



## Indirect Trademark Infringement: Policy Considerations under US and Iranian Law

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In US trademark infringement may occur in two ways: direct and indirect. In later type, a person without committing a conduct that is subject to a trademark infringement, will conduct a behavior that, as the case may be, results in a contributory (and inducing) or vicarious liability. Given the state of technological innovation in the US, recognition of such an institution seems to be justifiable. In Iran, indirect liability is not foreseen for trademark infringement and various examples of this type of infringement are subject to general civil liability, which is reasonable in the light of the state of technological innovation in Iran. The purpose of this study is to investigate the indirect trademark liability from the point of view of its policy consideration using a descriptive-analytical method. The state of US on technology, justifies the identification and enforcement of such a liability, but considering the state of technological innovation in Iran with respect to all the conditions, including international regulations, Iran's political and economic situation in the international arena, and ..., the failure to identify the indirect liability institution caused by trademark infringement and relying on general civil liability in this area, is justified and recommended.

**Keywords:** Indirect Infringement, Trademark, Contributory Infringement, Economic Growth, Technological Innovation, Non-technological Innovation, Iranian Law, US Law, Supreme Council of the Cultural Revolution, Inwood Test, Iranian Trademark Law System

The liability for trademark infringement may be direct or indirect. Along with the objective of non-confusion, decreasing search cost and more extensive protection from trademark owners, indirect liability has established in the US Judicial System and plays an important role in Trademark System. Considering the economic and technological situation of the United States of America, this type of liability has justification because both in domestic and international arena, can secure the sustainable commercial and economic interests of the USA. Innovation is the foundation of sustainable economic development in the age of knowledge-based economy. Among other things, technological innovation and its ingredients, such as, patents and research and development costs, plays a major role in this respect but the formal technological and economic aspects of innovation have received much more attention and have been taken into account in a far greater number of analyses, despite the great importance of the non-technological dimension of innovation.<sup>1</sup> In recent decades, non-technological innovation, such as trademarks, has been taken into account in economic

growth and development. However, the role of trademarks in this respect is still complementary and it is technological innovation that determines the competitiveness of companies and governments in domestic and international trade. Home to the world's largest technology companies such as Google, Facebook, Apple, and Microsoft, the United States is a powerhouse in global technology. Silicon Valley inspired and produced an entire generation of software engineers and technology companies and is currently home to some of the world's biggest tech companies. The US has made significant advances in space technology, pharmaceuticals, and telecommunications. The US also has the largest and most technologically advanced military in the world.<sup>2</sup>

Obviously, in such a situation, the strengthening of the non-technological innovation, results in the reinforcement of technology. Because technological and non-technological innovations are highly interconnected. The results of some studies have shown that mere emphasis on technological innovation cannot lead to growth.<sup>3</sup>

With this analysis, regardless of the legal and common law foundations of trademark liability, recognizing such a liability in US, is consistent with

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the situation of technology in US and can better secure the rights and interests of this country in international trade. In contrast, Iran is not among the technologically advanced countries and, therefore, the export of technological products in this country is also low. Although, Iran as one of the developing countries that are eager for economic growth and industrialization, and understands the importance of innovation and has moved forward in recent years but in the GII 2020, Iran ranked 67<sup>th</sup> among 131 countries with a score of 30.89 out of 100. Iran has been ranked second among 10 countries in the Central and South Asian Region following India. Iran is also ranked 19<sup>th</sup> among 37<sup>th</sup> middle- and upper-income countries.<sup>4</sup> Iran is an importing country, thus, strong protection from trademark owners in the form of indirect liability, unlike US can lead to the debilitation of the country's domestic industries and strengthen the foreign products.

### **U S Law: The Concept and Types of Indirect Trademark Infringement**

In Common Law, indirect infringement, generally means committing a wrongdoing indirectly, which results in secondary liability. Indirect Trademark Liability in US Law, include contributory, inducement, and vicarious liability. It is of two types: liability based on participation and liability based on the existence of a relationship that is called contributory (or inducement) and vicarious liability, respectively. In contributory liability, indirect infringer, contributes in direct infringement by inducing unlawful act or facilitating its occurrence. According to the US Trademark System, such a conduct, is called contributory infringement, which with respect to the role of inducement in it, it can be described as an inducement of infringement. Thus, theories of secondary liability in Trademark Law arose from the Common Law of Torts, which was the wellspring of Unfair Competition Law. Contributory liability can roughly be likened to tort or criminal liability for "soliciting" and "aiding and abetting," while vicarious liability imposes on a principal responsibility for the acts of her agent or joint tortfeasor.

