

The Legal Regulation of the Intellectual Property Rights Resulting from Innovative Entrepreneurship and the Entrepreneur's Civil Liability Arising from its Risks in the American law/ An Analytical Comparative Study with the Iraqi Law

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Abstract

This research engaged in studying the entrepreneurship and its importance in realizing the optimal levels of the development and growth of the national economy, because of the creative and innovative dimensions and horizons of the entrepreneurial activities exercised by entrepreneurs. The American law contains numerous and various U.S. legislations, enacted for the purpose of granting legal regulation to intellectual property rights in general, and innovations and inventions of entrepreneurs in particular. The system of the civil liability arising from the risks of the entrepreneurship or entrepreneurial activities in the American law can be based upon general principles of the common law civil liability. And the most considerable types of civil liability, particularly the non-contractual or extra-contractual liability suitable for compensating harms and injuries caused by entrepreneurial activities are: the tort of negligence liability (Unintentional Tort), the vicarious liability and the strict-liability. Both the Iraqi and Kurdistan region laws also provided legal protection to intellectual property rights. Whereas the civil liability arising from the damage caused by entrepreneurial activities is still subject to the general rules of the civil liability in the Iraqi civil law No. (40) of 1951. The problem of the research lies in the necessity of the adoption by both the Iraqi and Kurdistan region legislators an integral legislation known as the entrepreneurial law, which will be interested in planning the legal regulation of some aspects closely related to the entrepreneurial activities. by suggesting some relevant recommendations, the most important of which is to suggest some legal texts, in order to realize the integral and comprehensive legal regulation of the entrepreneurship.

Keywords: Entrepreneurship, Entrepreneurial law, Intellectual Property Rights, Entrepreneurial Ventures, Entrepreneur.

Introduction

First: The Introductory Preface to the Topic: The entrepreneurship is any innovative and creative activity performed by a person known as an **entrepreneur**, aimed at achieving economic growth and introducing a new innovation to the market. The entrepreneur is anyone who introduces a new innovation to the market and successfully contributes to the process of economic development. As for the legal protection of the intellectual property rights, the American laws on the one hand, and both the Iraqi and Kurdistan region laws on the other hand, granted and provided legal protection to these rights. The civil liability for compensating the damage arising from the risks of the entrepreneurship or entrepreneurial activities, is still subject to both the general principles of the common law in the American law, and the general rules of the Iraqi civil law.

Second: The problem of the research: The problem of the research lies in the necessity of the adoption by both the Iraqi and Kurdistan region legislators an integral legislation known as the entrepreneurial law, which will be interested in planning the legal regulation of some aspects closely related to the entrepreneurial activities, concerning both the entrepreneur's intellectual property rights and his or her civil liability. The researcher suggested some relevant recommendations to both the Iraqi and Kurdistan region legislators, the most important of which is to suggest some legal texts. The research had reached to a conclusion that both the Iraqi and Kurdistan region laws lack to the integral and comprehensive legal regulation of the entrepreneurship.

Fourth: The Research methodology: This research has followed up the analytical comparative methodology of the scientific legal research, by studying the concept of entrepreneurship, as well as legal regulation of the intellectual property rights arising from entrepreneurship or entrepreneurial activities.

Fifth: The plan of the research: This research has been divided into two sections. The first discusses the concept of entrepreneurship. The second studies legal regulation of the intellectual property rights arising from entrepreneurship or entrepreneurial activities and as follows:

First Section: The Concept of the Entrepreneurship

This section studies of the concept of the entrepreneurship, and reviews the definition of the entrepreneurship, Besides the distinguishing features of the entrepreneurship:

First Topic: The Definition of the Entrepreneurship

One of the American jurists defines⁽¹⁾ **Entrepreneurship** as any innovative and creative activity performed by a person known as an **Entrepreneur**, aimed at achieving economic growth and introducing a new innovation to the market. The entrepreneur is anyone who introduces a new innovation to the market and successfully contributes to the process of economic development. Entrepreneurship is also defined⁽²⁾ as the process of starting and performing **New Businesses or Start-ups**, generally in response to opportunities available to the entrepreneur. It is further defined⁽³⁾ as the process of determining and exploiting opportunities, developing resources, and taking all the risks connected with initiating and executing a new project or business. It can be concluded from these definitions that the entrepreneurship is based upon three basic elements: the innovation or creativity, the initiativeness and the risk-taking element. An entrepreneur is, therefore, someone who creates new professional activities that contribute to economic development⁽⁴⁾. The entrepreneur's activity often takes the form of a venture, project, a new business or even a small and medium enterprises that introduces new products to the markets. In return, the entrepreneur takes all the risks and uncertainties (**Uncertainty**) associated with undertaking entrepreneurial ventures (**Entrepreneurial Ventures**)⁽⁵⁾. It should also be noted that the entrepreneurship has not been restricted to the small and new businesses and start-ups, but it extends to some large companies, if their managers or business owners carry out entrepreneurial activities, resulting in the improvement of new productive lines, which flood markets with their products⁽⁶⁾. It is to be noted that the Iraqi law neither contains any definition of entrepreneurship, nor does it encompass the definition of entrepreneurial ventures, in spite of the gigantic development in this field of managerial activities. The entrepreneurship is sub-categorized into two sub-categories⁽⁷⁾: the innovative entrepreneurship, which is based on both the elements of creativity and innovation. And replicative entrepreneurship, which is based on the element of the imitation, and lacks the both the creativity and innovation. As to the Iraqi law, the entrepreneurship has neither been defined nor has it been regulated in the Iraqi law.

