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International Instruments Related to Industrial Property: An Empirical Analysis and a Case Study

Drita Bejtullahi

Assistant at the University of Tetova,

Faculty of Law, Macedonia

Alba Robert Dumi

Management Department, Economy Faculty,

University of Vlora, Albania

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Abstract

Along with its independence from the former Yugoslav Federation, the Republic of Macedonia opened a new chapter in reforming herself politically and economically and with the overall reforms in the law system, changes also happened in the field of Industrial Property. Proper measures were taken for its protection by establishing SOIP – the Country's State Office of Industrial Property, firstly known as the Office for the Protection of Industrial Property, within the Macedonian Ministry of Development, to later become an autonomous legal entity under the Government, according to the adopted Law on Industrial Property of 2002. The new Law and Institution further strengthened and enforced legal protection of IP rights by taking care of and handling disputes related to IP protection. Requests for the protection and acquisition of industrial property rights, such as patent requests, registration of trademarks, industrial designs, geographical indications or topographies of integrated circuits can be addressed by the abovementioned laws and Institution. Main functions of the State Office of Industrial Property are implementing the law and regulations, ratification of international agreements, creation of proper conditions for an efficient protection of Industrial Property in accordance with standards set by agreements and international industrial property institutions, such as WIPO and it also appears as a mechanism to help the growth of economic, social and cultural prosperity. The rights derived from a scientific or artistic work are also foreseen and encouraged by the

Country's Constitution, in order to promote and help the technological development and a free market for everyone concerned.

Keywords: Industrial Property, TRIPS, Copyright, IP Laws, IP Protection.

Introduction

Industrial Property is part of the broader notion, internationally known as Intellectual Property. It refers to intellectual creations or creations of the human mind which are protected by the IP laws. The area of Industrial property, starting to gain its importance and application with the Paris Convention for the Protection of Industrial Property (1883) applies to these main types of industrial creations: Patents for inventions, Industrial designs, Trademarks, Service marks, Layout-designs of integrated circuits, Commercial names and designations, Geographical indications and Protection against unfair competition. In Macedonia, the main source of the law, to be distinguished from other regular laws, that also covers Industrial property law is the Constitution, as the highest legal act, adopted in 1991, as an independent country. The Constitution and IP laws recognize and also guarantee the rights arising from the scientific and artistic work known as: Patents, Industrial designs, Trademarks, Appellations of origin and Geographical indications.

1. Main Sources of the Law on IP

1.1 IP Laws

Industrial Property issues around the world are mainly defined by their own specific laws on IP, as well as laws or regulations on their respective branches of IP. This kind of legislation serves mainly the purpose and effort to help and protect only a given IP product in a designated country or territory. Nowadays, with the ever-growing globalization there are international IP initiatives and organizations which have created their legislation and guidelines on how to treat and approach issues of IP, which are generally accepted and adopted by the national legislative frameworks. The goal has been for a greater interaction and unification of rules which tend to and actually benefit the overall good of the global market economy and greater development in technology.

The IP legislation of the Republic of Macedonia, Intellectual Property, as a whole consists of these sources:

- The *Constitution*, as the Basic Law;

The Main IP Laws, which are:

- the Law on Industrial Property,
- the Law on Copyright and Related Rights,

- the Law on Protection of Topographies of Integrated Circuits[1],
- the Law on Customs Measures for Protection of Intellectual Property Rights,
- the Law on the Breeder's Rights;

The IP-related Laws:

- the Law on Administrative Fees,
- the Customs Code,
- Inserts from the Relevant Provisions referring to Copyright and Related Rights from the Amendments of the Penal Code,
- the Code of the Criminal Procedure,
- the Penal Code;

The Implementing Rules/Regulations:

- Regulation on Trademark,
- Regulation on Industrial Design,
- Regulation on Appellation of Origin of the Product and Geographical Indication,
- Regulation for the Professional Exam of the Industrial Property Representatives and the Register of Representatives,
- Decision on the Amount of the Single Equitable Remuneration of Copying in Private Use,
- Rulebook on the Form and Contents of the Application Form for Action by Customs Authorities and Related Required Documentation and of the Application Form for Extension of the Period for Action by Customs Authority.

