authenticity and distinctiveness upon the work.”: Art 1.

14 See UAE Copyright Law, Art 1.

15 See UAE Copyright Law, Art 26. P. Hansen, Intellectual Property Law and Practice of the UAE (2009) OUP Oxford, 180, notes that the position of employers is not expressly mentioned in the copyright law and questions whether Art 26 is meant to do this job, concluding that it is not a complete solution.

16 See UAE Copyright Law, Art 25. On the notion of a “joint author” in an audio-visual, audio or visual work see Art 27.

17 See UAE Copyright Law, Art 9.

18 Ibid. See generally P. Hansen, Intellectual Property Law and Practice of the UAE (2009) OUP Oxford, 239-40 questioning whether “transfer” includes the notion of licenses and concluding that it does.
his successor may receive compensation in cash or in kind, in return for the transference of one or more of the financial exploitation rights of the work to third parties. Such compensation shall be in the form of percentage participation in the income generated by the exploitation”.¹⁹

**Duration/Term**

The term or length of protection that copyright law provides will depend on the type of copyright subject matter that is in issue.²⁰ For example in the UAE copyright in a book or musical composition will last for the life of the author plus fifty years²¹, a sound recording fifty years and a broadcast twenty years.²² In some countries, like Australia, moral rights last for the duration of the copyright²³ while in other countries such as France²⁴ and China²⁵ moral rights are “unlimited” or “perpetual” – they last forever. It is unclear from the UAE Copyright Law what the position is in the UAE.²⁶

**Treatment of Foreign Copyright**

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¹⁹ See UAE Copyright Law, Art 10.
²¹ Compare that with article L. 123-1 of the French Intellectual Property Law that provides that: “The author shall enjoy, during his lifetime, the exclusive right to exploit his work in any form whatsoever and to derive monetary profit therefrom. On the death of the author, that right shall subsist for his successors in title during the current calendar year and the 70 years thereafter”.
²² See UAE Copyright Law, Art 20.
²³ Australian Copyright Act 1968 section 195AM.
²⁶ One Jordanian scholar suggests that perpetual protection of moral rights is a characteristic of the copyright laws that are based on the French continental model. UAE as other Arab countries has relied in drafting their law on the Egyptian Copyright Law of 1954 that was also based on French law: see Nowaf Kanan, Copyright Law (in Arabic), Dar haqafa 2004 at 45, 88- 90. AL Tamimi & Co “Copyright Law” at page 2 suggests moral rights under UAE law are “perpetual”. [http://www.zu.ac.ae/library/html/UAEInfo/documents/UAECopyright.pdf](http://www.zu.ac.ae/library/html/UAEInfo/documents/UAECopyright.pdf)
Pursuant to a series of international conventions starting with the Berne Convention for the Protection of Literary and Artistic Works 1886 (Berne Convention), many countries will protect the copyright of a foreign national under their law as if the foreigner were a national — this is called the principle of national treatment. Art 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”.

Art 44 of the UAE Copyright Law explains that “without prejudice to the provisions of International conventions applicable in the State .. the law.. herein shall apply to the works, performances, phonograms and broadcasts made by foreigners provided that the principle of reciprocity is applied.” The use of the word reciprocity creates some confusion in this context. As a general rule the international conventions referred to above adopt the notion of “formal reciprocity” also known as national treatment yet eschew the notion of “material reciprocity”. The Berne Convention for example implements the principle of national treatment although in relation to copyright term it reverts to a principle of material reciprocity providing in Art 7(8) “that unless the legislation of that country [where protection is claimed] otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.” If “reciprocity” in Art 44 means “material reciprocity” then in accordance with the international obligations of the UAE under TRIPS, it could only have application in those circumstances where the international convention is not applicable. The words “without prejudice to International Conventions applicable in

