

Copyright^x

Spring 2020

Professor William Fisher

Final Examination

This is an “open-book” examination. When preparing your answer, you may read, watch, or rely on any material you wish. However, you may not consult in any way with any other person concerning any aspect of the test, and you must abide by the CopyrightX Academic Honesty Policy, available at <http://copyx.org/academic-honesty/>.

The exam will be available starting at 12:00 UTC on May 7, 2020. It is due no later than 23:59 UTC on June 30, 2020. Answers should be submitted, either in MSWord or PDF format, via email to copyrightxexam2020@gmail.com. You will receive an email message confirming receipt of your answer.

During the examination, all of the course materials (including the assigned readings, recorded lectures, and maps of copyright law and theory) will remain available at <http://copyx.org>.

Neither the course team nor your teaching fellow will respond to questions concerning the exam unless those questions involve emergencies. If an emergency does arise, please email copyrightx@cyber.law.harvard.edu, providing details. Someone will respond as soon as possible.

If you find any aspect of the exam’s content or instructions to be ambiguous, do not request a clarification. Instead, develop your own interpretation that resolves the ambiguity and make that interpretation explicit in your response.

The exam contains two questions. You must answer both. Your answers will be weighted equally in the grading. Neither of your two answers may exceed 2000 words.

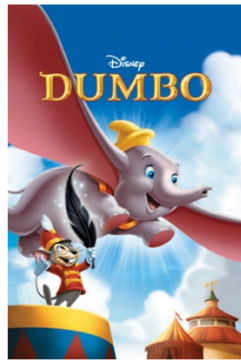
Until July 1, you may not redistribute this examination to anyone or submit to any publicly accessible website any comments concerning it. The reason for this requirement is that, until that date, students in some of the other courses affiliated with CopyrightX will be answering questions identical or similar to those contained in this exam.

Question #1

The Walt Disney Company (“Disney”) is one of the most successful corporations in the world. Despite the shock of the COVID-19 pandemic, the company’s current market capitalization is \$192 billion. Critical to Disney’s success has been the popularity of a series of animated movies. The titles and release dates of the most famous of those movies – along with authorized images of their central characters – are set forth below.



Pinocchio (1940)



Dumbo (1941)



Cinderella (1950)



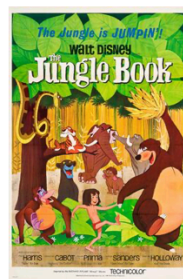
Alice in Wonderland (1951)



Peter Pan (1953)



Sleeping Beauty (1959)



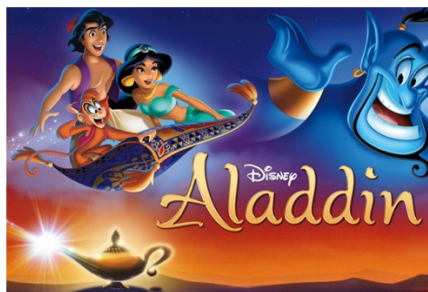
Jungle Book (1967)



Little Mermaid (1989)



Beauty and the Beast (1991)



Aladdin (1992)



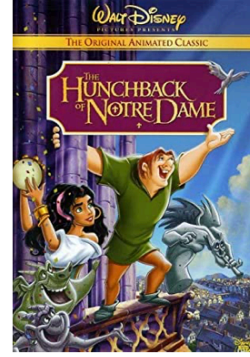
Lion King (1994)



Pocahontas (1995)



Toy Story (1995)



Hunchback of Notre Dame (1996)



Finding Nemo (2003)



Incredibles (2004)



Frozen (2013)



Moana (2016)



Coco (2017)

The plots of several of these movies were derived from books, folk tales, or historical events. For example, *Pocahontas* was loosely based on a quasi-historical narrative involving a relationship between a Native American woman and Captain John Smith, *The Hunchback of Notre Dame* was based on the novel of the same name by Victor Hugo (first published in 1831), and *Frozen* was loosely based on “The Snow Queen” by the Danish author, Hans Christian Andersen (first published in 1844). In addition, some individual characters in the films were derived from folk tales or myths. For example, Maui, one of the two stars of *Moana*, is a demi-god who figures prominently in many Polynesian tales.

