

**The judicial assumption of criminal intent
in the crime of imitation of mental works
(Critical analytical study of the French
judiciary's position)**

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Abstract:

This study aimed to emphasize that a judicial ruling convicting a person for imitating intellectual works must be based on sufficient evidence to prove criminal intent. It should not be presumed for anyone who merely engages in the material act of imitating intellectual works, as such a presumption conflicts with the principle that a person is presumed innocent and acting in good faith. Moreover, the defendant accused of the crime of imitation, who claims good faith to counter this presumption without being based on justified reasons, usually fails to prove it. This is due to the inflexible stance of the French judiciary on the qualifying facts necessary to prove good faith. This issue mirrors the problem addressed in this study, which needed to be tackled by understanding the substance of this presumption and its consequences through an analytical study. This study critically examines the French judiciary's position on presuming criminal intent in those who imitate intellectual works.

Hence, this study concluded that the French judiciary's presumption has faced significant criticism from legal scholars. The main issue is that this presumption overturns the general

rule of evidence, which holds that a person is presumed innocent and acts in good faith in their behavior. Moreover, it opens the door to inferring criminal intent merely based on the material element of the crime of imitation. Consequently, imitation could be treated as a crime of negligence rather than an intentional crime. So, this situation entails the danger of issuing unjustified convictions. Researchers believe that the knowledge required by law—as one of the two elements of criminal intent—to convict the defendant of imitation is certain knowledge, which cannot be presumed. A fundamental consequence of the presumption of the defendant's innocence is that anyone who claims otherwise must provide evidence to support their claim. When a defendant asserts good faith, the trial court must seek to establish criminal intent through its two elements (knowledge and will), rather than resorting to presumption. Resorting to presumption constitutes an infringement on personal liberties guaranteed by the constitution.

Keywords: Moral Element of The Crime, Criminal Intent, Assumption of Criminal Intent, Malice Aforethought, Crime of Imitating Mental Works.

الافتراض القضائي للقصد الجنائي في جريمة تقليد المصنفات الذهنية (دراسة تحليلية نقدية لموقف القضاء الفرنسي)

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ملخص البحث

تقليد المصنفات الذهنية جريمة قصدية، وقد وضع القضاء الفرنسي -خارجاً عن الأصل العام- قرينة على توافر هذا القصد بسلوك مادي معين، فيكون هذا القصد مفترضا في حق كل من يأتي هذا السلوك دون حاجة جهة الاتهام الى إقامة الدليل على وجوده، من هنا كانت الآثار المترتبة على التمسك بهذه القرينة تثير إشكالات من طبيعة نظرية وعملية في آن واحد، والمتهم بجريمة التقليد الذي يدفع بحسن نيته للتخلص من هذه القرينة- دون أن يكون مستندا إلى أسباب مبررة - يعجز عادة عن هذا الإثبات؛ وذلك للموقف المتشدد الذي اتخذه القضاء الفرنسي من الوقائع المؤهلة لإثبات حسن النية.

الكلمات المفتاحية: الركن المعنوي للجريمة، القصد الجنائي، افتراض القصد الجنائي، سوء النية، جريمة تقليد المصنفات الذهنية.

- Introduction

If the general rule in crimes is that they are intentional, and the exception is that they are unintentional, then in criminal law, the principle has settled that if the law remains silent on stating the image of the mental element in a crime, it means that criminal intent is required therein. However, if recklessness suffices, then it is necessary to disclose it¹. Adhering to the principle does not require an explicit statement, but departing from it does. It is prevalent in jurisprudence that imitation of mental works is a crime where the mental element takes the form of criminal intent. Therefore, it was necessary for the judgment of conviction to demonstrate criminal intent - with its elements of knowledge and will - and to prove its presence in the imitator with sufficient evidence, otherwise the judgment would be defective². However, the French judiciary has established a presumption of criminal intent based on specific behavior, meaning that this intent is presumed against anyone engaging in this behavior without the **need for the prosecution** to establish evidence of its existence³.

