



Intellectual Creativity in Literary and Artistic Intellectual Property

MEZILI Ouassila

University of Oran 2 Mohamed Ben Ahmed_ Algeria

E-mail: mezili.ouassila@gmail.com

Abstract:

Intellectual property can be divided into two types: industrial and commercial property on the one hand and literary and artistic property on the other hand. These two categories differ in several aspects, the most significant of which is the requirement under Algerian law for the presence of intellectual creativity in works of literary and artistic property for their owners to benefit from the rights arising from this system. This element constitutes the core of the copyright system; therefore, it is necessary to clarify its concept and the protection afforded to it. Thus, the silence of the Algerian legislature in providing a legal definition for intellectual creativity poses an obstacle to the application of legal provisions related to copyright, particularly in regard to granting legal protection to specific intellectual works. Nevertheless, one may infer from these provisions the criteria excluded from intellectual creativity, which should not be relied upon in determining its existence or absence. Furthermore, adjacent concepts that resemble intellectual creativity but do not fall under the same legal regime should be distinguished from it. Therefore, the existence of intellectual creativity in a work allows its owner to benefit from so-called "authors' rights," which consist of moral rights that are neither subject to prescription nor transferable nor from financial rights that may be assigned. This serves to encourage the author's efforts in addition to the legal protection guaranteed by the copyright system.

Keywords: *Intellectual creativity; financial rights; moral rights; mental finesse; literary and artistic property; protection of authors' rights.*

La créativité intellectuelle dans la propriété intellectuelle littéraire et artistique

Résumé :

La propriété intellectuelle peut être divisée en deux catégories : la propriété industrielle et commerciale d'une part et la propriété littéraire et artistique d'autre part. Ces deux catégories se distinguent par plusieurs aspects dont le plus important est l'exigence en droit algérien de la présence de la créativité intellectuelle dans les œuvres de la propriété littéraire et artistique pour que leurs titulaires puissent bénéficier des droits découlant de ce régime. Cet élément constitue le cœur du système du droit d'auteur ; il est donc nécessaire de clarifier son concept et la protection qui lui est accordée. Ainsi, le silence du législateur algérien sur la définition juridique de la créativité intellectuelle constitue un obstacle à l'application des dispositions légales relatives au droit d'auteur, notamment en ce qui concerne l'octroi d'une protection juridique à des œuvres de l'esprit déterminées. Néanmoins, on peut déduire de ces dispositions les critères exclus de la créativité intellectuelle, sur lesquels il ne faut pas s'appuyer pour déterminer son existence ou son absence. En outre, les concepts adjacents qui ressemblent à la créativité intellectuelle mais ne relèvent pas du même régime juridique doivent être distingués de celle-ci. Par conséquent, l'existence d'une créativité intellectuelle dans une œuvre permet à son propriétaire de bénéficier de ce que l'on appelle les « droits d'auteur », qui consistent en des droits moraux qui ne sont ni soumis à prescription ni transférables, et en des droits financiers qui peuvent être cédés. Cela permet d'encourager les efforts de l'auteur en plus de la protection juridique garantie par le système du droit d'auteur.

Mots-clés : *Créativité intellectuelle ; droits financiers ; droits moraux ; finesse d'esprit ; propriété littéraire et artistique ; protection des droits d'auteur.*



Introduction

What distinguishes human beings from other living creatures is their intellect, which has enabled the achievement of significant accomplishments throughout history, leading to progress and prosperity for humanity. There is no doubt that human intellects vary in terms of intellectual creativity. As a result, it is logical to encourage those intellects that drive the nation forward, since the value of thought lies not merely in its existence but also in the extent to which it is utilised. On this basis, and in response to the imperative of justice, which dictates that every individual be granted their due, the law of literary and artistic property emerged,¹ aiming to promote intellectual endeavour by safeguarding it and rewarding its creator. In this legislation, the legislator has addressed all matters related to authors' rights, from their definition to the means of benefiting from them, including mechanisms for their protection.

A close examination of these provisions reveals their strong connection to the subject of intellectual creativity, in the absence of which it would be impossible to discuss literary and artistic property rights. Therefore, the essence of literary and artistic property will be explored, beginning with an attempt to define its concept. This is no simple

¹ It is worth noting that the first text to address the subject of literary and artistic property in Algeria was Ordinance No. 73-14, followed by Ordinance No. 97-10. The current applicable law is Ordinance No. 03-05 of 19 July 2003 on copyright and related rights, Official Journal, 23 July 2003, no. 44, p. 3.

matter, given the legal gap regarding the definition of intellectual creativity, as the legislature has neglected this point, thereby leaving room for judicial interpretation. Nonetheless, the legislator's omission of a precise definition of intellectual creativity in the realm of literary and artistic property has not prevented the exclusion of specific criteria, which the trial judge is prohibited from relying upon when determining the existence of creativity in a given work. Moreover, there are neighboring concepts to intellectual creativity that may confuse legal practitioners; therefore, all these issues will be clarified in the first section of this study.

