

Strengthening Intellectual Property Rights at the National and International Levels under Criminal Legislation

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Abstract

Most national legislations, as well as international law, have addressed the protection of intellectual property against piracy, counterfeiting, and forgery since the nineteenth century. National and international legal systems have even resorted to criminal policy in this field due to its severity and its role in achieving general deterrence. However, is the application of this criminal policy suitable for the digital environment, which has become the primary platform relied upon by intellectual property owners to disseminate their electronic works? If criminal policy is indeed applicable to the protection of digital works in the digital environment characterized by complexity and by technologies intrinsically linked to intellectual property what is the legal nature of criminal protection for digital works in the digital environment, what is the scope of its intervention, and to what extent is it effective in strengthening the protection of intellectual property rights in the digital environment? These are the issues examined in this article entitled: Strengthening Intellectual Property Rights at the National and International Levels under Criminal Legislation.

Keywords: protection, crime, urgency, digitization, works

Introduction

There is no doubt that protecting intellectual property against infringement through imitation, counterfeiting, forgery, and piracy is a legitimate legal demand of intellectual property owners, who have persevered in creating modern technologies across various fields of human life. The true value of providing legal protection for intellectual property lies in ensuring the continued production and development of technology in a manner that serves contemporary human needs and promotes the sustainable development of states.

In view of this objective, countries producing intellectual property have devoted considerable attention to establishing legal frameworks capable of ensuring its protection at both the international and national levels through numerous international agreements. This process began in 1883 with the Paris Convention for the Protection of Industrial Property, followed by the Berne Convention for the Protection of Literary and Artistic Works in 1886. The purpose of these conventions was to unify the legal framework governing the protection of intellectual property, an area in which national legislations differed, making it difficult to achieve effective protection when intellectual creations crossed national borders.

These conventions remained in force despite their inability to address all the legal issues arising in relation to the protection of intellectual property rights worldwide. Consequently, international agreements continued to evolve until the adoption of the TRIPS Agreement by the international community under the auspices of the World Trade Organization, as a compromise solution intended to satisfy both intellectual property-producing and intellectual property-consuming countries.

However, the development of communication technologies and the emergence of the digital environment, which has become an integral part of human activity, encouraged intellectual property owners to enter this domain and make their intellectual products available through it in order to promote them more rapidly and increase sales. This development gave rise to the issue of how to protect intellectual property, regardless of its type whether intended for scientific research, industrial and pharmaceutical production, or technological innovation within the digital environment, which is characterized by technological complexity and it'self embodies intellectual property whose owners seek to protect and exclusively exploit it.

On this basis, I have chosen to examine the topic of Strengthening Intellectual Property Rights at the National and International Levels under Criminal Legislation, in light of the legal issues it raises regarding the effectiveness of criminal protection in safeguarding intellectual property rights in the digital environment, particularly given the difficulties of identifying compromised fake accounts and the complexities of criminal investigations in the digital world.

Accordingly, the following questions arise: To what extent can criminal policy be applied to the digital environment, which has become the principal platform through which intellectual property owners disseminate their electronic works? If criminal policy is applicable to the protection of digital works in the digital environment, characterized by its complexity and by technologies fundamentally linked to intellectual property, what is the legal nature of criminal protection for digital works in the digital environment? What is the scope of its application? And to what extent is it effective in strengthening the protection of intellectual property rights in the digital environment?