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- (1) Ahmed Awad Bilal, **Principles of the Penal Code - General Section**, Dar Al-Nahda Al-Arabiya, Cairo, 2004-2005, p. 692.
 - (2) Hilali Abdullah Ahmed, **Budapest Convention on Combating Cybercrimes, Commentary on it**, 2007, p. 136. Raouf Obaid, **Principles of the General Section of Punitive Legislation**, fourth edition, Dar Al-Fikr Al-Arabi, Cairo, 1979, p. 345.
 - (3) Ahmed Awad Bilal, **the objective doctrine and the diminishment of the moral element of crime (Comparative Study)**, Dar Al-Nahda Al-Arabiya, Cairo, 1988, pp. 226 et seq.

- **Study problem and its importance**

- The consequences of adhering to the presumption of criminal intent in cases of imitation of mental works raise theoretical and practical issues simultaneously. Theoretically, this presumption tends to categorize imitation of works as a crime of mere negligence rather than an intentional crime. This undermines the balance of justice because it equates intentional wrongdoers with those who act negligently, regardless of their intentions. As long as criminal intent is present, the physical act constituting the crime occurs intentionally or negligently. Practically, this presumption entails the danger of issuing unjustified conviction judgments.

- **Scope and Methodology**

The study focuses on the judicial presumption of criminal intent in the crime of imitation of mental works, specifically on the mental aspect of the crime without delving into its material aspect. This study is limited to the position of the French judiciary regarding the subject under investigation.

Researchers have adopted an analytical approach in studying this research, which poses the research problem and is supported by the critical methodology of the French judiciary's stance on the subject of study.

- **Research Plan**

In accordance with the objectives pursued by the study to address the problem raised by the subject under investigation, it is necessary to understand the content of the presumption (Chapter One), and then assess it and its resulting consequences and effects (Chapter Two).

- Content of the Presumption

Some jurists have interpreted the French legislator's omission of the mental element in Article 425-1 of the French Penal Code - which stipulates that "any reproduction of printed materials, musical compositions, drawings, paintings, or any other printed or engraved production - wholly or partially - in violation of laws and regulations relating to authors' rights is considered imitation" - to mean that this element is not essential in the legal definition of the crime of imitation. However, most jurists have reached the opposite conclusion, arguing that the provision treating imitation as a misdemeanor implies the necessity of resorting to general rules regarding the mental element of misdemeanors. These rules require this element, which takes the form of criminal intent.

While the French judiciary acknowledges the presumption of criminal intent in its judgments - without legislative basis but rather based on the judge's conviction¹, it has not clarified its foundation. It is limited in attributing this to the imitator, stating that "whoever imitates materially does so intentionally,"² basing this on the logical assumption that it is acceptable to presume initially that an imitator

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- (1) Abdel Hafeez Belqadi, *The Concept of Copyright and the Limits of Its Criminal Protection (A Critical Analytical Study)*, first edition, Dar Al-Aman, Rabat, 1997, pp. 541 et seq.
 - (2) Cassation Criminal, 15 May 1934, *Rescue Hebdomadaire*, Dalloz 1934, p350.

knows that their activity entails malice¹. This is supported by the fact that imitation, in its legal connotation, implies that strong resemblances between works lead to the belief in the malicious intent of the second actor. Moreover, any act allowing public access to the work, reproduction, modification - addition or deletion - or withdrawal from circulation without the author's consent logically implies that the individual performing any of these actions is aware that their behavior violates the author's rights and that this behavior was intentional².