### **Indirect Trademark Infringement Instances**

Since vicarious liability is limited to agency relationship or the right and ability to control, the instances of contributory liability are examined here.

Contributory trademark infringement, is judge-made. The judicial procedure of US courts, containing cases which entail the imposition of liability on those who assisted the direct infringement. Those who have provided means such as product, label or packaging, have been held responsible. Inwood, The US Supreme Court stated that "[I]f a manufacturer or distributor [sic] intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributory responsible for any harm done as a result of the deceit."<sup>5</sup> The Inwood test, thus offers plaintiffs two avenues through which to establish secondary liability: (1) intentional inducement and (2) continued supply with actual or constructive knowledge of infringement.<sup>6</sup>

This case is a balance between trademark protection and public law. The Supreme Court has tried to strike the best possible balance. Therefore, according to it, contributory liability is found only when the person intentionally or as a result of fault, causes trademark infringement. That is, if the intention or fault, is not proven, the liability would not be found. Contributory infringement includes cases in which, a defendant sells the product without using the plaintiff's mark. Typically, the defendant supplies a product, often unlabeled or in bulk, to distributors or retailers. Often, because the product is so similar to a popular, more expensive, brand-name product, some of the more unscrupulous distributors substitute the defendant's cheaper product for the brand-name good, either by selling the product unlabeled to customers who request the brand name<sup>7</sup> or by repackaging or relabeling the product with the brand name.<sup>8</sup>

In some cases, a person may, through the printing an illegal mark or product packaging, assist the infringer in direct infringement. The Lanham Act considered such persons liable for the losses subject to the direct infringement and defendant's knowledge; otherwise, they will only be prohibited from reprinting. This case cannot be regarded contributory infringement, since its remedy, that is, an injunction, do not subject to the proof of realization of a direct infringement. Therefore, it seems, as some scholars have acknowledged, such a case, is a direct infringement, not indirect.<sup>9</sup> Nonetheless, Article 7 of the Restatement (3d) of Unfair Competition, under the title of "Contributory Liability of Printers, Publishers and other Suppliers", has recognized such persons, as

having contributory liability. According to Paragraph 1 of this article, "*One who, by supplying materials or rendering services to a third person, directly and substantially assists the third person is subject to liability...*". Paragraph 2 of the Article, in accordance with Article 32 of the Lanham Act, acknowledged that who have not knowledge of infringing conduct, to be immune from monetary compensation and considered him to be subject to an injunction relief. Also, under Article 877(3) of "Restatement, (Second), Torts", Assistance to direct infringer, involves a wide range of conducts that providing an infringing label or *permission to use premises* for infringing the mark, is one of them. The inducing trademark infringement, has a more extensive scope, and therefore includes mere encouragement.<sup>10</sup> Paragraph 1 of Article 877, "Restatement, (Second), Torts," also Article 8 of the Restatement of Unfair Competition confirm this. According to Paragraph A of this Article, "*One who markets goods or services to a third person who further markets the goods or services in a manner that subjects the third person to liability to another for deceptive marketing ... is subject to liability ...*" Paragraph B of this Article, also state that "*failure to take reasonable precautions against the occurrence of the third person's conduct in circumstances in which that conduct can be reasonably anticipated*", the actor is subject to contributory liability.

### Indirect Trademark Liability Foundations

Given the fact that in indirect infringement, a person who is not directly charged with prohibited act, it may be difficult to justify this liability, but another reason may be given for this purpose. These reasons are different in the Iranian and US Legal System, since it seems, the general basis of the right on trademark in Iran, differs from the US.; preventing consumer from confusion and reducing its search costs, is the dominant basis of the protection of trademarks in US legal literature.<sup>11</sup> But in Iranian Law, the traditional and primary basis, is protection The rights of trademark holder.<sup>12</sup> Therefore, recognition of the indirect trademark liability, will also be based on different grounds and arguments in these two legal systems. The implementation indirect trademark liability rules in the US, basically leads to strengthening the basis of the consumer non-confusion and reducing its search costs and can be interpreted on this basis. But, in Iranian Law, this rule, as a primary principle, will led to the expansion

