

The judicial protection of intellectual property rights under the TRIPS Agreement

الحماية القضائية لحقوق الملكية الفكرية وفق اتفاقية التريبس

Naouel Brahimi *

University Lonici Ali-Blida2-Algeria, n.brahimi@univ-blida2.dz

Received: 06/01/2024

Accepted: 09/12/2024

Published:15/12/2024

Abstract:

Providing the greatest protection for intellectual property rights is one of the most important guarantees of the stability of transactions, because of its impact on attracting foreign investment. Therefore, countries were keen to develop legal texts that would activate the role of the judiciary, especially after the spread of modern technological means and digital works, which ultimately led to the emergence of new forms of attacks on intellectual property rights, which required the concerted efforts of countries to establish binding legal rules that guarantee the necessary protection for these rights after national legislation became insufficient in covering all forms of attacks. On the other side, it was essential to provide judicial protection to redress the damage and prevent it from occurring.

Keywords: Digital works; Judicial protection; unfair competition lawsuit; TRIPS Agreement; modern technology.

الملخص:

إن توفير أكبر قدر من الحماية لحقوق الملكية الفكرية يعد أحد ضمانات استقرار المعاملات لما له من تأثير على جذب الاستثمارات الأجنبية، لذا حرصت الدول على وضع نصوص قانونية تفعل من دور القضاء خاصة بعد انتشار الوسائل التكنولوجية الحديثة وظهور المصنفات الرقمية مما أدى بالنتيجة إلى ظهور أشكال جديدة من الاعتداءات على حقوق الملكية الفكرية، وهذا يتطلب تضافر جهود الدول لوضع قواعد قانونية ملازمة لهذه الحقوق، بعد أن أصبحت التشريعات الوطنية قاصرة عن الإلمام بجميع أشكال الاعتداءات، إلى جانب ضرورة تفعيل دور القضاء لجبر الضرر و الحيلولة دون وقوعه .

الكلمات المفتاحية: المصنفات الرقمية، الحماية القضائية، دعوى المنافسة غير المشروعة، اتفاقية التريبس، التكنولوجيات الحديثة.

* Corresponding author.

INTRODUCTION

The rapid development of technological means after the spread of the use of the internet in the last decade of the twentieth century led to the emergence of new forms of works that were not known to intellectual property rights in their traditional form, especially after the expansion of the scope of electronic publishing, so digital works appeared, which are works that do not differ in content from traditional works but are provided in new supports, including computer programs, databases, and the topography of integrated circuits, in addition to digital files such as e-books, periodicals, and encyclopaedias available via the internet.

However, the free dissemination of information on the Internet has caused many attacks on intellectual property rights, which required providing the greatest possible protection for them by amending national legislation to keep pace with the rapid developments in this field, as well as providing sufficient judicial protection to deter attacks on these rights and compensation for those affected by it in a digital environment that has extended its scope to other countries, which forced concerted efforts to provide the greatest amount of protection for intellectual property rights in light of the technological revolution. Therefore, several agreements were drawn up in this field. the Agreement on Trade-Related Aspects of Intellectual Property Rights, known as the TRIPS Agreement, is the most prominent one, because it valorised the role of the judiciary by regulating judicial rules for the effective protection of intellectual property rights and, for that purpose, laid foundations that must be respected.

Although the TRIPS Agreement played a crucial role in providing greater protection for intellectual property rights, it didn't oblige member states to establish a judicial system specific to these rights. Rather, it left them free to choose the form of this protection, which does not apply to abstract ideas, so it must ensure that these ideas are embodied in a material form to get protection under the Agreement on Trade-Related Aspects of Intellectual Property Rights by adopting civil, administrative, and even penal rules.

The spread of counterfeiting, piracy, unfair competition, or any other new form of infringement on intellectual property rights emphasized the extreme importance of the subject of our study and led us to pose the following problem: Are the judicial guarantees specified in the TRIPS Agreement sufficient to provide the necessary protection for intellectual

property rights in light of the rapid technological development and freedom of access to information?

Answering this problem requires us to use the descriptive approach since it is the most appropriate method to cover all aspects of the topic, because it requires analysis and discussion and a synthesis of the results reached, which leads us to the following detail:

Chapter 1: The Role of the Civil Judiciary in Protecting Intellectual Property Rights:

The civil judge intervenes to protect the rights of the owner of the digital work and ensures compensation for damage in case of infringement of his rights by stopping it and imposing appropriate compensation. However, the injured party must file an unfair competition lawsuit, which is not acceptable unless a set of conditions are met so that the injured party cannot obtain his right to compensation:

1.1 Conditions for Unfair Competition Lawsuit

The Algerian legislator did not assign compensation for damage to intellectual property rights, whether in their traditional form or their digital form, to a special system. Rather, in its rulings, it refers to the general rules stipulated in Article 124 of the Civil Code, as well as the rules stipulated in the Code of Civil and Administrative Procedures. Since the unfair competition is qualified as a liability lawsuit, it requires, even in national law or the TRIPS Agreement: the error, damage, and a causal relationship, so we focus our study on it because of its specificity:

1.1.1 Error on Unfair Competition

Intellectual property rights are exposed to a large number of attacks, which in their entirety constitute an error committed by a person, and the forms of this error are numerous to the extent that most national legislation and international agreements, especially the Paris Agreement in Article 10 bis and the TRIPS Agreement, do not give an exclusive list of errors that are committed and constitute unfair competition. Rather, enumerated only some of them due to the many forms of attacks, especially in light of the digital environment where the free dissemination of information appeared, making it accessible to everyone, and thus more vulnerable to attacks.