Furthermore, the French judiciary has not hesitated to arrange everything necessary concerning the consequences of this presumption, regardless of their severity. The French Court of Cassation has challenged every acquittal decision based on presuming good faith as a necessary derivative of the principle of innocence for the accused, and it endorses those decisions in which the judges ensure the articulation of the material elements constituting the crime without burdening themselves with discussing the aspects upon which the presumption of criminal intent is

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- (1) **Abdel Azim Morsi Wazir, Presumption as a Basis for Criminal Responsibility, Dar Al-Nahda Al-Arabiya, Cairo, 1988, p. 27. Nabil Ahmed Al-Sayed Zuhair, Presumed Criminal Liability, PhD thesis, Faculty of Law - Cairo University, 2000, p. 84. Muhammad Abdel-Latif Abdel-Al, Physical Crimes and the Nature of Responsibility Arising from them, Dar Al-Nahda Al-Arabiya, Cairo, 1997, p. 170. Ali Abdel Qader Al-Qahwaji, Criminal Protection for Computer Programs, University House for Printing and Publishing, Alexandria, 1999, p. 44.**
- (2) **Abdelhafid Belkadi, previously mentioned reference, pp. 543 et seq.**

based.

The French Court of Cassation has consistently overturned every judicial ruling that denies the existence of the presumption of criminal intent and bases its judgment on acquitting the accused on the general principles that presume good faith. It has also upheld the judgments appealed before it as long as it became evident that the judge had indicated in their ruling the presence of criminal intent along with a description of the material behavior constituting the crime of imitation¹.

Moreover, the mentioned court accepted interpreting doubt in favor of conviction, despite its contradiction with the principle of innocence as a basis for the right to defense, arguing that insisting on demonstrating criminal intent in the crime of imitation and proving its existence by the prosecution would lead - due to the difficulty of proving the commission of the crime of imitation and attributing it to a specific defendant - to the injustice towards the interests and rights of the victims of imitation. Especially since defendants in criminal cases usually do not hesitate to deny the charges attributed to them, necessitating access to the accused's subconscious to prove it.

Therefore, efforts were made to allow the prosecution authority to indirectly prove the mental element of the crime, thereby alleviating the burden of proof from the

(1) Ahmed Awad Bilal, *The Objectivist Doctrine*, previously mentioned reference, p. 266.

prosecution¹. This is achieved by resorting to evidence that allows proving an unknown mental element through proving a known material element. What assists the judge in performing this role is what the Court of Cassation has established regarding the judge's authority to assess the facts and their escape from the scrutiny of the Supreme Court, at least as long as the judgment does not contain a contradiction or overlook indicating the facts that were assessed or fail to infer criminal intent from them in a manner inconsistent with the facts as proven.

- **The consequences of the presumption**

The French judiciary continuously repeats the phrase: "The law does not prevent the accused of imitation from proving his good faith to negate the presumption of criminal intent against him, and the judge cannot deprive him of this proof. However, the accused who relies on his good faith to dispel the presumption - without being based on justified reasons - usually fails to provide this proof." This is due to the strict stance adopted by the French judiciary regarding the facts qualifying to prove good faith. According to this judiciary, merely doubting the presence of criminal intent in the accused is not sufficient to accept his good faith. Instead, if the judge wants to acquit the accused, he must decide on

(1) **Djawar Ahmed Piramis Omar, The Problem of Proving Criminal Intent (Causes and Treatments), Journal of the University of Dohuk (Humanities and Social Sciences), Volume (22), Issue (2), 2019, pp. 96, 97.**

the absence of criminal intent¹. Therefore, practically, the accused of imitation cannot effectively refute the presumed intent against him, with the existence of the traditional theory of intent that does not consider motives as a general principle². They are not a constitutive element of the crime³. Instead, it is up to the judge - within the scope of mitigating circumstances theory - to consider the nature of the motive when assessing the punishment. Consequently, no matter 4) how noble the motive is, it does not negate the crime of imitation and ultimately does not prevent its punishment⁵. Therefore, it is not a flaw in the judgment if it does not specify it and does not diminish the value of the evidence of