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29 See also Art 56 of the Jordanian Copyright Law which provides:
   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 Art 23 of this law.
30 “Formal reciprocity, often referred to as national treatment, involves granting foreign nationals the same level of protections/rights as one does one's own nationals... In such situations, a foreign national can rely on the host state granting him the same rights as local persons receive.” “Material reciprocity, often referred to as mutuality, occurs where a state agrees to provide foreign nationals only with the same protections/rights that the foreign state affords the first state' own nationals.”: S. Handa, Copyright Law in Canada (Toronto: Butterworths, 2002) <http://duhaime.org/LegalDictionary> See further S. Ricketson, The Berne Convention for the Protection of Literary and Artistic Works 1886, (1987), Sweet and Maxwell, 23-25.
32 See Art 147 UAE Constitution.
the State” would be read so as to suggest that UAE law adopts national treatment; the reciprocity requirement being applied only where the relevant international conventions are not applicable. Regardless of intent this provision should be more clearly expressed.

**Limitations and Exceptions**

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 will usually permit various uses of copyright material for no cost and without the permission of the copyright owner in defined circumstances. The US Copyright Act 1976 in s 107 provides that “fair use” of copyrighted work is not an infringement of copyright while in many other countries such as the UAE limitations and exceptions are enumerated in terms of specific categories of activity or purpose.

Art 22 provides for eight exceptions to the author’s financial or exclusive rights under the UAE Copyright Law. They can be summarised as follows:

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34 See generally Article 9 *Berne Convention* (1886). Art 13 of *TRIPs* provides: “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.”
35 S107: “Limitations on Exclusive Rights: Fair Use. Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”
36 UAE Copyright Law, Art 22 and Art 23.
37 Art 22 is extended to neighbouring rights through Art 24.
38 UAE Copyright Law, Art 22 corresponds with the *French Intellectual Property Code* Art L122-5 that provides similar limitations and exceptions and reads as follows:

“Once a work has been published, the author cannot prevent:

1. Private family performances.
2. Copies for the private and personal use of the copier. This provision does not apply to works of art, computer programs (where a single safeguard copy is allowed, Art L122-6-1-II) and databases.
3. In cases where the name of the author and the source are clearly indicated,
   a) Analyses and short citations justified by the critical, polemical, scientific or pedagogical nature of the work.
   b) Press reviews.
   c) Diffusion of public speeches as current news.
4. Reproductions of works of art in catalogues for auctions in France (subject to regulatory restrictions).
5. Parody, pastiche and caricature, "taking into account the usage of the genre".
1) “To make a sole copy from the work for the merely personal and non-commercial or professional but personal use of the copier.” (Not applicable in certain cases to fine and applied art, architectural works and software (subject to 2 below));

2) Making a sole copy of a computer software program with the acknowledgement of the person lawfully in control of the software within the limits of the license or for the purpose of back-up or replacement for when the original is lost, destroyed or unusable provided the “reserve or derived copy must be destroyed even if it was stored in a computer as soon as the right of acquisition of the original copy” is no longer valid.

3) Copying of works for judicial proceedings;

4) Making a sole copy of the work with the acknowledgement of libraries, archives or documentation offices and not for profit, for preservation or research and study;

5) Quotations and analysis for criticism and review;

6) “Performing the work in family meetings or by students in an educational institute against no direct or indirect remuneration”;

7) “Presenting the fine arts, applied and plastic arts works or architectural works in broadcasting programmes, if such works are permanently present in public places.”

8) “Reproduction of written, sound or audio-visual short excerpts for cultural, religious, educational or vocational training purposes, provided that copying be in the reasonable limits of its purpose and that the name of the author and the title of the work be mentioned wherever is possible and that the copying authority does not aim at direct or indirect profit and that license for copying was unobtainable in accordance with the provisions of this law.”

Art 23 of the *UAE Copyright Law* (which is also extended to neighbouring rights through Art 24) also provides other limitations and exceptions for newspapers, periodicals or broadcasting organisations that are allowed to reproduce certain works for publication purposes provided that “the limits are justified by the objective thereof”.39.