Second Topic: The Characteristic Features of the Entrepreneurship Justifying its Being Legally Protected

The entrepreneurship which should be legally protected is to be characterized by the following features:

First: **The Characteristic of Novelty:** One of the most important features characterizing entrepreneurial ventures, and justifying its being legally protected, or the possession of the legal protection is the **characteristic of novelty**⁽⁸⁾. Every new entrepreneurial venture or start-up must offer either **new products or advanced technology**⁽⁹⁾.

Second: **The Characteristic of Specific Quality:** Entrepreneurship or entrepreneurial activities must also be characterized by **their specific quality**, because their ultimate goal is to achieve **economic development**⁽¹⁰⁾. Entrepreneurship is not limited to introducing new products and services but it is also aimed at developing **existing products** and services provided by the businesses or start-ups to improve

⁽¹⁾ Viktor Mayer-Schönberger, Entrepreneurial Law, *Faculty Research Working Papers Series*, Harvard University, John F. Kennedy School of Government, 2007, P.1.

⁽²⁾ Stephen P. Robbins and Mary Coulter, Management, Eleventh Edition, PEARSON Education Limited, 2012. P.565.

⁽³⁾ Annie Mckee, Management A Focus on Leaders, Eleventh Edition, PEARSON Education Limited, 2012. P.304.

⁽⁴⁾ Annie Mckee, op. Cit . P.304.

⁽⁵⁾ Annie Mckee, ibid . P.304.

⁽⁶⁾ Don Hellriegel, Susan E. Jackson and John W. Slocum, Management A Competency-based Approach, Ninth Edition, South-Western Thomson Learning, 2002. P.134.

⁽⁷⁾ David M. Primo and WM Scott Green, Bankruptcy Law and Entrepreneurship, *Entrepreneurship Research Journal* , Volume-1-, Issue-2-, Article-5-, 2011. P.2.

⁽⁸⁾ Don Hellriegel, Susan E. Jackson and John W. Slocum, op. Cit . P.126.

⁽⁹⁾ <https://fastercapital.com/content/Legal-Protection-Measures--Entrepreneurship-and-Legal-Protection--A-Winning-Combination.html>.

⁽¹⁰⁾ Niklas Elert, Magnus Henrekson and mark Sanders, The Entrepreneurial Society A Reform Strategy for the European Union, Springer Open, 2019, P.27.

their specific quality (**Higher Quality Products and Services**). This feature enhances the commitment to ensure higher quality standards of the project's credibility, and facilitate the swift distribution of its products in the market⁽¹⁾.

Third: **The Characteristic of the Efficiency of Distribution:** Entrepreneurship is also characterized by the **efficiency of the distribution systems, networks, and channels**. More importantly in this respect, modern technologies, particularly the Internet websites, play a significant role in enhancing the efficiency of the distribution systems and channels for new or improved products and services⁽²⁾. This enables entrepreneurial ventures to distribute their products effectively. Efficient distribution systems, networks and channels also yield greater profits for entrepreneurial projects and ventures, by reducing distribution costs and expanding their reach to a larger geographical areas. Furthermore, **Small- and Medium-Sized Firms** are among the types of businesses that can benefit most from this characteristic. The efficiency of the distribution also requires a highly specialized staffs (Specialized Human Resources) in administering the projects and ventures, which are subject to or subordinated to the rules of the labor law, to determine their rights and obligation.

Fourth: The Entrepreneurial Characteristic: this features is considered as the most important among all the features distinguishing the entrepreneurship or entrepreneurial activities. The entrepreneurial feature means the creation and encouragement of the entrepreneurial spirit. In other words, the creative and innovative spirit of entrepreneurs⁽³⁾. The entrepreneurs is aimed at making use of the creative and innovative intelligence to realize an outstanding technological breakthrough in the sphere of his or her specific specialization. The trait of the creativity and innovation is also aimed at realizing a long-term sustainability in various fields, the most important of which may be the field of renewable energy.

Fifth: The Economic Characteristic: equally importantly the entrepreneurship, entrepreneurial ventures and activities are considered among significant factors contributing in the economic growth, and a vital component to the success of any economy. both at the national and international levels⁽⁴⁾. This is the reason why some writers⁽⁵⁾ refer to the economy relying upon the increasing role of entrepreneurial activities as an **"entrepreneurial economy"**.