1.2 The Customary Law

The Customary Law used to be an important source of the law, especially when there were no written laws to follow and use in the early times. It includes rules which are not a primary source of the law, mainly listed as last by application in our country and many others. But, as it is known, for a certain issue, a court proceeding, etc. first comes the Constitution, to make sure that the decision brought by the court is not against the Constitution, then the Law concerned is taken into consideration regarding the issue and, if there is no possible legal solution to the issue then, the customary law could come into consideration. In other words, the customary law may be included as a supplementary source to the sources of the law. As it is meant to develop from the

[1] *Official Gazette of the Republic of Macedonia, No. 05/2008, 33/2006, 136/2011 and 53/2016.*

bottom and up and be accepted more widely, unlike the usual one, being that of an authoritarian minority, the customary law does find some application, especially in family disputes, cultural issues and issues where parties would see and accept the mutual benefits and also act in accordance with them; meaning that both parties behave so because they expect each-other to do the same.

1.3 The Legal Science

The legal science is considered a source of the law which plays an important role in the shaping of industrial property law, as it has its part in the creation and development of the law and the legal system. It acts through the scientific interpretation, analysis and comparison of legal norms in the given field of the law, for the legal system to become better and more advanced through the possible adoption and application in that field. This kind of help can be given to legal authorities and other institutions concerned in the form of comments and recommendations which would additionally be an impetus to the economy and its general success. Generally, the legal science's influence might not be of a direct nature, but indirectly its role is very important for the legislation and judiciary. Concerning the judiciary, a given judge of a case cannot be referred to a scientific work in order to resolve the case as they would to a law; still such a work can have a very significant role in creating and implementing the legal rules.

1.4 The Judicial Practice

The judicial practice is when a court case is not covered by the law and that case's judge is to look for earlier court decisions for a same court procedure. In our country, this is not considered as a key source, because in the Civil System (the Roman System of the Law) the Law is the source of a law, whereas it is very much emphasized in the Anglo-Saxon System (Common-law) when the judge on the case decides based on an earlier decision brought on a case like the present one concerned, under same circumstances. So, whenever there are gaps in the national legislation in relation to intellectual property, where the judicial practice could influence the decision to be brought and thus play the role of a source of the law for the parties themselves, yes, in this case it is de facto, a source of the law for the intellectual property. This system works in UK, Canada, Australia, US and some other countries that were colonies under the United Kingdom. Even though, the judicial practice is not considered a direct source of the law, because courts only apply the existing written laws, it could be of use for the making of the law and be used indirectly.

2. International Agreements: TRIPS

With the latest trends of freedom of movement for people; educational, scientific, cultural and workforce exchange, with trade and economy liberalization, also comes greater institutional communication and relationships, internationally. There is a great deal of exchange at the political and governmental levels, as it is at the

professional level; that of expert exchange. Regardless of the field and level of cooperation, being it cultural, scientific or a mere purchase of goods and services, there is quite a deal of formal implications requiring legal modalities and solutions. Many of these issues find application in the national legislation and norms, while others are based on mutual and multilateral agreements and contracts, between countries or partners, which have to abide by certain general legal provisions, as well as, segments of them which have to follow legislation of the domain of IP rights.

Normally, international documents or agreements related to IP Law are handled by the Country's respective IP Law Office, the State Office of Industrial Property of Macedonia, responsible for the acquisition and protection of Intellectual Property since 1992. With the ratification of international conventions and agreements and by signing the Declaration of Acceptance for them, Macedonia became a member of the World Intellectual Property Organization (WIPO) in 1993. Some international agreements undergo a ratification process by the National Assembly, which then can gain the power of a national source of the law and become an integral part of the national legislation; some others only need to get the approval from the respective institution and/or that of Foreign Affairs in order to get further processing and implementation.

