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ASSIGNMENT
ON

**COPY RIGHT
ORDINANCE, 1962
(MID TERM)**

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INTRODUCTION

The Copyright Ordinance, 1962 ("Ordinance") is a very comprehensive as it is covering all aspects of the copyright law in the international scenario including the Agreement on Trade related aspects of Intellectual Property Rights (TRIPs) obligations under the WTO Agreement. As the Ordinance is an amending and consolidating law, thus, it has consolidated the existing laws in the present law and also included the new concepts to meet the present and future requirements. Since the enforcement of law in 1962, it had been amended from time to time to meet the national as well as international requirements in the field of copyrights because the concept of intellectual property rights are developing very fast and become a complicated subject due to different issues like piracy and infringement of various copyrighted materials due to growing needs at international level in global environment. Even in the presence of TRIPs, it is becoming very difficult to check piracy and infringement of copyrighted materials at international level. At present the law is covering all national as well as international aspects of intellectual property rights. It extends to the whole of Pakistan and provide an exclusive right;

- (a) **In the case of a literary, dramatic or musical work, to do and authorize the doing of any of the following acts, namely:-**
- (i) to reproduce the work in any material form;
 - (ii) to publish the work;
 - (iii) to perform the work in public;
 - (iv) to produce, reproduce, perform or publish any translation of the work;
 - (v) to use the mark in a cinematographic work or make a record in

respect of the work;

(vi) to broadcast the work, or to communicate the broadcast of the work to the public by a loudspeaker or any other similar instrument;

(vii) to make any adaptation of the work;

(viii) to do in relation to translation or an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (vi);

(b) **In the case of an artistic work, to do or authorize the doing of any of the following acts, namely;-**

(i) to reproduce the work in any material form;

(ii) to publish the work;

(iii) to use the work in a cinematographic work;

(iv) to show the work in television;

(v) to make any adaptation of the work;

(vi) to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv);

(c) **in the case of a cinematographic work, to do or authorize the doing of any of the following acts, namely:-**

(i) to make copy of the work;

(ii) to cause the work in so far as it consists of visual images, to be seen in public and, in so far as it consists of sounds, to be heard in public;

(iii) to make any record embodying the recording in any part of the sound track associated with the work by utilizing such sound track;

(iv) to broadcast the work;

- (d) **in the case of a record, to do or authorize the doing of any of the following acts by utilizing the record, namely:-**
- (i) to make any other record embodying the same recording;
 - (ii) to use the recording in the sound track of a cinematographic work;
 - (iii) to cause the recording embodied in the record to be heard in the public;
 - (iv) to communicate the recording embodied in the record by broadcast.

Problem Question

Saleem dictates a short story to his Friend Amjad, who as a Friend favour to Saleem takes the story down in shorthand and transcribes it into readable form on a word processor. Amjad corrects obvious grammatical errors but otherwise transcribes Saleem's spoken words verbatim. Saleem dies shortly thereafter, and Wife of Saleem namely Shahida succeeds to Saleem's estate, including all of Saleem's copyright in this short story, if any. Shahida considers the short story to be obscene and demands that Amjad destroy all copies. Amjad, however, believes that the story is a great work of literature and that it would be a travesty to keep it out of the world's literary canon. Saleem therefore makes the story available on the internet at his personal web site and emails the story to about 1000 libraries and individuals who he thinks would be interested in having and reading it. Shahida obtains a copy from Amjad's web site and uses that to register the copyright. Shahida then brings an action against Amjad for copyright infringement. Amjad defends on the ground that he is the author of the story, or at least a joint author, and that in any event his making the story available to others in the way he has a fair use. Evaluate the issues in this litigation and the available remedies.

- Whether this Short Story a "work" in the light of provisions of the Ordinance?
- What is the category of work?
- Who is the author of the work?
- Who is the owner of the work?
- Whether joint authorship exists between Saleem and Amjad?

- Can Shahida claim copyright of her husband? Or discuss entitlement of Shahida in this work.
- Discuss term of this unpublished work under the Ordinance.
- Can amjad's act of publishing it on internet be termed as fair use. (fair dealing).
- Does this work offends public policy enumerated in Ordinance?
- Can Amjad be termed as Joint Author.

Q. Whether this Short Story is a "work" in the light of provisions enumerated in Ordinance?

Ans. The term "work" has been defined under section 2(zf) of the Ordinance as under;

(zf) "work" means any of the following works, namely:-

- (i) a literary, dramatic, musical or artistic work;
- (ii) a cinematographic work;
- (iii) a record;

The above referred definition of work transpires that there are different categories of work. Furthermore, the definition of literary work explains the position of this short story that whether it is "work" or not. For convenience, the definition of "literary work" is reproduced as under;

2(p) "literary work" includes works on humanity, religion, social and physical sciences, tables, compilations of data or other material in any form and computer programmes, that is to say, programmes recorded on any disc, tape, perforated media or other information storage devices which, if fed into or located in a computer or computer based equipment is capable of reproducing any information;

OPINION

Short story dictated by Mr. Saleem falls within the ambit of work.