**Infringement and Remedies**

The *UAE Copyright Law* like any other copyright law has provisions on infringement and remedies.40 In practice, judges usually appoint experts to help them determine whether a copyright infringement has taken place, but the final decision is left to the...
judge presiding over the case. Chapter 7 (Arts 34-41) of the UAE Copyright Law (entitled “Precautionary Measures and Penalties”) deals with enforcement. It provides the author or the rights holder or their successors with various remedies against infringers including, precautionary measures, administrative sanctions, civil redress, and criminal penalties.

Art 34 gives the author or their successors the right to request the Head of the Court of First Instance to take precautionary measures against infringers of copyright. Customs authorities may also order on their account or upon the request of the author or the rights holder or their successors “the suspension of the release of goods that have been counterfeited in contradiction with the provision of the law herein, for a period not exceeding twenty days”.

Pursuant to Art 37, without prejudice to any severer penalty provided for in any other law, infringers of copyright shall be penalised by imprisonment for not less than two months and a fine of not less than ten thousand Dirhams (2,700 USD), and not exceeding fifty thousand Dirhams (13,600 USD) or either of both penalties.

5) Issues to Consider

Having outlined the core provisions of the UAE Copyright Law it is now possible to reflect upon how this law might meet the challenges of innovation and development in the digital age.

A) Intermediary Liability and the Need for Safe Harbour Provisions

The UAE Copyright Law contains no provision dealing expressly with secondary (or what is called in other jurisdictions – contributory/vicarious/inducement or authorisation) liability. In most jurisdictions in the absence of a provision in the

41 P. Hansen, Intellectual Property Law and Practice of the UAE (2009) OUP Oxford, 237-238 suggests that a right to compensation is not expressly provided for in the copyright law and must be found in the general law: see Federal Law No 5 of 1985 on Civil Transactions, Art 282.


43 See UAE Copyright Law Art 34 and Art 35.

44 See UAE Copyright Law Art 36.

45 Including the “moral or financial rights of the author or the holder of the neighboring right”: Art 37 (1).

46 See further UAE Copyright Law, Art 38 (dealing specifically with protection of technological measures, electronic rights management information and software) which provides for the tougher penalties of imprisonment for not less than three months and a fine of not less than fifty thousand Dirhams (13,600 USD) and not exceeding five hundred thousand Dirhams” (136,128 USD).

Significantly the UAE Copyright Law contains no “safe harbour” provisions designed to immunise intermediaries from liability for copyright damages. This type of protection first enacted in the US Digital Millennium Copyright Act (DMCA) 1998 is vital to ensuring a “free flowing” Internet as a platform for innovation. If intermediaries are held liable for every infringing article that passes through their services that will lead them to impose practices and policies that will chill communication over the Internet.

In France, hosting service providers or “technical intermediaries” as defined in the Law on Confidence in the Digital Economy (LCEN) of 21 June 2004 (“Pour La Confiance en l’économic Numerique”) are also protected in certain circumstances from liability in relation to the infringing acts of users. The LCEN implements (in French law) the European Union E-commerce Directive 2000/31/EC of 8 June 2000 on Certain Legal Aspects of Information Society.

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48 Tort is recognised in the UAE under Federal Law No 5 of 1985 on Civil Transactions, Art 124. Art 282 of the UAE Federal Law No 5 of 1985 on Civil Transactions provides that “any harm done to another shall render the perpetrator, even if he is a minor, liable to make good the harm”. Three elements must be present for tort liability to arise under UAE law and civil legal systems: (i) a fault or error (which may be either an act or a failure to act); (ii) damage to another; and (iii) a casual connection between the fault and damage. See Al Tamimi, Law of Tort in the UAE, See further the explanation of tort law under continental European systems which have had a strong influence in Arabic countries, particularly that of France (e.g. Art 1382 French Civil Code): Edward A. Tomlinson, Tort Liability in France for Act of Things: A Study of Judicial Lawmaking. 48 La. L. Rev. 1299, July 1988; Dr. Nouri Khater, Explanation of the Jordanian Civil Law (Obligations) (in Arabic), Dar Hamad (1997).