The second section is devoted to the effects resulting from intellectual creativity, specifically the rights gained as a result of the mental effort expended. These rights are divided into moral rights and financial rights, each possessing distinct characteristics that make them independent of each other due to their differences; however, they are complementary at the same time since, in the absence of the former, the latter ceases to exist. In their presence, the latter are established.

In addition to granting the creator rights over their intellectual work, copyright law also protects these rights from any infringement that may cause harm to the creator or their work. Thus, these rights are guaranteed and protected under the law of literary and artistic property.

1. Defining the Nature of Creativity in the System of Literary and Artistic Properties

Intellectual creativity plays a highly significant role in the system of literary and artistic property. The Algerian legislature, in Article 3 of Ordinance No. 03--05, expressly states: "Every holder of an original creative work of a literary



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or artistic nature shall be granted the rights stipulated in this Ordinance..." This explicit provision makes it clear that the essence of protection for intellectual works, whether literary or artistic, is intellectual creativity. This is the sole legal condition required for the holder of intellectual work to benefit from the moral and financial rights granted under this system. It is therefore necessary to shed further light on this subject, as it is at the core of the system of literary and artistic property, by defining its concept on the one hand and distinguishing it from other related concepts on the other hand.

1.1. The Concept of Intellectual Creativity

An understanding of intellectual creativity must begin with defining its concept, as it is difficult, if not impossible, to study any subject in the absence of a definition. It is therefore necessary to address what is meant by creativity in the field of literary and artistic property to study its other aspects. This applies regardless of the weight it holds in judicial rulings, since the trial judge relies on its definition when adjudicating cases concerning the legal protection of literary and artistic works. Once an intellectual work meets the legal condition, namely, intellectual creativity, it enjoys the protection afforded by the copyright system. For this reason, the trial judge needs to understand what is meant by intellectual creativity.

1.1.1. Definition of Intellectual Creativity in Literary and Artistic Property

The Algerian legislature has referred to intellectual creativity since the issuance of the first specific text on

literary and artistic property¹ and has maintained this approach in all subsequent texts,² making it the foundation of legal protection. However, there remains a legal gap concerning its definition, despite its importance, as previously indicated. In any case, intellectual creativity may be defined, in terminology, as the personal touch that reflects the ingenuity of the creator in a particular field of literary and artistic property through the provision of new ideas, materially embodied in a tangible form, which makes it possible to distinguish their work from others, whether in substance or expression. The subject of the idea must be structured in the form of a work to benefit from legal protection, as ideas that are not given a tangible form do not enjoy such protection.³

It may therefore be observed that creativity is personal and linked to the personality of its creator and not to the work itself. This explains the inability of the judiciary to establish a consistent criterion for determining the concept of intellectual creativity, such as judicial rulings.⁴ In this

¹ Ordinance No. 73-14 of 3 April 1973 on copyright, Official Journal, 10 April 1973, no. 29, p. 134.

² This refers to Ordinance No. 97-10 of 6 March 1997 on copyright and related rights, Official Journal, 12 March 1997, no. 13, p. 3, and to the aforementioned Ordinance No. 03-05.

³ Farha Zarawi Salah, *Al-Kamil fi al-Qanun al-Tijari al-Jaza'iri: al-Huquq al-Fikriyya* [The Complete Guide to Algerian Commercial Law: Intellectual Rights], Ibn Khaldoun Publishing and Distribution, 2006, no. 387, p. 413: "Ideas ... are excluded from the scope of copyright. They are, in themselves, not legally protected. For example, ideas are, in principle, not subject to ownership, regardless of their value—whether trivial or innovative...".

⁴ - Cass. civ. 1, 17 October 2012, pourvoi no. 11-21641: "Proof of the originality of software had to be established by seeking a personal intellectual contribution and a personalised effort on the part of its author."

- C.A. Paris, 24 June 2005, JurisData no. 2005-279386: "The Court of Appeal held that, for photographs of works of art commissioned by a gallery, the



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area, numerous cases clearly show the divergence of the courts' positions on this matter.