The protection of Intellectual Property worldwide recognizes many mechanisms and instruments. The Agreement on Trade Related Aspects of Intellectual Property Rights – TRIPS is considered to be of the most important agreements to set, spread and harmonize the standards for protection of several types of Intellectual Property. These standards are generally accepted and comfortably used, especially by industrialized countries, considering it to be the right tool which helps further development of technologies and the economy in general, through the protection of IP – Patents and Industrial designs, in particular. The system established was based on economic needs and the principle of reciprocity by the industrialized countries, as the largest intellectual property rights providers, the GATT Framework. With the creation of the World Trade Organization (in the course of Uruguay Talks), Intellectual Property Rights found their way to globalization as a smoother way for the development of technologies, trade, etc.

There are many standards which are also being accepted by developing countries, making it to be lawful and respected, especially when it passes the process of approval and ratification by the national legislations of these countries, giving it the necessary recognition and power, at an international level. The overall result is more and more inventions and consequently, growth, but this is not always the case with all the developing countries, or not yet, at least. It is also the goal of this Agreement to promote creation and innovation of wider inclusion, reaching out to, both the producer and the client, through unified and accessible rules and with that create greater equality, sustainability and social wellbeing.

When we talk about developing countries, where Macedonia is included, there have been constant steps taken to, first of all improve the adequate IP and related legislation, in order to create a favorable climate for the businesses, for general investments, especially, Direct Foreign Investments that would be in favor of a sustainable development and hopefully, more capital for further investments in, maybe costly but promising and rewarding innovative researches on new technologies. It is especially important for the investments to be very well planned and standardized and that way of higher competition at a larger scale.

Another way of stimulation is the Transfer of Technology (TRIPS) to developing countries, of course competitive technologies to be used, not only as replacements for existing or outdated ones, but for the adequate efforts leading to the latest advanced inventions of future developments, surely, if all other resources and theoretical knowledge were to be put into action in a given field and area.

The TRIPS Agreement, considered as "the most comprehensive multilateral agreement on intellectual property" is in effect since 1995. Member countries, part of which is the Republic of Macedonia, must implement the Agreement, meaning, the minimum standards for protection and the area of protection and even have the possibility to reinforce the standards with own national laws. This is one of the main features of the Agreement, *standards* which must be followed are the ones from the Paris Convention: Protection of Industrial Property and the Berne Convention: Protection of Literary and Artistic Works (both are WIPO Conventions). The other element is the *enforcement* of Intellectual Property Rights, setting out all main domestic procedures, provisions and measures in detail for the enforcement of these rights. And, the third feature is *dispute settlement* on TRIPS obligations. (WIPO)

The main areas of IP covered by TRIPS are: copyright, trademarks, geographical indications, industrial designs, patents, layout-designs of integrated circuits, and undisclosed information.

Concerning the Copyright, the TRIPS Agreement is based on the Berne Convention, covering its protection of the rights and further extension to expressions, where computer programs and compilations of data are to be taken under protection, and their copyrights be recognized.

A "Trademark is a sign or a combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings." So, the unique "trademark" indicates all its values and features which make it to be specific and identifiable for the interested consumers. The goods and services can actually be used and be able to pass the process of registration, regardless of where they find an

application. For goods and services, the Paris Convention (1967) is applicable. "Trademarks may be one or a combination of words, letters and numerals."[1]

The other important area of protection is the Patents, where conditions for patenting an invention or discovery are defined. It is stated that every invention shall be patentable, if it is new, inventive and it finds application in industry.[2] Under TRIPS, patent rights and availability are regulated, ensuring non-discrimination as to the place of invention and whether they are imported or from the country of origin. There are also exceptions made regarding the protection of patents when it comes to public order or morality, to include the protection of life and health of humans, flora and fauna in the world.

Under Article 38 of the TRIPS Agreement, the patent holder enjoys exclusive rights, such as:

a) The patent holder has the exclusive right to prohibit the use, exploitation, offer, sale and import of the patented product, without the patent holder's consent,

b) In cases when subject to patenting is some work (process) which is patented and it prohibits the other party to use the product used during that process, without authorization.

According to the TRIPS Agreement, WTO Members can terminate patent protection in cases of diagnostic, therapeutic, surgical methods for curing humans and animals, as well as in cases of animal and plant production, not to include microorganisms and non-biological procedures. The WTO member countries will envisage the protection of biodiversity with a patent or a special system, as well as international agreements, such as the Biodiversity Agreement. The use of the patent by government authorities or those authorized by the Government of the Member Country, without the authorization of the patent holder is also regulated, in a state of emergency or other situations of public use, informing the patent holder on the extent and duration of use.