These issues are examined in this paper by adopting the inductive-deductive approach, which enables the researcher to move from the particular to the general, while also relying on the analytical approach, which facilitates the analysis of the legal framework governing the protection of digital works at both the international and national levels and the derivation of scientific conclusions. The study is organized according to the following structure:

Section One: The Conceptual Framework of Digital Works and Intellectual Property Rights in National and International Legislation

First: The Concept of Digital Works

Second: The Concept of Intellectual Property Rights

Section Two: The Approach of Criminal Legislation in Strengthening Intellectual Property Rights at the National and International Levels

First: Substantive Criminal Protection of Digital Works and Its Role in Strengthening Intellectual Property Rights

Second: Procedural Criminal Protection of Digital Works and Its Impact on Strengthening Intellectual Property Rights

Conclusion

Section One: The Conceptual Framework of Digital Works and Intellectual Property Rights in National and International Legislation

The electronic world, which initially emerged with computers operating through electronic programs based on the binary system (0–1), has witnessed rapid development. The electronic dimension has evolved into the digital dimension with the emergence of the PDF format and new application software relying on digital storage systems rather than the binary electronic system (0–1). In light of this development, authors have increasingly chosen to present their works through digital platforms, which raises the question of what is meant by digital works and the extent to which they are connected to intellectual property rights. These issues are examined as follows.

First: The Concept of Digital Works

According to legal doctrine, a work is defined as a creation of the human mind.¹ It refers to every original literary, artistic, or scientific creation, regardless of its type, the manner in which it is expressed, its significance, or the purpose for which it was created.²

Under the Berne Convention for the Protection of Literary and Artistic Works of 1886, a work is defined as: "Every production in the literary, scientific, and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings, lectures, addresses, sermons, and other works of the same nature."

The term also encompasses dramatic and musical dramatic works;³ choreographic works and pantomimes; musical compositions, whether or not accompanied by words; cinematographic works, as well as works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving, and lithography; photographic works, as well as works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches, and three-dimensional works relating to geography, topography, architecture, or science.

Accordingly, a work may originally exist in printed form, in electronic form based on the binary system (0–1), or in digital form operating under the digital system.

Digitization, on the other hand, is the technical process that enables information to be transferred from the tangible physical domain or from the electronic domain based on the binary system (0–1) into a digitally encoded format that is processed through a computerized device equipped with digital application software.

¹ See: Abdel Razzaq Al-Sanhuri, *Al-Wasit fi Sharh al-Qanun al-Madani* (The Intermediate Treatise on Civil Law), Vol. 8, Beirut, publisher not specified, 2000, p. 100.

² See: Ammar Abbas Al-Husseini, "The Concept of Digital Works," article published at: <https://www.uomus.edu.iq/n>. Accessed on 11 September 2023 at 17:15.

³ See: Article 2(1) of the Berne Convention for the Protection of Literary and Artistic Works, dated 24 July 1971, as amended on 28 September 1989, available at: <https://www.wipo.int>. Accessed on 14 September 2023 at 17:02.

In this regard, digital works have been defined as creative intellectual works belonging to the information technology environment.¹

They have also been defined as the digital form of works without any alteration or modification of the original version, whereby a traditional written work is transferred to a digital technological medium using a scanner, or a traditional written work is initially created in digital form using PDF software.²

Another definition describes digital works as intellectual productions that are disseminated through a digital medium.³

The researcher may define digital works as: literary, artistic, or scientific intellectual works characterized by novelty and originality, transferred through an electronic medium to a computerized device containing an electronic database, electronic mail, and multimedia, as well as digital application software known as digital technology, which facilitates the easy and rapid dissemination of these literary, artistic, and scientific works among readers and users of such creative works.

Accordingly, there is a fundamental distinction between electronic software, which operates on the binary system (0–1) the most common examples being Microsoft Word, Microsoft Excel, WhatsApp, and Facebook and digital software, which represents a more advanced stage of technological development based on the digital environment. Examples include the PDF system and other digital applications such as ZIP, CamScanner, and WinRAR.

From the foregoing, it is evident that digital works are recorded on digital media and disseminated digitally, unlike traditional works, which are circulated in printed form. This constitutes the principal distinction between the traditional work and the digital work that is the subject of this paper. The latter has received legislative protection at the international level through numerous international agreements, including the European Patent Convention, whose Article 52 grants patent protection to inventions relating to the use of computer programs.⁴ It has also been afforded legislative protection under national legal systems.