Intellectual creativity also varies according to the type of work. Creativity in literary works differs from that in artistic works; the former is situated within the framework of scientific and literary ideas, whereas the latter is related to artistic and sensory aspects. Moreover, creativity is influenced by the inclinations and feelings of its creator, which shape their professional abilities. Since inclinations and feelings are subjective matters, it follows logically that the resulting work is unique, distinguished from others, and specific to its creator, bearing their imprint, which is the requirement within the system of literary and artistic property. In other words, the personality of the creator of the intellectual work becomes evident, and their work stands out from others in the same field.

This raises the question regarding the nature of such a distinction: should it be based on the mode of expression, the perspective, or the degree of merit, or are these criteria not considered when determining the existence of intellectual creativity in a given work? This issue will be addressed in the following branch.

originality of the photograph could not be expressed through the choice of subject, which was imposed on the photographer.”

- C.A. Paris, 26 October 2005, D. 2005, AJ 2875: “The formal representation of cover letters is not protectable as it follows a classical model; their content, developed from examples, such as job advertisements, which presents the candidate’s personality in a sophisticated and concise style tailored to the response, is the result of the author’s imagination and thus meets the criterion of originality.”

1.1.2. *Criteria Excluded from intellectual creativity*

The primary aim of the copyright system is to encourage intellectual creativity and to grant the creator an exclusive right over their intellectual achievement, thereby rewarding the effort expended. For this reason, most legal systems favour this framework to provide the best possible protection for authors and to safeguard the relationship between the author and their intellectual work.

Thus, the creator of intellectual work benefits from legal protection as soon as creativity is established, in contrast to inventions, industrial designs, models, trademarks, designations of origin, and layout designs of integrated circuits.¹ When the owner must complete deposit procedures to monopolise their intellectual achievement, as a result, the deposit is excluded for works of literary and artistic property.² Although the second part of Article 3 of the aforementioned Ordinance No. 03-05 contains a typographical error, in which the term "creativity" was replaced by "deposit",³ this error has no effect on the concept of intellectual creativity in literary and artistic works, where

¹ For all these concepts, see: Farha Zarawi Salah, previously cited reference.

² L. Marino, *Droit de la propriété intellectuelle*, PUF, 1st ed., 2013, no. 84, p. 184: "In France, protection by copyright does not require any particular formality. Copyright arises solely from the act of creation ... No legal act is necessary for its inception."

³ F. Zeraoui Saleh, "Les traductions: le régime de protection par le droit d'auteur, étude comparative droit algérien-droit français," *Revue Propriété intellectuelle*, no. 46, January 2013, p. 30 and see p. 31, note 14: "It should be recalled that this article, in its version in the national language (Arabic), contains a material error (the 'ya' is immediately to the left of the letter 'ba' on the AZERTY keyboard), which radically changes the meaning. The insertion of the letter 'ya' instead of 'ba' transforms the term 'création' into 'dépôt', making it absolutely necessary to correct the Arabic text."



Soumission : 10/02/2025 Acceptation : 10/06/2025 Publication : 15/07/2025

deposit procedures are excluded as a condition for benefiting from legal protection.

Novelty likewise plays no role in obtaining such protection; intellectual creativity is unrelated to novelty, and there is nothing to prevent an author from acquiring rights over their work even if others have previously produced works in the same field.¹

Suppose an author writes about the Palestinian issue and produces a book for which they acquire the rights granted by the copyright system. In that case, another person may also benefit from the same rights if they address the same subject differently, that is, in their own style, provided that they demonstrate intellectual creativity. The determining factor is the author's personal abilities and literary or artistic qualifications, which are used to produce distinctive work rather than a priority in accomplishment.

Notably, the perspective of the work, its degree of merit, and its mode of expression are likewise excluded as criteria for intellectual creativity. The trial judge is prohibited from considering these aspects when determining whether a work possesses intellectual creativity by the second part of Article 3 of the aforementioned Ordinance No. 03--05.² This leaves the field of intellectual creativity entirely open, as the absence of such restrictions ensures the freedom of

¹ C.A. Paris, 27 January 2006, CCE 2006, com. no. 60, in *L'application des droits de propriété intellectuelle*, WIPO, p. 188: "... The mere fact that there are numerous reproductions of the same paintings is not sufficient to demonstrate that the photographs lack originality...".

² The second part of Article 3 of the aforementioned Ordinance No. 03-05: "... Protection is granted regardless of the type of work, its mode of expression, degree of merit, or purpose, upon the creation of the work, whether or not it is fixed in any medium that allows it to be communicated to the public."

intellectual creativity. Thus, the judge does not consider the taste or style of the author, whether or not it meets a certain standard,¹ nor does the message conveyed by the work, whether it is political, literary, scientific, or artistic. The same applies to the mode of expression, whether the work is a book or a painting. None of these criteria are taken into account when assessing the eligibility of a work for protection; rather, what matters is the fulfilment of the legal requirement. Once a work possesses intellectual creativity, it is granted legal protection.

