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Explanatory Note to the Recommendations of Experts Nasser and Schlesinger

On the Lebanese Law on the Protection of Literary and Artistic Property No.75 of April 3, 1999

SUPPORT FOR LEBANON'S ACCESSION TO THE WORLD TRADE
ORGANIZATION (WTO) PROJECT
FROM BOOZ ALLEN HAMILTON
TO USAID

02/16/2011

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**EXPLANATORY NOTE
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SCHLESINGER ON
THE LEBANESE LAW ON THE PROTECTION OF LITERARY AND
ARTISTIC PROPERTY, NO. 75 OF APRIL 3, 1999**

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ORGANIZATION (WTO) PROJECT

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FROM BOOZ ALLEN HAMILTON

TO USAID LEBANON ECONOMIC GROWTH OFFICE

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1. INTRODUCTION

The protection of Intellectual Property and the enforcement against illegal uses of Literary and Artistic Property Law and other intellectual property rights are very important for Lebanon's economic development. The Intellectual Property Protection (IPR) could contribute more to the economy if intellectual property rights were more effectively enforced.

Below are a few numbers that demonstrate the contribution of IPR, in particular copyrights to the economy in Lebanon:

- In 2005, the total copyright industries in Lebanon contributed around US\$1.04 billion to the annual gross domestic product (GDP), employed almost 50,000 workers, and contributed 4.75% to the GDP and 4.49% to overall employment¹.
- Copyright industries continue to report high piracy levels, for example, the Business Software Alliance reports U.S. losses of \$29 million in 2009 due to piracy of all of its members' software titles, with the piracy rate growing to 75%, representing increases in losses for the fifth straight year and increased piracy levels for the third straight year (up from 73% in 2007). The record industry reported at least \$3 million in illegal sales and a 70% piracy in 2008.
- In 2000, a study carried out by Statistics Lebanon, Ltd. between April and June 2000 estimated that, due to cable piracy alone, the Lebanese government lost approximately US\$38 million in 1999, including lost taxes, social security contributions, and the earnings of the Lebanese government if the cable industry was legitimate.²

Intellectual property rights (IPR) are one of the main concerns of the U.S. Government and the European Union as Lebanon negotiates its WTO accession.

Copyrights remain one of the major outstanding IPR issues which will strongly influence the final decision of many WTO members regarding Lebanon's accession.

Therefore the GOL considered an overhaul of its 1999 Copyright Law, early drafts of which would have posed problems for copyright owners. The MOET requested the WTO Project to assist in drafting a bill that will be fully TRIPS-compliant and in conformity with the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).

The Project hired two respected experts in the field of copyrights to provide draft language for specific amendments (in both English and Arabic) to the Law on the Protection of Literary and Artistic Property of Lebanon (No.75 of April, 3 1999). The two experts are Mr. Walid Nasser from Lebanon and Mr. Michael Schlesinger from the United States. In addition to providing model text for the amendment, the experts were also expected to provide a white paper explaining the rationale of the suggested amendments.

¹ *The Economic Contribution of Copyright-Based Industries in Lebanon*. by Roger Malki World Intellectual Property Organization publications - 2007

² Special 301 report Lebanon 2010.

On January 31st 2011, the experts submitted the following deliverables:

- A document encompassing the amendments suggested by experts Nasser and Schlesinger to the Current Lebanese Law on the Protection of Literary and Artistic Property (No. 75 of April 03, 1999) in both English and Arabic. (The amendments were added under “track changes” to the existing Law).
- A Draft law on the amendments (as suggested by experts Nasser and Schlesinger) of the Lebanese Law on Literary and Artistic Property (No. 75 of April 03, 1999) with explanatory memorandum in both English and Arabic³.

The two advisors worked closely together while drafting their deliverables, and there was healthy deliberation. However, in a few instances Mr. Nasser and Mr. Schlesinger offer different language, as a result of the legal framework they are practicing in – the French legal system and the common law system, respectively. They have been retained and highlighted in this report. We note that both versions offered are WTO compliant. They are options for the Government of Lebanon to consider:

Mr. Nasser noted the following discrepancies between the English and the Arabic versions:

- The definition of "Audio Recording" was wrong in the English translation of the law that was provided to Mr. Schlesinger to work on. The original Arabic text uses the term "sounds" whereas the translated English text uses the term "sounds of a performance or other sounds". Mr. Nasser did not change the original Arabic text and only translated the modifications introduced by Mr. Schlesinger.
- In the explanatory note provided by Mr. Schlesinger, the US expert has mistakenly forgotten to add an explanation under the new article 25 regarding the amendments that were introduced to article 40 of the current law. Mr. Nasser added to the explanatory note prepared by US expert Schlesinger a provision (under new Article 25) related to the modifications made to Article 40. The numbering of the articles that followed changed.
- Article 45 of the draft law amending the Copyrights law, amends article 93 of the current Copyrights law. In the English version of Article 45 provided by Mr. Schlesinger the expert uses the terms “reasonable guarantee fixed by the court”. Mr. Nasser did not translate the term “reasonable” as such translation does not exist in "legal Arabic" especially given that the remainder of the sentence clearly explains the term "reasonable guarantee".