of the exclusive rights of the trademark owner.<sup>13</sup> The expansion of the rights, restrict the public domain. if the basis of this expansion, is the public non confusion and search costs reducing, then, this restriction, would be justified, but if the expansion done with the purpose of enlarging rights of the owner, here, limitation of the public domain does not have rational basis. With this analysis, non-recognition of the indirect liability in Iranian Legal System, is logical. Albeit, in the US Legal Doctrine, as well, one of the reasons for opposing contributory trademark liability is that, this type of liability, restricts business activities.

Along with these basic principles, in doctrine<sup>14</sup> and procedure,<sup>15</sup> preventing from unfair competition has also been mentioned as another basis for the contributory trademark liability. Based on particular conditions of the Article 10bis of the Paris Convention, Which Iran has joined to it, the same basis can be applied in Iranian Legal System. Therefore, Iranian courts can prohibit indirect trademark infringement by referring to the provisions of the Paris Convention.

Vicarious liability, has different foundations. It is generally based upon economic rationales such as enterprise liability and deterrence. In turn, enterprise liability itself is justifiable under economic concepts as: risk allocation, loss spreading, internalizing costs and allocative efficiency.<sup>16</sup>

### Conditions of Indirect Trademark Liability

Irrespective of direct infringement incidence which is prerequisite for indirect trademark infringement liability, direct trademark infringement is a strict liability one and does not require a specific relationship between persons, but indirect liability is subject to relationship between direct and indirect infringer. This relationship is necessary in contributory and vicarious liability, with this difference that in contributory, unlike vicarious liability, the relationship is weaker. Also, in contributory liability, the relationship is used for proving knowledge and ultimately fault of defendant, but in case of vicarious liability, it gives rise to prove the right and ability to control the direct infringer and the translating into a direct financial benefit for the defendant. Defendant's fault in the case of contributory liability, achieved based on his knowledge to illegal activity of direct infringer. Currently, courts, in contrast to some old judgments

requiring intention,<sup>17</sup> exercise upon the specific factual or constructive knowledge.<sup>18</sup> In other words, it has to be proven that defendant, had knowledge of a particular case of an infringement, or that according to the circumstances, he had reason to know the infringing activity.<sup>19</sup> As some scholars have argued, the distinction between factual and constructive knowledge, may do not have any practical effect, since one who has a factual knowledge, has constructive knowledge, as well.<sup>20</sup> In leading case of *Inwood*, the Court ruled that:

*"[I]f a manufacturer or distributor [sic] intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributor ally responsible for any harm done as a result of the deceit."<sup>21</sup>*

Therefore, whenever the direct infringer, had the knowledge of direct infringement, it will be held liable as a contributory infringer. In any case, the defendant must have knowledge of the particular circumstances and his general knowledge to infringement, is insufficient.<sup>22</sup> That is, specific factual or constructive knowledge to direct infringement is a condition for the contributory trademark infringement in the US Law.

Assessment of knowledge standard differs case by case. In the case of product, it would be established if defendant, with his knowledge to infringement, encourages the other to infringe the trademark, but where the case is the services, such as online services, the Assessment of the standard, is subject to the proving the direct control and monitoring of the means of infringement.<sup>23</sup> Lockheed Martin II, amended the *Inwood* test for cases considering online services and required that a service provider have a requisite level of control over the "infringing instrumentality" before the *Inwood* test is applied.<sup>24</sup>

In addition to the knowledge standard which indicates the defendant's mental state, also, substantiality of contribution is a requirement. In the past, upon *Inwood* case, only few cases have extended contributory trademark liability to manufacturers and distributors of products<sup>25</sup> this liability for services supplying was extremely rare.<sup>26</sup>

however, contributory trademark liability has broadened in recent decades to cover more than just

manufacturers and distributors.<sup>27</sup> For example, the Eleventh Circuit has opined that a franchisor could be held contributory liable for its franchisee's direct trademark infringement.<sup>28</sup> Additionally, the Seventh Circuit held that a flea market owner could face with contributory liability for the infringing actions of vendors on its property if it responded with "willful blindness" to the vendors' infringement.<sup>29</sup>