1.2. Distinguishing Intellectual Creativity from Certain Related Concepts

There is no doubt that the absence of a clear legal definition of intellectual creativity in provisions on literary and artistic property may lead to confusion and misunderstanding, not only for ordinary people but also for legal professionals. This is due to the existence of concepts closely related to intellectual creativity and bearing significant resemblance to it. For this reason, it would be preferable for the Algerian legislature to intervene and establish the necessary boundaries that allow each concept to be clearly distinguished from the others. Such action would help to eliminate this ambiguity on the one hand and provide criteria for determining the presence of intellectual creativity in a given work on the other hand. Thus, in this section, we seek to differentiate intellectual creativity from some of the commonly encountered concepts that share

¹ M.-F. Marais and T. Lachacinski, *L'application des droits de propriété intellectuelle: recueil de jurisprudence*, WIPO, p. 185: "While copyright rewards creation, it is not, strictly speaking, a counterpart to effort... merit, therefore, has no bearing on protection."



Soumission : 10/02/2025 Acceptation : 10/06/2025 Publication : 15/07/2025

certain aspects, thereby bringing their meanings and definitions closer together. This will remain only a partial treatment, as the related concepts are numerous and cannot all be addressed. Therefore, attention is given to those most similar to the concept of intellectual creativity.

1.2.1. *Distinguishing Intellectual Creativity from Novelty*

Despite the conceptual similarities between intellectual creativity and novelty, each stands as an independent notion, a point upon which there is consensus. However, the greater the number of similarities, the greater the differences. An objective criterion governs novelty,¹ as it is linked to the state of the art.² Novelty can be recognised only in the absence of prior art, which is in complete contrast to the concept of intellectual creativity, which is based on a subjective criterion, as previously explained. What is required in intellectual creativity is for the creator to be distinguished by individuality and to reveal their personality, regardless of merit, purpose, or manner of expression. In contrast, novelty involves merit and purpose as essential elements for benefiting from legal protection. For example, for an inventor to benefit from a patent, the invention must possess novelty and be capable of industrial

¹ A. Bernard, *Le droit d'auteur et les droits voisins*, Dalloz, 2nd ed., 1999, no. 3.312, p. 133: "Novelty is an objective concept, since the absence of prior art defines it, whereas originality is a subjective concept."

² "Prior art" refers to anything disclosed to the public anywhere, whether in written or oral description, by use, or by any other means by which knowledge of the invention is made available.

application.¹ Thus, purpose plays a role in eligibility for protection.

Another distinction between novelty and intellectual creativity is that coincidence is generally excluded from the latter. Intellectual creativity is the result of perseverance and the application of all the professional and artistic skills possessed by the creator to produce work that reflects their personality. In contrast, novelty may arise from a flash of genius that occurs entirely by chance. Thus, it is evident that novelty and intellectual creativity are separate and distinct concepts, and it is essential to understand the meaning of each to help interested parties distinguish between them.

It can therefore be concluded that novelty may exist in the absence of intellectual creativity and that a creation may benefit from legal protection under the provisions of industrial property law even if it is not considered original within the meaning of copyright law. The French Court of Cassation has established this.²

A single creation may also possess both novelty and intellectual creativity at the same time, which occurs when a work is characterised by unique intellectual creativity that emerges directly from the author's imagination and has not previously been achieved by anyone else with the same skill in the same field.

Finally, it should be noted that the existence of prior achievement in an intellectual work, whether literary or artistic, does not negate the presence of intellectual creativity, provided that imitation is excluded, that is, the

¹ Article 3 of Ordinance No. 03-07 of 19 Jumada I 1224, corresponding to 19 July 2003, on patents: "Patents may protect inventions that are new, result from inventive activity, and are capable of industrial application...".

² Cass. Com., 9 April 1991, *RIDA* October 1995, no. 166, p. 237.



Soumission : 10/02/2025 Acceptation : 10/06/2025 Publication : 15/07/2025

original work has not been copied. However, in most cases, the existence of prior achievement, and therefore the absence of novelty, may suggest the possibility of imitation. In other words, the second work may be a copy of the first, which negates both intellectual creativity and novelty. In this case, both elements would be absent.