All practices that conflict with honourable and fair customs in the industrial and commercial field and that would create turmoil in the market or harm the persons, goods, or services of the competitors through distortion, or any other act of competition contrary to honest practices in

industrial or commercial matters constitutes an act of unfair competition, whether by confusing a competitor, his products, or his activity, as stipulated by the Algerian legislator through Article 27 of Law 04/02 dated June 23, 2004, specifying the rules applied to commercial practices. The unfair competition also occurs in all ways and means that would prejudice the competitor, including infringement on intellectual property rights such as patents, trademarks, databases, computer programs, and the topography of integrated circuits. Therefore, the basis of unfair competition is the error committed by the competitor, and it is represented by violating fair and honourable customs in trade, unlike imitation, which is based on a legally protected right¹, based on this, the unfair competition lawsuit requires proof of error, while the imitation lawsuit relates to the infringement of the right². The burden of proof lies on the affected person by unfair competition. This burden of proving error is legitimate, as stipulated in Article 42 of the TRIPS Agreement: “Member countries shall provide rights holders with civil judicial proceedings in connection with the enforcement of any intellectual property rights covered by this Agreement, and defendants have the right to receive timely written notification containing a sufficient amount of details, including the basis on which the claims are based...all disputing parties are given the right to prove their claims and present all evidence related to the case....” Thus, the plaintiff includes in his claim petition sufficient reasons and shreds of evidence that prove the validity of his claim along with enough details and foundation for that.

On the other hand, the defendant must ward off the adversary’s allegations by proving that what he committed act doesn’t constitute an error that would give rise to his responsibility. Therefore, the burden of proof is double on the plaintiff and the defendant, which is confirmed by the phrase “disputing parties” mentioned in Article 42 previously mentioned according to the rule: “Proof is upon the one who claims, and the oath is upon the one who denies.”

However, paragraph 2 of Article 34 of the TRIPS Agreement, relating to proof in the event of patent infringement, makes exceptions to this rule by placing the burden of proof on the defendant rather than the plaintiff by stipulating that: “Any member country is free to stipulate that the burden of proof referred to in Paragraph 1: “For the purposes of civil proceedings in respect of the infringement of the rights of the owner referred to in

paragraph 1(b) of Article 28, if the subject matter of a patent is a process for obtaining a product, the judicial authorities shall have the authority to order the defendant to prove that the process to obtain an identical product is different from the patented process. Therefore, Members shall provide, in at least one of the following circumstances, that any identical product when produced without the consent of the patent owner shall, in the absence of proof to the contrary, be deemed to have been obtained by the patented process...”The matter here concerns the patent of manufacturing methods, where the judicial authorities order the defendant to prove that the method of manufacturing an identical product differs from the method covered by the patent owned by the plaintiff, whose patent has been infringed instead of proving the latter is wrong. The TRIPS Agreement violated the general rules of proof and placed the burden on the defendant when the following two conditions are met in the conforming product:

- If the product obtained according to the manufacturing method covered by the patent is a new product, which is a logical condition because novelty is an essential condition for extending patent protection following the TRIPS Agreement.
- If there is a high probability that the identical product was manufactured according to this method, and the holder of the right to the patent was unable to determine the method that was used by making reasonable efforts in that regard, here we note that the TRIPS Agreement provided the maximum amount of protection for the patent owner, once there is a possibility that his right to the patent will be infringed, he may file a lawsuit before the court to protect his right, even if he cannot prove that the error occurred³.

In all cases, whether the burden of proof is on the plaintiff or the defendant, the confidential information of each party must be respected, per what is emphasized in Article 42 mentioned above, which is the same as what is affirmed in paragraph 3 of Article 34 of the TRIPS Agreement while presenting evidence as proof. The legitimate interests of the defendants are taken into account in terms of protecting their industrial and commercial secrets: “In the adduction of proof to the contrary, the legitimate interests of defendants in protecting their manufacturing and business secrets shall be taken into account.”

Therefore, an unfair competition lawsuit cannot be a reason for disclosing commercial and industrial information and undisclosed ones,

whether to the plaintiff or the defendant, because disclosure is considered one of the modern forms of attacks against intellectual property rights in the digital environment such as the attack on e-commerce sites to create confusion.

2.1.1 Damage in Unfair Competition

The damage in an unfair competition lawsuit is represented by the loss of customers due to their transfer from the affected merchant to the merchant who committed the acts of unfair competition⁴. However, in the case of parasitism, where there is no competition between the two parties, the harm does not take the form of losing customers, as interference generally leads to a type of disturbance. Economic damage, which in itself constitutes immediate damage, opens the way for the affected person to demand an end to it and compensation for what happened to him. This rule remains common to unfair competition in its traditional sense, and parasitism⁵.