The scripts and animation of the films were written by employees of Disney or its subsidiaries. However, Disney sometimes also relied upon experts in the cultures depicted in the films. For example, the plot and characters of *Moana* were substantially influenced by advice provided by

Doug Herman, a scholar who specializes in the history of Polynesian migrations. And the popularity of *Coco* in Latin America is due in part to the accuracy of its depiction of Mexican culture, which in turn is attributable to the guidance that Disney received from three “creative consultants”: Octavio Solis, Lalo Alcaraz, and Marcela Davison Aviles.

The genesis of only one of the films deviated from this pattern. The script for *Little Mermaid* (an adaptation of another tale by Hans Christian Andersen) was written in 1986 by Frances Fitzgerald, a freelance screenwriter. In 1987, Fitzgerald assigned her copyright in the script to Disney for a substantial sum.

Disney continues to earn considerable revenue from derivatives of these films. For example, many of the attractions at the company’s famous amusement parks are based on the films. Mindful of the importance of these income sources, Disney’s executives manage the company’s intellectual property carefully. For example, they almost never authorize other people or firms to produce sequels to the films, and they closely supervise the few licensees who are permitted to produce merchandise based on the films.

Nevertheless, unauthorized references to Disney’s movies have long abounded in popular culture, not just in the United States but throughout the world. Some of those references have been respectful, but many have been disrespectful or profane. Many have been accompanied by reproductions (or imitations) of images from the films. (Examples include the work of the Indonesian artist, Andhika Muksin.) The rise of social media has contributed to an increase in the frequency and notoriety of such references. Disney has generally tolerated these invocations of its films. However, recently, they have become a cause of increasing concern among the executives.

A particularly troubling phenomenon has involved the emergence of a social practice in which people employ an Instagram filter that purports to tell them which Disney characters they most resemble. The filter in question was originally made by Arno Partissimo, a photographer and videomaker. Other Instagram users can download it from his site. Once installed on a portable device, the filter ostensibly enables an Instagram user to determine which of the Disney characters is suggested by the user’s face or identity. Once activated, the filter shuffles through images of several Disney characters before settling on one. The final image appears in an oval frame on top of the face of the user. Disney has not granted permission to Partissimo or to any of the users of his filter.

The algorithm underlying the filter is unclear. Partissimo claims that the results are random, but the pattern of results suggests not. For example, Zelda Williams, the daughter of Robin Williams, recently posted the image shown on the right, which indicates that the filter matched her with the genie in *Aladdin* – a character whose voice her father had provided. (This image has now been viewed 1.8 million times.)



In the past few months, a growing number of people – some of them celebrities – have been using Instagram and Tik-Tok (another social media platform) to make available on the Internet short videos (commonly known as “memes”) in which they use Partissimo’s filter and then react to the results. Many of these memes have “gone viral” – i.e., have spread quickly and widely on the Internet through social media and email. Screenshots from a few are set forth below.



Compilations (also prepared without Disney’s permission) of “full length” versions of similar memes are available the following sites:

- <https://www.youtube.com/watch?v=4VrbAZdSVSc>;
- <https://www.youtube.com/watch?v=ZYZaqNBHerU>;
- <https://www.youtube.com/watch?v=34A3d41cmz4>.

Press coverage of this practice has been extensive. In a recent interview, Adam Mosseri, the CEO of Instagram, pointed to the practice as an example of social-media behavior that thus far has minimized the adverse financial impact on Instagram of the pandemic. He indicated that he was strongly disinclined to implement on Instagram an automated filtering system like the Content ID system used by Youtube, for fear that it would suppress vibrant practices of this sort and drive users toward alternative social-media platforms.

