

the author's attribution right. Nevertheless, what is of particular interest to this writer is how pecuniary interests can be associated with the attribution right which is traditionally understood to be a personality related right.

The reader should also note that, in this writer's opinion, the 'trademark' function of the attribution right does not mean that the attribution right is an economical right¹⁹. This approach is not surprising, because one's right in his reputation is a personality related right, and yet, there is strong economical side to it. This however did not transfer the right from a personality related right to a pecuniary right. Thus, why would the case with the attribution right be any different?

And therefore, if the pecuniary or economical function of the attribution right is understood by analogy to the function of the trademark, then an author's action for infringement of his attribution right should be permissible

even if it was clear from the facts of the case, that the author merely intends to protect his economical interest through his attribution right.

Conclusion

The theoretical justification for the attribution right as a personality related right does not mean that it only serves personality related interests. This paper illustrates how there are evident similarities between an author's attribution right and a trademark in terms of the function of both rights. This means that there is an economical side or dimension to the attribution right that should not be overlooked. This may not have noticeable practical consequences, however, at the theoretical level, it is always interesting to re-examine traditional justifications from a different angle.

19 Some commentators argue that the right of attribution is not based on moral rights but rather on economical rights. It has its origin in the 19th century where authors wanted their names on the books so that audience will buy the future works of this particular author. see Brett Cottle, 'The Problem of legislating to protect moral rights: a personal comment' in Peter Anderson & David Saunders (eds), *Moral rights Protection in a Copyright System* (Institute for Cultural Policy Studies, Griffith University 1992) 106

and there is no difference between the mark (the name) and its owner (the author).

4. Application of an economical analysis to the attribution right in Bahraini law

As the legal system in Bahraini is part of the civil law tradition, it considers moral rights to be special form of general personality rights. Therefore, the position of the Bahraini legislator is not to have moral rights associated with or valued against any pecuniary interest. This intention is clearly reflected in the Bahraini Author's Rights Act. The Act addresses moral rights before addressing the author's pecuniary rights. Moreover, moral rights are given strong protection similar to that provided for in the French Intellectual Property Code 1992. Therefore, an author's attribution right is perpetual, not subject to prescription or any form of disposition.

On the other hand, our previous examination showed that there is a common ground between the author's attribution right and a trademark with regard to the function of the right. The Bahraini legislator recognizes the ordinary function of a trademark as an identifier of the origin or source of products or services. Although this is not the only function of a trademark, yet it is certainly an unchallenged one. It seems that the attribution right and the trademark serve the origin function in the same way. Both rights indicate the source of the work. In the attribution right it is the author, whereas in the trademark it is its owner. The fact that an author is the actual creator of the work whereas a trademark owner does not necessarily mean that he is the actual manufacturer is not of much significance. This is because the interest of the public in both situations is achieved. In relation to the copyrighted work, the public is interested in knowing who the author is. Hence, the attribution right comes into play. Whereas the interest of the public in relation to trademark

is to guarantee the source or origin is authentic so that the quality of products or services is guaranteed¹⁶.

The same argument is also true in relation to false attribution. As a mark owner would not want a competitor passing off goods as associated with the trademark, so is the situation with an artist who would not want an owner of a creation make a false assertion of ownership.¹⁷

Therefore, it is in this writer's opinion that the author's attribution right has an economical function similar to that of a trademark. An association which one could argue that is only of great significance to legal systems where the author's attribution right is not yet recognized such as the case in the US. In such situations, trademarks Act can be used to protect author's attribution right¹⁸. However, the legal system in Bahrain recognizes and protects both rights separately. Accordingly, it is not possible to say that the trademark act can be used to protect

16 In fact many argue that the meaning of the origin function of trade marks is «qualities – via – source» William Cornish, *Intellectual Property: Omnipresent, Distracting, Irrelevant?* (Oxford University Press, Oxford 2004) p 90

17 Robert C. Bird, 'Moral right: Diagnosis and rehabilitation' (2007) available online <<http://ssrn.com/abstract=1033021>> last accessed 2 Oct 2012, at [23]