The damage doesn't need to occur, but rather it may be future, but certain to occur, that is what we discern from the text of paragraph 3 of Article 50 of the TRIPS Agreement: "The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse". Therefore, the unfair competition lawsuit does not only aim to compensate the damage caused to the injured party, but it also aims to stop the increase in the damages and their aggravation in the future, which was expressed by the French High Court: "It is sufficient that the damage be presumed or verifiable."⁶

The damaged party must prove the harm he has suffered or the potential harm that threatens his interests. If the injured is unable to do so, the TRIPS Agreement makes it within the jurisdiction of the judicial authority to order the opponent to present the evidence he possesses, following the text of Paragraph 1 of Article 1. 43 of this convention.

However, although the TRIPS Agreement is keen to protect the injured person, and takes into account that in some cases it is difficult to obtain evidence, implementing this provision on the ground is difficult, if not impossible, since how can anyone provide evidence of his conviction?

especially since he knows that he may be subject to significant compensation, and this may be a reason for him to provide misleading or fabricated evidence. Perhaps this is what made the second paragraph of Article 43 of the TRIPS Agreement permit the member country if one of the disputing parties refuse to provide evidence that its opponent was unable to provide, in a reasonable period, to base its judgment on the information provided taking into account the refusal of the opponent to provide information and evidence, without prejudice to the principle of Prima Facie and the right of each party to present his point of view to defend his interests, accordingly, Article 43, paragraph 2 of the TRIPS Agreement stipulates: “In cases in which a party to a proceeding voluntarily and without good reason refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes a procedure relating to an enforcement action, a Member may accord judicial authorities the authority to make preliminary and final determinations, affirmative or negative, on the basis of the information presented to them, including the complaint or the allegation presented by the party adversely affected by the denial of access to information, subject to providing the parties an opportunity to be heard on the allegations or evidence.” But the question we ask here is: Is this ruling applied against multinational companies with all the power and influence they possess? Is it possible to force them to provide evidence condemning themselves? especially since they are considered the controllers of the digital environment and are even considered the aggressors in some cases of intellectual property rights

3.1.1 The Causation in Unfair Competition:

When there is error and damage, there must be a causal relationship linking them. However, proving this relationship is not an easy matter, mainly if the damage is based on the mere loss of customers. The results of acts of unfair competition and their harmful effects do not appear immediately, but often in the long term, so some legal systems are lenient in requiring a causal relationship, as it is sufficient for liability to establish damage⁷.

General rules require that the causal relationship between the damage and the error be proven, to establish liability for the illegal act. Therefore, the defendant can defend himself from liability by proving that the damage that befell the plaintiff has no relation to the error that occurred on his part,

such as proving that the damage occurred as a result of a foreign cause, as force majeure Or the sudden event or the fault of the injured person himself, and thus he has succeeded in severing the causal link⁸. However, even if it was conceivable to require proof of the causal link between the error and the damage, it is not a requirement for future danger because the goal is to stop illegal practices whose continuation may lead to damage in the future.

2.1The Effects of the Unfair Competition Lawsuit:

An unfair competition lawsuit results in the issuance of decisions and judicial orders aimed either at repairing the damage that has occurred or at avoiding the damage that may occur in the future. The TRIPS Agreement has emphasized that the decisions taken regarding any subject matter must be written, justified, and made available at least, to the parties involved in the case without undue delay, and it must be based on the evidence discussed in the case⁹.

1.2.1Compensation for Unfair Competition Damage:

The unfair competition lawsuit, as a liability lawsuit, aims to impose a penalty on the infringer of an intellectual property right and to compensate the party harmed by the infringement. In addition to being a deterrent lawsuit, it results in the confiscation of the goods that represent the subject of the infringement to remove every trace of the damage. Compensation is, therefore, considered the first goal of filing an unfair competition lawsuit. Once the fault, damage, and causal relationship are proven, a ruling will be imposed on it, which is what Article 45, paragraph 1, of the TRIPS Agreement takes into account: “The judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person’s intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.” The first thing that draws attention in this article is that it links the provision for compensation for damage resulting from the infringement of an intellectual property right, with the condition that the infringer knows or is likely to know with certainty that he is a transgressor, that is, in the sense of the violation, if the defendant proves by all means of proof that he was not aware of the error committed and that he did not intend this error. Therefore, to protect himself from liability, he is not obligated to pay compensation, even though the damage has occurred according to the meaning of this article. The Supreme Court in the Netherlands, for example,

interpreted the criterion of knowledge narrowly and considered that knowledge of the existence of the protected patent and its content is a matter insufficient, as the defendant must realize that the act he commits constitutes a crime of infringement of the patent¹⁰. However, we note that we cannot adopt this ruling in its entirety, as there are cases of negligence that result in aggression through unfair competition, without stipulating the bad faith of the plaintiff, this may happen, for example, concerning the disclosure of trade secrets, and is not permissible to stipulate bad faith, anyways. What raises the question here is that Paragraph 2 of Article 45 itself did not require knowledge, as it stated the judicial authorities also have the power to order the infringer to pay the right holder the expenses he incurred even when the infringer did not know or there were reasonable reasons for him to know, "he committed this transgression." This contradiction in the provisions in the same article confirms that the bad faith of the aggressor is not taken into account when awarding compensation because what matters is the subsequent damage. The estimation of compensation is based on the rule of loss that the plaintiff suffers, and the profit that he lost, according to the extent of the decrease in his sales number as a result of the act of unfair competition¹¹. It is also estimated according to the rule of benefits that the plaintiff could have received if there was a licensing contract. This condition is known when the parties are direct competitors¹².

