

Indirect Infringement of Intellectual Property in International Documents

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Abstract: It is obvious that mere relying on the domestic laws in intellectual property rights studies and neglecting to pay attention to international documents, is not acceptable, because ultimately, it is international documents that determine and explain the rights and obligations of governments in the international arena. Therefore, it seems necessary to study and review these documents and determine their position regarding the indirect infringement of intellectual property rights and the responsibility arising from it. Several international documents regarding the protection of intellectual property rights have been approved by international assemblies. The Paris Convention for the Protection of Industrial Property Rights, the Berne Convention for the Protection of Literary and Artistic Works (Copyrights), WIPO Internet Treaties and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), are among the most important documents in this field. This article is dedicated to examine the position of the indirect infringement of intellectual rights in these documents.

Keywords: Indirect, Infringement, International, TRIPS, WIPO.

INTRODUCTION

In common law, indirect Infringement generally refers to the failure to commit a direct wrong, which gives rise to secondary liability. Imposing responsibility on someone who becomes responsible without directly committing a tort, because of encouraging, facilitating or benefiting from that tort, is called indirect responsibility. Indirect or secondary infringement is opposed to direct or infringement and in US law, it includes contributory infringement, inducing infringement and vicarious liability. The occurrence of each of these two types of infringements, depending on the case, leads to indirect or secondary responsibility and primary responsibility, respectively. Realization of direct infringement in all fields, including intellectual property rights, is subject to committing the material element of the fault. For example, in the case of direct patent (copyright or trade mark) infringement, a person who exploits one or more of the claims of a registered patent without permission, is considered to be a direct infringer. In the same case, if a person, without being in charge of directly exploiting the claims of the patent, helps or encourages the direct infringer with the knowledge of her illegal act, the indirect patent infringement realized and the person who help or encourage the infringer, is considered indirect infringer. depending on the case and considering the element of intention, contributory infringement or infringement by inducement, will be realized. in some cases, a person is liable solely based on the existence of a specific

relationship with another person (direct infringer) and receiving financial benefit from the direct infringement, which is called vicarious liability in US law and is strict liability one. Vicarious liability generally appears in the employee-employer relationship, but in US law, such a responsibility is not limited to the employee-employer relationship.

Article 69 of the US Restatement (Second) of Torts, has also defined indirect responsibility as the responsibility of a person who did not directly commit a harmful act¹. According to this definition, the responsibility resulting from indirect infringement is considered as one of the types of responsibility resulting from the act of others. Secondary liability is considered to arise from the act of another,² and this issue has also been confirmed in American court decisions³.

Therefore, the indirect infringement of intellectual property rights can be defined as follows: facilitating or encouraging the infringement of another's intellectual rights or benefiting from such infringement as a result of the existence of a relationship, without direct intervention in the realization of the material element of the fault⁴.

¹restatement (second) torts, § 69(1979).

²Graeme B. Dinwoodie, Secondary Liability of Internet Service Providers, Springer, 2017, p.10

³Sony Corp. v. Universal City Studios, 464 U.S. 417 (1984)

⁴The territory of the material element of indirect infringement is different in different countries; For example, in English law, trading copies of infringing copyrights is also in the realm of indirect infringement, while in most legal systems, such an action is considered a direct infringement of copyright. On the other hand, in the same English legal system, some acts that are clearly defined in the subject area of indirect infringement have been considered

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In domestic legal systems, the indirect infringement of intellectual property rights is recognized but the purpose of this research is to examine indirect infringement of intellectual property rights in international documents on intellectual property rights and answer the question of whether such an institution can be found in international documents?

1. THE PARIS CONVENTION

The Paris Convention was adopted in 1883 as one of the first international documents governing intellectual property rights⁵. The subjects supported by this convention include various areas of industrial property including patents, trade names and trademarks, industrial designs, unfair competition, geographical indications and possibly trade secrets in the form of unfair competition⁶.