In this regard, the following question arises: What is the relationship between digital works and intellectual property rights? This issue will be clarified in the following section after defining intellectual property rights.

Second: The Concept of Intellectual Property Rights

Intellectual property rights have been defined as rights granted by law over intellectual creations, such as inventions, literary and artistic works, as well as designs, symbols, names, images, and trademarks used by commercial enterprises and companies.⁵

¹ See: Mohamed Ahmed Hatta, "The Concept of the Digital Work," article published at: www.arablaw.org. Accessed on 12 September 2023 at 20:06.

² See: Malika Atoui, Legal Protection of Intellectual Property Rights over the Internet, Ph.D. Dissertation in Information and Communication Sciences, University of Algiers 3, Academic Year 2009–2010, p. 118.

³ See: Mahmoud Ibrahim Al-Wali, Intellectual Property Rights in Algerian Legislation, Office of University Publications, Algiers, 1983, p. 114.

⁴ See: Abdul Rahman Jamil Mahmoud Hussein, Legal Protection of Computer Programs, Master's Thesis in Private Law, An-Najah National University, Palestine, 2008, p. 24.

⁵ See: Article published at: <https://www.itu.int>. Accessed on 12 September 2023 at 12:45.

They have also been defined as intangible property rights that encompass ideas and other non-material creations.¹

Intellectual property rights have also been defined as a legal authority granted by law to an individual over all products of his or her intellect and thought, in return for financial rights enjoyed for a specified period without dispute or interference from others.²

Intellectual property rights may also be defined as legal entitlements and privileges enjoyed by an author or inventor over an intellectual creation characterized by originality and novelty, regardless of whether that creation is presented in a traditional, electronic, or digital form.

Since digital works are intellectual creations characterized by originality and novelty, they are undoubtedly subject to and benefit from intellectual property rights. Their owners enjoy the same protection provided under national copyright and related rights legislation, as well as the international protection established under relevant international conventions.

Accordingly, when the Algerian legislator enacted Ordinance No. 03–05 on Copyright and Related Rights, it employed the term "work" to encompass all forms and categories of literary, artistic, and scientific works, whether traditional, electronic, or digital.

Section Two: The Approach of Criminal Legislation in Strengthening Intellectual Property Rights at the National and International Levels

In compliance with the provisions of the Berne Convention for the Protection of Literary and Artistic Works, together with its various amendments and supplementary protocols ratified by Algeria, particularly Article 36, which provides that:

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 shall be in a position, under its domestic law, to give effect to the provisions of this Convention."

and Article 19 of the same Convention, which provides that:

"The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection granted by legislation in a country of the Union."

the Algerian legislator has afforded works in general, including digital works, substantive criminal protection by defining the types of offences that may be committed against digital works and prescribing the corresponding penalties, over which the criminal courts have jurisdiction. Furthermore, the Algerian legislator has provided procedural criminal protection for works in general, including digital works, through the provisions of the Code of Criminal Procedure.

The question therefore arises as to whether these two forms of protection contribute to strengthening intellectual property rights, which constitute the ultimate objective of such protection. This issue is examined below.

¹ See: Louis Hams, *The Ruins of Intellectual Property Rights*, World Intellectual Property Organization (WIPO), country not specified, 3rd ed., 2012, p. 10.

² See: Wali Abdel Latif and Salmi Miloud, "Criminal Protection of Trademarks under Algerian Law," article published in the *Journal of Legal and Political Studies*, University of Laghouat, issue not specified, 2018, p. 177.

First: Substantive Criminal Protection of Digital Works and Its Role in Strengthening Intellectual Property Rights

Legal doctrine has defined the offence of counterfeiting a work in general as the reproduction of a work that has not entered the public domain without the authorization of its owner.