Certainly, narrow interpretation of the standard, would jeopardize the rights of the mark holders and would pave the way for abusive competitors. For this reason, US courts, especially with the development of modern technologies, such as, Internet, provided more broad interpretations of this standard, and in order to comply with the new conditions, tried to achieve a more straightforward and flexible standard of the substantiality element.<sup>30</sup> For example, in *Lockheed Martin Corp v Network Solutions, Inc.*, a domain name registrar was sued for contributory infringement. The plaintiff contended that the registrar committed contributory infringement by registering third-party domain names that contained the plaintiff's mark.<sup>31</sup>

Unlike contributory liability, in the vicarious liability, the relation between direct and indirect infringers, is the means of finding the control requirement, under contributory liability, in the case of service providing, the lack of control on direct infringer's conduct, leads to finding her fault and contributory liability. But, in vicarious liability, failure to control and supervise other conduct is not considered a fault. Finding the relationship requirement in vicarious trademark liability is subject to the formal agency relationship, and if it comes with a direct financial benefit, vicarious liability would be found. The agency relationship established when the defendant and the infringer have an apparent or actual partnership, have authority to bind one another in transactions with third parties or exercise joint ownership or control over the infringing product.

### **Analysis from the Policy Consideration Perspective**

Recognition of indirect trademark liability in the US, has two implications: first, it reduces the likelihood of consumer confusion and its search costs. Second, it extends the rights of trademark holder. Technological innovation in US, is such that, places this country in an excellent situation, thus, other tools that maximizes effectiveness of this capacity, should be created. Trademark as one of non-technological

innovations, is a tool for policy makers who can use it in order to promote domestic and international competitiveness. US competitiveness has a very good level,<sup>32</sup> and the existence of several companies that operate on the basis of globally defined standards of production and supplying of services, has improved the level of competitiveness in realm of technological innovation. The rules of indirect trademark liability are consistent with this competitive environment. As a principle, in societies with high technological growth, competition prevails over IP monopoly rights, but the US, in some cases, has deviated from this general principle.<sup>33</sup> However, it seems, in formulation of the rules of indirect trade mark liability, it has referred to the principle and while securing the rights of trademark owners, has taken the side of competition and has developed these rules. In US Case Law, on the one hand, where the defendant, has factual or constructive knowledge to direct infringement, he has liability (to secure the rights of the owners of the mark), but at the same time, specific and not general knowledge is required (supporting free trade).<sup>34</sup> In the case of vicarious liability, the same rule, applies; on the one hand, if there is a relationship and obtaining a financial benefit from the defendant, liability is found (protection of the rights of trademark owners), and on the other hand, this relationship is limited to formal agency relationship (support for free trade and competition).

Establishing such measures in US, will result in continues improving of domestic technological and non-technological innovation. Additionally, in international realm, existing similar standards in other countries, especially in developing countries, will protect the interests of US trademark owners and don't contribute to enhancing the of competition policy and competitiveness of products of the developing countries, because logically, due to the lack of technological innovation in the underdeveloped countries, the competitiveness of domestic products of these countries, compared with American products, is low and as a result, the expansion of liability arising from trademark infringement, through indirect liability, will lead to reduction in competitiveness in the destination country and an increase in the securing of the rights of the mark holders and ultimately the productivity of American products. Also, this analysis, is compatible with the intellectual property clause in US Constitution that states: "*The Congress shall have Power ... To promote the Progress of*

*Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*"<sup>35</sup>

## **Iranian Law**

### **Legal Status**

According to Iranian legal system, the liability arising from the causation (indirect)<sup>36</sup> unlike direct one, is subject to fault;<sup>37</sup> thus contributory and inducing liability, requires knowledge or intention. Therefore, in the case of the contributory and inducing infringement, the defendant has been the cause of the infringement and the case will be subject to the rules of causation in damage.