In the provisions of the Paris Convention, there is no explicit reference to indirect infringement. However, Article 10 of this Convention, regarding unfair competition, is formulated in such a way that the possibility of inferring indirect infringement and the resulting liability, is not unlikely. Moreover, some countries have accepted the secondary responsibility resulting from the indirect infringement of intellectual property rights in the form of the unfair competition.

According to paragraph 1 of Article 10 b is of the Paris Convention, "The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition."

Paragraph 2 of the same article stipulates that "Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition."

According to these two clauses, we should first see whether the various examples of indirect infringement of intellectual property rights are considered unfair competition or not. It is obvious that because vicarious liability is not based on fault, it cannot be included in this title but it seems that contributory infringement is included in the title of unfair competition. An act that is

done with the aim of gaining benefit from another's technology or commercial reputation and with the knowledge of causing loss to him, without a doubt cannot be considered a fair act in commercial practice.

On the other hand, the member countries of the Paris Convention, have been obliged to "provide effective protection against unfair competition" according to the paragraph 1 of Article 10 bis. The clause "effective" in this paragraph shows that the drafters of the convention have correctly sought to protect the legal and legitimate rights of industrial property owners. Although establishing regulations regarding direct infringement of patents and trademarks can indicate the commitment of member states to provide effective protection against unfair competition, in some cases, such as indirect infringement of patents or trademarks, effective protection cannot be provided except in light of the recognition of liability (whether criminal or civil) for offenders resulting from indirect infringement.

In some legal systems that do not have explicit provisions on the indirect infringement, it is also recommended to identify it based on the theory of unfair competition⁷. Even in US law, a certain types of contributory trademark infringement, has been accepted in the Restatement of the Law Third, Unfair Competition. section 27 of the Restatement, foresees contributory trade mark liability for any producer or distributor who, fails to take reasonable precautions against the occurrence of the third person's infringing conduct in circumstances in which the infringing conduct can be reasonably anticipated. the basis for identifying such liability is unfair competition⁸. In addition, one of the US courts, in its famous decision, has called the theory of unfair competition in the common law as the basis for identifying the liability resulting from the indirect trade mark infringement⁹.

Therefore, it can be said that although the indirect infringement of industrial property rights is not explicitly foreseen in the Paris Convention, it seems that its inference is possible based on the article 10 bis and in the form of dealing with unfair competition and providing effective protection against it. Some researchers have given broad and unconditional

subject to the provisions of direct infringement of copyright. See: Copyright, Designs and Patents Act 1988, ss 22-26., see also: Graeme B. Dinwoodie, *op.cit*, pp.8-9.

⁵Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, last revised July 14, 1967, last amended Sept. 28, 1979, 828 U.N.T.S. 305.

⁶see: G. H. C. BODENHAUSEN, *Guide to the Application of the Paris Convention for the Protection of Industrial Property As Revised at Stockholm in 1967*, WIPO Publication, 1969.

⁷Jacques Labrunie, *Contributory Infringement*, Gusmão & Labrunie, Brazil, p.11.

⁸See RESTATEMENT (THIRD) OF UNFAIR COMPETITION §, 27 (1995).

⁹Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 861 n.2 (1982) (White, J., concurring).

authority to member countries in the field of applying effective protection against illegal competition¹⁰.

2. BERN CONVENTION

The Berne Convention was concluded in 1886 in order to support the creators of literary and artistic works at the international level¹¹. Article 3 of this convention grants protection to the author's rights regardless of the person's nationality. It is obvious that the mere granting of the right is not the ultimate desire of the authors and the convention. For this reason, the necessary measures have been determined in order to secure the rights of the authors. According to the two clauses of Article 36 of the Berne Convention, "(1) Any country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention. (2) It is understood that, at the time a country becomes bound by this Convention, it will be in a position under its domestic law to give effect to the provisions of this Convention."