It has also been defined as the offence of publishing a work, or importing or exporting it from its country of origin, without the permission of its owner.¹

The Algerian legislator's concern for the substantive criminal protection of digital works is reflected in Ordinance No. 03–05 on Copyright and Related Rights, under the offence of counterfeiting, specifically in Articles 151 and 152.² Through these provisions, the legislator defines the offence of counterfeiting a work in general, including digital works, as the unlawful disclosure of the content of a work by reproducing and disseminating it without the authorization of its owner; the importation, exportation, sale, rental, or circulation of counterfeit copies; and any infringement of the integrity of a digital work or its communication through an information processing system, such as compromising its encryption system through piracy.

Article 153 of the same Ordinance prescribes the penalties for the offence of counterfeiting a work, namely imprisonment for a period ranging from six months to three years and a fine ranging from 500,000 Algerian dinars to 1,000,000 Algerian dinars, regardless of whether the publication occurred within Algeria or abroad.

Article 154 of the same Ordinance further sets out detailed provisions concerning accomplices to the offence of counterfeiting, providing that an accomplice shall be subject to the same penalty as the principal offender where he or she contributes, through an act or by means under his or her control, to the infringement of the rights of the author or of any holder of related rights.

Article 155 of the aforementioned Ordinance provides that any person who intentionally refuses to pay remuneration due to an author or to the holder of related rights shall be punished with the same penalty prescribed for the offence of counterfeiting. In the event of recidivism, the penalty shall be increased in accordance with the provisions of Article 156 of the same Ordinance.

The competent judicial authority may also order the temporary or permanent closure of the establishment used by the counterfeiter or his accomplice to commit the offence of counterfeiting. It may further order the confiscation of financial sums equivalent to the revenues generated from the unlawful exploitation of the protected work. In addition, the judicial authority is empowered to destroy all equipment specifically designed for the unlawful exploitation of the protected work, as well as all counterfeit copies, in accordance with Article 157 of the same Ordinance.

From the foregoing, it is evident that the Algerian legislator has established substantive criminal protection for works, regardless of their nature, including digital works, under the general designation of the offence of counterfeiting, which encompasses every form of unlawful

¹ See: Abdul Rahman Khalfi, "Legal Protection of Digital Works (A Study in Algerian and Comparative Legislation)," article published at: <https://www.asjp.cerist.dz>. Accessed on 11 September 2023 at 16:54.

² Ordinance No. 03–05 on Copyright and Related Rights, dated 19 July 2003, published in the Official Gazette, No. 44, 2003, p. 3.

infringement of a protected work, whether through counterfeiting in its narrow sense, forgery, or alteration.

However, a legal analysis of the constituent elements of the offence of counterfeiting digital works reveals that the material element (*actus reus*) consists of both a positive and a negative aspect. The positive aspect is manifested in engaging in acts prohibited by law, such as counterfeiting a work, selling, renting, or pledging it, or circumventing its encryption system through piracy. The negative aspect consists of refraining from performing an act required by law, namely obtaining the authorization of the intellectual property rights holder before exploiting the work.

It is also evident that the Algerian legislator has broadened the concept of counterfeiting. It is not limited to the mere reproduction of the original work but also extends to altering the content of the work, circumventing its encryption system through piracy, and refusing to pay royalties to the author or the holder of related rights, the latter being expressly treated as part of the offence of counterfeiting.

In this regard, some scholars argue that the Algerian legislator has provided criminal protection for digital works not only against direct counterfeiting, but also against offences analogous to counterfeiting, including dealing in counterfeit digital works through importation, exportation, circulation, rental, or sale, in addition to the offence of refusing to pay royalties to the rights holder. This demonstrates that the Algerian legislator has expanded the scope of substantive criminal protection to cover digital works both within and outside the national territory, unlike certain comparative legislations that confine such protection to works exploited within their national borders.¹

With regard to the mental element (*mens rea*) of the offence of counterfeiting digital works, the Algerian legislator requires proof that the infringement occurred without the knowledge or consent of the victim, namely the owner of the protected work, in order for criminal liability to arise. Accordingly, it falls upon the criminal judge to determine whether the offender possessed the intent to infringe the protected work without the authorization or permission of its owner. By reference to the Berne Convention for the Protection of Literary and Artistic Works, Article 16 provides as follows:

1. All infringing copies of a work shall be liable to seizure in any country of the Union where the original work enjoys legal protection.
2. The provisions of the preceding paragraph shall also apply to reproductions coming from a country where the work is not protected or has ceased to be protected.
3. Seizure shall take place in accordance with the legislation of each country."