Q. What is the category of work?

Ans. Before discussing the category of work pertaining to this short story, it will be necessary to have glance at the categories provided under the Ordinance. The Ordinance has provided following categories of work protectable under the Ordinance;

2(p) "literary work" includes works on humanity, religion, social and physical sciences, tables compilations and computer programmes, that is to say, programmes recorded on any disc, tape, perforated media or other information storage device, which, if fed into or located in a computer or computer-based equipment is capable of reproducing any information;

2(j) "dramatic work" includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise but does not include cinematographic work;

- 2(zb)** "**record**" means any disc, tape, wire, perforated roll or other device in which sounds are embodied so as to be capable of being reproduced therefrom, other than a sound track associated with a cinematographic work;
- 2(r)** "**musical work**" means any combination of melody and harmony or either or them, printed, reduced to writing or otherwise graphically produced or reproduced;
- 2(c)** "**artistic work**" means:-
- (i) a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possess artistic quality;
 - (ii) an architectural work of art; and
 - (iii) any other work or artistic craftsmanship
- 2(h)** "**cinematographic work**" means any sequence of visual images including video films of every kind, recorded on material of any description (whether translucent or not), whether silent or accompanied by sound, which, if shown (played back, exhibited) conveys the sensation of motion;

- 2(b)** “**architectural work of art**” means any building or structure having an artistic character of design, or any model for such building or structure;
- 2(c)(a)** “**Audio-visual work**” means a work which consist of a series of related images which are intrinsically intended to be shown by the use of a machine or device, such as projector; viewer or electronic equipment, together with accompanying sound, if any, regardless of the nature of the material object such as film or tape, in which the work is embodied;
- 2(m)** “**Government work**” means a work which is made or published by or under the direction or control of—
- (i) the Government or any department of the Government; or
 - (ii) any Court, Tribunal or other judicial or legislative authority in Pakistan;

First I shall discuss term “literary work”. The expression “literary” cannot be construed to mean only such works which deal with any particular aspect of literature in prose or poetry. The expression “literary work” as used in the Imperial Copyright Act merely indicates a work which is literature, anything in writing which could be said to come within the ambit of literary work. The literary woks referred to in Ordinance are not confined to works of literature in the commonly understood sense, but must be taken t include all works expressed inn writing, whether they have any literary merit or not. Similarly section 13 of the Ordinance, does not imply any originality of ideas but merely means that work in question should not be

copied from some other work but should originate in author, being the product of his labour and skill.

The principle is that one is permitted to make profit from the labours of another person by merely copying his work. Where however the source of information is common and another person to whom also the common source is available, applies his mind to the subject and result of his labours are published then even if the results of his work may be similar to the results of another person pursuing the same inquiry in cannot be said that there has been any infringement of copyright. It is open to any person to bring out a ready reckoner by applying the principles of mathematical calculations. If a person compiles a chart, then naturally the result of his labours would be similar to the result of another person pursuing the same set of calculations. In such a case it will be a question of fact whether the impugned work is merely a copy of an earlier publication or it is the result of the labours of another person who has also worked on his own.¹

The first articles which got copyright protection were books. But in due course of time, judicial decisions have extended copyright protection to several other literary works. Under the rubric of literary work, following works have been included as capable of having copyright namely;

School text books;²

Question papers set for examination;³

Law reports;⁴

¹ AIR 1971 All. 192 (P # 195).

² AIR 1921 All. 95.

³ {1916} 2 Ch 601; AIR 1966 Pat. 33; AIR 1957 All. 9.

Business letter;⁵

Application and other forms;⁶

Research theses and dissertations;⁷

Catalogues;⁸

Contract forms;⁹

Consignment note;¹⁰

Directories;¹¹

Football coupons;¹²

List of bills of sale;¹³

Compilation of book on household accounts and domestic arithmetic;¹⁴

List of football fixtures;¹⁵

Mathematical tables;¹⁶

Railway timetables;¹⁷

Road books;¹⁸

⁴ {1801} 5 Ves 709.

⁵ {1925} Ch 383.

⁶ {1894} 38 Sol Jo 681; (1978) 2 SA 184 (S Afr).

⁷ AIR 1990 Raj 8.

⁸ (1882) 21 Ch D 369 (CA); (1898) 78 LT 613; (1924) 41 RPC 160.

⁹ (1923) 23 SR (NSW) 349 (Aus).

¹⁰ (1903) 20 RPC 617.

¹¹ (1866) LR 1 Eq 34; (1868) LR 7 Eq 634.

¹² (1964) 1 WLR 273.

¹³ (1889) 40 Ch D 425 (CA).

¹⁴ (1977) 79 Punj LR 181.

¹⁵ (1959) Ch 637.

¹⁶ (1824) 3 LJOS 66.

¹⁷ {1915} 2 Ch 376; {1894} AC 335 (HL).

Guide books;¹⁹

Book of scientific questions and answers;²⁰

Rules of game;²¹

Stud books;²²

Trade statistics;²³

Compilation of list of clients and law firms;²⁴

Opinions and advises to clients;²⁵

Telegraph codes;²⁶

Questionnaire for collection of statistical information;²⁷

Head notes of law reports;²⁸

Diaries²⁹

Compilation derived from common source falls within the ambit of literary work.³⁰ However syllabus 'merely prescribing the guidelines which are to be followed by the textbook writers' has not been accepted as original work.³¹

¹⁸ (1776) Mor Dict 8308 (SC).

¹⁹ AIR 1964 Mad. 391.

²⁰ (1857) 3 K & J 708.

²¹ (1936-45) MCC 99.

²² [1910] 2 Ch 297.

²³ (1867) LR 3 Eq 718.

²⁴ (1995) PTC 278 (Del).; (2006) 32 PTC 609 (Del).

²⁵ (2006) 32 PTC 609 (Del).

²⁶ [1971] 2 KB 469.

²⁷ (1977) RPC 149.

²⁸ (2001) PTC 57 (Del).

²⁹ PLD 1970 Kar. 554.

³⁰ AIR 1971 All. 192.

³¹ AIR 1982 Cal. 245.