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- (1) **Muhammad Abd al-Latif Abd al-Al, The Good Faith of the Defamer in Cases of Publishing News and Criticism, Dar al-Nahda al-Arabiya, Cairo, 2003, p. 4.**
 - (2) **Muhammad Eid al-Gharib, the freedom of the criminal judge to have certain convictions and its effect in reasoning for criminal rulings, 1996-1997, p. 17 et seq. Muhammad Abd al-Latif Abd al-Al, Good Faith al-Qathir, previously mentioned reference, pp. 60, 61, and material crimes and the nature of responsibility arising from them, Dar al-Nahda al-Arabiya, Cairo, 1997, p. 126.**
 - (3) **Mahmoud Naguib Hosni, The General Theory of Criminal Intent (A Comparative Study of the Moral Element in Intentional Crimes), Fourth Edition, Dar Al-Nahda Al-Arabiya, Cairo, 2004, pp. 256 et seq.**
 - (4) **Mahmoud Mahmoud Mustafa, Explanation of the Penal Code - General Section, Cairo University Press and University Book, Cairo, p. 370**
 - (5) **Fattouh Abdullah Al-Shazly, Explanation of the Penal Code - General Section, University Press House, Alexandria, 1998, p. 375.**

guilt if it overlooks stating it¹. Hence, it is not acceptable for the accused - in order to ward off the charge of imitation from him - to claim that the author has shown negligence in defending his rights or adhering to the state of necessity arising from the exhaustion of the copies of the printed mental works.

The presumption of criminal intent for the imitator of mental works has resulted in multiple consequences, including the unnecessary requirement to prove intent with its elements - will and knowledge - or to mention it in the judicial judgment of conviction. When the criminal behavior of the crime of imitation is clear, it must rule on the existence of criminal intent without refuting the presumption of its presence; otherwise, its judgment would be flawed and subject to annulment. Therefore, the implications of insisting on the presumption of criminal intent for the imitator of mental works are significant.

However, the severity of these implications varies depending on the specific context in which this presumption is applied. In French judicial practice, this presumption has been rigorously enforced, particularly in the realm of reproduction. So, -this enforcement stems from the publisher's obligation, under intellectual property law-, to verify that their contracting party is authorized to publish a work as its rightful author.

(1) **Egyptian Criminal Cassation, Appeal No. (2036) of the Judicial Year (29), Collection of Court of Cassation Rulings, Technical Office, Eleventh Year, from January to December 1960, p. 23.**

Therefore, it was logically necessary to adhere to the presumption of criminal intent if the imitation took on a tangible material form. As for the physical copier, it is not reasonable to apply the presumption of criminal intent unless it is proven that their behavior was knowingly engaging in the act committed. If this is the case, their conviction will be as an accomplice to the client who requested the unauthorized reproduction of the copyrighted work¹. Thus, the owner of the store accused of selling counterfeit works is merely a middleman completely dissociated from the production process of these works².

In this regard, the Paris Court of First Instance ruled that "sales require proof of the seller's bad faith against whom no evidence is established." However, this court convicted the reprographer in the Clermont-Ferrand³ case when defining the copier as "one who makes reproduction means of copyrighted works available to customers, thus the store cannot benefit from the private copy exception."⁴⁵

(1) Abdel Hafeez Belqadi, previously mentioned reference, pp. 545 et seq.

(2) Abdel Hafeez Belqadi, previously mentioned reference, pp. 548, 549.

(3) Tribunal de Grande Instance Paris, 20 oct 1970, *Revue Internationale du droit d'auteur* 1971, p85.

(4) The private copy is one of the most important restrictions on the author's financial right to his works, according to which a person may obtain a copy of a legally protected author without paying any financial compensation. See: Nadia Sabunji, controls of the private copy as a restriction on the author's financial rights, research published in the *Algerian Journal of Law. And Political Science*, Volume (8), Issue (1), 2023, p. 1076.

As a result of this concept, the responsibility of reprography stores for actions of copying copyrighted works using their tools and machines arises¹. Therefore, in the Laserge case, the manager of the store, which provides self-service to its customers without intervention, was convicted. Thus, any of them can copy duplicated discs². In the Rannou-graphie case, the responsibility fell on the owner of the photo shop since he possessed photography tools and devices in his store and made these tools accessible to his customers³.

Afterwards, the burden of proof shifts to the accused to refute the presumption of criminal intent⁴, especially

(5) Cour d'appel Grenoble, 1ere ch, 18 janvier 2001, Com Electr, Dalloz Juin 2001, Commercial 59, p28, Caron (C); Expertises no 248, note Bequjard (V).