It follows from the above that the protection of intellectual works under the provisions of literary and artistic property law depends on the fulfilment of the requirement of intellectual creativity.¹ This is unrelated to novelty. Nevertheless, in practice and with certain types of works, the absence of prior achievement often gives rise to a presumption of intellectual creativity, particularly in the case of musical works and works of applied arts.²

Second Branch: Distinguishing Intellectual Creativity from Mental Finesse

In addition to novelty and other related concepts, intellectual creativity must also be distinguished from mental finesse, as the latter differs in ways that are incompatible with the former. Mental finesse refers to a technique devised by its author that facilitates the use of a particular achievement and is unique to them, reflecting, to some extent, their intelligence, taste, or personality. This technique is not required to be applied to a tangible result; it may simply be a method or approach developed by a professional and attributed to them without being linked to

¹ Ch. Caron, *Droit d'auteur et droits voisins*, Litec, 2006, no. 50, p. 56: "Once the creative intervention of the natural person is sufficiently significant, the status of creator within the meaning of copyright law cannot be contested."

² TGI Paris, third chamber, 7 March 1991, *RDPI* no. 35/36, p. 28: "A design is recognised as original as long as no valid prior art is established against it."

a material achievement. In either case, the person possessing mental finesse cannot benefit from the system of literary and artistic property in general, whether in terms of the rights granted by it or the protection it affords.

Here lies the fundamental distinction between the two concepts: the result of intellectual creativity is always literary or artistic work, regardless of its type, a book, a painting, a photograph, or any tangible work, whereas mental finesse does not necessarily result in tangible material achievement. In principle, it is merely a technique created to improve or facilitate preexisting work. In this context, French courts have, in their decisions, excluded certain professionals, such as chefs.¹ and hairdressers² from benefiting from the copyright system. The rationale behind this is that it is not permissible to grant the status of creator to a person who merely implements a technique.

The overlap between intellectual creativity and mental finesse occurs because producing intellectual work usually requires a certain degree of mental finesse. The creator must be knowledgeable about the subject of their achievement, and even more, must master it and possess the necessary competencies in the field, allowing them to excel and create a work that reflects their personality and the qualifications they hold. Thus, mental finesse is a component of intellectual creativity. The trial judge must distinguish between the two concepts to apply the legal provisions correctly, since the creator of an intellectual work benefits from legal protection, whereas the person possessing only a mental finesse does not, as this has not been recognised at all

¹ TGI Paris, 30 September 1997, *RIDA* July 1998, p. 273.

² TGI Paris, 26 April 1989, *Gaz. Pal.* 1989, 2, p. 425.



Soumission : 10/02/2025 Acceptation : 10/06/2025 Publication : 15/07/2025

by the Algerian legislature. Consequently, by implication, they do not benefit from any legal protection.

2. Effects resulting from intellectual creativity

Intellectual creativity in the field of literary and artistic property has several advantages. Some of these benefits the creator of the intellectual work as encouragement for their mental effort, namely, moral and financial rights (First Requirement). Others are intended to safeguard their work, whether literary or artistic, with the law on literary and artistic property countering any infringement that may cause harm (Second Requirement).

2.1. The Moral and Financial Rights of the Creator of Intellectual Creativity

The presence of intellectual creativity in a work confers upon its creator the status of the author, entitling them to what are known as authors' rights. These consist of two contrasting but complementary rights, moral rights and financial rights, both of which serve to promote intellectual creativity.

2.1.1. *The Moral Rights of the Creator of Intellectual Creativity*

The moral rights of the creator of intellectual creativity hold great significance within the system of literary and artistic property.¹ They are considered personal rights

¹ F. Zéraoui Salah, "Contrat de nègre et droit de paternité dans les œuvres littéraires: L'ombre du créateur ou le créateur dans l'ombre?" in *Mélanges en hommage à A. Benhamou*, Kounouz, no. 1, p. 94: "The moral right of the author in literary and artistic property is, without doubt, 'the backbone' of the legal prerogatives attributed to the creator, as opposed to creations within industrial

because of the close relationship that links the author to their intellectual achievement. These rights grant the work a distinctive and unique character that reflects the author's personality and highlights their inclinations. This explains the legislator's position in excluding the possibility of certain transactions concerning moral rights, rendering them inalienable and not subject to prescription.¹

Thus, moral rights, sometimes referred to as “literary rights”, are distinguished by being perpetual and inalienable. This means that they endure over time; the author enjoys these rights throughout their lifetime, and their heirs benefit from them after their death. As such, they do not lapse after a specific period and are not extinguished by prescription. The nature of moral rights also precludes their transfer, such as through sale, because, first, they are personal rights intended for the author alone, and second, general legal principles require that the object of a sale be a tangible asset capable of being delivered, which is impossible in the case of literary rights. Therefore, they cannot be relinquished, as they form part of the creator’s personality. Nor may they be infringed through possession, as this may create confusion regarding the identity of the creator. According to the principle that “possession of a movable is evidence of ownership,” it can be inferred that possession of one of the author’s moral rights may cause harm to the author. Furthermore, these rights cannot be subject to seizure, even though, in practice, this would be pointless, as they have no material value. Consequently,

and commercial property, for which the moral right seems to be only a subsidiary attribute.”