Sixth: The Characteristic of Risk: one of the significant features of the entrepreneurship is the risk-taking feature. If someone intends to play the role of the entrepreneur, he or she should accept and take the risks surrounding entrepreneurial ventures and activities. The project or business initiated by the entrepreneur is called as a "venture", because of its risky nature. It is frequently surrounded by a good deal of risks, which the entrepreneur should accept to take⁽⁶⁾. Therefore, every entrepreneur should be courageous, because of being tasked with managing non-traditional businesses and projects. But at the same time the risk-taking feature should not mean recklessness or carelessness, and the entrepreneur should take calculated risks, and not be reckless⁽⁷⁾. The risk, in turn, is defined as the cumulative impact or effect of the probability of uncertain occurrences and events that may positively or negatively effect project objectives⁽⁸⁾. Although the probability of the occurrence of the event is considerably low if it is of a negative type, but if occurring the consequences will be catastrophic. The risk is usually made up of three fundamental elements: the "event", the "probability" and the "severity" or impact. Therefore the best interpretation of the entrepreneurial spirit is that it can be interpreted as a risk-taking spirit. The risks are also generally regarded as being long-range risks, arising as a result of the entrepreneurial projects, ventures and start-ups to achieve long-range objectives, serving the process of the economic development. Not to mention that the risks encountering entrepreneurial projects, ventures and start-ups are financial, because the nature of these types of projects may yield heavy financial losses. .

Seventh: The Initiative Characteristic: for the most part the feature of initiativeness is closely-related to the feature of risk. This can be interpreted by the fact that the initiatives assumed by the entrepreneur may lead

(1) Don Hellriegel, Susan E. Jackson and John W. Slocum, op. Cit . P.127.

(2) Don Hellriegel, Susan E. Jackson and John W. Slocum, ibid . P.127.

(3) Annie McKee, op. Cit, P.304.

(4) David M. Primo and WM Scott Green, Bankruptcy Law and Entrepreneurship, *Entrepreneurship Research Journal* , Volume-1-, Issue-2-, Article-5-, 2011. P.1.

(5) David B. Audretsch, Max C. Keilbach and Erik E. Lehmann, Entrepreneurship and Economic Growth, Oxford University Press, 2006 , P.12.

(6) Stephen P. Robbins and Mary Coulter, op. Cit. P.580.

(7) Annie McKee, op. Cit, P.307.

(8) Carl L. Pritchard, Risk Management Concepts and Guidance, Fifth Edition, CRC Press, 2015, P.7.

to a great deal of risks encircling or besieging the entrepreneurial venture, such as the financial losses and monopoly of powerful incumbents or giant companies on markets⁽¹⁾. It is to be noted that the entrepreneurial project, seeking to bring about radical or fundamental changes in the quality of the products it produces and the services it renders, or to search for new markets to distribute the products, should take self-initiatives to achieve these changes. The feature of the initiativeness imposes on both the entrepreneur and the entrepreneurial project heavy tasks and duties. They are tasked for presenting new creative and innovative ideas, amassing or gathering suitable capitals to start up the venture or project, as well as solving the problems encountering the project.

Eighth: The Self-independence or autonomy: the feature of the self-independence or autonomy by which the entrepreneurial venture is characterized, can be described as the desire of the independence from other companies and corporations⁽²⁾. The nature of the entrepreneurial project makes it unsuitable for large conservative bureaucratic organizations with traditional objectives.

Ninth: The Small-Size Characteristic: one of the distinctive features of the entrepreneurial projects and ventures is their being small-sized. This is the reason why these ventures often take the form of small enterprises established to exploit new opportunities arising from **radical innovations**⁽³⁾, represented by manufacturing new products or delivering new services⁽⁴⁾. Most **entrepreneurs** are **owners of small-businesses**, which contribute to the growth of the national economy. However, they differ from traditional small-business owners by initiating innovative activities and taking extra-ordinary risks in managing their entrepreneurial activities⁽⁵⁾. Some reliable statistics refer that nearly (60%) of the new entrepreneurial ventures and start-ups in the United States take the shape of the sole-proprietorship⁽⁶⁾.

Second Section: The Legal Regulation of the Intellectual Property Rights Arising from Entrepreneurship or Entrepreneurial Activities

The rights are generally classified into three types⁽⁷⁾: the personal, real⁽⁸⁾ and moral rights⁽⁹⁾, the source of which all goes back to the legal disposition and the legal event⁽¹⁰⁾. The moral rights are also known as the intellectual property rights. Jurist Al-Sanhouri nominated also the moral rights as the intellectual rights, and defined them as a type of rights which are closely related to incorporeal objects or thing⁽¹¹⁾. The legal protection of the intellectual property rights arising from entrepreneurial activities is considered as one of the most remarkable aspects of the legal regulation of innovative and creative entrepreneurial activities⁽¹²⁾. The innovations are always embodied by the ownership of innovative thoughts and creative ideas. Therefore, we shall discuss the legal regulation and protection of two fundamental sub-categories of the intellectual property rights, which entrepreneurial start-ups and entrepreneurs take initiative and a lot of risk to innovate, that is, the patents and copyrights. Therefore, we shall dedicate this section of the study of

⁽¹⁾ Annie Mckee, op. Cit, P.307.