OPINION

After the perusal of above narrated provisions and case laws referred, it is clearly gleaned that short story dictated by Mr. Saleem falls under the term "literary work".

Q. Who is the author of the work?

Ans. In order to determine that who is the author of this short story, we have to make reference to definition given under Ordinance which is being reproduced as under;

2(d) "author" means:--

- (i) in relation to a literary or dramatic work, the author of the work;
- (ii) in relation to a musical work, the composer;
- (iii) in relation to an artistic work other than a photograph, the artist;
- (iv) in relation a photograph, the person taking the photograph;
- (v) in relation to a cinematographic work, the owner of the work at the time of its completion; and
- (vi) in relation to a record, the owner of the original plate from which the record is made, at the time of the making of plate.

The author is the person who actually writes, compiles, composes or draws the work in question, although the idea of the work have been suggested by

another,³² or the work may have been subsequently altered in accordance with the advice of another.³³ Where, however, the compiler of a directory or work of reference collects written material from a large number of individuals and arranges and publishes the result, the compiler, and not the individuals supplying the information, is the author of the work.³⁴ *A mere copyist or a person to whom words are dictated for the purposes of being written down is not an author; but a translator from one language into another or a reporter of legal decisions or of a speech is an author.*³⁵ The author of the design of a building in which copyright subsists is the architect who makes the plans and supervises the work and not the builder.³⁶ However a reporter has no copyright in the reports of cases, but he will have a copyright in the selection and arrangement of cases.

The author of a work is its creator. The person by whose creative activity the work is produced in a concrete form capable of protection is to be regarded as its creator. The same principles apply to works of the fine arts. Several persons may have collaborated in producing a work.

Authorship is the origination of a meritorious production, embodying the thought of the author, or the thought of the author as well as the thought to others in an organized, communicable form and bearing the impress of the distinctive individuality of the mind which produced it. The mere recitals in print of certain incidents, when not written in a narrative form involved creative imagination, do not entitle the writer to a claim of authorship, if they lack that originality which is indispensable to authorship. So, where a person is not the

³² (1890) 25 Q.B.D. 99.

³³ (1932) 1 Ch. 201.

³⁴ (1927) 1 Ch. 177, p.179.

³⁵ (1840) 21 Eq. R. 266.

³⁶ (1941) 3 All. E. R. 144.

author, but merely a carrier of news, rendering a distinctly commercial services of profit, he can lay no claim to authorship under the Ordinance.

OPINION

As per above discussed provisions of Ordinance and judicial decisions, Mr. Saleem was the author of this work (short story). Mr. Amjad cannot be termed as author of the work as there was no intention to make contribution in this work. Further he has no substantial contribution in work rather he was only doing favour to Mr. Saleem as he was his friend although his skill and labour was implied for this work. Mr. Amjad took dictation in shorthand and transcribed it into readable form on word processor and corrected obvious grammatical errors and eliminated all the "Ah"s and "Um"s but otherwise transcribed Saleem spoken words verbatim. [Reliance (1840) 21 Eq. R. 266.]

Q. Who is the owner of the work?

Ans. The concept of first ownership of any work has been defined under section 13 of the Ordinance. For ease of reference, the same is being produced as under;

- 13. First owners of copyright.--** Subject to the provisions of this Ordinance, the author of a work shall be the first owner of the copyright therein:

Provided that:-

- (a) in the case of a literary, dramatic or artistic work made by the author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, for the purpose of publication in a

newspaper, magazine or similar periodical, the said proprietor shall, in the absence of any agreement to the contrary, be the first owner of the copyright in the work in so far as the copyright relates to the publication of the work in any newspaper, magazine or similar periodical, or to the reproduction of the work for the purpose of its being so published, but in all other respects the author shall be the first owner of the copyright in the work;

- (b) subject to the provisions of clause (a), in the case of a photograph taken, or a painting or portrait drawn, or an engraving or a cinematographic work made, for valuable consideration at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;
- (c) in the case of a work made in the course of the author's employment under a contract of service or apprenticeship, to which clause (a) or clause (b) does not apply, the employer shall, in the absence of any agreement to the contrary be the first owner of the copyright therein;
- (d) in the case of a Government work, Government shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;
- (e) in the case of a work to which the provisions of section 53 apply, the international organization concerned shall be the first owner of the copyright therein.

OPINION

As we have already concluded that Mr. Saleem is the author of work hence he is also the owner of the work.

Q. Whether joint authorship exists between Saleem and Amjad?

Ans. The idea of joint authorship has provided in Clause (zg) of section 2 of the Ordinance which states as under;

2(zg) “work of joint authorship” means a work produced by collaboration of two or more authors in which contribution of one author is not distinct from contribution of the other author or authors;

The prominent aspect of the definition is that the contributions are not distinctly mentioned. However, where the contributions are distinct then, even if they are intermingled in one work, there are distinct copyrights vested in the several authors. Joint authors own the copyright in their work as tenants-in-common.

When by independent creative activity, a person contributes an important element of a work, which is indivisible and has been produced by agreement between the collaborators, as a general rule such person is a joint author. There must be a common design and co-operation in work of carrying out the design to constitute joint authorship.³⁷ Here in this litigation, Mr. Amjad is just working on behalf of Mr. Saleem being his friend and he has no common or substantial collaboration in this work rather he just acted on dictation of Mr. Saleem and transcribed his work in readable form. *A mere copyist or a person to whom words are dictated for the purposes of being written down is not an author; but a translator from*

³⁷ 1871 L. R. 6 C. P. 523.