18 Note that the court in *Dastar v. Twentieth-Century Fox* [123 S. Ct. 2041 (2003)] ruled that false designation of the origin of the work which is prohibited under sec 43(a) of the Lanham Trademark Act is not applicable to intellectual works. J. Ginsburg criticizes this approach and argues that in the absence of protection for the attribution right under copyright in the US, trademark law should fill the gap; see Jane C. Ginsburg, 'The author's name as a trademark: a perverse perspective on the moral right of "paternity"' (2005) Columbia Law School - Public Law & Legal Theory Working Paper Group – Paper No. 05-91 <<http://ssrn.com/abstract=724343>> accessed 30 Jan 2010

economic perspective, the smaller the market is the easier it will be to identify the producer without any identification mark, the situation in the modern academic market is different. It is an international market with a huge number of competitors which increase every day, in this case identification without a mark is very difficult if not impossible, authors will not be able to be identified and build up reputation if there was no identification of who they were¹⁴. As a consequence to this public role¹⁵, if one is to imagine that someone else other than the actual creator of the work passed himself as the author of the work it should be considered as deceiving the public and providing false information concerning the source of the work.

Nevertheless, one could argue that there is a social dimension associated with certain famous trademarks that is not applicable to famous authors. For example, the social prestige associated with carrying a 'Channel®' bag is not established in famous author's literary works. Yet, and although this social prestigious dimension is probably not applicable to literal works, it is most likely applicable to artistic works.

Therefore, in conclusion, a trademark and an author's attribution right seem to be serving

the public in a similar way.

3.2 The attribution right benefits its author in the same way a trade mark benefit its owner

When one considers how a trademark benefits its owner, the first thing that comes in mind is the pecuniary gains of its owner. This is logical since trademarks are classified as commercial creatures. In other words, trademarks existed in the first place to serve the economic interest of its owner.

When a trademark is well known, its owner enjoys certain recognition and fame. Nevertheless, it is not the common practice to print the name of the owner of a particular trademark next to the trademark itself. Furthermore, licensing and assignment of trademarks is a common practice that is carried out regularly, and most important of all, the consumer has little or no interest in knowing 'who' the trademark owner is. What the consumer is concerned with is the quality and prestigious status associated with the trademark. These qualities are well recognized by the trademark itself regardless of its owner. The situation however, is different with the author. An author's name serves as the trademark itself. There is no difference between the owner and the mark, as the author's name is the trademark. This means, when the author's name is well known (or considered as a famous trademark) the author gains reputation, recognition and eventually makes money. His name (his trademark) becomes an important factor in selling the work and thus not only benefiting the author himself, but also benefiting the publisher.

This difference means that a well known trademark does not necessarily grants its owner the same social recognition enjoyed by a famous author. This is because the public does not need to know who the trademark owner is to buy the product, but when it comes to the author, his well known name is the trademark

14 For more details see William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property law* (The Belknap Press, London 2003) pp 61-66

15 The public role of the attribution right is also applicable to performers, Dr. Al-shaikh argues that the attribution right for performers serves a public interest because the audience is aware of the name of the person behind the performance and can provide him with feedback on his performance that would help develop his performance. The public benefit from this because such exercise is expected to improve and develop the general taste of the public; see Ramzi Rashad Al-shaikh, *Neighboring rights to the author's right* (Dar Algame'a Aljadeeda, Alexandria 2005) pp 487-488

function of a trademark i.e. the origin function which simply indicates where goods or services come from¹⁰.

3. Identifying the intersection between the two rights

Our previous examination showed that the primary function of the attribution right is to identify the author of the work. On the other hand, the primary function of a trademark is to identify the origin of the goods or services. Therefore, it is clear that there is an explicit intersection between the two rights: the attribution right serves as an identifier of the author, the origin of the copyrighted work, whereas a trademark serves as an identifier of the trademark owner, the origin and source of the product or service.

Nevertheless, for further understanding, the arguable similarity between the two functions needs to be examined from public and private perspectives.

3.1 Author's attribution right as a trademark to the public

As the author's attribution right, grants him the right to have his work attributed to him, it provides the public with certain benefits. The accurate reference regarding 'who' the real creator of the work, assures the public that the product is authentic¹¹ and that the name

associated with the work is the work's genuine creator. Accordingly, the general public will consider the author's work while keeping his cultural, educational, ethnical and sometimes religious background in mind. It says a lot about where did this work come from and why did it end up in this particular format.

In addition to that, just as a particular trademark guarantees certain level of quality that a consumer is expected to associate with the product, an author's attribution right conveys similar information about the author's work. In other words, there is certain level of quality associated with the author's name.