The compensation includes, in addition to the value of the damage, all expenses incurred by the plaintiff in filing the lawsuit and lawyers' fees, as well as the recovery or payment of compensation that the parties have agreed upon. This ruling can be imagined if the licensee exceeds the limits of the license granted to him in exploiting an intellectual property right, and this is under paragraph 2 of Article 45 of the TRIPS Agreement: "The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees. In appropriate cases, Members may authorize the judicial authorities to order recovery of profits and/or payment of pre-established damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity."

Compensation is not limited to the plaintiff, but the latter may arbitrarily file a lawsuit against the defendant, so The TRIPS Agreement, through Article 48, paragraph 1, added a special provision in this case,

which is to compensate the defendant for the damage he suffered from the unfair competition claim: “The judicial authorities shall have the authority to order a party at whose request measures were taken and who has abused enforcement procedures to provide to a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse. The judicial authorities shall also have the authority to order the applicant to pay the defendant's expenses, which may include appropriate attorney's fees.” The TRIPS Agreement did well by stipulating compensation if the defendant abuses the unfair competition claim against him.

2.2.1 Accessory penalties:

The civil procedures of issuing judicial orders to deter the infringer from violating an intellectual right, or ordering the payment of compensation for damage, may not be effective, as the defendant may refrain from implementing the judicial order, or delay paying compensation, so Article 46 of the TRIPS Agreement includes more powerful and deterrent civil measure against the aggressor, which is to enable judicial authorities to issue a judicial order to dispose of goods that represent an infringement of a legally protected intellectual right, without the need to impose compensation on the convicted person to ensure that no harm is caused to the original right holder¹³.

In all cases, proportionality must be taken into account between the committed error and the penalty imposed, and it is a principle that all legal systems agree to acknowledge, as the judge must respect this principle, which is subject to his discretionary authority, which is emphasized in the aforementioned Article 46 of TRIPS agreement.

Chapter 2: The Role of the Urgent Judiciary in Protecting Intellectual Property Rights:

Jurisdiction is assigned to the urgent judge in exceptional cases. He takes urgent orders to confront a current danger or situation without resolving it by following the normal procedures of litigation. This is done by issuing temporary precautionary measures that aim to prevent the violation from occurring, or at least, to reduce the resulting negative effects. Therefore, the TRIPS Agreement, in its article 50, regulates these measures by stipulating the authority of the judiciary to issue them: “The judicial authorities shall have the authority to order prompt and effective provisional measures...”,

Thus, the TRIPS Agreement emphasized the urgent nature of temporary measures, and that they don't affect the origin of the right.

It must be effective, that it has an effect in preventing the infringement from occurring, or reducing its effects.

1.2 Cases of Issuing Provisional Measures Following the TRIPS Agreement:

Provisional measures shall be taken under paragraphs (a) and (b) of Article 50 of the TRIPS Agreement in two cases:

1.1.2 Preventing Infringement of Any Intellectual Property Right:

This happens in the case of an imminent danger that threatens the interests of the injured party, so these temporary measures are the most effective way to prevent any infringement of intellectual property rights, as well as the quickest. If the right holder had followed the ordinary judicial path, this would have led to the damage occurring or its effects would have been exacerbated due to what it requires. Ordinary judicial procedures take a long time, compared to urgent procedures, and paragraph (a) of the aforementioned article 50 emphasized that issuing these temporary measures is: "...to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance"; We note here that the article mentioned the "goods" which means that the matter also applies to locally manufactured goods, the illegal manufacture of which constitutes an infringement of an intellectual property right, or imported goods that are intended bringing them into the territorial scope of the state to introduce them into commercial channels, and here the role of temporary measures is to prevent the aggravation of the infringement by preventing their marketing, because the infringement itself has already occurred by manufacturing and importing those products, so all goods, regardless of their origin, may be taken. Temporary measures in this regard whenever requested by the owner of the intellectual property right.

2.1.2 Preservation of Evidence:

This case concerns evidence that is perishable or that is feared to be destroyed intentionally, as confirmed by Paragraph 2 Article 50 of the TRIPS Agreement. The judicial authorities have the power to take provisional measures when there is a clear possibility of the destruction of evidence. Here, the condition for issuing provisional measures to preserve evidence is that the latter be important and prove the infringement, which is what the article expresses in its text: "to preserve relevant evidence in

regard to the alleged infringement”. Therefore the claimant of infringement must base his request for the issuance of temporary provisional measures sufficiently to demonstrate the importance of the evidence.

2.2 Conditions for Issuing Temporary Measures:

The matter here relates to several conditions specified by Article 50 of the TRIPS Agreement, which are:

1.2.2 Notifying the Defendant of Interim Measures:

This is what was stipulated in Paragraph 2 of Article 50 of the TRIPS Agreement that the judicial authorities have the power to take temporary measures without the knowledge of the other party where appropriate, especially if any delay is likely to result in damages that are difficult to compensate for to the right holder, or when there is a clear possibility that evidence will be destroyed.¹⁴ It is understood from this article that the principle is that the defendant must be notified of the infringement of an intellectual property right. However, in the case of extreme urgency, temporary measures may be issued without notifying him, and the assessment of the element of urgency here is due to “the judge’s appreciation,” including the discretionary power to determine the state of extreme urgency, which requires the issuance of temporary measures without informing the opponent. The article specified that the assessment of this is if it is likely that Any delay may result in serious damage to the right holder, or if there is evidence that may be destroyed by any party.