*one language into another or a reporter of legal decisions or of a speech is an author.*³⁸ A person is not a joint author who only suggests the subject matter or idea of the work.³⁹ Nor is the person who makes alterations or additions to the work, for the purpose of rendering it more attractive a joint author.⁴⁰ Joint authors are in the position of tenants-in-common and not of joint tenants.⁴¹

OPINION

In the light of above said averments, we can say that Mr. Saleem was the sole author of his work. Mr. Amjad cannot be termed as joint author of the work as there was no intention to make contribution in this work. Further he has no substantial and active contribution in work hence no question of distinctiveness of contribution arises rather he was only doing favour to Mr. Saleem as he was his friend. Mr. Amjad took dictation in shorthand and transcribed it into readable form on word processor and corrected obvious grammatical errors and eliminated all the "Ah"s and "Um"s but otherwise transcribed Saleem spoken words verbatim. He only acted as a typist. (emphasis given)

Q. Can Shahida claim copyright of her husband? Or discuss entitlement of Shahida in this work.

Ans. All rights pertaining to a copyright work has been defined in section 3 of the Ordinance which are as under;

3. Meaning of Copyright.--- 1. For the purpose of this Ordinance, "copyright" means the exclusive right, by virtue of, and subject to, the provisions of this Ordinance:- -----

³⁸ (1840) 21 Eq. R. 266.

³⁹ (1921) 1 Ch. 503.

⁴⁰ 1871 L. R. 6 C. P. 523

⁴¹ (1879) 12 Ch. D. 686.

(a) in the case of a literary, dramatic or musical work, to do and authorize the doing of any of the following acts, namely:-

(i) to reproduce the work in any material form;

(ii) to publish the work;

(iii) to perform the work in public;

(iv) to produce, reproduce, perform or publish any translation of the work;

(v) to use the mark in a cinematographic work or make a record in respect of the work;

(vi) to broadcast the work, or to communicate the broadcast of the work to the public by a loudspeaker or any other similar instrument; (vii) to make any adaptation of the work;

(viii) to do in relation to translation or an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (vi);

(b) in the case of an artistic work, to do or authorize the doing of any of the following acts, namely:-

(i) to reproduce the work in any material form;

(ii) to publish the work;

(iii) to use the work in a cinematographic work;

(iv) to show the work in television;

(v) to make any adaptation of the work;

(vi) to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv);

(c) in the case of a cinematographic work, to do or authorize the doing of any of the following acts, namely:-

(i) to make copy of the work;

(ii) to cause the work in so far as it consists of visual images, to be seen in public and, in so far as it consists of sounds, to be heard in public;

(iii) to make any record embodying the recording in any part of the sound track associated with the work by utilizing such sound track;

(iv) to broadcast the work;

(d) in the case of a record, to do or authorize the doing of any of the following acts by utilizing the record, namely:-

(i) to make any other record embodying the same recording;

(ii) to use the recording in the sound track of a cinematographic work; (iii) to cause the recording embodied in the record to be heard in the public;

(iv) to communicate the recording embodied in the record by broadcast.

- (2) Any reference in sub-section(1) to the doing of any act in relation to a work or a translation or an adaptation thereof shall include a reference to the doing of that act in relation to a part thereof.
- (3) Entitlement to copyright in compilation of data or other material shall not extent to data or other material itself and shall be without prejudice to any copyright subsisting in the data or other material, that is to say, the copyright shall subsist to the extent of compilation only.

Copyright, in the strict sense of the term, is purely a statutory right. It is a new or independent right granted by the statute and not simply a pre-existing right regulated by the statute. Being a statutory grant, the right is only such as the statute confers and may be obtained and enjoyed only on respect to the subjects, and by the persons, and on the terms and conditions specified in the statute. Copyright is an intangible, incorporeal right, in the nature of a privilege or franchise and wholly disconnected from and independent of any material substance, such as manuscript or the plate used for printing. A sale or other transfer of such physical embodiment of subject copyrighted does not carry with the right to make copies. Thus, the sale of an original copyrighted picture does not authorize the purchaser to publish copies. So the sale of plate on which a copyrighted picture is etched or engraved does not authorize the purchaser to use it to reproduce copies of such picture without the consent

of copyright proprietor. But sale of plate or block for printing a design may operate as a licence to use it for that purpose where the circumstances show that intent.

Section 9 of the Ordinance states that no person shall be entitled to copyright or any similar right in any work, whether published or unpublished, otherwise than under and in accordance with provisions of this Ordinance, or of any other law for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence. Therefore, copyright is purely a statutory right.

There cannot, however, be a copyright in an event which has actually taken place. There is a distinction between the materials upon which one claiming copyright has worked and product of application of his skill, judgment, labour and literary talent to these materials. Ideas, information, natural phenomena and events on which an author expends his skill, labour, capital, judgment and literary talent are common property and are not the subject of copyright.

Section 62 deals with right of legal heirs of deceased author which is reproduced as under;

Author's special rights, -- (1) Notwithstanding that the author of work may have assigned or relinquished the copyright in the work, he shall have the right to restrain, or claim damages in respect of any distortion, mutilation or other modification of the said work, or any other action in relation to the said work which would be prejudicial to his honor or reputation.

(2) The right conferred upon an author of a work by sub-section (1) may be exercised by the legal representatives of the author.

OPINION

In the light of above referred provisions of Ordinance, Mrs. Shahida is the legal heirs of Mr. Saleem and she has title by the virtue of sub-section (2) of section 62 of the Ordinance. She will enjoy and exercise all rights conferred under sub-section (1) of section 62 and section 3 of the Ordinance.