The executives of Disney worry that this practice is getting out of hand. Among their concerns is the possibility that they are losing control of the social meanings of the fictional characters in question. For example, the frequency with which users lament being matched with the genie in *Aladdin* (on the ground that it implies they are overweight) creates a hazard that future viewers of the film will see the genie, not as jolly and mischievous, but as obese. The executives are considering using copyright law to curb this behavior.

In a memorandum containing no more than 2000 words, answer the following questions, explaining the reasoning underlying each of your responses:

- (1) What claims might Disney assert under the copyright law of the United States against each of the following parties:
 - a. Arno Partissimo;
 - b. Zelda Williams;
 - c. Instagram?
- (2) What defenses might those parties assert in response?
- (3) What is the probability that Disney would prevail against each party?
- (4) If Disney prevailed, what remedies would be available to the company?

If you need additional information to answer any of these questions, say what that information is and why it matters.

[This question contains a fictionalized composite of several events. Most of the statements made in the question are true, but others are “alternative facts” – i.e., either distortions of true events or outright fabrications. If you happen to know (or learn) about aspects of the actual events that are inconsistent with the narrative set forth above, you should ignore that knowledge when framing your answer.]

Question #2

Set forth below is a draft copyright statute, prepared at the behest of the Business and Intellectual Property Authority of Namibia. The provisions highlighted in red deviate significantly from the corresponding aspects of the copyright systems of most countries.

Select a country other than Namibia. It could be the United States, the jurisdiction that has figured most prominently in this course, it could be your country of residence, or it could be any other country with which you are familiar. Then select two of the statutory provisions highlighted in red below. In an essay containing no more than 2000 words, discuss whether the copyright law of the country you have selected should be amended to incorporate the two statutory provisions you have selected. Explain fully why or why not. Your answer should reflect familiarity with at least one of the four general theories of copyright law considered in this course.

Proposal for:
Copyright Act of Namibia

William Fisher
Draft 1.2, April 18, 2020

This document was prepared at the request of the Business and Intellectual Property Authority of Namibia. The purposes of the document are:

- (a) to advance and reconcile the aspirations of several Namibian constituencies, representatives of which participated in a series of workshops hosted by BIPA in Windhoek on September 18-20, 2019;*
- (b) to simplify Namibia's copyright system and thus make it more readily understandable by nonlawyers; and*
- (c) to implement the intellectual-property treaties of which Namibia is a member.*

The document has not yet been approved by BIPA. Thus, none of the views expressed herein should be attributed to any government official in Namibia.

I. Objectives

101. The objectives of the Copyright Act of Namibia are:

- a) to provide authors and artists appropriate rewards and fair attribution for their creative works;
- b) to foster the creation of socially beneficial intellectual products;
- c) to make those products accessible to all persons;
- d) to ensure the preservation and integrity of works of art; and
- e) to promote a vibrant and diverse culture, an informed and well-educated citizenry, and a healthy democracy.

102. When interpreting and applying the provisions of this Act, the judiciary and the Copyright Tribunal should strive to advance and reconcile these objectives.

II. Protected Material

201. Subject to the restrictions in section 202, copyright protection shall extend to original works of the following types:

- a) literary works;
- b) dramatic works;
- c) choreographic works;
- d) musical works;
- e) sound recordings;
- f) pictorial, graphic, and sculptural works;
- g) audiovisual works;
- h) architectural works; and
- i) computer programs.

202. Copyright protection shall not extend to:

- a) facts;
- b) ideas;
- c) procedures, processes, or methods of operation;
- d) industrial designs;
- e) application program interfaces;
- f) works produced or commissioned by the government of Namibia; or
- g) submissions to the government of Namibia for use in judicial or administrative proceedings.

203. A work is protected by copyright as soon as it is fixed in a physical medium, regardless of whether the fixation is made by or with the authority of the author.

III. Ownership

301. Subject to the limitations in sections 302-306, the owner of a copyright is the author of the work to which the copyright applies.

302. When a work is authored by two or more authors working collaboratively, they shall share the copyright in that work as joint authors.