Significant examples of vicarious liability in Iranian Law, which, of course, are described as "Responsibility for the act of others", includes: responsibility of guardians arising from the conduct of the child and mentally deranged persons and employer's responsibility due to Damages caused by the act of employees.<sup>38</sup> Contrary to the US Law, such a liability is upon the fault and accordance with Iranian Civil Liability Act of 1960, is not strict or absolute liability.<sup>39</sup> Therefore, where damage is caused by the conduct of the minor or insane (mentally deranged) person or employee to another's body or property, the loss, as the case may be, is also attributed to fault of guardian or employer, And that is why, proving no fault, will be exempted them from ultimate responsibility. Criminal liability for the act of others in the "*Islamic Penal Code*" 2013, which is exactly in accordance with the situation in which an employer or guardian, is liable for the employee's or supervised person's fault<sup>40</sup> is also based on fault, because under Article 142 of the Act:

*"Criminal responsibility for conduct of another party shall be established only if the individual is deemed responsible by law for the acts of another person, or if s/he is at fault regarding the outcome of the conduct of another person."*

On this basis, it can be said that, since in Iranian Legal System, instances of vicarious liability, is based on fault, they are subject to the rules of causation,<sup>41</sup> and for this reason, the use of the title of causation to describe instances of vicarious liability in Iranian Law, is true. This, of course, does not mean that in US Law, the notions of contributory, inducing, and vicarious infringement are completely different from

each other and there is no common denominator between them. With this explanation, hereafter, wherever, the term *indirect* used with infringement in Iranian Law, this is a general title that includes contributory, inducing, and vicarious infringement.

Under Iranian Law, one of the main elements of civil liability, is damage suffered by plaintiff.<sup>42</sup> The indirect trademark infringement of also is subject to this rule, assuming its existence in Iran. Therefore, if a person having knowledge to infringing activity, supplies infringer with some products, she does not subsequently commit an infringement, the supplier does not have any liability. The general rules of civil liability in Iran, includes provisions that, may encompass instances of indirect trademark infringement. If the direct infringer, considered as direct cause of destruction of the property,<sup>43</sup> person who pave the route for him, will be the cause of the infringement and will be subject to the rules of causation.<sup>44</sup> Therefore, cases of indirect trademark infringement in Iranian Law, are under the rule of indirect and direct cause.<sup>45</sup> Thus, it can never be considered under the title of pure causation<sup>46</sup> in Iranian Law. These cases are subject to the rule of "The accumulation (multiplicity) of the direct and indirect causes" and follows its results. Accordingly, the argument which suggested<sup>47</sup> that indirect patent infringement in Iran, is covered by the provisions of pure causation, is not perfect. In such a case, due to the principle of liability of perpetrator, only the direct infringer is responsible and the causative factor, don't have liability, unless in certain circumstances, such as the finding duress or temptation,<sup>48</sup> the cause, be more effective in causing damage than perpetrator. It may be claimed that, if the case is subject to the rule set forth in Article 526 of the Islamic Penal Code,<sup>49</sup> the direct and indirect infringer, would have joint liability and share damages between themselves. this claim, could not be accepted, because according to famous opinion in *Imamiyah jurisprudence*, as the main basis for the Iranian Legal System, there is no doubt that, condition for jointness in liability, is the *transversely* occurrence of effect of multiple causes in causing damages,<sup>50</sup> While cases of indirect infringement of intellectual rights, are the sort of a multiplicity of causes (direct and indirect cause) longitudinally. Therefore, there can never be considered an indirect infringement of intellectual property rights in accordance with the rules of criminal complicity or jointness in torts. However, generality of this article,

has caused the illusion of inclusion of it to all cases of cause multiplicity, including the longitudinal and transversal causes.<sup>51</sup> it should be acknowledged that, according to the famous opinion in *Imamiyah Jurisprudence*, in the case of direct and indirect causes multiplicity, in principle, only the direct cause is liable, unless the latter, is the stronger cause in such a way that according to custom and usage the destruction could be attributed to him.<sup>52</sup> the rule set forth in Article 526, is contrary to this principle of jurisprudence and should therefore be interpreted narrowly. thus, it should be apply only in the cases in which, the multiplicity of causes in causing damage, is transversely.<sup>53</sup>

If the direct trademark infringement, considered as causation in infringement,<sup>54</sup> where, the direct infringer, with someone else's help, infringes a trademark, the case would be subject to the multiplicity of indirect causes; the most popular theory in determination of responsible cause in this situation (multiplicity of longitudinal causes), is liability of prior effecting cause.<sup>55</sup> That is, the cause which, has the first effect in occurrence harmful event. The Islamic Penal Code of 2013, has accepted the principle of prior effecting cause liability in such cases. according to Article 535 of the code: "*Whenever two or more persons, with engaging in an unlawful conduct, contributing in a crime, as indirect cause and longitudinally, who effect of his conduct is prior to the effect of other cause or causes, has liability...*"