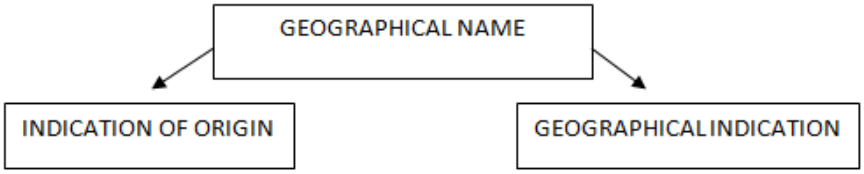
Under the TRIPS Agreement, the patent protection term is 20 years from the date of application with the competent patent authority (in Macedonia, the patent application is filed with the State Office of Industrial Property).

3. The Geographical Name

The geographical name of a country, place or region of certain characteristics and reputation attributed to the geographical origin are identified under the Geographical indication. So, the geographical name identifies the products based on their origin, characterizing the product of special quality on a territorial basis, where the natural conditions and the work of the humans have an impact. The collective right, known as

[1] *What is Intellectual Property? WIPO: www.wipo.int*
[2] *TRIPS: ANNEX 1C, Article 27.*

geographical name names a product or products created by a natural or legal person in a specific geographical are. Natural products, agricultural products, industrial products and local handicrafts can be labeled by the geographical name. The geographical name consists of two key parts, which also go through different registration procedures and serve functions, based on their values and the importance of their respective products offered in the market.



So, the geographical name is a distinguishing sign which marks the mentioned products of a given geographical origin for their quality, reputation and other characteristics.

If geographical names don't qualify for protection based on their designation of origin, they can find protection as geographical indications. Meaning that, geographical indications of products, prepared and produced in the place of origin can be protected (SOIP). It can be used by all persons registered in the directory during the process of registration of the geographical name. Regarding ownership, the geographical name cannot be transferred to any other person rather than that defined in the elaboration or specification.

According to TRIPS (Article 22), geographical indications "identify a good originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin." With the geographical indication, based on WIPO's Lisbon Treaty on International Registration, are protected names that mark countries, cities, regions, territories, having nothing to do with the individual holder of the right, but are enjoyed by all resident persons (natural persons) and the headquarters (legal persons) who operate and work in that country. The term itself might indicate a broader area of protection, but it has been mainly used to mark agricultural, food, wine, and beverage products, handicrafts and industrial products. Specific qualities of products, influenced by the origin and producer, using specific production skills and traditions may also be taken as criteria.

The geographical name can be registered with the State Office of Industrial Property, if we deal with the protection of a geographical name for agricultural products, according to the Law on the Quality of Agricultural Products and the application is filed with the Ministry of Agriculture, Forestry and the Economy of Waters as it does for the geographical name. According to the Industrial Property Law of Macedonia, a procedure of registration of a geographical name can be initiated by any natural or

legal person, or jointly by two or more, governmental institutions, a local government office, that are capable of undertaking the protection obligation and use of the geographical name. The applicant must also submit a specification for the products bearing the geographical name – geographical indication or, an elaboration instead of a specification if there are wine or alcoholic beverages to be registered. There is also the registration that can be done with the European Union Intellectual Property Office and that of Agricultural and Food Products, Wines and Alcoholic Beverages, based on the Lisbon Treaty on the International Registration of the Geographical Name.

The protection of industrial property rights is explicitly included in the TRIPS Agreement and the European Union Directives for Combating Counterfeiting and Protecting Industrial Property Rights. IP Rights are part of the rights violated the most, at both, national and global levels and with the rising trends, the challenge of protection requires quite greater efforts by everyone concerned, to include WIPO and governments of individual countries. Due to the nature and influence of past democracy issues, social conditions, the market economy, the transition processes, widespread corruption and overall awareness, in the developing countries, to include Macedonia, it is very difficult for the protection of these rights to take place.

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