303. The copyright in a sound recording of a performance shall be shared by the performer and the producer, as joint authors.

304. Unless they agree otherwise in a signed writing, joint authors shall enjoy equal, undivided rights without a right of survivorship, and each joint author shall have the authority to exploit the work commercially, subject to a duty to share any profits equally with other joint authors.

305. The owner of the copyright in a work created by an employee within the scope of employment is the employer, but the employee remains the author of the work.

306. The copyright in a commissioned work shall be owned by the party commissioning the work if and only if, prior to the creation of the work, the parties so agree in a signed contract. In such a case, the person creating the work remains the author.

IV. Rights

401. Subject to the limitations in sections 501-511, the owner of a copyright in a literary, dramatic, choreographic, musical, or audiovisual work shall enjoy the exclusive rights:

- a) to reproduce the work in any manner or medium;
- b) to adapt the work;
- c) to distribute copies of the work through sales or other transfers of ownership;
- d) to import into Namibia copies of the work that have been acquired outside of Namibia;
- e) to perform the work publicly;
- f) to authorize any of the foregoing activities.

402. Subject to the limitations in sections 501-511, the owner of a copyright in a pictorial, graphic, or sculptural work shall enjoy the exclusive rights:

- a) to reproduce the work in any manner or medium;
- b) to adapt the work;
- c) to distribute copies of the work through sales or other transfers of ownership;
- d) to import into Namibia copies of the work that have been acquired outside of Namibia;
- e) to display the work to members of the public not physically present where a copy of the work is located.
- f) to authorize any of the foregoing activities.

403. Subject to the limitations in sections 501-511, the owner of a copyright in a sound recording shall enjoy the exclusive rights:

- a) to reproduce the actual sounds of the recording;
- b) to distribute copies of the sound recording through sales or other transfers of ownership, rental, lease, or lending;
- c) to import into Namibia copies of the sound recording that have been acquired outside of Namibia;
- d) to perform the sound recording publicly;
- e) to authorize any of the foregoing activities.

404. Subject to the limitations in sections 501-511, the owner of a copyright in a computer program shall enjoy the exclusive rights:

- a) to reproduce the program in the form of another computer program;
- b) to distribute copies of the program through:
 - a. sale or other transfer of ownership, or

- b. commercial rental, unless the program is not the essential object of the rental;
- c) to import into Namibia copies of the program that have been acquired outside of Namibia;
- d) to authorize any of the foregoing activities.

405. Subject to the limitations in sections 501-511, the owner of a copyright in an architectural work shall enjoy the exclusive rights:

- a) to reproduce the work in another architectural work;
- b) to reproduce the work in a building; and
- c) to authorize such reproductions.

406. Subject to the limitations in sections 501-511, broadcasting organizations shall enjoy the exclusive rights:

- a) to rebroadcast their broadcasts or otherwise to perform them publicly; and
- b) to authorize any of the foregoing activities.

407. Subject to the limitations in sections 501-511, performers of musical compositions shall enjoy the exclusive rights:

- a) to fix their performances in tangible media;
- b) to communicate their live performances to the public; and
- c) to authorize any of the foregoing activities.

408. The exclusive rights specified in sections 401-407 may be assigned or licensed to other parties, in the aggregate or separately.

409. The author of a work subject to protection under section 201 shall enjoy a right to fair attribution. This right may be neither waived nor assigned.

410. The author of a work subject to protection under section 201(f) that is embodied in fewer than 100 authorized copies shall have the right to prevent:

- a) destruction of any of those copies; or
- b) alteration of any of those copies in a fashion that would be prejudicial to the reputation of the author.

These rights may be waived in a signed writing but may not be assigned.

411. Duration

- a) With respect to a work prepared by an employee, a commissioned work, an anonymous work, or a pseudonymous work, the exclusive rights prescribed by sections 401-407 and 409-410 shall endure for 100 years from the date of the creation of the work or 75 years from the date of its first publication, whichever occurs first.
- b) With respect to a work that does not meet the qualifications of section 411(a), the exclusive rights prescribed by sections 401-407 and 409-410 shall endure for 50 years from the death of the last surviving author of the work.