Q. Discuss term of copyright. Also explain the term of this unpublished work under the Ordinance.

Ans. Term of copy right means a period during which as author of a copyrighted work may enjoy complete control on its published, reproduction or performing rights uninterrupted without any interference according to nature of work. Term of copyright is different for different works and for different circumstances. It is the creation of a law and law has fixed this term. It can be changed for amending the relevant law if the government considers suitable. In this regard section 36 of the Ordinance is relevant to mention as it has given a right to Copyright Board which can allow compulsory licences in works withheld from public.

Copinger and Skone James on Copyright, 9th edition, at page 23, had discussed whether the protection afforded to copyright should be unlimited in time or it should be for a limited time period and explained as under;

“since the Copyright Law does not create a monopoly, it has often been argued that the protection which the Law of Copyright affords, namely that of preventing unlawful reproduction, should extend without limit of time.

Unlimited protection indeed always has been and still is, with some qualification, given to unpublished literary works and it was at one time contended that the right which subsisted at common law was not taken away by the Copyright Acts which gave statutory protection to published works. This question came before the House of Lords in the case of *Donladson v. Becket*⁴². The judges were directed to attend the following questions, amongst others, were put to them by the House of Lords;

“Firstly, whether, at common law, an author of any book or literary composition had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published and sold the same without his consent?

Secondly, if the author had such right originally, did the law take it away upon his printing and publishing such book or literary composition? And might any person afterwards reprint and sell, for his benefit, such book or literary composition, against the will of the author?

Lastly, whether the author of any literary composition and his assigns had the sole right of printing and publishing the same in perpetuity by the common law?

“The first question was decided in the affirmative by the ten judges, against one in favour of negative; the second was decided in the negative by eight to three; and the third in the affirmative by seven to four. It was, however, held by the majority of the judges that the common law right which an author had to copyright in his works

⁴² (1774) 4 Burr. 2408.

became merged in the statutory right conferred by the Copyright Act then in force upon publication”.

Article 7 of the Berne Convention for the Protection of Literary and Artistic Works provides that the term of protection granted by Convention shall be the life of the author and fifty year after his death.

Similarly, Article 12 of the TRIPs Agreement states:

“Whenever the term of protection of a work, other than photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.”

Similarly, paragraph 5 of the Article 14 of the TRIPs Agreement provides the term of the protection available to performers and producers of phonograms to last at least until the end of a period of 50 years computed from the end of the calendar year in which the fixation was made or the performance took place. Term of protection provided to Broadcasting Organization lasts for at least 20 years from the end of the calendar year in which broadcast took place.

TERMS OF COPYRIGHT FOR DIFFERENT KINDS OF WORKS:

Terms of copyright in published literary, dramatic, musical and artistic works:

- (a) Under section 18 of the Ordinance,** Except as otherwise hereinafter provided, copyright shall subsist in any literary, dramatic, musical

or artistic work (other than a photograph) published within the life time of the author until fifty years from the beginning of the calendar year next following the year in which the author dies.

Explanation.---- In this section, the reference to the author shall, in the case of a work of joint authorship, be construed as a reference to the author who dies last.

(b) Terms of copyright in posthumous work:

According section 19 of the Ordinance,

Term of copyright in posthumous work. --- (1) In the case of a literary, dramatic or musical work or an engraving, in which copyright subsists at the date of the death of the author or in the case of any such work of joint authorship, at or immediately before the date of the death of the author who dies last, but which or any adaptation of which, had not been published before that date, copyright shall subsist until fifty years from the beginning of the calendar year next following the year in which the work is first published or where an adaptation of the work is published in any earlier year, from the beginning of the calendar year next following that year.

(2) For the purposes of this section. a literary, dramatic or musical work or an adaptation of any such work shall be deemed to have been published, if it has been performed in public or if any records made in respect of the work have been sold, or offered for sale, to the public.

(c) Terms of copyright in cinematographic works, records and photographs:

Section 20 of the Ordinance states that;

(1) In the case of a cinematographic work, copyright shall subsist until fifty years from the beginning of the calendar year next following the year in which the work is published.

(2) In the case of a record, copyright shall subsist until fifty years from the beginning of the calendar year next following the year in which the record is published.

(3) In the case of a photograph, copyright shall subsist until fifty years from the beginning of the calendar year next following the year in which the photograph is published.

(d) Terms of copyright in anonymous and pseudonymous works:

Section 21 of the Ordinance provides that;

(1) In the case of a literary, dramatic, musical or artistic work (other than a Photograph), which is published anonymously or pseudonymously copyright shall subsist until fifty years from the beginning of the calendar year next following the year in which the work is first published: Provided that where the identity of the author is disclosed before the expiry of the said period, copyright shall subsist until fifty years from the beginning of the calendar year next following the year in which the author dies.

(2) In sub-section (1), references to the author shall, in the case of an anonymous work of joint authorship, be construed:-

(a) where the identity of one of the authors is disclosed as references to that author;

(b) where the identity of more authors than one is disclosed, as references to the author who dies last from amongst such authors.

(3) In sub-section (1), references to the author shall, in the case of a pseudonymous work of joint authorship, be construed:-

(a) where the names of one or more (but not all) of the authors are pseudonyms and his or their identity is not disclosed, as references to the author whose name is not a pseudonym, or, of the names of two or more of the author are not pseudonyms, as references to such one of those authors who dies last;

(b) where the names of one or more (but not all) of the authors are pseudonyms and the identity of one or more of them is disclosed, as references to the author who dies last from amongst the authors whose names are not pseudonyms and the authors whose names are pseudonyms and are disclosed ;
and

(c) where the names of all the authors are pseudonyms and the identity of one of them is disclosed, as references to the author whose identity is disclosed or, if the identity of two or

more of such authors is disclosed, as references to such one of those authors who dies last.