Given the specific nature of intellectual property, it seems, in the case of indirect trademark infringement, the effect of direct cause always precedes, since it is the direct infringer conduct that empowers causality to the previous conduct and making it an unlawful act. This analysis is justified, because of the secondary nature of the indirect infringement, the illegitimacy of the first offense in the indirect infringement, is subject to direct infringement occurrence. This assumption, conforms with the procedure which,<sup>56</sup> even despite the principle of liability of "Prior Effecting Cause", considered the "Reasonable Cause" as liable, because it seems, in such cases, the tradition also considers the direct cause as liable.

The Iranian Legal System, has no specific rule about online infringements. The specific rules on the responsibility of Internet service providers are limited to the two regulations: "the method of information and internet services" and "The regulation of

information and internet service provider's centers", was approved by the Supreme Council of the Cultural Revolution of 2001, which apparently, the latter, is new and effective legislation.

The responsibility, expressed in these regulations, reflects the general rules of civil liability in Iranian Law. In the preface of the Regulations and standards for computer information networks adopted in 2001, by Supreme Council of the Cultural Revolution, said that, these provisions, approved with emphasis on some basic rules, such as the legal and civil liability of persons in relation to their activities. This emphasizing shows that, the Supreme Council of the Cultural Revolution, while adhering to the general principles of civil liability in Iran, such as, the principle that liability is personal, endorses such rules. The same analysis applies to the Electronic Commerce Law of the Islamic Republic of Iran. Article 66 of it provides that "*In order to protect consumers' rights and encourage legitimate competition in trough electronic transactions, use of trademarks as domain name or any online usage of trademarks which may mislead or deceive the other party in terms of the originality of goods and services is illegal and the offender will be sentenced according to this Law*".<sup>57</sup> Therefore, only the one who infringes the trademark in trough electronic transactions is liable for direct infringement and the domain name registrant<sup>58</sup> or internet service provider, don't have any liability in accordance with this law.

### **Role of Brand Loyalty in Innovative Activities**

Brand loyalty means that customers are willing to pay high prices for a certain brand in the same product group and also recommend that brand to others. Brand loyalty can also be defined as "the likelihood of repeat purchase increases that lead to formation of brand loyalty. Moreover, customers may prefer and buy a brand due to additional value created by brand signal."<sup>59</sup>

One of the important effects of brand loyalty, is the producers' confidence in the production of new products, which plays an important role in pave the way for technological production. The domestic industries of Iran, like other developing countries, are not able to compete with foreign branded products<sup>60</sup> and because of this, the risk of producing new products is always on the shoulders of these industries, and therefore, there is not enough incentive to produce. In contrast, foreign brands, due to

consumer loyalty to that brand, are always successful in producing new innovations because they believe in the success of that product in the market and will be sufficiently motivated to produce new products.<sup>61</sup> In other words, the low competitiveness of domestic products with foreign brands will further reduce the competitiveness of domestic industries and, conversely, the competitiveness of foreign brands will increase as a result of consumer loyalty. If the three factors of competitiveness in technology, the capacity to deliver timely delivery of the product to the market and its price, are the determining elements of competitiveness,<sup>62</sup> some research findings suggest that, unlike price, technology and delivery capacity, plays a very important role in this field.<sup>63</sup> The results of some studies also confirms that Iranian consumers, prefer foreign brands to domestic ones, for reasons such as higher quality, and this tendency is even observed among low-income people due to tendency to prestige.<sup>64</sup> The consumption of foreign goods in Iran, regardless of its biological needs, is also symbolic and has become a culture.<sup>65</sup> This issue, don't negate the desire of Iranian consumers to domestic brands in the field of natural products such as dairy products. In this regard, the results of some studies confirm that there is a meaningful relationship between the identity and credibility of the "KALEH" brand and the Iranian consumer tendency towards dairy products of the KALEH Company and loyalty to its product.<sup>66</sup> However, given the cognitive aspect of loyalty to foreign brands, Iranian consumers in the field of audio, video and computer products, which are high tech or close to them, even with the assumption of equal quality between Iranian and foreign products, they prefer to purchase, illicit foreign products.<sup>65</sup> Conversely, it can be said, the lack of strong trademark protection in Iran, may reduce the incentive for domestic firms to produce new products and innovation. In other words, the lack of strong protection for domestic trademarks, may lead to a decline in technology growth. Although, this claim is acceptable, it seems, the expansion of protection trademark by means of indirect responsibility rules, would have more negative or At least parity effects in this regard. This analysis, in particular, seems justified with respect to the fact that, Iranian companies, due to numerous sanctions, are deprived from access to advanced technologies and, in any case, because of the existing sanctions, it is difficult to move towards innovation. Because of these sanctions,