412. Liability for infringement of any of the rights set forth in sections 401-407 and 408-409 shall extend to a party that facilitated the infringement in either of the following circumstances:

- a) the facilitator had actual or constructive knowledge of the infringer's behavior and materially contributed to that behavior; or
- b) the facilitator both benefitted financially from the infringement and had the power to prevent or materially curtail it and yet failed to exercise that power.

V. Exceptions and Limitations

501. Notwithstanding the provisions of sections 401-407, the following uses of copyrighted works are permissible:

- a) A use for the purpose of caricature, parody, or pastiche.
- b) The reproduction, distribution, or public performance, for an informatory purpose, of a publicly delivered speech, lecture or similar address.
- c) The reproduction, distribution, or public performance of a published work in connection with nonprofit educational activities, provided that such activities are compatible with fair practice.
- d) The reproduction or adaptation of a work for the purpose of scientific research.
- e) The reproduction of a work for archival purposes by a library or archive – or lending such a reproduction or making it available to the public.
- f) The quotation of a portion of published work where (1) the quotation is compatible with fair practice and (2) the extent of the quotation does not exceed the quantity justified by the purpose of the work in which the quotation is used.
- g) The translation of a work into Oshiwambo, Kavango, Otjiherero, Nama/Damara, San, or Namibian sign language – or the reproduction, distribution, or performance of such a translation. The Copyright Tribunal shall have the authority to supplement this provision with additional minority languages.
- h) The translation of a copyrighted work into braille, sign language, or other medium for the purpose of facilitating the education of persons with visual impairments – or the reproduction, distribution, or performance of such a translation.
- i) Use of a hyperlink or similar mechanism to refer users to a publicly available copy or adaptation of a copyrighted work.
- j) The reproduction, distribution, public performance, or public display of a photograph or audiovisual work containing a copy of a pictorial, graphic, sculptural, or architectural work (by or with the authority of the author of the photograph or audiovisual work) if either:
 - 1) the pictorial, graphic, sculptural, or architectural work is permanently located in a place accessible to the public; or

- 2) the depiction of the pictorial, graphic, sculptural, or architectural work is incidental to the principal purpose of the photograph or audiovisual work.
- k) The public performance, not through a transmission, of a copyrighted work if:
 - 1) the performer receives no compensation, direct or indirect, for the performance; or
 - 2) the performance is a component of a religious ceremony or observance.
- l) Any use of a copyrighted work if the copyright owner has engaged in copyright misuse, until such time as the copyright owner has purged the effects of the misuse.
- m) A fair use of a copyrighted work. Whether a use is fair should be determined by considering:
 - 1) The purpose and character of the use, including the degree to which the use is creative and the degree to which it fosters education;
 - 2) The nature of the copyrighted work, including the degree to which the work is creative and the author's interest in controlling the initial public disclosure of the work;
 - 3) The scope of the use, qualitatively and quantitatively, in relation to the copyrighted work as a whole;
 - 4) The effect of the use upon the value of the copyrighted work.

The Copyright Tribunal may promulgate regulations prescribing the conditions under which particular uses shall be deemed fair. In the absence of a pertinent regulation, whether a use is fair shall be determined by a court, either in an infringement suit brought by the copyright owner or in a suit for a declaratory judgment brought by the user. In making their determinations, the Copyright Tribunal and the courts shall strive to advance and reconcile the objectives set forth in section 101.

