Intellectual Property Rights in Macedonia: an undervalued and undermanaged asset or not?!

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Introduction

Intellectual property is a young branch of the legal system. In the regulation of this area intertwine private, social and public interest. Characteristic of all industrial property rights is that they are aimed at increasing sales and increased profits. It is made from exclusive character sui generis, despite personal and property rights are the third group of rights. Unlike personal rights have effect inter parties, these have an absolute effect erga omnes. From personal rights are distinguished by their action have and it is absolutely, and the property rights differ in term of protection (defined short period of time), or when it expires, intellectual property becomes common good. The main role of the intellectual property right should have the protection of private and public interests. Intellectual property as one of the sub-forms of ownership as constitutionally guaranteed right contains the creations of the human mind or intellect, and unites in itself on the one hand - Industrial Property, and the other copyright. In a market economy, the protection of industrial property plays a key role. Intellectual property rights (IPR) in Macedonia are consisted from **industrial property rights** or *patents, trademarks, industrial design, geographical indications and topography of integrated circuits* on one side and **copyright** and related rights on the other side. IPR are becoming more and more important for *competitive advantage* and *companies success*.

IP strategy and goals achieved

Macedonia is a candidate country for EU membership so while building its approach for Intellectual Property Rights it begins from the standpoint that: the most competitive economy is the knowledge-based economy meaning that Europe pursues the building of a **knowledge-based society** and Macedonia needs *foreign direct investments* for the development of its own capacities, that will grow proportionally along with the level of IPR protection; its own human potentials - talents, creative people, authors, scientists etc. should be stimulated by respecting the IPR and thus enabling the economic effects stemming thereof to be retained, as well as to attract new talents; the IPR could allow the small and medium sized enterprises to become competitive, to become recognized in the market, through innovations, ideas, branding and similar; protection of the intellectual property is a fundamental instrument for the success of the European Union internal market that we aspire to accede. Recognizing knowledge as a raw material,

i.e. the most important resource for the development of society, where the primary goods are intellectual and innovative products and services, Macedonia considers the IPR as one of the developmental instruments that will pave the way towards the knowledge-based society. The final objective for development of IPR in Macedonia is to create a competitive economy, based particularly on knowledge and production that exploits intellectual capital. Macedonia recognizes the need for foreign direct investments, as a source for creation and development of the domestic economy and productive, creative and export-oriented industries. This objective were part of the strategy from 2009 and till today they are all achieved. The infringement of intellectual property rights leads to serious impairment of national economies, while at the same time the improper protection of rights does not stimulate the foreign investors. Also Macedonia recognizes the need for stimulating creativity and innovations of individuals and teams through institutional actions. Macedonia assists in overcoming the present situation in the country and to start investing in the human capital through improved education, in order to exploit the talent and innovative knowledge. Institution involved in protection of intellectual property rights are: ministry of economy, justice, agriculture and other ministries, SOIP (State Office for industrial property), courts, customs, association of inventors and authors of technical improvements of Macedonia etc. Implementation or use of IPR and the public awareness on the importance of IPR is not yet at satisfactory level. The development of telecommunications and information technologies in Macedonia allows the public easier access to artistic and literary works, especially phonograms and audio-visual works. On the other hand, the technological development in the Republic of Macedonia enables the occurrence of various forms of audio, audio-visual and computer piracy such as: unauthorized recording of live events for commercial purposes, unauthorized reproduction and distribution of such recordings for commercial purposes; reproduction, distribution and public performance and broadcasting of phonograms by infringing relevant existing rights of right holders for commercial purposes; illegal re-broadcasting, cable distribution, recording and reproduction for commercial purposes and illegal distribution of copies of broadcasting programs and films for commercial purposes; reproduction, distribution and public performance and broadcasting of audio-visual works for commercial purposes by breaking the exclusive rights of right holders; unauthorized production and distribution for commercial purposes of decoding equipment and other similar means that enable illegal access to works and protected contents. The number of media is also growing. According to the data by the Broadcasting Council, in addition to radio and TV program services of the public service (Macedonian Radio Television), five other television program services are broadcasted at the national level, 10 television program services at the regional level, 47 television program services at the local level, three radio program services at the national level, 16 regional radio programs and 49 at the local level. There are ten television program services broadcasted via satellite; registered program packages and 52 operators of public communications networks (51 cable operators and one IPTV operator). However, this media pluralism has led to increased illegal broadcasting, re-broadcasting and cable distribution for commercial purposes. At the international level, the Republic of Macedonia should participate in and facilitate the following:

legal procedures concerning activities in the domain of tone and audio-visual piracy; exchange of information among bodies that in various countries are in charge of the fight against piracy, bearing in mind the relevant international recommendations. In the last couple of years, there is an expansion of the IT industry in the Republic of Macedonia. However, the expansion of personal computers and the use of the Internet were followed by the expansion of unauthorized reproduction of computer software for commercial purposes, particularly the reproduction and distribution for commercial purposes of computer software related to audio-visual productions, mostly in the domain of multimedia and video games. Activities of the Government of the Republic of Macedonia for the legalization of the Microsoft software brought results, but there are still many things that need to be done in this field, by undertaking concrete measures and activities by the competent institutions. In the last two year there the number of litigation for using the illegal Microsoft software are decreasing and people using the legal software are more and more. At the same time, it is necessary to raise the awareness of the business community that operates in the IT industry about the importance of the protection and about the economic and financial opportunities provided through the trade in intellectual property rights. Analysis of statistical data for registered industrial property rights in the Republic of Macedonia prepared by SOIP shows a low level of interest among domestic industrial property right holders for protection thereof. Simultaneously, the applications for protection by foreign right holders are numerous. As concerns the various industrial property rights, it is obvious that the patenting is most frequent for products that are used for general consumption in the field of chemistry and metallurgy, so this is proof that the interest for protection is closely related to the structure of production facilities in the Republic of Macedonia. The number of filed applications for registration of trademarks is continually growing, but foreign applicants are still far ahead of domestic ones. Products that are most often subject to protection are pharmaceutical and medical products, as well as food products, which is proportional to the share of these industries in the Macedonian economy. Currently, procedures are underway for the protection of six certified marks. The number of applications for protection of industrial design is quite low compared to the applications for protection of other rights. There are 8 protected appellations of origin for wines, however, the rights of authorized users has not been renewed, yet. The Ministry of Agriculture, Forestry and Water Economy initiated protection of six appellations of origin for agricultural products, which is still in procedure. Protection of varieties of plants is in stagnation. The low level of registration of industrial property rights by domestic applicants is, to a great extent, the result of the low level of knowledge of the business community concerning the economic benefits that may be acquired from intellectual property rights. Two other facts support this situation: there are no applications for use of funds obtained through the program for improving the competitiveness of Macedonian products for 2009 till 2014 for compensations of costs for preparing industrial design solutions and for filing international applications for patent protection; as well as the fact that the number of court procedures for protection of rights initiated by rights holders is quite insignificant. The low level of knowledge is particular lividest in small and medium enterprises and in the agricultural sector. Creation of efficient trilateral mutual

support: business community-universities-public administration has proven to be a very useful model for encouraging innovations and technological development. In this context, the role of the technological infrastructure is particularly important, which consists of research and development units in the economy, innovation centers and centers for technology transfers, scientific and technological parks and information and communication technology centers. Potentials and capacities for research and development of Universities should be used in the function of the business and the public administration, especially those ones that are supported by public funds. In addition to the need for increasing the funds for financing research and development, and innovative projects, it is also necessary to build awareness and upgrade knowledge of innovators and authors, and of the business managers and administrators in the process of higher education. Macedonia gives tax incentives for intellectual property right holders. Pursuant to Article 17-a of the Law on Profit Tax, costs of legal entities for research and development made within their own research and development centers or through independent scientific and research institutions, are recognized in the item of expenditure in the tax balance, i.e. they reduce the tax base on which the profit tax is calculated. According to the provisions of the Law on Personal Income Tax, the income subject to taxation consists of income from copyrights and industrial property rights. The basis for calculation of the tax is the net income that is obtained by a natural person after deducting the costs made for earning such income. The costs may vary between 25% to 60% of the gross income, depending on the type of the work, however, upon request by the taxpayer, the substantive costs may also be recognized if s/he has evidence for that. The tax incentives will be retained and promoted in the future. During the past period, activities were performed in the light of raising public awareness concerning the importance of intellectual property rights. Several mass media campaigns, numerous meetings with businessmen at the municipal level, education for various target groups, public destruction of confiscated pirated and counterfeited goods, numerous events, fairs, exhibitions, conferences, etc., were organized. Activities of the Coordinative Body of Intellectual Property and other competent institutions contributed for improving the situation in regard to the piracy and counterfeited goods. However, the rate of piracy, especially for audio-visual works and computer programs, and the presence of counterfeited goods in the markets how that the level of public awareness concerning the importance of intellectual property rights is not at a satisfactory level. It is a fact that the infringement of intellectual property rights is a global phenomenon. Problems with piracy and counterfeiting are not a concern only of the right holders, but they also have an impact on consumers, bearing in mind the quality and safety of counterfeited goods. Thus, it is necessary to undertake actions in this area, by raising public awareness regarding the consequences of supplying goods and use of services that infringe intellectual property rights. Associations of consumers play an important role in this process, as well as the advisory services for consumers at the local level. Future actions with the intention of strengthening the protection of intellectual property rights and its enforcement should be based on referential data on the economic effects of intellectual property rights and the consequences suffered by the national economy due to their abuse. Currently, there is no such data in the Republic of Macedonia.