⁽²⁾ Don Hellriegel, Susan E. Jackson and John W. Slocum, op. Cit . P.139.

⁽³⁾ Mike Smith, Fundamentals of Management, Second Edition, Mcgraw-Hill Higher Education, London, 2011. P.10.

⁽⁴⁾ Don Hellriegel, Susan E. Jackson and John W. Slocum, op. Cit . P.136.

⁽⁵⁾ Don Hellriegel, Susan E. Jackson and John W. Slocum, ibid . P.136.

⁽⁶⁾ Paul Davidson Reynolds, Entrepreneurship in the United States The Future is Now, Springer Science+Business Media, LLC, 2007, P.119.

⁽⁷⁾ Ismat Abdul Majeed Baker. The general theory of obligations. Part one. in Arab civil laws. Al-Thakira Publishing house. Baghdad. 2011. P.24.

⁽⁸⁾ Abdul Razaq Al Sanhouri. The Medium Commentary on the elucidation of the New Civil Code (Al Wasit in the Explanation of New Civil Law). part One. The theory of obligations in general. Sources of obligations. Contract-illegal act-Unjust enrichment-law. Al-Ma'arif Publishing house. Alexandria.2004. p.89.

⁽⁹⁾ Abdul Majeed Al Hakim. The Medium Commentary (Al Wasit) in the theory of contract. With the comparison and equilibrium between theories of western jurisprudence and their counterparts in Islamic Jurisprudence and the Iraqi civil law. Part one. Conclusion of the contract. Al-Ahliyyah Publishing house. Baghdad. 1967. p.17.

⁽¹⁰⁾ Munther Al-Fadhel, The Medium Commentary on the explanation of the civil law, A comparative study between Islamic Jurisprudence and Arab and foreign laws, A study reinforced by opinions of both the jurisprudence and judiciary. Aras Publishing house Erbil. 2006. p.33.

⁽¹¹⁾ Abdul Razaq Al Sanhouri. The Medium Commentary on the elucidation of the New Civil Code (Al Wasit in the Explanation of New Civil Law). part Eight. Right of Ownership, with a Detailed Explanation of Objects and Property, and the law of the intellectual property rights protection. Al-Ma'arif Publishing house. Alexandria.2004. p.237.

⁽¹²⁾ **Ethan David**, Understanding Business Law and its Importance in Entrepreneurship, Business studies Journal , Vol: 15 Issue: 2S. , 2023. Published in following website: https://www.abacademies.org/articles/understanding-business-law-and-its-importance-in-entrepreneurship-15970.html#google_vignette

legal regulation of the entrepreneurship from an important perspectives, namely the protection of the two sub-types of intellectual property rights arising from entrepreneurial activities as follows:

First Topic: The Legal Regulation of patents

It is noteworthy that the laws regulating Patents in the United States are federal laws issued by Congress under the U.S. Constitution⁽¹⁾, to promote scientific, technological, and technical progress. The amended U.S. Patent Act of 2023 did not define patents explicitly. However, some American legal scholars and jurists⁽²⁾ have defined the "Inventor's Right" as the exclusive right of an inventor to benefit from or sell their invention⁽³⁾. A patent has been described⁽⁴⁾ as a "Legal Grant" issued by the United States Patent and Trademark Office to prevent others from manufacturing, selling, or using a particular invention without the patent owner's permission. Article (35) of the Act defines the United States Patent and Trademark Office as a patent and trademark registration agency operating under the Department of Commerce. The office performs its duties under the political directives issued by the Secretary of Commerce. Regarding the legal protection of patents, the first and second paragraphs of Article (271) of the Act, under the title "Infringement of Patent," define a "Patent Infringer" as anyone who, without authorization or license, manufactures, uses, sells, or offers to sell any patented invention within the United States or imports a patented invention during the patent's validity period. Furthermore, if a person induces another to infringe or trespass on a patent in a substantial manner, they are considered liable as a patent infringer or trespasser. Article (281) grants the patent owner (Patentee) the right to file a lawsuit or bring an action seeking compensation. The main reason why the patent is to be granted is a utilitarian reason, the legislator or law-maker seeks from which to be a cogent incentive or motive to improve the creativity and innovation, as well as ameliorating the productive process, in order to industrialize new products as a result of the entrepreneurial activities⁽⁵⁾. The legislator also hopes that inventors will begin marketing their innovative and creative ideas to reinforce the economic growth. Therefore the intellectual property rights became a considerable drive for entrepreneurial activities. In other words the protection of the intellectual innovation or creativity by the legal regulation of the intellectual property rights grants entrepreneur and entrepreneurial start-ups a strong motive for innovation⁽⁶⁾. The same is true also for the Iraqi law which grants legal protection to patent holders under the first paragraph of Article (44) of the Patents, Industrial Designs, Undisclosed Information, Integrated Circuits, and Plant Varieties Law No. (65) of 1970, as amended. This provision gives the patent holder the right to file a lawsuit to prevent the infringement or trespass of their patent rights. The patent holder can bring the action or file the lawsuit before a competent court of the first instance⁽⁷⁾.