502. *Orphan Works.*

- a) A party who has been unable – through documented, reasonably diligent, good-faith efforts – to identify either the owner of the copyright in a particular work or an entity authorized to grant a license to use that work may use that work in any of the ways specified in sections 401-407, provided, however, that upon receipt of actual notice from the owner or an authorized licensor, the party expeditiously ceases the activity in question.
- b) A party who has been unable – through documented, reasonably diligent, good-faith efforts – to identify either the owner of the copyright in a particular work or an entity authorized to grant a license to use that work and subsequently has adapted the copyrighted work or integrated it into a new work, may continue to reproduce, distribute, display, and perform the adaptation or new work, even after the receipt of actual notice from the owner or an authorized licensor, provided that the party pays a reasonable fee for such continued use, as determined by the Copyright Tribunal. In addition, the party shall retain a copyright in the original aspects of the adaptation or new work.

503. Notwithstanding the provisions of sections 401(c), 402(c), 403(b), and 404(b), the owner of a lawfully made and acquired copy of a copyrighted work, or any person authorized by such owner,

is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy.

504. Notwithstanding the provisions of 401(d), 402(d), 403(c), and 404(c), the importation into Namibia of copies of copyrighted works is permissible under the following circumstances:

- a) The importer is a nonprofit educational institution, and the purpose of the importation is to make the work available to the students in the institution;
- b) The importer is an archive or library, and the purpose of the importation is preservation or noncommercial lending;
- c) A single copy of the work is imported for the importer's personal use.

505. *Compulsory Licenses.* Notwithstanding the provisions of sections 401-407, the following uses of copyrighted works are permissible if the user or another party has paid the fees and complied with the conditions that the Copyright Tribunal has determined to be applicable to the use in question:

- a) The reproduction, distribution, or public performance of a work for educational purposes;
- b) The reproduction of a work for private consumption;
- c) The reproduction, distribution, or public performance of a musical work via the reproduction, distribution, or performance of a sound recording containing the musical work, provided that the owner of the copyright in the musical work has previously authorized the distribution to the public of a recording of another performance of the work;
- d) The commercial rental of a copy of a sound recording or software program;
- e) The retransmission of a broadcast.

506. In determining the fees and conditions applicable to each of the activities identified in sections 502(b) and 505, the Copyright Tribunal shall:

- a) seek to advance and reconcile the objectives set forth in section 101; and
- b) ensure that the patterns of entitlements it creates do not conflict with normal exploitation of the works in question and do not unreasonably prejudice the legitimate interests of the rights holders.

507. Parties who obtain licenses to engage in one or more of the activities specified in sections 401-407 may not waive the privileges specified in sections 501-506, and any purported such waiver is invalid.

508. *Activities involving the Internet.*

- a) The automated transmission and associated transient storage of copyrighted material by a service provider are permissible, even in the absence of authorization from the copyright owner, if the provider does not initiate the transmission, does not select or modify the material, and does not select the recipients of the transmission.
- b) The automated storage of copyrighted material by a service provider is permissible, even in the absence of authorization from the copyright owner, if the provider does not select or modify the stored material and complies with reasonable requests from the party who made the material available online concerning the updating of the material, the gathering of information concerning the usage of the material, or limitations on access to the material.
- c) The storage and incidental communication of copyrighted material by a service provider at the direction of a user for the purpose of making that material available to the public is permissible, even in the absence of authorization from the copyright owner, if the service provider:
 - 1) does not have actual knowledge that the material or the use thereof is infringing, is not aware of circumstances from which infringing activity is apparent, and upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
 - 2) does not receive a financial benefit directly attributable to infringing activity that the service provider has the right and ability to control;
 - 3) provides copyright owners a convenient mechanism for notifying the provider of claims of infringement;
 - 4) upon receipt of specific claims of infringement, responds expeditiously to remove, or disable access to, the material in question; and
 - 5) adopts a system designed to reduce the incidence of repeat offenses.
- d) The provision by a service provider of information location tools that refer or link users to online locations containing infringing material is permissible, even in the absence of authorization from the relevant copyright owner, if the provider:
 - 1) does not have actual knowledge that the material or the use thereof is infringing, is not aware of circumstances from which infringing activity is apparent, and upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
 - 2) does not receive a financial benefit directly attributable to infringing activity that the service provider has the right and ability to control;
 - 3) provides copyright owners a convenient mechanism for notifying the provider of claims of infringement;
 - 4) upon receipt of specific claims of infringement, responds expeditiously to remove, or disable access to, the material in question; and
 - 5) adopts a system designed to reduce the incidence of repeat offenses.