¹ Article 21 of the aforementioned Ordinance No. 03-05: “... Moral rights are inalienable, not subject to prescription, and cannot be waived...”



Soumission : 10/02/2025 Acceptation : 10/06/2025 Publication : 15/07/2025

compelling an author to publish their work, that is, infringing upon one of their moral rights (the right to decide on publication), is deemed invalid.

Moral rights consist of three elements:¹ the right to respect, the right to disclosure and publication,² and the right to withdrawal (or repentance). The Algerian legislature addresses these in Articles 22 to 26 of the aforementioned Ordinance No. 03--05.

The right to respect refers, on the one hand, to the obligation to guarantee the author's right of attribution and, on the other hand, to attribute their work to them.³ The moral bond, known as the bond of authorship, which links the author to their work, allows the author to have their name, surname, and academic qualifications appear on it. In general, this includes any information that helps to introduce the author to the public, whether the work is published under their name or through someone else. By implication, the right of attribution means that it is not permissible to attribute work to anyone other than its creator.

¹ F. Zéraoui Salah, "Contrat de nègre et droit de paternité dans les œuvres littéraires: L'ombre du créateur ou le créateur dans l'ombre?" in *Mélanges en hommage à A. Benhamou*, Kounouz, op. Cit., p. 94: "Moral rights are, in general, divided into four prerogatives: the right of disclosure, the right of repentance and withdrawal, the right of authorship, and the right to respect for the work. Nevertheless, the last two components may, in our view, be combined under the term 'right to respect.'"

² It should be noted that, under previous legislation, the legislator did not provide for the right of repentance and the right of publication.

³ Article 23 of the aforementioned Ordinance No. 03-05: "The author of the work is entitled to require that their family name or pseudonym appear in its customary form, as well as on suitable copies of the work..."

In addition to the right of attribution, the right to respect also encompasses respect for the work itself, that is, the physical form of intellectual creation and the prohibition of any infringement upon it. In practice, this means that the creator of the work has complete freedom to object to any modifications made to their work. No changes may be made to a work without the creator's consent, as they have the right to defend it and protect it from any distortion or alteration that might affect the substance of their ideas.

In addition to the right to respect, moral rights also include the author's right to disclose or publish their work,¹ that is, the creator's right to decide whether to introduce their work to the public. There is no doubt that this has an impact on financial rights. Thus, it should be noted that the author has complete freedom to decide whether to publish their work or to refrain from doing so and may also choose to publish under their name or a pseudonym. Furthermore, they may transfer this right to another person.

If the author dies before disclosing their work, this right passes to their heirs, and in the event of a dispute among them, the competent judicial authority will decide on the method of disclosure. The Algerian legislature has also granted the minister responsible for culture, or their representative, the authority to disclose a work whose author is deceased and whose heirs have refused disclosure, provided that the intellectual achievement is considered important to the national community.² In the absence of

¹ Article 22 of the aforementioned Ordinance No. 03-05: "The author enjoys the right to disclose the work published under their own name or a pseudonym. They may transfer this right to another person..."

² Paragraph 4 of Article 22 of the aforementioned Ordinance No. 03-05: "The minister responsible for culture or their representative, or at the request of others, may refer the matter to the judicial authority to decide on the disclosure



Soumission : 10/02/2025 Acceptation : 10/06/2025 Publication : 15/07/2025

heirs, judicial authorisation must be obtained to permit such disclosure.

Finally, the creator of intellectual work enjoys another moral right known as the right of withdrawal or repentance. This right gives them the authority to cease the publication of their work if they believe that the ideas it contains are no longer compatible with new societal values or that it may harm their reputation. Although these two rights are mentioned in the same article,¹ legal scholars² have regarded them as distinct from one another. The right of withdrawal aims to halt the publication of a work and is exercised after publication has occurred. In contrast, the right of repentance precedes publication and allows for the termination of the publishing contract before the work is published.

2.1.2. The Financial Rights of the Creator of Intellectual Creativity

In addition to the intangible moral rights enjoyed by the creator, they also benefit from other rights designed to encourage their intellectual creativity and enable them to earn financial rewards for their mental effort.³ These are known as material or financial rights.

of the work if the heirs refuse such disclosure and the work is of importance to the national community.”