(1) Ashraf Jaber Sayyid, towards a modern concept of the private copy (a comparative study in the concept of the private copy as one of the restrictions on the exclusive rights of the author and owners of related rights between digital copying means and technological protection measures), Dar Al-Nahda Al-Arabiya, Cairo, 2007, p. 77.

(2) Tribunal Correctionnel Valence, 2 juillet 1999, Com.Electr, Oct 1999, comm No5; expertises avril 1999, Revue international du droit d'auteur, janvier 2000, p348.

(3) Cour de cassation, 1ere Civil, 7 mars 1984, Revue international du droit d'auteur 3/1984, p151, Juris-classeur périodique Général 1985, II, 20351, note Plaisant.

(4) Hani Munawar, The judicial assumption of the moral element in economic criminal law, Journal of Legal and Political Sciences, Volume (10), Issue (3), December 2019, p. 157. Grace Youssef Tohme, The status of the moral element in economic crimes, Modern Book Foundation, Tripoli - Lebanon, p. 31. Ahmed Fathi

since these crimes are characterized by the difficulty of proving criminal intent on the part of the accused of imitation, and imposing this burden on the prosecution.

Conclusion:

The study on the presumptive intent in the crime of intellectual property infringement (an analytical critical study of the French judiciary's stance) has been concluded according to its methodology and outlined plan. Moreover, researchers have reached a set of conclusions, leading to recommendations aimed at resolving the issues addressed in this study, as follows:

First: Results

1. The French judiciary, without legislative text, has presumed the criminal intent of the perpetrator of intellectual property infringement, when material behavior in imitating intellectual works is evident. This presumption, justified as lightening the burden of proof for the prosecution, shifts the burden of proof to the accused to deny the presumed criminal intent. Without this presumption, penal law provisions would have no scope for application, potentially allowing some offenders to escape punishment due to the difficulty of proving criminal intent. Further this would unjustly harm the rights of victims, especially considering that criminal offenders often deny the charges against **them**. Therefore, according to the justification of the French judiciary, sacrificing some considerations of justice for the effectiveness of penal law is necessary.

2. What has aided the trial judge in assuming criminal intent in the crime of intellectual property infringement is the exemption of his authority from the oversight of the Court of Cassation as long as criminal intent is not deduced in a manner contradicting the established material facts. The stance of the Court of Cassation has leaned towards overturning any judicial verdict that denies the presumption of criminal intent and bases its judgment on acquitting the accused on the general principles that presume good faith as a derivative necessity from the principle of innocence.

3. When the accused relies on his good intentions to dispel this presumption, without being supported by justifiable reasons, he usually fails to prove his defense. This is due to the inflexible stance of the French judiciary towards the qualifying facts for accepting his defense of good faith, especially in light of the traditional theory of intent that does not consider the motive for committing the crime as a constitutive element of the offense.

Second: recommendations

1- Based on the presented results, the researchers support the jurisprudential opinion that rejects the idea of the French judiciary presuming criminal intent in the crime of intellectual property infringement. This is because it overturns the general rule of presumption of innocence and good faith in human behavior. Additionally, it opens the door, upon the presence of the material element of the offense, to infer criminal intent from it. This implies that imitation becomes a negligence offense rather than an intentional crime, leading to unjustified convictions.

2- The researchers recommend that the French judiciary bases its judgments by convicting intellectual

property infringers on sufficient evidence of criminal intent. When the accused claims good faith in imitation, the judiciary must ascertain the presence of criminal intent with its two elements (knowledge and will). Insisting on convicting the imitator without discussing this defense renders the judgment vulnerable to justifiable appeal, considering that the knowledge required by the law as one of the elements of criminal intent is certain knowledge that cannot be presumed.

3- The researchers advise the French prosecution, alleging intentional intellectual property infringement, to evaluate the evidence of the presence of this intent. Since one of the principles of the presumption of innocence is that whoever claims otherwise must provide evidence for their claim.

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