Second Topic: The Legal Regulation of Copyrights

As for copyright, Article (101) of the U.S. Copyright Act of 2016 ("17 U.S.C." 2016) defines it as an exclusive right granted to the author, namely, the creator or owner of an original work. This right includes the printing and distribution of the work⁽⁸⁾, which can be licensed or transferred. The first paragraph of Article (201) of the Act grants the initial ownership of a protected copyright to the author or authors in the case of joint authorship. Naturally, entrepreneurs can utilize this provision to protect their creative or innovative works. The fourth paragraph (Clause 1) of the same article allows for the transfer of copyright ownership, either in whole or in part, through an official ownership document, by operation of law, by will, or as personal property under applicable inheritance laws in the absence of a will. Additionally, the first paragraph of Article (501) defines a copyright infringer or trespasser as anyone who violates or infringes any of the exclusive rights of the copyright owner. The second paragraph of the same Article provides legal protection to the lawful owner or beneficiary of the copyright by allowing them to file a lawsuit or bring an action to prevent any infringement of their exclusive rights. and provides that (The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an

⁽¹⁾ Don Mayer, Daniel Warner, George J. Siedel and Jethro K. Lieberman, Law for Entrepreneurs, Saylor Foundation, 2012, P.706.

⁽²⁾ Don Mayer, Daniel Warner, George J. Siedel and Jethro K. Lieberman, op. Cit, P.706.

⁽³⁾ Don Mayer, Daniel Warner, George J. Siedel and Jethro K. Lieberman, ibid, P.706.

⁽⁴⁾ Annie Mckee, op. Cit, P.318.

⁽⁵⁾ Niklas Elert, Magnus Henrekson and mark Sanders, op. Cit, P.27.

⁽⁶⁾ Viktor Mayer-Schönberger, op. Cit, P.11.

⁽⁷⁾ Nuri Hamad khater, The Elucidation of the Intellectual Property Rules, Industrial Property, A Comparative Study Among Jordanian, Emirates and French Law, Wa'el Publishing House, Amman, 2005, p.148.

⁽⁸⁾ Annie Mckee, op. Cit, P.318.

action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright). As for the Iraqi law, the Iraqi Copyright Protection Law No. (3) of 1971, as amended, also provides legal protection to authors. It grants them the right to appropriate compensation in case of any infringement on their established rights, as stipulated in Article (44) of the law. The same is true for the copyright and adjacent rights law No.(17) of 2012 in Kurdistan region, which extends the scope of the legal protection to both the copyright and adjacent rights of the copyright. And in which also the article (7) determines the author's rights on his/her literary and artistic work as both the financial and moral rights This means that the author is not only entitled to financial rights, but also to moral rights over his or her literary or artistic work. Such as the right to attribute the work to him/herself. And in certain cases to object to the distortion or misrepresentation of his/her work. The protection includes the title of the work⁽¹⁾. The article (25) also determines the duration of the legal protection granted for protecting the author's financial rights during his/her life or time span of his/her life, in addition to (50) years after his/her death. In brief the duration of the copyright protection in the Kurdistan region endures for the period of the author's lifetime, and fifty years following the author's passing or death⁽²⁾. Upon the lapse of its protection period and , in the absence of the author's heirs/ successors, a published work will enter the public domain, and be available for use without the author's permission. Conversely, an unpublished work will not enter the public domain, and any use thereof is prohibited in the absence of approval from the author of such work, or his/her heirs⁽³⁾. It The scope of legal protection provided by this law extends also to such neighboring or adjacent rights of the copyright of performers, like singers and musicians, producers of sound recordings and phonograms, broadcasting organizations, institutions, corporations and companies, as well as publishing houses⁽⁴⁾.

Third Section: The Entrepreneur's Civil Liability Arising from the Risks of Entrepreneurship or Entrepreneurial Activities

To begin with, and before speaking about the entrepreneur's civil liability in the American law, it is to be noted that the origin of the American law, as it is the case with other Anglo-American or Anglo-Saxon law, dates back to the common law⁽⁵⁾. Which borrowed its principles from the judicial precedents of the English and American courts⁽⁶⁾. As well as the rules of equity and justice⁽⁷⁾. Therefore, it can be said that in spite of the absence of the so-called entrepreneurial law, the system of the civil liability arising from the risks of the entrepreneurship or entrepreneurial activities can be traced back to general principles of the common law civil liability. And the most considerable types of civil liability, particularly the non-contractual or extra-contractual liability are: the tort of negligence liability (Unintentional Tort), the vicarious liability and the strict-liability. Therefore, we shall discuss these three types of civil liability in the American law, and compare them with the situation of the Iraqi civil code:

First Topic: The Tort of Negligence Liability

The system of the tort of negligence liability is considered as one of the considerable types of the entrepreneur's civil liability in the American law . in order for this type of liability to arise, four basic elements or basic requirements should be satisfied⁽⁸⁾: 1-the entrepreneur's duty of due and reasonable care, 2- the entrepreneur's breach of the duty of due and reasonable care, 3-the actual damage or loss inflicted to the plaintiff or the injured (aggrieved or damaged) party, and 4- the causal link or causation between the tort of negligence and damage. It is to be noted that the American judicial precedent (Liebeck v. McDonald's

(1) Nigar Ibrahim Muhammad, Access to Information: The necessity of Including International Standards in the Federal Iraq & Iraqi Kurdistan Region Law analytical Study on Copyright Law, Journal of University of Human Development (JUHD), Volume 4, No. 4 , 2024, P.50.

(2) Nigar Ibrahim Muhammad, *ibid*, P.50.

(3) Nigar Ibrahim Muhammad, *ibid*, P.50.

(4) Ismat Abdul Majeed Baker, The Legal protection of the adjacent rights of the copyright A comparative study among Arab laws with reference to both the Arab and international conventions, Zein Juridique Publishing house, 2018, P.43.

(5) Simon Deakin, Angus Johnston and Basil Markesinis, Markesinis and Deakin's Tort Law, Seventh Edition, Clarendon Press, Oxford, 2013, P.580.

(6) Cathy J. Okrent, Torts and personal injury law, Fifth Edition), DELMAR, 2015, P.3.

(7) John Cartwright, Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer, Second Edition, Hart Publishing Ltd, 2013, P.4.

(8) Don Mayer, Daniel Warner, George J. Siedel and Jethro K. Lieberman, *op. Cit*, P.295.

Restaurants 1994)⁽¹⁾ is one of the pioneering cases, in which all of the preceding or former basic elements of entrepreneur's negligence liability are available. It is also well-known as McDonald's coffee case, owing to the entrepreneurial activity of one of McDonald's restaurants, represented by its improving the quality of a type of hot coffee, in order to be presented to customers. One of the customers (Stella Liebeck), purchased hot coffee from a McDonald's restaurant, accidentally spilled it on her abdomen, and suffered [third-degree burns](#) in her abdomen. She was hospitalized for eight days while undergoing plastic or reconstructive surgery, followed by two years of medical treatment. Therefore she brought an action or filed a lawsuit to the New Mexico District Court, and demanded (\$20,000) as damages to cover her medical expenses. And claimed that McDonald's restaurant committed or perpetrated gross negligence, as a result of its entrepreneurial activity. The court found McDonald's restaurant liable for the gross negligence underlying the production of the defective hot coffee, which caused serious injuries to the plaintiff. And awarded her an amount of (\$160,000) as compensatory damages. The court also qualified or classified this type of liability as a liability for defective products. If we compare the situation of the American law with that of the Iraqi civil law No. (40) of 1951, we can find that although this law does not refer directly to the entrepreneur's negligence liability in particular, but it can take place according to the general rules of the civil liability arising from the destruction (destroying) or even reduction (decrease) the value of the property of another person, either willfully or by trespassing (transgression) of both the perpetrator and abettor⁽²⁾, in conformity with the first paragraph of the article (186) which provides that (A person who willfully or by trespassing has directly or indirectly, as a perpetrator or abettor, caused damage to or decreased the value of the property of another person shall be liable).

Second Topic: The Vicarious liability

American courts also adopted the entrepreneur's vicarious liability, which arises from risks and losses brought about or caused by the employees of the entrepreneur, in the course of their employment of the entrepreneurial venture. This type of liability can be applied in any time when the relation of the subordination or dependence exists or takes place, either between a natural and corporate person, or between two natural persons⁽³⁾. In both cases the natural person will certainly be an employee to the natural or corporate person in their capacity as an employer. The rules of this type of liability are to be applied in the American law in four distinctive situations: the employer-employee relation, the partnership-partner relation, the corporation-corporate director and officers, and the parent-child relation. The first judicial district court of the state of Nevada applied this rule in its judgment of (McCrosky v. Carson Tahoe Reg'l Med. Ctr., 133 Nev. Adv. Op. 115. 2017) case⁽⁴⁾. According to which (Tawni McCrosk) was pregnant and consulted Maternal Obstetrical Management (MOM's) clinic, operated by Carson Tahoe Regional Medical Center (CTRMC) for the delivery of her baby, but because of the entrepreneurial approach used by the obstetrician (Dr. Hayes), the delivery resulted in McCrosky's child suffering permanent, debilitating injuries. Therefore the plaintiff McCrosky sued the defendant Dr. Hayes, and brought a medical malpractice action or filed a lawsuit of medical negligence. And alleged that both the clinic and medical center are vicariously liable for Dr. Hayes's alleged negligence. The first judicial district court rejected in its judgment the vicarious liability of both the clinic and medical center for their employee obstetrician's negligence. But the supreme court of Nevada decided that both the clinic and medical center are vicariously liable for Dr. Hayes's medical negligence. And mentioned in its judgment that the vicarious liability is the liability that a supervisory party bears for the actionable conduct of a subordinate, based on the relationship between the two parties. If we compare the situation of the American law with that of the Iraqi civil law No. (40) of 1951, we can find that the general rules of the Iraqi civil law regulated the principle of the vicarious liability in the article (219), which defines the employer-employee relation⁽⁵⁾. It contains the phrase of (industrial or commercial enterprise), which can strictly be applied to entrepreneurial ventures, start-ups and projects. Three basic requirements should be satisfied in order for the vicarious liability in the Iraqi civil law to be materialized⁽⁶⁾: First the relation of the subordination or dependence between the employer and employee,