The author's name on a particular book for example gives the public an expectation of a certain standard that is associated with this particular author¹². A book with the name of a best-selling author, says about the expected level of quality as much as what 'Channel®' sign says on a bag. This 'quality indication' function reduces the searching cost endured by the public. This is because the more products you have in the market the higher the cost of information and the higher the value of knowing 'who' produced it¹³. From an

of the British Literary and Artistic Copyright Association (BLACA) at the offices of Theodore Goddard, London on July 8, 1999) 5

10 William Cornish, *Intellectual Property: Omnipresent, Distracting, Irrelevant?* (Oxford University Press, Oxford 2004) p 89; also W. Cornish & D. Llewelyn, *Intellectual Property: Patents, copyright, trademarks and allied rights* (6th edn Sweet & Maxwell, London 2007) p 620; In addition, trademarks serve other functions such as quality and advertising functions, for more information see Sabri Hamad Khater, *Intellectual Property: a comparative study to the Bahraini law* (Bahrain University Press, Sukhair 2007) pp 373-377

11 David Vaver, 'Moral rights yesterday, today and tomorrow' IJL&IT (Presented to a meeting

12 J. Ginsburg supports this view and suggests that the attribution right helps consumers choose from the available products the author's work based on their previous experience with this work so it is no different from any other trademark attached to a physical production like shampoos and clothing Jane C. Ginsburg, 'The author's name as a trademark: a perverse perspective on the moral right of "paternity"' (2005) Columbia Law School - Public Law & Legal Theory Working Paper Group - Paper No. 05-91 < <http://ssrn.com/abstract=724343> > accessed 30 Jan 2010 pp 2-3

13 For more details see William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property law* (The Belknap Press, London 2003) pp 61-66

2- Examining the ordinary function of an author's attribution right and a trademark:

As a first step, one needs to understand the ordinary function of an author's attribution right and that of a trademark. This is important so that the reader can see why an association between the two rights is triggered at the first place.

2.1 The function of an author's attribution right: art 5(1) (b) and (c) of Bahraini Authors' Rights Act

In general, Bahraini Authors' Rights Act is very similar to the French droit d'auteur where the central focus is on the author. Art 5 (1) grants the author a list of perpetual moral rights which are not subject to prescription or disposition. Hence, reaffirming classification of moral rights as being derived from general personality rights. Paragraph (b) of art (5) stipulates for the author's right in having his work attributed to him (attribution right) and in particular to put his name on all copies of his work – when it is possible – in the usual form⁶. Moreover, paragraph (c) of the same article clarifies this right further by stating that the author has 'the right to remain anonymous or to use pseudonym' which is clearly derived from the right of attribution.

Thus, the function of the attribution right in Bahraini law is in line with how this right is generally perceived. As a matter of fact, this perception and understanding of the attribution right and its function, is not limited to the civil law tradition. To be specific, recognition of the attribution right is less problematic even when examined from a common law perspective due to its acceptance on the international level⁷.

6 Art 5(1)(b) Bahraini Authors' Rights Act.

7 For example, the UK Copyright Design and Patent Act 1988 (CDPA) sec 77 recognizes the paternity right. However, some argue that this recognition is not in line with the Berne Convention due to the assertion requirement

2.2 The function of a trademark: art (2) of Bahraini Trademark Act

From a historical point of view, trademarks were originally used as a source and origin identifier⁸, and at a later stage, they were used to indicate ownership. After the industrial revolution, and the internationalisation of trade, along with development of the advertisement, trademarks were perceived by consumers as an identification of the source. Eventually, consumers started to realize that certain marks reflected certain standards of quality.

In the 20th century trademarks became valuable assets, meaning they were able to attract consumers not as indicators of origin or quality but as a result of the advertising or persuasive function. Thus, a trademark function has changed from being a "signal" that used to identify the manufacturer to a "symbol" which associates broad meanings.⁹

Art (2) of Bahraini Trademark Act defines a trademark as any device that is used to distinguish products or services of one establishment from another, or is used as an indication for providing a particular service or to indicate the origin or source of any product or to indicate its manufacturing elements or quality or any other characteristic. A trademark can take the form of names, words, signatures, letters, symbols, numbers, addresses, imprinting, designs, smells, images, engravings, packaging, or visual elements or shapes, colour or group of colours, or could be a mix of the elements mentioned earlier.

In this sense, it is evident that Bahraini Trademark Act recognizes the primary

under sec 78 and the permissibility of its waiver under sec 87.

8 Sabri Hamad Khater, *Intellectual Property: a comparative study to the Bahraini law* (Bahrain University Press, Sukhair 2007) p 373.

