

Problems of Customs Protection of Intellectual Property in Conditions Of International Economic Integration As Illustrated By The Eurasian Economic Union

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The article deals with customs protection of intellectual property. It describes the existing system of customs protection of intellectual property in the Eurasian Economic Union. It lists issues related to the customs protection of intellectual property through economic integration.

The Eurasian Economic Union (EEU), intellectual property, customs control of goods containing intellectual property, international economic integration.

1. Introduction

Intelligence is an asset inherent in humans. It largely identifies and distinguishes them from other objects of the living world on our planet. In fact, everything that has been created by humanity so far is the result of the activities of intelligence, creativity, etc. Notwithstanding this fact, it was not until the 15th century that the results of creative activity

were recognized as intellectual property. In fact, anyone could freely use the results of other people's intellectual activities, in other words, they were considered to be in the public domain.

In industrial and post-industrial society the importance of intellectual property not only increases but also becomes an essential element for the formation of a high-tech and innovative economy [1]. Sustainable supply and demand is not the only sine qua non for the intellectual property market to function effectively. It is necessary to maintain a high level of intellectual property rights protection. Otherwise, copyrighted material will be simply stolen, copied and illegally used instead of being sold on the markets[2].

Global requirements for protection of intellectual property assets (IPA) have been set forth in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) [3]. They are mandatory for

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every WTO member country. Under the TRIPS, customs protection of IPA rights is the cornerstone of an overall copyright protection system.

Today, there are numerous academic papers on copyright protection during cross border movement of goods. However, most of them were published either prior to the formation of the Customs Union, or right after its creation [4,5,6]. However, in our view, problematic issues of intellectual property rights protection in conditions of economic integration have not been fully studied yet.

2. The problem of providing a uniform level of customs protection throughout the customs border of the EEU

When engaged in international economic integration countries face significant challenges that result in the absence of a high level of intellectual property rights protection during the cross border movement of goods. By way of illustration let's consider the issues the Customs Union countries of Russia, Belarus and Kazakhstan had to face as well those that are being encountered by the Eurasian Economic Union countries.

The main reason lies in the difference in the Union countries' legislatures. They exist in spite of international treaties in this area. Another group of problems relates to differences of IPA customs registers and procedures for customs control of IPA containing goods.

Under the current Customs Code the EEU countries' customs protection covers IPAs which have been entered by intellectual copy right holders into the EEU common customs intellectual property register (hereinafter, SCIPRA) or the national customs intellectual property register (hereinafter, CIPRA) [7]. The customs authorities are obligated to take IPA rights protection measures in respect to these intellectual property assets. The EEU member countries may exercise their ex officio powers as provided for by the TRIPS. In line with these powers, they have a right (but not an obligation) to implement

intellectual property rights protection measures in regard to IPAs which have not been entered into the register.

When applying for the introduction of an IPA in the SCIPRA the former is checked by each EEU member state's customs authorities on the basis of its national legislation. Moreover, the national legislation is not limited exclusively to the customs laws. Also of great importance are legal acts regulating general issues of intellectual property rights, e.g., in Russia it is section 4 of the Civil Code. To decide on the inclusion of an IPA into the SCIPRA it is required to have a positive feedback from the customs authorities of all the EEU states. Thus, the application must simultaneously satisfy all national legislations.

In this respect, the SCIPRA tends to be not so much of a single register but rather a procedure that enables to run a check of its conformity to the EEU member states' legislatures. If we are to consider the SCIPRA as IPA registration process rather than a register, in that case all the SCIPRA gives to a right holder is a chance to make a one-time application for its entry and to pledge compensation. At the same time, the right holder is still required to know and comply with all the subtleties of the national laws of the EEU member states.

The SCIPRA has only slightly eased the steps and requirements necessary to ensure IPA protection along the EEU customs borders without solving the main problem of harmonizing the EEU member states' laws which would enable a right holder to be guided by uniform requirements, specifically, those of the EEU members, rather than those of their national legislations. No IPA has been entered into the SCIPRA in the past five years since it was formed. This serves only to prove the inadequacy of the given institution.

3. Schemes for the importation of counterfeit goods into the EEU territory

The EEU member states' national customs registers are very similar in form, but quite different in

content. For example, the RF CIPRA contains more than 3,000 IPAs, that of Kazakhstan has about 550, with Armenia and Belarus having 300 and 150 respectively. It should be understood that once an IPA has been included in any EEU member state's CIPRA it becomes subject to customs protection when moving across the customs border of another EEU country.