Explanation.----- For the propose of this section, the identity of an author shall be deemed to have been disclosed, if either the identity of the author is disclosed publicly by both the author and the publisher or is otherwise established to the satisfaction of the Board but that author.

(e) Terms of copyright in Government works and in works of international organizations:

According to section 22 of the Ordinance,

(1) Copyright in a Government work shall, where Government is the first owner of the copyright therein, subsist until fifty years from the beginning of the calendar year next following the year in which the work is first published

(2) In the case of a work of an international organization to which the provisions of section 53 apply, copyright shall subsist until fifty years from the beginning of the calendar year next following the year in which the work is first published.

(f) Terms of copyright in unpublished work:

Section 23 of the Ordinance states that:

(1) If a work, whose author's identity is known, is not publish posthumously within fifty years after the death of the author, such work shall fall into the public domain after fifty years from the

beginning of the calendar years next following the year in which the author dies.

(2) If a work, whose author's identity is not known, is not published within fifty years of its creation, such work shall fall into the public domain after fifty years from the beginning of the calendar year next following the year in which the work is created.

OPINION

In light of above cited provisions of Ordinance, it can be concluded that term of Copyright in this case is fifty years from beginning of the calendar year next following the year in which the work is published in public by the Mr. Amjad. Publication in has been made by in shape of emails to 1000 readers and availability at Mr. Amjad's personal website. Mrs. Shahida shall have the right of fifty years from beginning of the calendar year next following the year in which story was published by Mr. Amjad.

Q. Can Amjad's act of publishing it on internet be termed as fair use. (fair dealing).

Ans. Before going further, first I shall discuss what steps has been taken by Mr. Amjad regarding this literary work. He has taken three steps in respect of this literary work which are as under;

- i) STEP 1-has uploaded this literary work on his personal website;**
- ii) STEP 2-has furnished 1000 copies to libraries; and**
- iii) STEP3-has sent copies to individuals.**

Now before diluting the above three steps, I would like to reproduce the provisions of the Ordinance which deals with status of infringement. Section 56 of the Ordinance deals with infringement which is reproduced as under;

56. When copyright infringed, -- Copyright in a work shall be deemed to be infringed:-

(a) when any person without the consent of the owner of the copyright or without a license granted by such owner or the Registrar under this Ordinance or in contravention of the conditions of a license so granted or of any condition imposed by a competent authority under this Ordinance;-

(i) does anything the exclusive right to do which is by this Ordinance conferred upon the owner of the copyright; or

(ii) permits for profit any place to be used for the performance of the work in public where such performance constitutes an infringement of the copyright in the work unless he was not aware and had no reasonable ground for suspecting, that such performance would be an infringement of copyright, or

(b) when any person:-

(i) makes for sale or hire or sells or lets for hire, or by way of trade displays or offers for sale or hire, or

(ii) distributes either for the purpose of trade to such an extent as to affect prejudicially the owner of the copyright, or

(iii) by way of trade exhibits in public, or

(iv) imports into Pakistan any infringing copies of the work.

Explanation. For the purposes of this section, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematographic work shall be deemed to be an "infringing copy".

As reported in AIR 1978 SC 1613, it has been observed by the Indian Supreme Court that on a careful consideration and elucidation of the various authorities and the case law on the subject the propositions emerge explaining infringement of copyright:

(1) There can be no copy right in an idea, subject-matter, themes, plots or historical or legendary facts and violation of copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work.

(2) Where the same idea is being developed in a different manner, it is manifest that the source being common, the similarities are bound to occur. In such a case the Courts could determine whether or not the similarities are on fundamental or substantial aspect of the mode of expression adopted in the copyrighted work. If the defendant's work is nothing but a literal imitation of the copyrighted work with some variations here and there it would amount to violation of the copyright. In other words in order to be substantial and material one

which at once leads to the conclusion that the defendant is guilty of an act of piracy.

(3) One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the work is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.

(4) Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.

(5) Where however apart from the similarities appearing in the two works there are also material and broad dissimilarities which negative the intention to copy the original and the coincidence appearing in the two works are clearly incidental no infringement of the copyright comes into existence.

(6) As a violation of copyright amounts to an act of piracy it must be proved clear and cogent evidence after applying the various tests laid down by the case discussed above.

(7) Where, however, the question is of the violation of the copyright of stage play by a film producer or a director, the task of the plaintiff becomes more difficult to prove piracy. It is manifest that unlike stage play a film has much broader perspective, wider and bigger background.

(8) Where the defendant can, by introducing a variety of incidents, give a colour and complexion different from the manner in which the copyrighted work has expressed the idea. Even so, if the viewer after seeing the film gets a totality of impression that the film is by and large a copy of the original play, violation of the copyright may be said to be proved.

In PLD 1968 Dacca 455, the Dacca High Court in a case has observed that infringing book containing more material than borrowed from infringed book. Assessment of damages on basis of royalties recoverable by copyright owner in usual course, held, difficult. Right owner allowing notes and solutions to be published unrestrained by persons proceeded against and some others and the infringing book being a note-book for school students, which though not desirable yet a necessary evil, in circumstance. Token damages alone awarded against the author and publisher. Printer, held, protected under section 8 and not liable for damages. Injunctions prohibiting further printing and publication, however, issued against all.

OPINION

STEP-1, As I have already determined that Mr. Saleem was the sole author of this literary work and after his death, Mrs. Shahida being his wife and as his legal heir has acquired all the rights given under section 3 of the Ordinance. Mr. Amjad has uploaded this literary work on his personal website and also getting financial benefits thereof without permission/

consent or licence from Mrs. Shahida. Hence committing infringement of her copyrighted work.