509. If a service provider, upon receipt of a specific claim of infringement pursuant to section 508(c)(4) or 508(d)(4), removes the material in question or disables access to it, a party adversely affected may petition for reinstatement of the material. Upon receipt of such a petition, the service provider must reinstate the material and notify the party who submitted the original claim. If the claimant then initiates a civil copyright infringement suit against the petitioner, the service

provider must expeditiously remove, or disable access to, the material in question, until and unless directed to the contrary by the court. Failure to abide by these procedures will abrogate the service provider's immunity under section 508 and render the provider strictly liable for reasonable costs incurred by, and any injuries sustained by, the petitioner.

510. A service provider may use an automated system to comply with its obligation under section 508(c)(5) or 508(d)(5). However, if it does so, and if material excluded by that system is later adjudged to be noninfringing, the service provider shall be strictly liable for reasonable expenses, including attorneys' fees, incurred by parties whose submissions were initially excluded and for all injuries proximately suffered as a result of the exclusion.

511. The Copyright Tribunal shall promulgate regulations implementing the provisions of sections 508-510.

VI. Technological Protection Measures

601. Subject to the limitations of section 603, it shall be unlawful to circumvent a technological protection measure that effectively protects one or more of the exclusive rights prescribed by sections 401-407.

602. Subject to the limitations of section 603, it shall be unlawful to manufacture, import, offer to the public, provide, or otherwise traffic in any product or service that is primarily designed to enable circumvention of the sort proscribed by section 601.

603. It shall not be unlawful to engage in the activities described in sections 601 and 602 if neither the owner of the copyrighted work at issue nor the user of the technological protection measure at issue has previously adopted and publicized technological or administrative mechanisms that accommodate fairly all of the exceptions and limitations set forth in sections 501-507.

VII. Remedies

701. Any court having jurisdiction of a civil action arising under this Act may grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain violation of the exclusive rights enjoyed by a copyright owner.

702. As part of its final decree in a civil action arising under this Act, a court may order the destruction of all copies found to have been made in violation of a copyright owner's exclusive rights and of all means or devices for producing infringing copies.

703. A copyright owner who establishes in a civil action that a defendant has infringed one or more of the owner's exclusive rights is entitled to recover:

- a) the actual damages suffered by the owner as a result of the infringement; and

- b) any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.

704. In a case involving egregious infringement of a copyright, a court may augment the monetary award to the copyright owner, so long as the total amount of the award does not exceed twice the amount recoverable under section 703.

705. As part of its final decree, a court may award a reasonable attorneys' fee to the prevailing party if, in the court's judgment, such an award would advance the objectives set forth in section 101.

VIII. Definitions

801. In this Act, unless the context otherwise indicates -

- An "application program interface" is a component of a computer program that enables the program to communicate with other programs.
- "audiovisual work" means a work that consists of a series of related images which impart the impression of motion, with or without accompanying sounds, susceptible of being made visible, and where accompanied by sounds, susceptible of being made audible;
- "broadcast", when used as a noun, means a broadcasting service as defined in section 1 of the Namibian Communications Commission Act, 1992 (Act No. 4 of 1992), and includes the emitting of programme-carrying signals to a satellite; and, when used as a verb, has a corresponding meaning;
- "broadcaster" means a party that undertakes a broadcasting service as defined in section 1 of the Namibian Communications Commission Act, 1992 (Act No. 4 of 1992);
- "broadcasting organisation" means the Namibian Broadcasting Corporation established by section 2 of the Namibian Broadcasting Act, 1991 (Act No. 9 of 1991) or any other broadcasting organisation licensed under the Namibian Communications Commission Act, 1992 (Act No. 4 of 1992) or any other law;
- "building" means a structure fit for human occupancy;
- "collective work" means a work created by two or more individuals at the initiative and under the direction of a natural person or a legal entity
- "commissioned work" means a work created in pursuance of a written, signed contract between the author or authors and a party commissioning the work at issue.