Iranian companies are not able to accede to international technical standards. Accordingly, it is not seen the technologies that accepted by consumers in the Iranian market. However, competitiveness in today's knowledge-based market is largely dependent on standard products. These sanctions also eliminate the attraction of foreign direct investment and, therefore, cannot be considered as a rational for the recognition of the indirect liability for trademark infringement. Research results in the Iranian consumer community, also shows that, despite the symbolic importance of targeting illicit foreign brands, the safety features of these products, including quality, efficiency, health, and assurance services, are even more important in this regard.<sup>67</sup>

Generally, the expansion of responsibility for activities that may lead to indirect IP rights has been criticized and challenged by some scholars. Some of these challenges include:

- (i) Indirect liability, in addition to limiting unlawful activities, may also limit lawful activities.<sup>68</sup>
- (ii) It will potentially impede the development of technologies such as peer to peer networks which are powerful, socially-beneficial tools for dissemination of information when used appropriately.
- (iii) Indirect liability is, in effect, the imposition the task of management of the gray area of the law<sup>69</sup> on those who provide facilitating services, which this seems to be inappropriate.
- (iv) Business activists and social facilitators do not have specific incentives to distinguish lawful from unlawful conduct, and for this, indirect liability, which imposes a kind of agency cost on them,<sup>70</sup> also reduces the movement towards the production of legitimate content, and as a result, and indirectly expands the rights of trademark owners.
- (v) Imposition of indirect liability, especially in the copyright area, may endanger the intellectual property in the long run because, Though, combating with technologies such as video cassette recorders (VCR), in the short term will reduce activities for illegal purposes, but given The legitimate aspect of such tools in the long run, can lead to the creation of new technology markets for the right holders.<sup>71</sup>

This analysis indicates that, protection for domestic production and promotion of competitiveness in this field, mainly depends on the quality and technology used in products, not advertising.

It may be argued that lack of indirect trademark liability in Iran, not only leads to narrowing the scope of protection, but also is harmful to consumers and may lead to an increase in their risk of confusion and increased search costs for them, and from this perspective, it is critical. In response, it can be said that, firstly, the frequency of cases of indirect infringements, similar to those found in the United States, is low in Iran and, in principle, the infringement of trademark in Iran, take place in a direct and without intervention of who facilitates the infringement. Secondly, the range of electronic exchanges in Iran, as a major room for the occurrence of indirect trademark infringement, is much lower than that of the United States. In cases where individuals infringe the trademark by using the virtual environment, can be asserted that consumers don't confuse, because, as mentioned, Iranian consumers tend to foreign brands, and as a result, sales in the virtual environment are more closely related to foreign brands.

Regarding public knowledge to existence of severe economic and commercial sanctions, the presence of foreign products in Iranian markets, can be interpreted in two ways: original products that are smuggled into the Iranian market; and counterfeit products that are offered in the Iranian market. In the first hypothesis, due to the originality of the products, there is certainly no harm to the consumer, and in the second assumption, it seems, consumers' tendency to luxury products, is reason why they buy product knowing that it is fake, thus, they are not confused in this case either.

In addition, as stated above, in Iranian Law, trademark, is a personal right and the protection from rights of owners, prefers to the consumer's rights. Managing any right, is logically on the owner of it and he has to pay the necessary expenses in this regard. IP Indirect Trademark Liability Rules, impose liability on persons other than the trademark owner, forcing them to bear costs such as searching to ensure that the trademark is not registered. From this perspective, the absence of such rules in the Iranian Legal System is preferable.