2. ARTICLES TO BE AMENDED

In addition, the two experts offer two alternatives with regard to Articles 17, 20, 21.4, and 23 as discussed below:. Please note that both alternatives are WTO compliant.

³ This is the legal document (the draft law) that should be referred to the Lebanese Parliament for voting.

a. ARTICLE 17:

Mr. Schlesinger recommends an amendment to Article 17 that would require the assignee to “endeavor” to pay the author either a percentage of the exploitation revenues or a lump sum.

Mr. Nasser believes that the use of the term “endeavor” is not appropriate in copyright law.

In the case of Article 17, the law should either provide for an obligation to pay an amount (either as a percentage or lump sum), or remain silent regarding such payment.

Mr. Nasser believes that Article 17 should not remain silent because (i) such silence would be interpreted as a loss by the authors of an "acquired right" that was granted to them in the copyright law enacted in 1999, (ii) a similar provision exists in the French Intellectual Property Code and seems to be valid and accepted by the international community, and (iii) the provision requiring the payment of a percentage to the author is intended to protect the latter in any contractual deal as the author is usually the weakest party in such deal.

Based on the above, Mr. Nasser believes that the provision requiring the payment of a compensation to the author should remain in the Lebanese copyright law, and such compensation should take the form of either (i) a lump sum or a percentage based on the agreement of the parties, or (ii) a percentage and, in exceptional cases, a lump sum, similar to the French law.

b. ARTICLE 20:

Mr. Nasser believes that the text of Article 20 should either be kept as is, or deleted all together, because:

- a. The purpose behind the provisions of Article 20 is to facilitate the sharing of the profits on a 50/50 basis between the author of the lyrics and the composer of the music in a song when there is no agreement providing for how such profits should be shared. The current provision would apply whether or not the *situation where the lyrics and the music constitute an integral part of a song*.

- b. The text proposed by the US Consultant is intended to confirm that the sharing of the revenues derived from the exploitation of a song on a 50/50 basis between the author of the lyrics and the composer of the music is limited *only to the situation where the lyrics and the music constitute an integral part of a song*. Since the sharing of the profits between the joint authors where *the different contributions to the work constitute an integral part* is already provided for in Article 6 of the law, we do not see the need to the amended version of Article 20 as it becomes redundant.

Therefore, the two available options are (1) maintain the current text or article 20, or (2) delete Article 20 all together.

c. ARTICLE 21.4:

Mr. Schlesinger proposes to delete Article 21.4. Mr. Nasser, on the other hand, recommends the redrafting of Article 21.4 to provide that the rescinding parting “indemnify the assignee beforehand for any prejudice that might be caused by the reconsideration or withdrawal” and to provide that “if the author decides to have his work published after having exercised his right to reconsider or of withdrawal, he shall be required to offer his rights of exploitation in the first instance to the assignee he originally chose and under the conditions originally determined.” Mr. Nasser does not agree with Mr Schlesinger that the right to rescind a work should be deleted because (i) it is adopted by the Berne Convention, and (ii) it is included in the French Code of Intellectual Property.

d. ARTICLE 23:

The amendment proposed by Mr. Schlesinger to Article 23 requires the payment of a fair compensation by the person making a private copy. Mr. Nasser recognizes that in Europe, the EU Information Society Directive provides that the State *may* provide for the payment of a fair compensation in the case of a private copy. However, Mr. Nasser believes that (1) paying a fair compensation in a situation such as this goes against the spirit of the private copy, and (2) it is extremely difficult (if not impossible) to implement a provision requiring the payment of a fair compensation in the case of a private copy in Lebanon. Therefore, Mr. Nasser recommends accepting the amendment proposed by Mr. Schlesinger with the following modifications:

- Delete the reference to the payment of a fair compensation.
- Delete the following sentence: “that such copy does not otherwise conflict with a normal exploitation of a work and does not unreasonably prejudice the legitimate interests of the rights holders” as it is redundant with the opening sentence of article 24. The sentence to be deleted in article 23 can be replaced with the following sentence: “and subject to the provisions of Article 24.”