When temporary measures are taken without the knowledge of the opponent, he must be notified immediately, or after their implementation at the latest, to preserve his right to request a review of these measures, so that the judicial authority takes its decision within a reasonable period to cancel, amend, or confirm the provisional measures¹⁵.

2.2.2 Providing Sufficient Evidence and Informations:

This is what is specified in paragraph 3 of Article 50 of the TRIPS Agreement: “The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant’s right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse”. Hence, we find that proof is divided, according to this paragraph,

into two parts. On the one hand, the right holder must prove his status on the right that is allegedly infringed, and on the other hand, he must prove that his right is being infringed or is about to be infringed, as necessary. The person claiming that his right has been infringed upon must provide all necessary information that facilitates identifying the right threatened to be infringed upon, or the aggressor.

Accordingly, the nature of this assault facilitates the implementation of interim measures, as stipulated in paragraph 5 of Article 50 of the Convention: “The applicant may be required to supply other information necessary for the identification of the goods concerned by the authority that will execute the provisional measures”. We note here that the party’s provision of information is not only required when submitting a petition for temporary measures, but rather the plaintiff may be required to provide more information after the measures are issued and when they are implemented, which is what we infer from the phrase “other information” mentioned in the article.

2.2.3 Providing Adequate Guarantees:

The plaintiff must provide sufficient guarantees to protect the defendant’s right from the plaintiff’s abuse by resorting to the judiciary to issue temporary measures, following Article 50 of the TRIPS Agreement, and ordering the plaintiff to provide an equivalent guarantee sufficient to protect the defendant and prevent abuse of rights or their implementation. The plaintiff may intend, through his request for temporary measures, to prevent his competitor from introducing goods that compete with the goods he markets, so he accuses his opponent of infringing upon them, or he may want to obstruct the plaintiff’s industry. He must stop his production of a commodity, for example. Therefore, in case orders are issued rejecting the request for temporary measures due to the lack of seriousness of the request, or the lack of proof of current or potential harm, the TRIPS Agreement guarantees the right of the defendant to obtain compensation for the plaintiff’s abuse of his right or the possibility of it.

3.2 Expiration of Provisional Measures:

Temporary measures, as their name indicates, are measures limited to a short-term period because they aim to protect certain situations. Therefore, these measures have specific effects for each case:

3.2.1 Methods of Expiration of Temporary Measures:

Provisional measures shall expire in the following cases:

- Implementing temporary measures, which is the principle, so once implemented, they expire.
- Cancellation of the temporary measures that were taken without the knowledge of the defendant after submitting a request to do so, as stipulated in Paragraph 6 of Article 50 of the TRIPS: “Without prejudice to paragraph 4, provisional measures taken on the basis of paragraphs 1 and 2 shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated...”
- The temporary measures will be suspended if a lawsuit is not filed in the matter, as stipulated in paragraph 6 of Article 50 of the TRIPS Agreement. Judicial authorities order the measures to be taken if the laws of the member country permit it, or in the absence of any such determination, within a period not exceeding 20 working days. Or 31 days of the calendar year, whichever is longer. Therefore, if the final lawsuit in the matter is not filed for a period determined by the laws of the member country, the temporary measures shall be suspended, and if the laws of this country do not stipulate a specific time, this period shall be determined by a period not to exceed 20 working days or 31 days, whichever is longer.

3.2.2 The effects of the expiration of the Provisional Measures:

The expiration of temporary measures results in preventing the occurrence of infringement or the aggravation of its effects, this is the principle. However, if they are cancelled or their validity period expires as a result of negligence on the part of the plaintiff, or the lack of seriousness in requesting temporary measures to prevent damage from occurring, or it is proven that it is not likely to occur in the first place, then the judiciary authorities order the plaintiff to pay appropriate compensation to the defendant as a result of the damage caused to him, and this is the reason why Paragraph 3 of Article 50 of the TRIPS requires the provision of adequate financial guarantees, when the temporary measures taken are repealed or their validity period expires as a result of action or negligence on the part of the plaintiff, or when it becomes clear later that no infringement has occurred, or the possibility of any infringement of an intellectual property right occurring, the plaintiff has the authority to order the plaintiff, upon the defendant’s request, to pay appropriate compensation to the defendant for any damage sustained as a result of these measures.

Finally, we point out that the judicial orders issued by the judicial authorities in the member country are not limited to temporary measures to prevent the occurrence of infringement or limit its negative effects. Rather, the judicial authorities may order the infringer to inform the right holder of the identity of the third parties that participated in the production and distribution of goods or services. The infringer and the distribution channel it uses, under Article 47 of the TRIPS Agreement.