Accordingly, under international law, the seizure of unlawfully reproduced digital works constitutes a criminal enforcement measure in the form of confiscation.

¹ See: Radia Mechri, "Criminal Protection of Digital Works under Copyright Law," article published in the *Journal of Communication in Humanities and Social Sciences*, No. 34, 2013, p. 143. (The original text states "3013," which appears to be a typographical error.)

Second: Procedural Criminal Protection of Digital Works and Its Impact on Strengthening Intellectual Property Rights

In addition to substantive criminal protection, digital works require procedural criminal protection. Investigating the offence of counterfeiting digital works is particularly difficult and complex for several reasons, most notably the lack of specialized training for investigating judges in digital technologies and the absence of adequate technological tools for detecting counterfeiting, encryption breaches, or other forms of infringement affecting digital works. Furthermore, identifying the offender's account and determining his or her location is often difficult, as the offender may use cyberspace as the scene of the offence without any clearly identifiable physical place of commission.

For this reason, the Algerian legislator has established special rules governing investigation, search, and seizure in cybercrime cases through Law No. 09–04 on the Special Rules for the Prevention of Offences Related to Information and Communication Technologies.¹

Since the offence of counterfeiting a digital work is regarded as a cybercrime requiring electronic investigation and inquiry, it is subject to electronic surveillance pursuant to Article 3 of the aforementioned Law, which provides:

"Without prejudice to the legal provisions guaranteeing the confidentiality of correspondence and communications, where required for the protection of public order or for the purposes of ongoing criminal investigations or judicial inquiries, and in accordance with the rules laid down in the Code of Criminal Procedure and this Law, technical arrangements may be implemented to monitor electronic communications, collect and record their content in real time, and conduct search and seizure operations within an information system."

Accordingly, the investigation of the offence of counterfeiting a digital work begins with the judicial police collecting digital evidence and preliminary information relating to the offence and submitting it to the Public Prosecutor, who then refers the matter to the investigating judge. The investigating judge decides either to relinquish jurisdiction in favor of the competent specialized criminal division or to retain the case and initiate the judicial investigation.

Once jurisdiction is transferred to the specialized criminal division, the judicial police officers operating within its territorial jurisdiction receive instructions to gather additional evidence establishing the material element (*actus reus*) of the offence of counterfeiting a digital work. The investigating judge may also extend the period of the accused's pre-trial detention, given the complexity of investigating this category of offences and the difficulty of proving their material element.

In this regard, the judicial police are entrusted with carrying out electronic searches pursuant to Article 5 of Law No. 09–04, which provides:

"The competent judicial authorities, as well as judicial police officers acting within the framework of the Code of Criminal Procedure and in the cases provided for in Article 4 above, may, for the purpose of conducting a search, gain access, including remotely, to:

- an information system or any part thereof, as well as the data stored therein;

¹ See: Law No. 09–04 on the Special Rules for the Prevention of Offences Related to Information and Communication Technologies, dated 16 August 2009, published in the Official Gazette, No. 47, 2009, p. 5.

- an information storage system.

Accordingly, judicial police officers conduct searches within the digital environment by accessing the electronic and digital data and software contained in computer systems. Such searches must be carried out while ensuring the protection of the stored data and preventing its destruction. They may also seek the assistance of an electronic expert witness, namely a person with expertise in computer systems and digital technologies, who can assist in determining whether information has been transferred from one system to another, deleted, or removed, as well as identifying the date on which such operations occurred. Assistance may likewise be sought from specialists in digital software, digital systems, and their analysis.

