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Improvement of Enforcement of Intellectual Property Rights and Remedies for IP Infringements in Uzbekistan – Lessons from Germany

Almosova Shahnoza Sobirovna
Lecturer of Tashkent State University of Law

Abstract

In the article, an author attempted to provide a solution to the problems observed in the practice of law enforcement and judicial practice in the Republic of Uzbekistan by comparing the legal system of Germany. It is proposed to study the experience of Germany in the issue of compensation, comparing the handling of intellectual property rights disputes in courts in Germany and the consideration of this type of cases in the judicial system of Uzbekistan.

Keywords: legislation, IP rights, IP litigation, IP infringements, remedies, enforcement methods, trademark counterfeiting, copyright piracy.

As one of the developing countries, where the number of new trademarks, services and innovations in all fields is increasing day by day, there is a need to create an optimal protection regime in the protection system of intellectual property rights in Uzbekistan. This issue is becoming increasingly urgent at the global level at a time when many countries are suffering from widespread counterfeit goods and piracy.

According to survey conducted by the State Competition Committee of the Republic of Uzbekistan, over the past years, the flow of complaints about unfair competition in the field of intellectual property has increased by more than 7 times within the country. And it is clear from the results of the complaints heard by the courts that the courts are more loyal to local entrepreneurs, that is, the local producer as the defendant has an advantage in the courts. Thus, brand-riding – the capture of foreign brands through loopholes in the law and low level of enforcement – has become a widespread practice.

Another painful point of the protection system of intellectual property rights of the Republic of Uzbekistan is that insufficient property liability is established for violations in this area, which causes the continuation of these violations. In addition, there is no established practice for compensating the right holders for damages. The customs administration cannot directly apply measures in relation to objects of intellectual property appropriated on the basis of counterfeiting or piracy. These cases indicate that the legislation in this area should be improved. For these reasons, it seems to me that there is no any hotter topic than “Improvement of enforcement of Intellectual Property rights and remedies for IP infringements in Uzbekistan” in discussions. Relevance might also be supported by accelerating processes related to Uzbekistan’s accession to World Trade Organization and urgency for harmonization of national legislation with treaties of Marrakesh declaration of 1994, with TRIPS Agreement in this case. Unlike other international conventions, TRIPS Agreement is more detailed in enforcement rules of IPRs, it is the very point Uzbekistan’s IP legislation is facing some difficulties to

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bring into compliance in harmonization process. At this point, it should be noted that harmonizing our laws with world standards is important not only for the integration of the republic into large financial organizations, but also for creating an optimal protection regime.

Another reason is the fact that existing shortcomings of the system are directly affecting foreign investment and business environment in the country and, eventually, economic development at large. As an intangible investment asset IP is becoming the most revenue generating investment and business tool, that's why their state of protectedness is increasingly playing a determining role in investment decision. Though a number of steps have been taken to grow country's investment attractiveness, measures to enhance effectiveness of IPR enforcement seem not to be sufficiently covered.

General overview of the IP legislation of Uzbekistan gives a clue as to the protection degree of IP objects, in which substantive norms are more extensive, however, there are a lot of gaps in determining enforcement methods and legal recourses. For many years, our legal IP norms have lacked enforcement provisions that can be explained by the fact that our legislation is taken from the model of post-Soviet states. In the practice of most post-Soviet states, the norms related to law enforcement are stated not in special laws (laws, regulations, decrees), but in general norms (such as Codes)[1]. The hierarchy of normative acts provides the priority of codes over separate laws though, in practice courts tend to apply the norms of special laws for their comprehensive guidance compared to general language style of Codes. Recent legal reforms introduced penalty procedures for IP infringement in some separate laws, i.e. on February 7, 2022 a law on "On introducing amendments to some legislative acts of the Republic of Uzbekistan in connection with the improvement of legislation on intellectual property objects" was adopted, in which grounds and procedure for imposing a fine and paying it by legal entities for violating the legislation on industrial property objects, on trademarks and appellations of origin of goods, on trade names have precisely been determined.

In Uzbekistan IP rights can be protected by administrative, civil and criminal mechanisms. Administrative measures applied pursuant to Code on Administrative Responsibility and civil proceedings are more widespread. Statistics reveal that from 2021 until today (as of September 2022), 162 administrative reports were issued for the violation of intellectual property rights. In addition, the number of administrative cases initiated in January-September 2022 increased by 12.5% compared to the same period of 2021. More than 500 legal proceedings took place in the field of intellectual property in 2021 alone which shows the extent of the existing problem.

Criminal remedies are rare in nature provided only for copyright infringements. However, as for criminal responsibility for IP rights infringements, international standards, exactly Article 61 of TRIPS Agreement requires to launch criminal procedures at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale and provide remedies in the form of imprisonment and/or monetary fines consistent with the level of penalties applied for crimes of a corresponding gravity. Uzbekistan's criminal legislation is so limited in this sense. Article 149 of the Criminal Code of Uzbekistan (Infringement of Copyright and Inventive Rights)[2] refers particularly the

[1] As my findings show that Germany poses a traditional approach to keep the acts separate in transposition law by making amendments in pre-existing laws. (https://www.cambridge.org/core/books/abs/enforcement-of-intellectual-property-rights-in-the-eu-member-states/enforcement-of-intellectual-property-rights-in-germany/1D9A17ACC24EAAA2635D099DDA982736) and, in turn, contrary to Uzbekistan's legislation, all enforcement measures (civil and administrative measures, border measures) and remedies are included in separate laws.

[2] The name of the article includes both copyright and patent rights, however, the text of the article only refers to copyright violations.