Now before dilating on second and third step, I would like to have a glance at the provision dealing with "**fair use**". Section 57 of the Ordinance deals with circumstances where the term "**fair use**" or "**fair dealing**" can be used to avoid the infringement of any protected copyright work. According to section 57;

57. Certain acts not to be infringement of copyright, -- (1) The following acts shall not constitute an infringement of copyright, namely:-

(a) a fair dealing with a literary, dramatic, musical or artistic work for the purpose of :-

(i) research or private study;

(ii) criticism or review, whether of that work or of any other work;

(b) a fair dealing with a literary, dramatic, musical or artistic work for the purpose of reporting current events:-

(i) in a newspaper, magazine or similar periodical, or

(ii) by broadcast or in a cinematographic work or by means of photographs;

(c) the reproduction of a literary, dramatic, musical or artistic work for the propose of a judicial proceeding or for the purpose of a report of a judicial proceeding;

(d) the publication in a newspaper of a report of an address of political nature delivered at a public meeting unless the report is prohibited by conspicuous written or printed notice affixed before and maintained during the lecture at or about the main entrance of the building in which the lecture is given and, except whilst the building is being used for public worship, in a position near the lecture; but nothing in this clause shall affect the provisions as to newspaper summaries;

(e) the reproduction of any literary, dramatic, or musical work in the certified copy made or supplied in accordance with any law for the time being in force;

(f) the reading or recitation in public of any reasonable extract from a published literary or dramatic work;

(g) the publication in a collection, mainly composed of non-copyright matter, bona fide intended for the use of educational institutions and so described in the title and in any advertisement issued by or on behalf of the publisher, of short passages from published, literary or dramatic works, not themselves published for the use of educational institutions, in which copyright subsists:

Provided that not more than two such passages from works of the same author are published by the same publisher during any period of five years;

Explanation, -- In the case of a work of joint authorship references in this clause to passages from works shall include references to passages or by any one or more of those authors in collaboration with any other person;

(h) the reproduction or adaptation of a literary, dramatic, musical or artistic work:-

- (i) in the course and for the sole purpose of instruction whether at an educational institution or elsewhere where the reproduction or adaptation is made by a teacher or a pupil otherwise than by the use of a painting process;
 - (ii) as part of the questions to be answered in an examination; or
 - (iii) in answers to such questions;
- (i) the performance, in the course of the activities of an educational institution, of a literary dramatic or musical work by the staff and students of the institution, or of a cinematographic work or a record, if the audience is limited to such staff and students, the parents and guardians of the students and persons directly connected with the activities of the institution;
- (j) the making of records in respect of any literary, dramatic or musical work, if:
 - (i) records recording the work have previously been made by or with the license or consent of, the owner of the copyright in the work; and
 - (ii) the person making the records has given the prescribed notice of his intention to make the records, and has paid in the prescribed manner to the owner of the copyright in the work royalties in respect of all such records to be made by him, at the rate fixed by the Board in this

behalf: Provided that in making the records such person shall not make any alterations in, or omissions from, the work, unless records recording the work subject to similar alterations and omissions have been previously made by, or with the license or consent of the owner of the copyright, or unless such alterations and omissions are reasonably necessary for the adaptation or the work to the records in question;

- (k) the causing of a recording embodied in a record to be heard in public utilizing the record,-
 - (i) at any premises where persons reside, as part of the amenities provided exclusively or mainly for residents therein, or
 - (ii) as part of the activities of a club, society or other organization which is not established or conducted for profit:
- (l) the performance of a literary, dramatic or musical work by an amateur club or society, if the performance is given to a non-paying audience, or for the benefit of a religious, charitable or educational institution;
- (m) the reproduction in a newspaper, magazine or other periodical of an article on current economic, political, social or religious topics, unless the owner of copyright of such article has expressly reserved to himself the right of such reproduction;

- (n) the publication in a newspaper, magazine or other periodical of a report of a lecture delivered to public;
- (o) the making of not more than three copies of a book (including a pamphlet, sheet of music, map, chart or plan) by or under the direction of the person in charge of a public library or a non-profit library available for use by the public free of charge or a library attached to an educational institution for the use of such library if such book is not available for sale;
- (p) the reproduction, for the purpose of research or private study or with a view to publication, of an unpublished literary, dramatic or musical work kept in a library, museum or other institution to which the public has access: Provided that where the identity of the author of any such work, or in the case of a work of joint authorship, of any of the authors, is known to the library, museum or other institution, as the case may be, the provision of this clause shall apply only if such reproduction is made at a time more than fifty years from the date of the death of the author or, in the case of a work of joint authorship, from the death of the author whose identity is known or, if the identity of more authors than whose identity is known or, if the identity of more authors than one is known, from the death of such one of those authors who dies last;
- (q) the reproduction or publication of-
 - (i) any matter which has been published in any official Gazette, or the report of any committee, commission, council, board or other like body appointed by the

Government unless the reproduction or publication of such matter or report is prohibited by the Government.