9 L. Bently and B. Sherman, *Intellectual Property Law* (2nd edn Oxford university press, Oxford 2004) p 694

Is the function of an author's attribution right similar to that of a trademark? Examination in the light of Bahraini law

Hanan Almawla

1- Introduction

The attribution right, or paternity right, is the actual creator's right to be identified as the author of his own work¹. Only the attribution right, along with the integrity right, have gained international recognition and acceptance². The attribution right was recognized in the Berne Convention³ (1886) as well as in the Universal Declaration of Human Rights (1948).

As the legal system in Bahrain is part of the civil law tradition, the justification of the attribution right and moral rights in general, is based on the personalist theory⁴. According

1. See art 5(1)(b) Bahraini Author's rights Act; also sec 77 CDPA 1988
2. It is interesting to note that even at the Arab States level, the proposed Arabic Agreement for protection of author's rights, only recognizes the attribution and integrity rights as moral rights of authors, see art (6) of the agreement.
3. Art 6 Berne Convention and art 27(2) UDHR. It is interesting to note that
4. The concept of personalist author's rights was the result of change in the situation in the 2nd half of the 19th century where focus started to be on the aesthetic character of works in France. This had huge influence on the theory behind copyright in France along with the concept of personalist author's rights; Gillian Davies, *Copyright and the public interest* (2nd edn. Sweet & Maxwell, London 2002), pp 169-177; also see Ramzi Rashad Al-shaikh, *Neighboring rights to the author's right* (Dar Algame'a Aljadeeda, Alexandria 2005) pp 440-441, for more details on moral rights theories see A. Alrashid M'amoun Shadeded, *Author's moral right: the general theory and its applications* (Dar Alnahda Alarabia, Cairo 1978) pp 23

to this theory, moral rights exist to protect the author's personality, or in other words, moral rights are an author's personality related rights. The personalist theory is not universally accepted⁵, however, this does not change the fact that even legal traditions that do not approve of this theory still recognize moral rights as rights that protect the 'non-economic' interests of the author. Hence, one can say that what both legal traditions agree on is that moral rights are concerned with the 'non-economical' interests of the author.

However, the settled theoretical justification for the attribution right, and how it is concerned with the 'non-economical' interest of the author, could soon become under questioning when it is examined against the function of a trademark.

Accordingly, as a first step, this paper will study and compare the function of an author's attribution right and that of a trademark. As similarities between the two functions are revealed, the paper will examine the permissibility of applying economical analysis to the attribution right.

Examination is undertaken from the perspective of Bahraini law. However, reference to other legal systems will be made for reasons of comparison when necessary.

onwards.

⁵This is true in relation to common law traditions such as the UK and the USA; See Amy M. Adler, 'Against moral rights' (2009) New York University school of law – Public law and legal theory research paper series – working paper No. 09-14 <<http://ssrn.com/abstract=1365437>> last accessed 2 Oct 2012

هل يؤدي حق المؤلف

في نسبة المصنف إليه ذات الوظيفة التي تؤديها العلامة التجارية؟
(دراسة في ظل أحكام القانون البحريني)

حنان المولى

جامعة البحرين - مملكة البحرين

الملخص

يقارن هذا البحث بين الوظيفة التي يؤديها حق المؤلف في نسبة المصنف إليه كحق معنوي، وتلك التي تؤديها العلامة التجارية في ظل أحكام القانون البحريني. تتناول الباحثة الوظيفتين بالتفصيل وتخلص إلى أن الوظيفة التي يؤديها حق المؤلف في نسبة المصنف إليه مشابهة لتلك التي تؤديها العلامة التجارية، وبناء عليه ترى ضرورة تحليل حق المؤلف في نسبة المصنف إليه تحليلا اقتصاديا وإن كان الحق نفسه من الحقوق غير المالية وبصرف النظر عن المدرسة اللاتينية التي ينتمي إليها المشرع البحريني.

Is the function

of an author's attribution right similar to that of a trademark?
(Examination in the light of Bahraini law)

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Abstract

This article examines and compares the function of an author's attribution right and that of a trademark in Bahraini law. It argues that if both rights were understood to be purposely similar, then an economical analysis to the attribution right could be permissible in Bahraini law regardless of its civil law tradition.

Keywords: Copyright; Moral rights; Attribution right, Paternity right, Trademarks; Bahrain.

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Received: 20 April 2013

Revised: 15 May 2013, Accepted: 1 June 2013

Published online: 1 July 2013