¹ Article 24 of the aforementioned Ordinance No. 03-05: “An author who considers that their work is no longer consistent with their convictions may stop the production of any medium for communicating the work to the public by exercising their right of repentance, or may withdraw a previously published work from public communication by exercising their right of withdrawal...”

² Farha Zarawi Salah, previously cited reference, p. 470, no. 426.

³ B. Galopin, *Les exceptions à usage public en droit d’auteur*, LexisNexis, 2012, no. 105, p. 81: “The concern to provide a reward to the author, to grant them the

What distinguishes the financial rights of the creator of intellectual creativity as original rights is their exclusive nature.¹ These are monopolistic rights, meaning that the author alone determines how they are exercised and exploited. Such rights may be used to settle debts, and the author may transfer them, either in whole or in part, in exchange for a relative sum calculated according to sales or a fixed amount determined in advance. The transaction must be in writing, whether it is a contract of exchange or a gift.² Unlike moral rights, financial rights are subject to seizure, which is a characteristic of financial rights in general. This applies to the author's work after publication rather than to the financial right itself, as it is difficult to determine the exact sources of the author's assets.

The financial rights of the author include the following: the right of reproduction, the right of communication to the public, and the right of resale royalty.

The right to reproduction is considered one of the most important financial rights of the author. It refers to the author's ability to reproduce their intellectual work by various means, the most common and widely used being the

means of subsistence, is, of course, one of the main concerns of copyright law..."

¹ P. Tafforeau, *Droit de la propriété intellectuelle*, Gualino édition, 2nd ed., 2007, p. 45: "The existence of *usus* has been more contested. According to some representatives of doctrine, the right to use the work or invention would belong to the public and not to the creator. Intellectual rights would consist specifically of exploiting the creation. However, to do so, it would be essential to reveal and deliver it to the public, thus renouncing exclusive use. From the perspective of intellectual property, it would be of no interest for the painter to look at their painting alone, or for the writer to read their novel to themselves..."

² Paragraph 3 of Article 21 of Ordinance No. 03-05: "... The material rights are exercised personally by the author or by their representative, or by any other owner of the rights within the meaning of this Ordinance."



Soumission : 10/02/2025 Acceptation : 10/06/2025 Publication : 15/07/2025

publishing contract. The Algerian legislature has specified the conditions for the validity of this contract and outlined the obligations of both parties, the author and the publisher, in Articles 84--98 of Ordinance No. 03--05. In general, a publishing contract in the field of copyright is defined as making work available to the public for the first time and producing it in thousands of tangible copies. It is, therefore, an agreement between two parties, the creator and the publisher, under which the former undertakes providing their intellectual work to the latter, who, in turn, undertakes printing the work at their own expense and distributing it under their responsibility. This allows for the tangible fixation of intellectual achievement.

The creator also enjoys another financial right, namely, the right of communication to the public, referred to in Ordinance No. 03--05 as "the right of communication," which is exercised through public performance. Notably, such performance must fulfil the condition of publicity; the work must be performed or presented in a public place accessible to the public, even for a fee. The Algerian legislature has not specified whether the performance must be for profit or gratuitous, nor does the total or partial nature of the public performance affect its legal characterisation.

The distinction between the right of reproduction and the right of communication to the public does not make them conflicting rights; instead, they are independent of one another. A single act may result in an infringement of both rights. For this reason, two separate licences are needed: one relating to the right of reproduction and the other to the right of communication to the public. Thus, holding one

licence does not automatically confer entitlement to the other.

In addition to these two rights, the creator also enjoys a third financial right known as the resale royalty right. This right enables the author to receive a percentage of the sale price whenever the original copies of their artistic works are resold, regardless of whether these sales occur at public auctions or through a dealer, with the percentage specified by law.

The resale royalty right is based on considerations of justice for the creators of works of fine art. It is common for painters, sculptors, or photographers to sell their paintings or sculptures at low prices because of the urgent financial need, only for the work to become highly valuable over time. It is therefore considered fair for the creator to benefit from the wealth generated by their work.

Notably, although the resale royalty right is purely financial, it differs from the aforementioned rights in that it is not exclusive. The author does not have the authority to manage the sale or object to it, and the assignment of such rights is permitted only to heirs.

2.2. Protection of the Creator of Intellectual Creativity

Among the effects resulting from intellectual creativity is legal protection against any infringement that may cause harm to the creator or their work. In this context, the Algerian legislature has acted wisely by establishing provisions aimed at regulating such protection in terms of conditions and the legal period.