- (ii) any judgment or order of a court, tribunal or other judicial authority, unless the reproduction or publication of such judgment or order is prohibited by the court, tribunal or other judicial authority, as the case may be;
- (r) the making or publishing of a painting, drawing, engraving or photograph or an architectural work of art;
- (s) the making or publishing of a painting, drawing, engraving or photograph or a sculpture or other artistic work if such work is permanently situate in a public place or and premises to which the public has access;
- (t) the inclusion in a cinematographic work of-
 - (i) any artistic work permanently situate in a public place or any premises to which the public has access; or
 - (ii) any other artistic work, if such inclusion is only by way of background or is otherwise incidental to the principal matters represented in the work;
- (u) the use by the author of an artistic work, where the author of such work is not the owner of the copyright therein, of any mould, cast, sketch, plan, model or study made by him for the purpose of the work; Provided that he does not thereby repeat or imitate the main design of the work;

- (v) the making of an object of any description in three dimensions of an artistic work in two dimensions, if the object would not appear, to persons who are not experts in relation to objects of that description to be a reproduction of the artistic work;
- (w) the reconstruction of a building or structure in accordance with the architectural drawings or plans by reference to which the building or structure was originally constructed:

Provided that the original construction was made with the consent and licence of the owner of the copyrights in such drawing or plans.

- (x) in relation to a literary, dramatic or musical work recorded or reproduced in any cinematographic work, the exhibition of such work after the expiration of the term of copyright therein:

Provided that the provisions of sub-clause (ii) of clause (a), sub-clause (i) of clause (b) and clauses (f), (g), (m), and (p) shall not apply as respects any act unless that act is accompanied by an acknowledgment-

- (i) identifying the work by its title or other description;
and
- (ii) unless the work is anonymous or the author of the work has previously agreed or required that no acknowledgment of his name should be made, also identifying the author.

Explanation. For the purposes of clause (a) or clause (b) of this subsection—

- (i) in relation to a literary or dramatic work in prose, single extract up to four hundred words, or a series of extracts (with comments interposed) up to a total of eight hundred words with no one extract exceeding three hundred words; and
- (ii) in relation to a literary or dramatic work in poetry, an extract or extracts up to a total of forty lines and in no case exceeding one fourth of the whole of any poem may be deemed to be fair dealing with such work :

Provided that in a review of a newly published work, reasonably longer extracts may be deemed fair dealing with such work.

- (2) The provisions of sub-section (1) shall apply to the doing of any act in relation to the translation of a literary, dramatic or musical work or the adaptation of a literary, dramatic, musical or artistic work as they apply in relation to the work itself.

OPINION

STEP-2, As Mr. Amjad has provided 1000 copies of this literary work to libraries, the use of these copies by libraries may or may not amount to infringement depending upon following circumstances explained as under;

- a) If the copies provided to libraries are being solely used for research purposes; or

- b) If these libraries are working on non-profit basis and these copies will be available to the public free of charge; or
- c) if these libraries attached to educational institutions and they use these libraries for their educational purposes as this literary work is not available for sale.

Then no question of infringement will arise otherwise vice versa.

OPINION

STEP-3, As Mr. Amjad has also provided copies (Nos. of copies or Nos. of persons/individuals not mentioned) the use of these copies by such individuals may or may not amount to infringement depending upon following circumstances explained as under;

- a) If the copies provided to individuals are being solely used for research purposes; or
- b) If the copies provided to individuals are being solely used for private study; or
- c) If the individuals this literary work with intention to criticise or review, whether of that work or of any other work.

Then no question of infringement will arise otherwise vice versa.

Q. Does this work offend public policy enumerated in Ordinance?

Ans. The Copyright Ordinance, 1962 does not describe any parameters regarding public policy or principle of policy which would restrain the publication of obscene literary work. Whereas other IP laws like Trade Mark Ordinance, 2001 provides complete details of marks which would

come under such allegation. Immoral or obscene marks cannot be protected under the Trademark Ordinance, 2001 in Pakistan however there is no express bar on protection of obscene work under the Copyright Ordinance, 1962 in country. In the absence of any specific provisions, we could not assume that obscene work is not protectable under Copyright Ordinance, 1962. However, before making any decision, we ought to see other laws particularly The Constitution of Pakistan, 1973 and Pakistan Penal Code, 1860 regarding bar on protection of obscene work or public policy enumerated therein. When we see other Intellectual Property Laws, obscenity is always denied protection.

The Constitution of Pakistan, 1973

PARINCIPLES OF POLICY

29. Principles of Policy.– (1) The Principles set out in this Chapter shall be known as the Principles of Policy, and it is the responsibility of each organ and authority of the State, and of each person performing functions on behalf of an organ or authority of the State, to act in accordance with those Principles in so far as they relate to the functions of the organ or authority.

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37. Promotion of social justice and eradication of social evils.– The State shall-

(a) promote, with special care, the educational and economic interests of backward classes or areas;

(b) remove illiteracy and provide free and compulsory secondary education within minimum possible period;

(c) make technical and professional education generally available and higher education equally accessible to all on the basis of merit;

(d) ensure inexpensive and expeditious justice;

(e) make provision for securing just and humane conditions of work, ensuring that children and women are not employed in vocations unsuited to their age or sex, and for maternity benefits for women in employment;

(f) enable the people of different areas, through education, training, agricultural and industrial development and other methods, to participate fully in all forms of national activities, including employment in the service of Pakistan;

(g) prevent prostitution, gambling and taking of injurious drugs, printing, publication, circulation and display of obscene literature and advertisements;

(h) prevent the consumption of alcoholic liquor otherwise than for medicinal and, in the case of non-Muslims, religious purposes; and

(i) decentralise the Government administration so as to facilitate expeditious disposal of its business to meet the convenience and requirements of the public.

38.

39.

40.

Pakistan Penal Code, 1860

294. Obscene acts and songs. Whoever, to the annoyance of others,

(a) does any obscene act in any public place, or

(b) sings, recites or utters any obscene songs, ballads or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

OPINION

In the light of above referred provisions of Constitutions of Pakistan, 1973 it can easily be concluded that obscene work cannot be registered and protected under the Copyright Ordinance, 1962.