50 Oman, Morocco, and Bahrain US-FTAs contain provisions and side letters on intermediary liability, safe harbours and notice and taken down: see Bahrain Article 14.10.29, Oman Article 15.10.29 and Morocco Article 15.11.28 and related side letters.


The UAE needs to consider legislating safe harbour provisions (including notice and takedown provisions) that will sensibly protect intermediaries especially if it wants to develop industries providing information services. Such provisions should also cover caching which is a key ingredient of the provision of network services. It is important to carefully and sensibly define who is protected by the safe harbours as in Australia for example there is uncertainty as to whether content hosts like YouTube are covered.

B) The Adequacy of Current Limitations and Exceptions

The UAE Copyright Law has a number of limitations and exceptions as outlined above.

These limitations and exceptions are critical to a vibrant education, research and innovation system. Therefore they should be closely considered in this context. While free trade agreements provide many benefits too often countries who are net importers of IP (such as Australia) have struck deals that see a narrow limitations and exceptions regime put in place. This serves to privilege US copyright interests but has the potential to slow down the development of education and research as the cost of accessing copyright material increases. Any free trade agreement with the US should expressly permit the UAE to embed in its law the “freedom to reuse” copyright material to the same extent as the fair use principle allows. Some may suggest this is not necessary as there is already wide scope for reusing copyright material under the personal use exception under UAE Copyright Law. The key question will be the extent to which the personal use exception will operate in the digital environment? In testing the efficacy of its law in the digital environment the UAE should ask to what extent its law allows activities such as the:

- right to reuse copyright material (for non commercial purposes) in circumstances where there is no financial detriment to the copyright owner
- right to engage in transformative and fair use

- right to reuse government funded copyright (for non commercial purposes)
- right to engage in format shifting e.g. changing material from analogue to digital format or changing material from one digital format (CD) to another (mp3)

The usefulness of limitations and exceptions is seriously undermined if they can be overridden through contractual licences or agreements. This is a practice that arises where books, journals or software are licensed rather than sold to the consumer and the licence provides that the freedoms like those provided under Articles 22, 23 and 24 are not permitted. Which is more powerful – the public interest of the copyright legislation or the private interest of the contractual agreement? There are cases in the US that uphold the contractual ouster of copyright exceptions yet in Australia our Copyright Law Review Committee recommended that copyright should trump contract and in relation to reverse engineering of software this is expressly stated.\(^{59}\)

Best practice would suggest that UAE Copyright Law should contain a section that expressly provides that copyright limitations override any attempt to oust them by contract.\(^{60}\)

C) Term extension

There are strong arguments to suggest that there is no sensible economic reason for extending the term of copyright in any country and therefore the UAE should be wary of and investigate closely any proposal for extending copyright term.\(^{61}\)

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59 CLRC Contract and Copyright (2002) www.clrc.gov.au; s 47 H Australian Copyright Act 1968 which provides: “An agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of subsection 47B(3), or section 47C, 47D, 47E or 47F, has no effect.”; Bowers v Baystate 320 F.3d 1317 (Fed Cir. 2003), see generally <http://www.eff.org/cases/bowers-v-baystate>; Blizzard v BDNet 422 F.3d 630 (8th Cir. 2005).