It is obvious that domestic laws on direct copyright infringement, are a necessary condition for the implementation of this treaty. But the issue here is whether the mere domestic laws are sufficient for this purpose, or is it necessary to establish additional regulations in this field? In other words, can it be claimed that the mere direct copyright infringement laws, guarantees the implementation of the obligations resulting from the acceptance of the Berne Convention?

This issue is especially important from the point of view that in the current era, many infringements take place in virtual space and with using its facilities. For example, some internet sites provide a space for users where a person can illegally publish, download and share copyrighted videos, images or music. In such a situation, the direct infringement rules can only be used to prosecute direct infringers who are generally numerous and unknown people, and given that the rights owner is unable to identify and prosecute infringing users, her rights will effectively remain unenforceable. This is despite the fact that the Berne Convention has mandated its members to take the necessary measures to guarantee the protection of the authors' rights, and it seems that in the current

situation, guaranteeing the implementation of the Berne Convention will not be realized unless responsibility is identified for indirect infringers.

3. WIPO INTERNET TREATIES

Due to the increasing growth of the Internet and digital space in the last few decades, the World Intellectual Property Organization approved important documents in order to secure the rights of the creators of literary and artistic works and related rights. Since the Berne and Rome Conventions did not have the necessary capacity to cover the rights of creators of literary and artistic works and performers and producers of Phonograms in the digital space and the Internet environment, the World Intellectual Property Organization approved the Copyright Treaty and the Treaty on Performances and Phonograms. Due to the fact that the present treaties have been prepared in terms of the requirements of the digital and Internet environment, they are known as WIPO Internet treaties¹².

3.1. WIPO Copyright Treaty

The WIPO copyright treaty¹³ is one of the special agreements under the provisions of Article 20 of the Berne Convention;¹⁴ According to this article, "The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable"¹⁵. Based on the authority granted in Article 20 of Bern, the member countries of WIPO in 1996 approved the WIPO Copyright Treaty in order to protect the rights of authors of literary and artistic works in the digital space. This treaty came into force in 2002, and according to it, the member countries are obliged to comply with all the substantive provisions of the Berne Convention.

In addition to the rights granted in Berne, in the WIPO copyright treaty, other rights have been recognized for authors; For example, computer programs and databases are also explicitly protected in

¹⁰G. H. C. bodenhausen, op.cit, p.144.

¹¹Wipo,guide to the berne convention for the protection of literary and artistic works (Paris Act, 1971), GENEVA, 1978.

¹²see:http://www.wipo.int/copyright/en/activities/internet_treaties.html.

¹³WIPO Copyright Treaty (adopted in Geneva on December 20, 1996).

¹⁴see: http://www.wipo.int/copyright/en/activities/internet_treaties.html

¹⁵Berne Convention for the Protection of Literary and Artistic Works 1886, article 20

this treaty. In order to guarantee the implementation of such rights, just like any other provision, the treaty, through articles 11, 12 and 14, obliges the member countries to establish specific implementation arrangements and provides the necessary implementation guarantees. Article 18 also contains a provision by which all members of the treaty are entitled to the rights and are bound by the obligations of the treaty, as the case may be¹⁶.

According to Article 11 of the treaty, "Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law"¹⁷.

In various technology sectors, several facilities and tools have been designed to protect the privacy and rights of creators. Currently, there are various software for computer-based devices that provide the ability to encrypt and protect people's personal information. Article 11 of the treaty, seeks to protect these technical measures so that people cannot circumvent such measures and gain unauthorized access to copyrighted works by using special technical tools. It is obvious that the text of Article 11 refers to the act of circumventing technical measures by someone who directly and illegally accesses the content of works (direct infringer). However, in some cases, the necessary facilities and capabilities for circumventing technical measures are provided by other persons. For example, someone may prepare and make available to the public decryption software that can be used to access the content of copyrighted works while decrypting them without authorization. It seems that Article 11, has the capacity to provide appropriate enforcement guarantees not only to direct infringers but also to those who indirectly enable the circumvention of technical measures.