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copyright aspects of intellectual property objects and does not provide punishment for actions that cause violations of trademark rights and patent rights. Any special laws, be it copyright law or law on industrial property don't include any provisions stipulating criminal remedies for violations. Unlike, German special laws have separate provisions on criminal responsibility, for instance, sections 143 to 145 of Act on the Protection of Trade Marks and other Signs, sections 106 to 108 of Act on Copyright and related rights or section 142 of Patent Act give a detailed account of criminally punishable actions.

Secondly, Art. 149 of the Criminal Code of Republic of Uzbekistan sets out sanctions in the form of a fine or deprivation of certain rights for up to five years or compulsory community service for up to three hundred and sixty hours or correctional work for three years, the gravity of which does not match sanctions of any type of crimes in classification and according to Art.36 of the Criminal Code criminal acts with such kinds of sanctions are not classified as crimes but minor, not socially dangerous act due to its low importance. It means that in practice the case will not even reach the court.

When it comes border measures, the Customs Code of Republic of Uzbekistan sets out the procedures to take measures in importation of counterfeit trademark or pirated copyright goods. Despite this, there are some open moments in customs legislation on customs control of IP objects, like a positional collision between Customs Committee and courts in parallel imports issue since the legislation does not clearly refer to any type of exhaustion regime. The second issue relating customs measures is ex officio action that enables customs bodies to take measures irrespective of request of right holders. Current system establishes dependence of customs bodies on right holders or their assignees' application to suspend the release of goods.

We fully agree that the judicial procedure for resolving disputes is the highest form of protection of the rights, including intellectual property rights. Uzbekistan relates to the family of continental law like the Federal Republic of Germany, despite the fact that there are many similarities in judicial system, the IPR litigation practice has considerable differences. Actually, all courts in Uzbekistan consider cases related to IP infringements within their jurisdiction. The result of my studies shows that, unlike the practice of Uzbekistan, in Germany there are specific patent chambers of 12 regional courts, in general, each federal state has at least one patent infringement court. And Federal Patent Court is an appeal instance for decisions of higher regional courts. What is interesting that Germany has a bifurcated system (separate trials for infringement and validity) in patent litigation.

The analysis of the court cases heard by the uzbek courts during the years 2018-2022 shows that the rights to the means of individualization were mainly violated in the cases, and from territorial perspective most of them were heard in Tashkent city. There are several factors that prevent the public from using the courts for securing intellectual property rights. Along with subjective factors such as public's legal illiteracy and incompetence of judges in IP disputes, there are a series of objective roots of the problem, including the insufficiency of regulatory legal acts.

The above-mentioned penalty measures that were recently introduced are undoubtedly main deterrents for infringers, but compensating the damage caused is more significant for right holders, that's why effective measures and procedures for improving the enforcement of intellectual property rights should definitely address, inter alia, the procedures for assessing the compensation in detail and its effective implementation by judicial bodies. Uzbekistan's Civil Code states: damage caused to a person or a person's property due to illegal action (inaction), as well as damage caused to a legal entity, including lost profits, must be compensated in full by the person who caused the damage (Article 985), or the law "On copyright and related rights" sets if the infringer received income as a result of the violation of copyright or related rights, he must compensate the rights holders, along with

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other damages, for the lost profit in an amount not less than such income (Article 65).

The courts, in this regard, need some interpretations and concise guidelines to determine the compensation amount and methods. Regrettably courts have no any practice to assess the damage caused (actually courts usually use the term of "damage" in their decisions, i.e. they don't elaborate loss claims and claims for lost profit, even though Civil Code sets: "damages are considered to be the costs incurred or required to be incurred by the person whose rights have been violated to restore the violated rights, the loss or damage to his property (real damage), as well as the profit that this person could have received under the conditions of normal civil treatment if his rights had not been violated (lost profit). In copyright cases general claims include compensation of moral damage as well, however, courts mostly reject claims for recovery of moral damage). German practice to calculate the amount of damages make clear that there are 3 methods: the patentee's lost profits, the infringer's profits and the license analogy that are currently used by courts. This mechanism was introduced into German court practice through the EU IP Rights Enforcement Directive (2004/48/EC). This mechanism is worth comprehensively studying in the context of gradual introduction into national IP litigation practice.

The problem of law enforcement is closely related to the lack of a well-developed theoretical base in the area concerned. It should be admitted that the development of law enforcement practice is impossible without a clear understanding of the norms and principles of intellectual property legislation due to its significant differences from traditional property rights and the law of obligations, as well as the legal content of exclusive rights, their dualistic nature and protection of personal non-property rights along with property rights.

One should agree with the fact that cases in the field of intellectual property are "higher mathematics in law", therefore, a high professional level of consideration of such cases requires not only a thorough knowledge of the legislation but also appropriate specialization of both judges and other participants in the process. Therefore, it seems to me that it is appropriate to establish a judicial panel specializing in intellectual property disputes in the Supreme Court of the Republic of Uzbekistan. The existence of this well-competent panel specialized in intellectual property, at least at one instance guarantees a more efficient resolution of disputes in this regard. As a result of the development of simplified mechanisms and procedures for IP related dispute resolution by this judicial panel, we would also achieve specialization of judges.

Deducing all above-mentioned points, I am completely convinced that comparative research of the other countries' legislation in IP enforcement and practices of IP litigation will serve as a catalyst in reforming this sphere of law in Uzbekistan. Particularly comparison with those of Germany is highly relevant for the fact that Germany is the most preferred venue for patent litigation around Europe and approximately two-thirds of all European patent litigation cases are tried in this country. Furthermore, this country choice is well justified by similar legal systems of the two countries which can ease the transfer of legal norms.

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