Chapter 3: The role of the criminal judiciary in protecting intellectual property rights:

The issue here is mainly related to counterfeiting, which has become considered one of the most common forms of attacks on intellectual property rights, along with piracy, and their effects and danger on intellectual property rights have exceeded the borders of one country due to the huge losses incurred by countries, which has stimulated international efforts to criminalize counterfeiting and piracy, not only at the internal level but especially at the international level after that the counterfeiting became an international crime that must be addressed to reduce its serious effects on the global economy. The first efforts to ban counterfeiting in the field of industrial property were through the Paris Union Agreement of 1883.

The TRIPS Agreement does not define counterfeiting but defines counterfeit goods in article 51/14 as: “counterfeit trademark goods” shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation”. The first question that comes to mind when reading this article is why the TRIPS Agreement defines counterfeit goods, as it would have been more appropriate to define counterfeiting itself since the absence of a unified definition of counterfeiting in the international texts may lead to differences in the application of provisions related to it as well as to piracy, this is what the International Trademark Association in the European Union stated, as it confirmed in its study that: “The absence of an international definition of counterfeiting leads to the absence of coordination in the application of criminal laws related to counterfeiting and piracy in member states, and this is what happens with piracy linked to technological development, which leads to the continuous development of the legal systems of countries,

which is what makes them different and remains in constant difference.”¹⁶ However, this did not prevent Jurisprudence developed a definition of counterfeiting, defining it as: “imitating a program or producing copies of its likeness such that they appear to be the original when marketed, partial copying of a program is sufficient to say that it is imitated as long as the imitation relates to its main parts.”¹⁷ As for piracy, it is related to automated media programs, so it is defined as: “copying programs without permitting, or exploiting it materially without authorization for such exploitation, or imitating, imitating, or making material use of it in a manner that violates the copyright.”¹⁸

Therefore, piracy is counterfeiting in its modern form, as both of them are linked to the illegal exploitation of one or more intellectual property rights. This is because in imitation what matters is the physical act of creating similarity between goods and services, while in unfair competition, what matters is the result, which is the infringement of competition in the market by compromising fair commercial practices and harming the interests of the competitor. This is the crucial difference between imitation and unfair competition.

Counterfeiting is also classified as a crime, due to its danger to the economy, and this is what made countries include penal provisions related to counterfeiting in the TRIPS Agreement. The European Council has confirmed that recent attacks on Commercial Internet sites such as Amazon have drawn the attention of the international community to the dangers facing the Internet and computer networks and that cybercrimes threaten trade and government interests¹⁹.

3.1 Elements of the crime of counterfeiting:

3.1.1 The material element

This element is represented by the similarity between the real mark and the counterfeit one. Here, identicalness between the two marks is not required, rather it is sufficient for there to be a similarity between them that would mislead consumers and cause confusion between products²⁰. The similarity is only in the character and general appearance of the two marks, not in the details because what matters is the effect that the mark has on the mind of the consumer, products bearing the original mark and those bearing the counterfeit mark are not displayed side by side, otherwise the imitation will be exposed²¹.

Articles 151 and 152 of Order 03/05 dated 07/19/2003 relating to copyright and related rights have specified number of acts that constitute the crime of counterfeiting in its traditional form, and due to the generality of its text, it can be applied to digital works as well, which are:

-Illegal disclosure of works by broadcasting or publishing them without permission from their authors.

-Reproduction of a work, import, export, or sale of counterfeit copies.

- Counterfeiting computer programs. This crime is achieved by intentionally inserting, modifying, altering, or erasing data to use it legally as if it were original²².

-Violating the financial rights of authors of computer programs and databases through use.

-Or unlicensed full or partial translation and commercial exploitation, except in the cases stipulated.

3.1.2. The moral element in the crime of counterfeiting:

The moral element in the crime of imitation has been the subject of great disagreement among jurists. Some of them stipulated bad faith for the crime of counterfeiting to occur, and some of them were satisfied with verifying the effect of misleading consumers to say that the crime occurred²³. Whatever the case may be, the condition for the crime of counterfeiting is the bad faith of the perpetrator or the extreme negligence of the counterfeiter simply because he committed the physical act of counterfeiting, which is considered sufficient evidence of his intention to deceive and imitate. The assessment of these matters rests with the judge of the matter.”²⁴ However, Article 61 of the TRIPS Agreement added a noteworthy provision that: “member countries are obligated to impose the application of criminal procedures and penalties, at least in cases of intentional counterfeiting of registered trademarks or plagiarism of copyright on a commercial scale. We note here that it was stated in Article 61 of the TRIPS Agreement: “At least intentional counterfeiting...” meaning that there is unintentional counterfeiting and it falls within the scope of application of the TRIPS Agreement. This is in fact a major expansion of the concept of counterfeiting that clearly reflects the desire of states to deter counterfeiting in all its forms in order to reduce the catastrophic consequences that it will cause since that this phenomenon affects the global economy, human health, and the environment as well.

3.2 Penalties for the Crime of Counterfeiting:

The Algerian legislator, through Article 153 of Order 03/05 dated 07/19/2003 relating to copyright and related rights, specified a number of penalties for the counterfeiter, whether the publication was published in Algeria or abroad, including original penalties, which are:

- Imprisonment from six months to three years.
- A fine of five hundred thousand to one million dinars.