60 See further Art 6 of the French Civil Code which provides that an “agreement between individuals may not derogate from laws concerning public order or good moral.” Cf. Robert A. D. et al. Chanel et al., French Court of Cassation, 5 February 2008, see further Estelle Derclaye, French Supreme Court rules fashion shows protected by copyright—what about the UK?, <http://jidp.oxfordjournals.org/cgi/content/full/3/5/286>. Art 127 of the UAE Civil Transactions Law No 5 of 1985 provides that: “Agreeing on a sin is not allowed”, see also Art 3. of the UAE Civil Transactions Law on what is considered “public order”.

extension has occurred in a number of Arab countries that have signed an FTA with the US including Bahrain\textsuperscript{62}, Morocco\textsuperscript{63} and Oman\textsuperscript{64}

D) Anti-Circumvention Law

While the actual or dealing in devices designed for the circumvention of “technological protection” is prohibited under Art 38 UAE Copyright Law this provision only provides for criminal (not civil) redress\textsuperscript{65} and importantly there are no

\textsuperscript{62} Art 14.4 (section 4) of the Bahrain US FTA (2005) 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.” Available at <http://www.ustr.gov/Trade_Agreements/Bilateral/Bahrain_FTA/final_texts/Section_Index.html>

\textsuperscript{63} Art 15.5 (section 5) of the Morocco US FTA (2006) 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.” Available at <http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Morocco_FTA/FInal_Text/asset_upload_file?797_3849.pdf>

\textsuperscript{64} Art 15.4 (section 4) of the Oman US FTA (2006) provides that:
“4. 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.” Available at <http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Oman_FTA/Final_Text/asset_upload_file?715_8809.pdf>

\textsuperscript{65} Art 38 of the UAE Copyright Law provides that:
“Without prejudice to any severer penalty provided for in any other law, a penalty of imprisonment for not less than three months and a fine of not less than fifty thousand Dirhams and not exceeding five hundred thousand Dirhams shall be imposed upon any person committing any of the following acts:-
1- Unrightfully manufacturing or importing, for the purpose of sale, rental or circulation, any work, counterfeit copies, apparatus, means or devices designed or prepared for manipulation upon the technical protection used by the author or holder of neighbouring right for transmitting, offering for circulation, regulating or managing such rights; or for maintaining particular quality of fidelity and clarity for reproduction.
2- Unrightfully impairing or distorting any technical protection or electronic information aiming at regulating and managing the rights prescribed by the Law herein.”
specific exceptions listed. Breach of Art 38 of the UAE Copyright Law will result in a penalty of imprisonment for not less than 3 months and a fine of not less than 50 000 Dirhams and no greater than 500 000 Dirhams and in case of recurrence, the penalty shall be increased to imprisonment for a period of not less than nine months and a fine not less than 200 000 Dirhams. Provisions relating to or dealing in devices that will allow the circumvention of technological protection measures (imposing civil and criminal liability) are common around the world (see the DMCA) and were considered at the highest level in the Sony PlayStation case in the High Court of Australia.

In France, the Law on Authors' Rights and Related Rights in the Information Society (“Loi sur le Droit d'Auteur et les Droits Voisins dans la Société de l'Information”) ("DADVSI Act") which was enacted on 1st August 2006 provides for the protection of “technological protection measures”. In doing so it implements the European Directive 2001/29 on the Harmonisation of certain aspect of copyright and related rights in the information society and substantially modifies the French Intellectual Property Code (Code de la propriété intellectuelle). The DADVSI Act grants protection to effective technological measures which enable a right holder to control the use of a protected work, on condition that they do not undermine the right of every legal user of a copyright work to make a copy for private use and for non-commercial purposes; and also that they do not hinder the interoperability of a copyright protected work with the systems which allow it to be read. It also creates a regulatory authority that monitors the operation of the DADVSI Act in certain cases relating to interoperability.

Digital Rights Management enforced through self executing technology is seen by many as an inefficient way to manage rights. If anti-circumvention provisions have to be introduced then they should be strictly limited to preventing copyright infringement and not allow a broad range of consumer issues to be protected through such copyright law as seems to have happened in Australia. The US courts appear
to have interpreted the **DMCA** in line with the narrow approach that TPMs will only be reinforced where they are preventing or inhibiting copyright infringement.  