Where the authority conducting the search discovers stored data within an information system that may be useful in identifying the offence or its perpetrator, and where seizure of the entire information system is unnecessary, the relevant data, together with any data necessary for its interpretation, shall be copied onto an electronic storage medium capable of being seized.¹

In addition to the foregoing, within the framework of ongoing investigations and judicial inquiries, international information may be exchanged for the purpose of detecting offences committed electronically, including the offence of counterfeiting digital works.²

Requests for mutual legal assistance aimed at the exchange of international information are also executed in accordance with bilateral international agreements and the principle of reciprocity, pursuant to Article 17 of Law No. 09–04 mentioned above. This indicates that the Algerian legislator permits, in the context of investigating and searching for offences affecting information systems and electronic and digital crimes committed through such systems, the exchange of information at the international level, provided that national public order is respected and the security of the State is not compromised.

From the foregoing, it is evident that the procedural criminal measures established by the Algerian legislator under Law No. 09–04 on the Special Rules for the Prevention and Combating of Offences Related to Information and Communication Technologies, for the prosecution of perpetrators of electronic and digital crimes, including offences involving the infringement of the intellectual property rights of owners of digital works, introduce new legal provisions that are consistent with the particular nature of offences committed against digital works. These provisions require specialized electronic search procedures supported by electronic safeguards and assisted by experts proficient in electronic and digital systems. Likewise, the seizure of digital data is carried out with the assistance of technical experts, who provide the criminal judge with the necessary evidence and preserve it using specialized technical application software.

Conclusion

Following this study on "The Criminal Protection of Digital Works and Its Importance in Strengthening Intellectual Property Rights at the National and International Levels," the following findings and recommendations were reached:

¹ See: Article 6 of Law No. 09–04, cited above.

² See: Article 16 of Law No. 09–04, cited above.

Findings

- The Algerian legislator has not clarified the distinction between digital works, which belong to the digital environment and rely on advanced and sophisticated application software with their own encryption systems, and electronic works operating under the binary system (0–1), as well as traditional printed works.
- Under Ordinance No. 03–05 on Copyright and Related Rights, the Algerian legislator has not established specific provisions governing digital works in light of the complexity of their material element. Instead, digital works are subject to the same provisions applicable to the offence of counterfeiting traditional printed works.
- In establishing a system of criminal protection for works in general, including digital works, the Algerian legislator has extended such protection to infringements committed both within and outside the national territory, without addressing the extent to which international cooperation in investigation, criminal inquiry, and assistance from INTERPOL may be required.
- The absence of intrusion detection systems, owing to their own protection under intellectual property rights, makes it difficult for national judges to establish evidence of guilt in cases involving the counterfeiting of digital works, due to the lack of technological means for proving the material element of this transnational offence.

Recommendations

- Amend Ordinance No. 03–05 on Copyright and Related Rights to better accommodate the requirements of the digital environment by introducing specific provisions governing the criminal protection of digital works, particularly since infringements may occur through the circumvention of encryption systems.
- Establish international cooperation in the criminal enforcement of offences involving the infringement of digital works and promote the use of advanced technologies in this field. The international community should seriously consider requiring electronic service providers and platform operators to strengthen the technical protection of digital works and facilitate the transfer of protection technologies to consumer countries, thereby enabling national criminal judges to obtain the electronic evidence necessary to establish the material element of the offence of counterfeiting digital works.
- Provide specialized training for national investigating judges on the characteristics of the digital environment, enabling them to employ appropriate methods of investigation and criminal inquiry in this field.
- Establish a panel of court-appointed experts within criminal courts composed of engineers specializing in digital technologies to assist trial judges in identifying and proving the material element of the offence of counterfeiting digital works.
- It is recommended that investigations into offences involving digital works be conducted in cooperation with INTERPOL in order to facilitate the collection of material evidence from the countries where the infringement or counterfeiting has occurred.

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