Article 14(1) of the WIPO Treaty also stipulates that "Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty."

According to the 14(2), "Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements."

With a similar argument, it can be said that according to the two clauses of the above article, it is also possible to impose liability due to indirect infringements in order to ensure the implementation of the provisions of the treaty, including ensuring the rights of authors.

Contrary to the aforementioned treaties, Article 12 of the WIPO Copyright Treaty explicitly prescribes the imposition of liability for indirect infringement. According to article 12(1 and 2) of this treaty:

- 1) "Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:
 - i) To remove or alter any electronic rights management information without authority;
 - ii) To distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.
- 2) As used in this Article, "rights management information" means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public."

As can be seen, indirect liability resulting from encouraging, facilitating or concealing the infringement of authors' rights can be one of the sufficient and effective means of compensation for authors. The US

¹⁶See generally WIPO Copyright Treaty, Dec. 20, 1996, S. TREATY Doc. No. 105-17 (1997), 36 I.L.M. 65 (1997), available at http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf.

¹⁷ibid, art 11.

Digital Millennium Copyright Act (DMCA), also enacted based on the requirement stipulated in Article 12 of the WIPO Copyright Treaty¹⁸. According to section 1201(2A) of this statute, “No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;” according to articles 1203 and 1204 of the act, the infringer will be subject to civil and criminal liability.

3.2. WIPO Performances and Phonograms Treaty

Like the copyright treaty, the WIPO Performances and Phonograms Treaty was created by the World Intellectual Property Organization with the aim of securing the rights of beneficiaries, especially in the Internet and digital space.¹⁹ This treaty was ratified in 1996 and entered into force in 2012. The beneficiaries of the current treaty are two categories; First, the performers, that is, people such as actors, singers, and musicians, and second, the producers of phonograms, that is, the person or institution that invests in the field of sound recording and takes responsibility for it. economic rights, such as the right to broadcast, reproduce and transmit to the public, along with moral rights, are provided for the beneficiaries in this treaty. The present treaty, in relation to the issue of enforcement, repeats the provisions set out in the WIPO Copyright Treaty. Articles 18 and 19 of this treaty contain provisions to ensure the rights of the beneficiaries and confront the infringers; According to Article 18 of this treaty, “Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.”

According to article 19 (1) of this treaty, “Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any

of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered, by this Treaty:

- (i) To remove or alter any electronic rights management information without authority,
- (ii) To distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority”²⁰.

paragraph 2 of the article also stipulates in the explanation of the term rights management information: “As used in this Article, “rights management information” means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public.” The explanations given above regarding the WIPO Copyright Agreement can be presented here as well and will not be repeated.

4. TRIPS AGREEMENT

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), is considered the most comprehensive international document in the field of intellectual property protection, which includes the protection of industrial property rights and copyright. This document is an integral part of the regulations of the World Trade Organization, and membership in the World Trade Organization automatically entails the imposition of TRIPS regulations on members²¹. In this agreement, there is no specification regarding indirect infringement and the resulting liability. TRIPS, like the Paris Convention, has been approved regardless of the challenges related to online and internet activities, and

¹⁸Katie E. Flowers, TEACH, the DMCA and Distance Education, SANS Institute Reading Room, 2003, p.2.

¹⁹see: http://www.wipo.int/copyright/en/activities/internet_treaties.html.

²⁰ibid.

²¹UNCTAD, Training Module on the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), United Nations New York and Geneva, 2010, PP.1-60.

for this, it lacks an explicit provision in the field of indirect infringement of intellectual rights, which is often likely to occur in cyberspace²². However, according to paragraph 1 of Article 41 of the TRIPS Agreement, "Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse."

This article imposes a general obligation on members to provide for provisions to ensure the implementation of TRIPS. Without a doubt, imposing liability for indirect infringements can ensure the implementation of TRIPS rules.