It is critically important to include appropriate exceptions and limitations in any anti-circumvention provisions. By failing to include such exceptions and limitations in the copyright law countries like the UAE, Qatar, Kuwait, and Jordan run the risk of impeding the development of education, research and the IT sector in their jurisdictions.

### E) The Promotion of Voluntary Mechanisms like Creative Commons

The task of making copyright law more suitable for the digital age will - as outlined above - involve looking at and reforming the provisions of the copyright law. However many people have realised that a more immediate route is to try and use the copyright system as it currently exists along with voluntary mechanisms to improve the situation. The Creative Commons and Free and Open Source Software projects are key examples of this.

**Creative Commons (CC)** is a worldwide project that aims to build a distributed information commons by encouraging copyright owners (who wish to share their material) to licence use of their material through open content licensing protocols and thereby promote better identification, negotiation and reutilization of content for the purposes of creativity and innovation. It aims to make copyright content more “active” by ensuring that content can be reutilized with a minimum of transactional effort.

**Free and open source software** (FOSS) is software which is liberally licensed to grant to users the right to study, change, and improve its design through the availability of its source code. This approach has gained both momentum and acceptance as the potential benefits have been increasingly recognized by individuals, government and corporate players.

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76 See Article 38 of the **UAE Copyright Law**.
77 See Article 51 of the **Qatari Copyright Law** No 7 of 2002.
80 See generally B Fitzgerald et al. (eds.) *Open Content Licensing: Cultivating the Creative Commons* (2007) Sydney University Press, Sydney, Australia.
The UAE represent a fertile ground for the development of Information Communication Technologies (ICT) for the Arab region in general and FOSS in particular. The UAE government should explore the potential of using FOSS to develop its governmental institutions. In doing so it is also critical to understand the legal issues associated with the use of FOSS in government.

Jordan is the first country in the Middle East to start a Creative Commons (CC) project. Creative Commons (CC) has been working with Abu-Ghazaleh Intellectual Property (AGIP), a law firm specializing in IP issues since March 2004 to port the CC license into the Jordanian civil legal system and copyright law. Version 01 of the CC license was translated into Arabic and posted over the internet on 30 March 2004 and Version 03 was finalized and launched in November 2009. There is currently no CC initiative in the UAE. The possibility that the UAE will open its own chapter on CC was discussed in the meeting of “CC Arab region” that took place in Doha, Qatar on 14 March 2009 with the support of Al Jazeera.

In August 2008 one of, if not the most, influential intellectual property courts in the USA known as the Court of Appeals for Federal Circuit upheld the validity of an open source software licence known as the Artistic Licence. The case is significant because up until this point there has been little judicial discussion of the legal operation of this new type of copyright licensing that is sweeping across the world fuelled by the ubiquity of the Internet. The decision in Robert Jacobsen v. Matthew Katzer and Kamind Associates provides a unique and welcomed insight into the legal operation of free and open source software licences and by analogy Creative Commons styled open content licences.

Public licenses, often referred to as open source licenses, are used by artists, authors, educators, software developers, and scientists who wish to create collaborative projects and to dedicate certain works to the public. Several types of public licenses have been designed to provide creators of copyrighted materials a means to protect and control their copyrights. Creative Commons, one of the amici curiae, provides free copyright licenses to allow parties to dedicate their works to the public or to license certain uses of their works while keeping some rights reserved. Open source licensing has become a widely used method of creative collaboration that serves to advance the arts and sciences in a manner and at a pace that few could have imagined just a few decades ago. For example, the Massachusetts Institute of Technology (MIT) uses a Creative Commons public license for an OpenCourseWare project that licenses all 1800 MIT courses. Other public licenses support the GNU/Linux operating system, the Perl programming language, the Apache web server programs, the Firefox web browser, and a collaborative web-based encyclopedia called Wikipedia.
F) The needs of education and research

The education and research sector is vital to the development of all countries. Many countries are developing national policies on access to and reuse of publicly funded knowledge. Copyright can be an impediment to achieving these goals and needs to be managed strategically from its creation.