Some EEU countries implement their ex officio powers, provided for by the TRIPs for customs protection of IPA rights [3]. Currently, they include Russia [8] and Kazakhstan [9]. In Belarus and Armenia, these powers are not applicable. This results in a significant reduction in the amount of IPAs, the rights to which can be protected by the customs authorities. Control of IPA containing goods that have not been entered in the register which exists in some EEU countries, adds to the differences in the list of controlled IPAs.

The EEU member countries apply different principles determining the exhaustion of the exclusive intellectual property rights (Fig. 1).



Fig. 1. The principle of exhaustion of exclusive rights to an IPA in the EEU countries.

Russia and Belarus adhere to the territorial principle. This means that the right to import original goods from other countries into their country belongs only to its right holder or authorized distributor. In this case, we are talking about original and non-counterfeit goods, i.e., goods produced by an intellectual property owner. Kazakhstan and Armenia employ an international principle, which presupposes that the owner's exclusive right is considered to have been exhausted in respect to a particular product at the time of its first introduction into circulation in a country. Consequently, the commercial movement of goods between two

countries is, in fact, unlimited. In their relationship the EEU member states apply one regional principle- that of free movement between the states.

Combination of the differences in the EEU countries' CIPRA content, the domain of their ex officio powers and the exhaustion of exclusive IPA rights makes it impossible to provide a sufficient level of customs protection of intellectual property rights. Currently, due to the above discrepancies, we believe, there exist, at least, two legal schemes (in terms of customs legislation) for the importation of counterfeit goods into the EEU territory. The fundamental reason underlying all the problems is the axiom: "Once imported into the EEU customs territory, products continue to move freely between the member countries since there are no customs borders between them." [10].

The first scheme allows "gray" goods to be imported into the countries of the former Customs Union through Kazakhstan while the second one- due to the differences in the lists of controlled IPA along the customs border - makes it possible to import counterfeit goods through the territory of a country where an IPA contained in (on) the goods is not subject to Customs protection. Given the present differences in the national legislations it is currently impossible to terminate the activity under these schemes.

The first scheme is related to the principle of exhaustion of exclusive rights now in force in the EEU countries. It should be recalled here that Russia and Belarus use the territorial principle. Kazakhstan and Armenia, conversely, employ the international principle, implying that the owner's exclusive right is considered to be exhausted in respect to a particular product at the time of its first introduction into circulation in any country.

Parallel imports are prohibited in Russia, and "gray goods" are considered to be counterfeit under the Civil Code while Kazakhstan holds such goods to be completely legal provided they have been placed on the market in another country. Moreover, mo-

vement of such goods does not require any license agreement or other documents to be granted by their right holder.

Goods purchased in third countries find their way into the customs territory through the EEU customs border section which belongs to Kazakhstan, and later on as they move freely within the EEU, they may turn up in Belarus and Russia where they will have the status of counterfeits. At the same time, the customs authorities have no powers to suppress such deliveries.

The scheme of legal importation of illegal goods in violation of intellectual property rights, is much more complex and multilayered. It is based on a significant difference in the nomenclature of EEU customs-controlled IPIs. In mathematical terms, the amount of customs-controlled IPIs differs from country to country literally by an order. More than that, Russia and Kazakhstan use the ex officio principle, i.e. the customs authorities are empowered to take action in relation to those goods that have not been included in the EEU SCIPRA or the national CIPRA. This increases further the gap between these countries in respect to the volume of IPIs they control.

Once the task is to import counterfeit goods into Russia, it can be done legally through Belarus, provided that an IPA contained on (in) a product is excluded from Belarus's CIPRA. It can also be done through Kazakhstan, but they use their ex officio power, and even if an IPA is excluded from the SCIPRA, the Customs authorities are able to detain counterfeit goods. In contrast to this, the Belarus customs authorities are virtually powerless (in case of IPA containing imported goods which have not been included in the Belarus CIPRA).

4. Conclusion

It can be inferred thus from the above examples and diagrams that under the present conditions of the integrated association the right holder cannot be provided with adequate protection of his intel-

lectual property rights through customs methods. For protection to be relatively efficient it is necessary to include an IPA in all the four CIPRAs (or in the SCIPRA), and even in this case it still will not absolutely guarantee against any violations, to say nothing of parallel imports prevention.

The existing system of customs protection of an EEU holder of intellectual property rights ought to be substantially improved and revised. The least possible thing that can be done is to terminate the operation of the above schemes.

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