In addition to consequential penalties related to the disposal of counterfeit goods, this takes several forms specified by Article 46 of the TRIPS Agreement, which are:

- Disposal of goods without compensation following Article 46 of the TRIPS Agreement which established an effective deterrent to infringement, judicial authorities may order the disposal of goods that they find to constitute infringement, without any kind of compensation outside commercial channels to ensure that harm to the right holder is avoided.”

-Destruction of goods, taking into account the constitutional provisions of the country that may refuse to apply this penalty.

-Disposal of materials and equipment that are mainly used in the manufacture of infringing goods without any kind of compensation following Article 46 of the TRIPS” ...The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements. In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account” to minimize the risk of further infringement. It is not enough to just get rid of the goods that constitute a violation of intellectual rights, the penalty here is increased to include the materials and equipment that were used in the attack, such as typewriters, printers, cameras, recording devices, and industrial equipment, by any means by confiscating them or even selling them at public auction, and all of this without the owners obtaining permission. These tools and equipment are not subject to any compensation, and this strict measure aims to minimize the risk of further violations and subsequent infringements²⁵.

Article 46 of the TRIPS Agreement added a provision relating to counterfeit goods: “...In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other

than in exceptional cases, to permit release of the goods into the channels of commerce.” Therefore; for these goods, it’s not sufficient to simply remove the trademark affixed to them to release the goods except in exceptional cases. However, we find here that the article did not specify the procedure to be taken in this case, since removing the counterfeit marks affixed to them is not sufficient to release the goods, nor did it specify what are the exceptional cases in which goods may be sold. This ruling regarding counterfeit goods is extremely vague.

Conclusion:

We conclude that the TRIPS Agreement has tried to provide the greatest amount of judicial guarantees, on the one hand, to protect the rights of the affected person from all attacks on intellectual property rights, especially recent ones, and on the other hand, to deter any attack on works that today have huge economic value, so through our study, we reached the following results:

- The TRIPS Agreement at the international level is a stand-alone legal system in its organization and protection of intellectual property rights related to trade, as it not only stipulates the rights but also clarifies the violations that are exposed to them due to unfair competition, counterfeiting, and the protection imposed on it.

- The agreement neglected to precisely define attacks on intellectual property rights, which may lead to a difference in concepts between countries and thus a difference in the application of its provisions from one country to another.

- Many of the texts contained therein were often characterized by inaccuracy and clarity, which may open the door to violations and thus impunity.

- The practical reality has proven that developing and least developed countries remain a fertile market for unfair competitive practices and attacks on intellectual property rights due to their inability to keep pace with technological development, and the TRIPS Agreement did not provide sufficient guarantee to provide effective protection for them.

Therefore, to address these shortcomings, we present some suggestions that may fill the legal loopholes known by the TRIPS Agreement:

- _ Legal texts, whether contained in the TRIPS Agreement or intellectual property laws, must be amended accordingly with rapid technological developments.

_The necessity of taking precautionary measures that narrow the scope for compromising works, such as encryption, adopting oblivious techniques, and electronic signature of the digital work, and establishing effective protection mechanisms and devices to combat electronic crime in all its forms.

_The greatest amount of protection must be provided by activating the role of the national judiciary, whether by deterring practices of unfair competition, imitation, piracy, and all information crimes against digital works.

Bibliography List:

1. المراجع باللغة العربية:

الكتب:

-د/ الخصاونة أحمد علي، الأحكام القانونية للمنافسة غير المشروعة و الأسرار التجارية ، دراسة مقارنة ، ط 1 ، دار وائل للنشر، 2015.

-د/ اللهبي حميد محمد علي، الحماية القانونية لحقوق الملكية الفكرية في إطار منظمة التجارة العالمية ، ط 1، المركز القومي للإصدارات القانونية، 2011.

-عفيفي عفيفي كمال، جرائم الكمبيوتر و حقوق المؤلف و المصنفات الفنية و دور الشرطة و القانون، منشورات حلب الحقوقية، 2003.

- الجنبيهي منير محمد، الجنبيهي ممدوح محمد، أمن المعلومات الإلكترونية ، درا الفكر الجامعي، جمهورية مصر العربية. مازوني كوثر الشبكة الرقمية وعلاقتها بالملكية الفكرية، دار هومة للطباعة والنشر والتوزيع، الجزائر، 2008.

-د/ عبد الصادق محمد مصطفى، الحماية القانونية للعلامات التجارية إقليميا ودوليا، ط 1، دار الفكر والقانون للنشر والتوزيع، 2011.

23_د/ طه مصطفى كمال، القانون التجاري مقدمة الأعمال التجارية والتجار الشركات التجارية الملكية التجارية والصناعية، منشأة المعارف، الإسكندرية جمهورية مصر العربية.

الأطروحات:

-بوقميحة نجية، المنافسة غير المشروعة في ميدان الملكية الفكرية ، رسالة دكتوراه ، جامعة الجزائر1، كلية الحقوق ، 2013 ، 2014.

المقالات:

شعران فاطمة، حماية المصنفات الرقمية في التشريع الجزائري والتشريعات المقارنة ، مجلة الدراسات القانونية المقارنة ، جامعة حسنية بن بوعلي بالشلف، المجلد 2 ، العدد 3 ، ديسمبر 2016.