⁽¹⁾ https://en.wikipedia.org/wiki/Liebeck_v._McDonald%27s_Restaurants.

⁽²⁾ Munther Al-Fadhel, op. Cit, p.282.

⁽³⁾ <https://www.forbes.com/advisor/legal/personal-injury/vicarious-liability/>

⁽⁴⁾ <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=2122&context=nvscs>

⁽⁵⁾ Munther Al-Fadhel, op Cit. p.361.

⁽⁶⁾ Abdul Majeed Al-Hakkim, Abdul-Baki Al-Bakri, & Mohammed Taha Al-Basheer, The concise of the general theory of obligations in the Iraqi civil law. Part one, the source of Obligations, Baghdad, 1980. P.260 and 262.

based upon the authority of the former on the latter⁽¹⁾. Second the fault committed by the employee⁽²⁾. Third the employee's fault should be committed or perpetrated in the course of his or her employment of the employer⁽³⁾. But the researcher reached to a conclusion that the text of the article (219) is unsuitable for encouraging innovative entrepreneurship and entrepreneurial activities. And will recommend that the Iraqi legislator should adopt the principle of the balance between the encouragement of innovative and creative entrepreneurship from one hand, and the protection of the rights of injured or damaged third parties from the risks of entrepreneurial activities on the other hand. Considering the element of risk-taking as a main feature of entrepreneurship.

Third Topic: The Strict liability

The strict-liability is not based on the basic element of fault⁽⁴⁾, rather it is based upon the basic element of damage. It is also defined⁽⁵⁾ as the sanction or penalty imposed without proving the tortfeasor's negligence or intention. It is not based upon the tort itself, particularly the three aspects characterizing the moral element of the fault-based tort, namely, the negligence, malice and intention⁽⁶⁾. If these three aspects, or at least one of them, are available, the fault-based liability will be realized. And it is established upon tort-based principle. Therefore, the strict-liability is considered as an exception to the general rule of the fault-based liability. The American supreme court of California adopted the strict-liability principle arising from entrepreneurial activities, and applied the article (402A) of the Second Restatement of Torts 1965, in the (Greenman v. Yuba Power Products, Inc 1963) case⁽⁷⁾. In which the manufacturer company developed a Shopsmith, which caused severe injuries to the plaintiff (William B. Greenman), who brought an action or filed a lawsuit and demanded compensatory damages. The court of first instance awarded an amount of (\$65,000) as compensatory damages to the plaintiff from the defendant company. The court established the compensatory damages of the plaintiff on the element of the damage, without requiring him to prove the element of the fault, represented by the defendant's negligence⁽⁸⁾. The American supreme court of California confirmed the first instance judgment, and based the application of the strict-liability on the social utility. If we compare the situation of the American law with that of the Iraqi civil code No. (40) of 1951, we can find that this law has adopted the fault-based liability, as a general rule, in conformity with the aforementioned first paragraph of the article (186), and applied the strict-liability as an exception to the general rule⁽⁹⁾. According to the first paragraph of the article (191), and restricted it to the harmful, illegal or unlawful act committed by both the discerning and non-discerning minors, without proving the element of the fault. But the researcher will recommend that the Iraqi legislator should adopt the entrepreneur's strict-liability, and establish it on the basis of the damage inflicted on the injured party, without proving the basic element of the fault perpetrated by the entrepreneur.

Conclusions

The conclusion is made up of both the findings and recommendations and as follows:

First: Findings: The study has reached the following findings:

1. The entrepreneurship is defined as any innovative and creative activity performed by a person known as an **entrepreneur**, aimed at achieving economic growth and introducing a new innovation to the market.
2. It is also defined as the process of starting and performing **new businesses or start-ups**, generally in response to opportunities available to the entrepreneur.
3. The entrepreneur is anyone who introduces a new innovation to the market and successfully contributes to the process of economic development.
4. The entrepreneurship which should be legally protected is to be characterized by many distinctive features, the most important of which its novelty, **high-level of specific quality, efficiency of**

(1) Dara'a Hammad. The general theory of obligations. Part one sources of Obligations. Al-Sanhouri Publishing house Beirut. 2016. p.403.