- “computer” means an electronic or similar device having information-processing capabilities;
- “computer program” means a set of instructions that is capable, when incorporated in a medium that a computer can read, of causing a computer to perform or achieve a particular task or result;
- “copy” means a material embodiment of a work;
- The “date of the creation of a work” shall be determined as follows:
 - a work, other than a broadcast, is created when it is first reduced to writing, recorded or otherwise reduced to material form;
 - a broadcast is created at the time when it is first broadcast.
- “derivative work” means a work that constitutes an independent creation resulting from adaptation, translation or other transformation of an original work;
- “industrial design” means a three-dimensional work with inherent utilitarian functions, whether made by hand or produced on an industrial scale;
- “judicial proceedings” means proceedings before a court, tribunal or person having by law power to hear, receive and examine evidence on oath or affirmation;
- “literary works” include, irrespective of literary quality and in whatever mode or form expressed:
 - a) novels, stories, and poems;
 - b) textbooks, treatises, histories, biographies, essays, articles, and other works of non-fiction;
 - c) encyclopedias and dictionaries;
 - d) letters, reports, diaries, and memoranda;
 - e) lectures, speeches and sermons;
 - f) compilations;
 - g) song lyrics; and
 - h) websites.
- “Minister” means the Minister responsible for information and broadcasting;
- “Ministry” means the Ministry responsible for information and broadcasting;
- “musical work” means a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music;
- A work is “original” if and only if:
 - a) it was independently created by the putative author; and

- b) the overall impression that the work at issue produces on a reasonable person differs from the overall impression produced on such a person by any other single work that had been publicly available prior to the creation of the work at issue.
- "performance" includes a mode of visual or acoustic presentation of a work, including that presentation by the operation of a loudspeaker, a radio, television or diffusion receiver or by the exhibition of an audiovisual work or by the use of a record or by any other means, and in relation to lectures, speeches and sermons, includes the delivery of those lectures, speeches and sermons;
- To perform or display a work "publicly" means—
 - a) to perform or display it in a place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
 - b) to communicate a performance or display of the work to the public, by means of any device or process, regardless of where or when members of the public receive it.
- "performer" means an actor, a singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in, or otherwise performs a literary or musical work;
- "Permanent Secretary" means the Permanent Secretary of the Ministry;
- A "sound recording" means a fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in an audiovisual work;
- "photograph" means a product of photography or of a process analogous to photography, but does not include any part of an audiovisual work;
- "producer" of a sound recording means the party responsible for the first fixation of the sounds of a performance or other sounds or the representations of sounds;
- "programme", in relation to a programme-carrying signal, means a body of live or recorded material consisting of images or sounds, or both, embodied in a signal;
- "programme-carrying signal" means a signal embodying a programme which is emitted and passes through a satellite;
- "publication" means making available to the public one or more copies of a work with the consent of the owner of the copyright in that work. "Publication" does not include:
 - a performance of a musical or dramatic work, cinematograph film, audiovisual work or sound recording;
 - a public performance of a literary work;
 - a transmission in a diffusion service;

- a broadcast of work;
- an exhibition of an artistic work or a work of applied art;
- a construction of a work of architecture;
- "qualified person" means -
 - b) a natural person who is a Namibian citizen or is domiciled or resident in Namibia;
or
 - c) a body incorporated under the laws of Namibia;
- "rebroadcasting" means the simultaneous or subsequent broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation;
- "sculpture" includes a cast or model made for the purposes of sculpture;
- "signal" means an electronically generated carrier capable of transmitting programmes;
- "sound recording" means a fixation of sounds capable of being reproduced, but does not include a soundtrack associated with an audiovisual work;
- "Tribunal" means the Copyright Tribunal;
- "writing" includes any form of notation, whether by hand or by printing, typewriting or a similar process.