2. باللغة الأجنبية:

Books

-Malaurie-Vignal Marie, Droit de la concurrence interne et communautaire, Edition Sirey, 2008.

-Burst Jean-Jacques, concurrence déloyale et parasitisme, Édition Dalloz, 1993.

Thesis and dissertations:

-Passa Jérôme, Articulation entre l'action en contrefaçon et l'action en concurrence déloyale, thèse pour le doctorat en droit, Université Panthéon Assas Paris2, 1995.

Conference paper:

Clift M. Charles, Comité consultatif du WIPO sur l'application des droits, Septième session, Genève, 30 novembre – 1^{er} décembre 2011.

Legal documents:

The TRIPS agreement.

References:

¹Malaurie-Vignal Marie, Droit de la concurrence interne et communautaire, Edition Sirey, 2008, p 162.

² « La cour de cassation en France rappelle que : l'action en concurrence déloyale a pour objet d'assurer la protection de celui qui ne peut se prévaloir d'un droit privatif L'action en concurrence déloyale exige une faute alors que l'action en contrefaçon concerne l'atteinte à un droit privatif... » Ibid, p 162.

³ according to the text of Article 34, paragraph 1, of the TRIPS Agreement.

⁴ Jean-Jacques Burst, concurrence déloyale et parasitisme, Edition Dalloz, 1993, p. 17.

⁵نجيبة بوقميحة، المنافسة غير المشروعة في ميدان الملكية الفكرية، رسالة دكتوراه، جامعة الجزائر 1، كلية الحقوق ، 2013 .

2014، ص 230.

6/د/ أحمد علي الخصاصونة، الأحكام القانونية للمنافسة غير المشروعة والأسرار التجارية، دراسة مقارنة، ط 1، دار وائل للنشر،

2015، ص 184.

7/د/ أحمد علي الخصاصونة، المرجع السابق، ص 186.

8 نجيبة بوقميحة، المرجع السابق، ص 230.

9/د/ حميد محمد علي اللهبي، الحماية القانونية لحقوق الملكية الفكرية في إطار منظمة التجارة العالمية ، ط 1، المركز القومي

للإصدارات القانونية، 2011، ص 545 .

¹⁰ Jean-Jacques Burst, op –cit , p 207

¹¹ Jérôme Passa, Articulation entre l'action en contrefaçon et l'action en concurrence déloyale, thèse pour le doctorat en droit, Université Panthéon Assas Paris2, 1995, p385.

¹² نجيبة بوقميحة، المرجع السابق، ص 245.

¹³ د/ حميد محمد اللهي ، المرجع السابق، ص 549 .

¹⁴ we notice that the text in Arabic was not accurate as it stated: "Inflicting damages that are difficult to compensate for on the right holder," which means that at first glance it is understood that damages are difficult to compensate and replace on the right holder. It would be more correct if the wording of the article was as follows: "Inflicting damages on the right holder." "It is difficult to replace it", which corresponds to the text in French and is an original text :

« ...est de nature à causer un préjudice irréparable au détenteur du droit ... »

¹⁵ Stipulated in paragraph 4 of Article 50 of the TRIPS Agreement: "When temporary measures are taken without the knowledge of the other party, the affected parties shall be notified as a result of this without delay, at the latest, after the implementation of the measures. A review shall be conducted, upon the defendant's request, of the measures taken regarding Amend, cancel or confirm these measures."

¹⁶ Clift M. Charles, Comité consultatif du WIPO sur l'application des droits, Septième session, Genève, 30 novembre – 1^{er} décembre 2011, p 5 .

¹⁷ كمال عفيفي عفيفي ، جرائم الكمبيوتر و حقوق المؤلف و المصنفات الفنية و دور الشرطة و القانون، منشورات حلب الحقوقية، 2003، ص 95.

¹⁸ منير محمد الجنيهي ، ممدوح محمد الجنيهي ، أمن المعلومات الإلكترونية ، درا الفكر الجامعي ، جمهورية مصر العربية ، ص 22.

¹⁹ مازوني كوثر الشبكة الرقمية و علاقتها بالملكية الفكرية، دار هومة للطباعة والنشر والتوزيع، الجزائر، 2008، ص 254 .

²⁰ د/ عبد الصادق محمد مصطفى، الحماية القانونية للعلامات التجارية إقليمية ودولياً، ط 1، دار الفكر والقانون للنشر والتوزيع، 2011، ص 332.

²¹ د/ طه مصطفى كمال، القانون التجاري مقدمة الأعمال التجارية و التجار الشركات التجارية الملكية التجارية والصناعية، منشأة المعارف ، الإسكندرية جمهورية مصر العربية ، ص 589 .

²² مازوني، كوثر، المرجع السابق، ص 254 .

²³ د/ عبد الصادق، محمد مصطفى، المرجع السابق، ص 335 إلى 341.

²⁴ فاطمة شرعان ، حماية المصنفات الرقمية في التشريع الجزائري والتشريعات المقارنة ، مجلة الدراسات القانونية المقارنة ، جامعة حسبية بن بوعلوي بالشلف، المجلد 2 ، العدد 3 ، ديسمبر 2016، ص 120 .

²⁵ د/ حميد محمد علي اللهي ، المرجع السابق، ص 550 .