#### **Analysis from the Perspective of Innovation**

As said, the Iranian Trademark Law System is essentially aimed at protecting the rights of the



trademark owners. The mentioned general provisions about Iranian Law are: it does not reduce the likelihood of confusion; and don't expand the rights of the trademark owners. In Iran, due to the low level of competition in market and the lack of diversity of domestic production, the function of trademarks is, in practice, more geared towards achieving this goal than to promote consumer welfare through providing information so as not to be misled and reducing search costs for him. In such a situation, though, lack of indirect liability rules is against the interests of mark owners but, general rules of liability are sufficient to secure the rights of them and keep their motives for producing, as possible as. At the same time, regarding the market needs for new business environments and market development, since the general rules, do not transfer the risk of liability to the public domain, are also consistent with these requirements as the same way, in the international context, due to the less competitive power of Iranian products with foreign products and the greater tendency of consumers to purchase foreign branded products arising from the low level of technological innovation in Iran. This situation seems to be favorable because technological innovation plays the main role in the field of economic development and promotion of social welfare, and non-technological innovations such as trademarks have a complementary role in this respect. In other words, until technological innovation reaches the optimal level, the protection of trademarks, that indicates these technologies, will not lead to economic growth. The heterogeneity of the products in the international market, due to the difference in the level of technology in the countries, creates consumer loyalty to brands that have a higher level of technology, and, as a result, strong protection of trademarks, will be strong support from foreign technology owners and by imposing possible liability for indirect infringement of foreign trademarks, it transfers the risk of liability to the domestic industries.<sup>72</sup>

Effective factors involved in shaping the brand loyalty include:

- (i) Product characteristics which can be determined by inspection prior to purchase of the product or by actual consumption of it.
- (ii) The consumer demand characteristics: consumer and his behavior is also effective in investigation of brand loyalty. For example, older consumers who have been taking certain

drug over time, have a greater loyalty to that medication.

- (iii) The amount of technological change; the amount of technology in products, is another factor in the strength of a trademark and the formation of loyalty to it. Consumers are loyal to a brand that has a higher technology, and for this reason, they may lose their loyalty to a particular brand and switch to a new product when a higher technological product enters the market.
- (iv) Consumers' mental generalization, i.e. consumers can share their loyalty and interest toward a specific brand, among all products produced by a particular company.<sup>73</sup> For example, if a person buys a product from Company A and has a positive experience with that product, it will have the same positive feelings for other products manufactured by that company and will generalize the previous experience to other products. accordingly, if the first product, is a patented one, and the second, is only protected by the trademark system, the consumer's tendency to purchase the second product, will be led to lower prices on monopolistic (patented) goods in order to increase demand for competitive (non-patented) goods in the same family of brands and thus, the consumer interests is secured.

Although the product's optimal (low in the view of consumer), price is one of the factors contribute in brand loyalty, it seems, loyalty to a brand, leads to a continuing consumer desire to purchase that product, even if it is priced at a higher range.<sup>74</sup> In addition, regarding the tendency of Iranian consumers to foreign goods, extensive trademark protection will have two other negative effects: in the event of the import of products whose import is prohibited, having regard to the consumer's desire for foreign products, these products enter the Iranian market in the form of smuggling; and aiming to satisfy customers' interest in foreign brands, Iranian products, will be offered with counterfeit foreign brands.

## Conclusion

Level of technological development of countries and their political, commercial and economic conditions, particularly, at the international interactions, has a central role in determining the legal policies of the countries. Legal regulations and

policies are a means for countries to pursue their goals through optimal use of them. Accordingly, as one size don't fit all sorts of intellectual property, a single format, cannot be the standard for all countries. The indirect trademark liability, has two different outcomes and functions in the two legal and economic systems of Iran and the US; in US, due to the high level of technological innovation and its superior domestic competitiveness, it has led to the development of lawful business and competition, and at the international level, will also boost its economic growth through the development of technological innovations. On the contrary, the identification of this type of responsibility in Iran, in the domestic arena, will reduce the number of new businesses and lawful activities, and in the international arena, due to the transfer of the risk of liability to lawful business activities and the imposition of trademark management costs, it causes the outflow of foreign currency from the country and brings technology innovation into trouble. Hence, the lack of Indirect Trademark Liability Rules in Iran is justifiable and reliance on the general rules of civil liability in this area, insufficient and especially, with respect to sanctions which imposed on Iran in science and technology, it seems more favorable.

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