Although member states are apparently not required to provide for such an institution, and such a requirement is not even observed in the context of membership in the WTO, in practice, the lack of provisions to deal with indirect infringements has created difficulties for some countries in joining the said organization.

As mentioned earlier, with the emergence of the digital space and the Internet, most intellectual property infringements, especially in the field of copyright and trademark rights, are carried out using the capabilities of cyberspace. Obviously, if there are no necessary regulations to combat the illegal activities of such spaces, it is not possible to ensure the existence of a "fair and equitable" enforcement for infringement of intellectual property rights, as TRIPS requires members to do. Before accepting Russia's membership in the World Trade Organization, the United States was against Russia's membership in this organization due to the widespread infringement of copyright by using cyberspace facilities in this country²³. For this reason, along with other factors, the proper implementation of the bilateral agreement between the United States and Russia to combat copyright infringement on the Internet, has been one of the most important tasks for this country on its path to joining the world trade

organization²⁴. Some authors have also considered the Establishment of contributory and vicarious liability for sites that facilitates or induces intellectual property infringement, as a key element of providing fair and equitable regulations to combat infringements under TRIPS²⁵.

Therefore, it can be said that although the TRIPS Agreement does not clearly and explicitly contain any provision regarding indirect infringement of intellectual property rights and the liability arising from it, given that, at present, most infringements of intellectual property rights, especially in the field of copyright and trademark rights, are carried out indirectly using the Internet, it seems necessary to foresee provisions to deal with such an issue at the level of domestic laws, in order to implement the obligation to establish fair and equitable enforcement stipulated in TRIPS.

5. CONCLUSION

Indirect infringement of intellectual property rights and the liability arising there from are not explicitly stipulated in international regulations, except in the WIPO Internet Treaties. However, in the TRIPS Agreement, the Paris Convention, and the Berne Convention, by citing the articles that mandate the proper implementation of these treaties, it can be inferred that there is a need to provide provisions regarding indirect infringement of intellectual property and the liability arising from it. The policy of some powerful countries such as the United States is also based on this basis, and other countries are forced to implement the necessary laws and regulations to protect intellectual property at the international level in a timely manner by following these policies so that they do not face legal challenges in the international arena or are not prevented from entering the World Trade Organization, because historical precedent shows that in some cases, the United States has either referred a dispute to the dispute settlement body of the World Trade Organization in order to protect the intellectual property of its citizens, or has blocked the entry of some countries into the World Trade Organization in order to meet its demands regarding the protection of intellectual property. Therefore, it seems that at least in

²²Graeme Dinwoodie, Secondary Liability for Online Trademark Infringement: The International Landscape, 37 Colum. J.L. & Arts 2014, P.468.

²³See:OUT-LAW.COM, Russia and US Set Up Copyright Hotline, Nov. 28, 2006.

²⁴See OUT-LAW.COM, Russia and US Set Up Copyright Hotline, Nov. 28, 2006, http://www.theregister.co.uk/2006/11/28/us_russia_copyright_hotline.

²⁵Trudy-S-Martin, Vicarious and Contributory Liability for Internet Host Providers: Combating Copyright Infringement In The United States, Russia, and China, Vicarious and Contributory Liability for Internet Host Providers: Combating Copyright Infringement in the United States, Russia, , 27 Wis. Int'l L.J. ,2009,p. 32.

some cases, the implementation of obligations resulting from the acceptance of international treaties depends on the establishment of arrangements including civil liability resulting from indirect infringement of intellectual property in the domestic laws.

CONFLICT OF INTEREST" STATEMENT

The author declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

ACKNOWLEDGEMENT

I wish to thank my wife, Mahrou Madani, who has stood by me through all my travails, my absences, my fits of pique and impatience. She gave me support and help me. she was always with me throughout the writing of this article.

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Received on 09-10-2024

Accepted on 07-11-2024

Published on 29-11-2024

<https://doi.org/10.6000/2817-2302.2024.03.10>

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