UAE will need sensible policies on the development of Internet based resources that its researchers can build and access in order to stimulate innovation.

It will need to look at and promote: the development of university and government repositories for research data and publications; incentives for researchers to share their research on the Internet; publishing agreements that permit this to happen; data management plans; conditions on research funding that promote open access to research; and education on how to create open licensed materials and how to find and utilise such materials. Robust and up to date copyright provisions on orphan works, digital preservation, library access, management and lending, educational use and reuse more generally are also vitally important.

G) Access to Government Material

Art 3 of the UAE Copyright Law provides that “official documents” are not protected however the selection and arrangement of such materials if it involves innovation or

notes that, by some estimates, there are close to 100,000,000 works licensed under various Creative Commons licenses. The Wikimedia Foundation, another of the amici curiae, estimates that the Wikipedia website has more than 75,000 active contributors working on some 9,000,000 articles in more than 250 languages. Open Source software projects invite computer programmers from around the world to view software code and make changes and improvements to it. Through such collaboration, software programs can often be written and debugged faster and at lower cost than if the copyright holder were required to do all of the work independently. In exchange and in consideration for this collaborative work, the copyright holder permits users to copy, modify and distribute the software code subject to conditions that serve to protect downstream users and to keep the code accessible. … There are substantial benefits, including economic benefits, to the creation and distribution of copyrighted works under public licenses that range far beyond traditional license royalties. For example, program creators may generate market share for their programs by providing certain components free of charge. Similarly, a programmer or company may increase its national or international reputation by incubating open source projects. Improvement to a product can come rapidly and free of charge from an expert not even known to the copyright holder: 535 F.3d 1373, 1378-1379 (Fed. Cir. 2008) <http://www.cafc.uscourts.gov/opinions/08-1001.pdf>.


92 There is provision to request a compulsory licence under Article 21. See generally Ali Dualeh Abdulla, “Copyright and Knowledge Advancement: A Case Study on UAE Copyright Law” (2007).
creativity\textsuperscript{93} may be protected. It is not clear whether official documents include government reports or research generally and this should be clarified.

If copyright is held by government in any publicly funded material the presumption is that it should be available for access on the Internet under an open licence like Creative Commons\textsuperscript{94}. This should also apply to any copyright (database or compilation right) held by government in the selection and arrangement of official documents. The creation of such copyright will depend on the threshold for originality in compiling databases and specifically whether there is a low threshold of originality\textsuperscript{95} and or a higher level like that in the USA.\textsuperscript{96}

**Conclusion**

The rise of digital networked technologies has meant that copyright is now central to most everything we do from recreation to research. Every time we use networked digital technologies – which inherently reproduce and communicate as part of their operation - we automate the possibility of copyright infringement.

In every country copyright law and not just patent law should be seen as a key ingredient of the innovation system. It is fundamental to the generation and transfer of knowledge.

In further developing its copyright law and practice UAE needs to be mindful of the importance of “information flow” in the modern economy.\textsuperscript{97} It needs to be alert to the fact that overly restrictive copyright law will slow down development and innovation whereas copyright law that can harness the power of the technology will provide a competitive advantage.\textsuperscript{98}

\textsuperscript{93} This is linked to the definition of “creativity” in UAE Copyright Law, Art 1. Creativity is defined as: “The element of innovation that bestows authenticity and distinctiveness upon the work.”


\textsuperscript{98} This article is a revised version of a paper delivered on 20 May 2009 at the E Commerce and E Governance Conference held by the College of Law at the UAE University in Abu Dhabi. We are thankful to Professor Nhouri Khater for the invitation to speak at this event.