Soumission : 10/02/2025 Acceptation : 10/06/2025 Publication : 15/07/2025

2.2.1. *Conditions for Granting Legal Protection*

Legal protection is granted to a work when it is established that the work possesses intellectual creativity, which is the fundamental requirement for legal protection and the source of the author's rights, as previously explained. In addition, an infringement upon this intellectual achievement must occur for the law to intervene. Infringement may take several forms, the most common of which is imitation, meaning the unauthorised exploitation of an intellectual work, since the law on literary and artistic property grants this right exclusively to the author, who may transfer their rights to others provided that there is valid consent.

The Algerian legislature does not differentiate between infringement of moral rights and financial rights; any violation of the author's rights in general constitutes the offence of imitation, which is punishable by law.¹

Accordingly, none of the elements of the moral right, namely, the right to respect, the right to disclosure and publication, or the right to withdrawal, as previously mentioned, may be infringed upon, and any act that affects any of them is punishable. For example, revealing the identity of the author of an anonymous work constitutes the offence of imitation, just as verbatim reproduction of a sentence from a legally protected intellectual work without placing it in quotation marks and mentioning the author's name is considered a breach of academic integrity.

Furthermore, the complete or partial reproduction or communication of an intellectual work without the author's

¹ See Article 152 of the aforementioned Ordinance No. 03-05 regarding acts considered by the legislator to constitute imitation.

or their rights holders' permission is unlawful. Moreover, any person who imports, exports, leases, or sells counterfeit copies of a legally protected work or performance is deemed to have committed this offense.¹

Notably, the method of imitation or the means used are of no consequence; once the act is classified as an infringement, the penalty for imitation applies.² However, the trial judge is permitted to order the confiscation and destruction of the means used in committing the offence.³

Whether an act is classified as imitation is subject to the discretion of the trial judge, who relies on specific criteria and judicial principles. Among these is the principle that imitation is determined on the basis of similarities rather than differences.⁴ A work that contains elements similar to those found in the original, legally protected intellectual work is considered an imitation, and the presence of different elements does not alter this classification, as the focus is on the similarities, even if they are only partial. Furthermore, the inability to identify the creator of the imitated intellectual work does not prevent the imposition of penalties.⁵

¹ Article 151 of the aforementioned Ordinance No. 03-05.

² Article 153 of Ordinance No. 03-05: "Any person convicted of the offence of imitation of a work or performance as set forth in Articles 151 and 152 above shall be subject to imprisonment for six (6) months to three (3) years and a fine of five hundred thousand dinars (500,000 DZD) to one million dinars (1,000,000 DZD), whether the publication took place in Algeria or abroad."

³ Article 157 of the aforementioned Ordinance No. 03-05.

⁴ C.A. Paris, 19 February 2003, *Légipresse* 2003, no. 202, p. 79: "The fact that the infringing work contains certain original elements does not preclude counterfeiting, which is assessed based on similarities rather than differences."

⁵ C.A. Paris, 31 October 2000, *CCE* 2001, no. 76: "The inability to identify the author of a protected photograph does not permit the reproduction of the work."



2.2.2. Duration of Legal Protection

The need to balance the creator's interest with the public interest requires that the creator be granted only temporary control over their financial rights. The author enjoys financial rights throughout their lifetime and the right to exploit their work in any manner they deem appropriate to generate profits. After their death, these rights continue in favour of their heirs for fifty years, starting from the beginning of the calendar year following the author's death.¹

When this legal period expires, the work falls into the public domain, meaning that others may use it without the need for permission from the rights holders and without any compensation. However, this authority to exploit work materially does not extend to moral rights, as these rights are not subject to prescription; they belong to the author in perpetuity, unlike other personal rights. The legislator's aim in this respect is not to protect the authors themselves but rather to safeguard intellectual creativity.

For joint works, this period is calculated from the end of the calendar year in which the last surviving coauthor dies.² For collective works, the duration of protection is fifty years from the end of the calendar year, in which the work was lawfully published for the first time.³

¹ Article 54 of the aforementioned Ordinance No. 03-05.

² Article 55 of the aforementioned Ordinance No. 03-05.

³ Article 56 of the aforementioned Ordinance No. 03-05.

Conclusion

The Algerian system of literary and artistic property represents an advanced framework in theory, particularly with Ordinance No. 03--05, which covers creative works and related rights. However, practical challenges such as digital transformation and the need to accelerate mechanisms that support creators require ongoing development. Recent initiatives, such as the ONDA Connect platform and international partnerships, demonstrate a commitment to addressing these challenges and further strengthen Algeria's position as a regional actor in the protection of intellectual creativity.

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Soumission : 10/02/2025 Acceptation : 10/06/2025 Publication : 15/07/2025

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