(2) Sabri Hamad Khater, The general theory of the obligation, the sources of the obligation A comparative study, Second Edition, Hat-trick for distribution and publishing Erbil, 2024, p.377.

(3) Munther Al-Fadhel, op Cit . p.363.

(4) John Cooke. Law of torts.Fourth Edition.Financial Times.Pitman Publishing, 1999. p.4.

(5) Linda Edwards.Stanley Edwards.Patricia Kirtley Wells, Tort Law, Fifth edition, DELMAR, 2012. p.239.

(6) Catherine Elliott and Frances Quinn, Tort law, Eighth edition.Longman, Pearson 2011 , P.4.

(7) https://en.wikipedia.org/wiki/Greenman_v._Yuba_Power_Products,_Inc

(8) Don Mayer, Daniel Warner, George J. Siedel and Jethro K. Lieberman, op. Cit, P.305.

(9) Mohammed Suleiman Al-Ahmed, The fault and the truth of the basis of the civil liability in the Iraqi law an analytical study, Tafseer Bookshop for publishing, 2008. p.60.

distribution, full of entrepreneurial, economically effective and influential, assuming a good deal of risk, self-independence and taking initiatives.

5. Although entrepreneurial small ventures are similar to traditional small businesses in some aspects, but differences are still conspicuous between them. The most significant difference between them can be summarized by innovation, risk-taking, opportunities of production and job creation, fulfillment of long-term objectives and acceptance of accept failure and mistakes.
6. Both the American and Iraqi laws regulated the intellectual property rights, which are considered as one of the most remarkable aspects of the entrepreneurship and protected them legally.
7. The legal regulation includes the legal protection of patents and copyrights arising from entrepreneurial activities.
8. Although the American legislator did not enact the so-called entrepreneurial law, the system of the civil liability arising from the risks of the entrepreneurship or entrepreneurial activities in the American law can be based upon general principles of the common law civil liability. And the most considerable types of civil liability, particularly the non-contractual or extra-contractual liability suitable for compensating harms and injuries caused by entrepreneurial activities are: the tort of negligence liability (Unintentional Tort), the vicarious liability and the strict-liability.

Second: Recommendations: After displaying these findings, the researcher suggests the following recommendations:

1. It has been clearly shown by this research the importance of the legal protection of intellectual property rights arising from entrepreneurial activities, based upon innovation and creativity. Therefore, the researcher recommends that both the Iraqi and Kurdistan region legislators enact special texts for protecting the patents of the inventions made by entrepreneurs, particularly when they manage sole-ownership. We suggest the following text to be added to both the Iraqi copyright protection law No. (3) of 1971, as amended. And the copyright and adjacent rights law No. (17) of 2012 in Kurdistan region: (The legal protection provided by this law shall extend to all the patents of the inventions made by entrepreneurs, as a result of his/her entrepreneurial activities).
2. The researcher recommends that both the Iraqi and Kurdistan region legislators enact special texts for protecting the exclusive rights of the entrepreneur's copyright, and granting him/her the right of filing a lawsuit, to prevent any infringement of their exclusive rights. and prove the infringer's civil liability. Therefore, We suggest the following text to be added to both the Iraqi copyright protection law No. (3) of 1971, as amended. And the copyright and adjacent rights law No. (17) of 2012 in Kurdistan region: (The legal protection provided by this law shall extend to the exclusive rights of the entrepreneur's copyright, and grant him/her the right of filing a lawsuit, to prevent any infringement of their exclusive rights. and prove the infringer's civil liability).
3. The researcher recommends that the Iraqi civil code adopt the entrepreneur's strict-liability, and establish it on the basis of the damage inflicted on the injured party, without proving the basic element of the fault perpetrated by the entrepreneur. In order to realize the balance between the encouragement of innovative and creative entrepreneurship from one hand, and the protection of the rights of injured or damaged third parties from the risks of entrepreneurial activities on the other hand. Therefore, the researcher suggests that the following text be added to the Iraqi civil code: (If any risks, arising from the entrepreneur's innovative and creative entrepreneurial activities, cause harms or injuries to the aggrieved third party. The entrepreneur will be liable for these harms or injuries and guaranteeing them. Unless proving that the damage results from such extraneous cause as force majeure, act of the victim or third party's act independent of the entrepreneurial activity).
4. The researcher recommends that the Iraqi civil code adopt the entrepreneur's vicarious liability, in case of any harmful, illegal or unlawful act committed by the entrepreneur's employees, may cause harms or injuries to the third party. Therefore, the researcher suggests that the following text be added to the Iraqi civil code: (The entrepreneur will be liable for any harmful, illegal or unlawful act committed by his or her employees. In the course of employment and fulfillment of entrepreneurial activities).

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