Infringement of IPR

Business Software Alliance has conducted research on the rate of piracy of software and the rate of economic loss as a consequence of that. Nevertheless, there is no assessment of economic losses that it suffers from tone and audio-visual piracy and counterfeiting, which in Europe are measured in billions of euro. Pirated and counterfeited goods are often used as a replacement for purchasing legally produced goods; thus, as a result, the piracy leads to significant losses of income of authors, performers, producers, and industrial property right holders, as well as companies included in the production and distribution of authors' works and products in which industrial property rights are incorporated. This discourages the cultural creation and future investment, which had negative impact on the variety and quality of available products and may be harmful for the consumers in the long run. The state loses as well because of piracy and counterfeiting, if we take into consideration the customs duties, the value added tax and other fees and revenues. Social contributions for street piracy and in companies that "deal" with piracy and counterfeiting are not paid either. Some individuals or companies are specialized for misuse of intellectual property rights. Although Macedonia has achieved important improvement in terms of the existing legislation, those who are to apply it are still indifferent or even repulsive. Frequently, in some quite important sectors there is widely spread opinion that the piracy is not that harmful activity (there is no measure for its harmfulness) and therefore it should not be punished (there is even some opinion that it is good for poor countries). Areas that should be in the focus of the future activities is not to prevent the public from using the technological development and accessing to creative works such as the audio-visual works, software, etc., however, it must always be emphasized that the rights and legitimate interest of domestic and foreign right holders must be protected. The improvement of the legal framework, technical anti-piracy methods, must go hand in hand with the raising of the awareness of judicial (civil and criminal) and administrative (police and customs) bodies. Furthermore, great efforts should be invested in forming and raising the awareness of users of audio-visual works and software. In other words, the entire public must become aware how harmful piracy is. This is particularly important considering that piracy is felt as a serious attack on numerous sectors in the production and commercial presentation of phonograms, films, video recordings, broadcasted programs, printed works and computer software. It can be said that the relation between the trade in pirated materials and organized crime is evident. Therefore, the preparatory activities and other acts should be sanctioned as accomplice in piracy activities that are subject to punishment. Bearing in mind the overall activity of the government sector for encouraging innovations and entrepreneurship, and the activities of the business community for the creation and use of intellectual property rights, it is necessary to create a relevant database about the industrial sectors most active in this area. At the same time, it is necessary to identify the "weak points" and the economic losses suffered by Macedonia from the infringement of intellectual property rights. This should represent grounds for the creation of further policies in the field of innovations, technological and industrial development and the development of entrepreneurship. To strengthen the legal framework in the area of intellectual property law by: increasing the level of horizontal and vertical compliance of national legislation as concerns

enforcement of intellectual property rights, acceding to the multilateral conventions on intellectual property rights, strengthening the penalties for violating the protection of intellectual property rights , improving the legal framework in the area of labor relations for issues pertaining to intel-lectual property law, improving the legal framework for registration of internet domains pertaining to trade-marks, improving the legal framework that governs transfer of intellectual property rights, improving the legal framework that governs protection of agricultural and food products as concerns their origin and traditional specificity. Also to strength the enforcement of intellectual property rights by: adopting a comprehensive and operative program for fighting piracy and counterfeiting, strengthening the institutional and administrative capacity of the copyright and related rights sector in the ministry of culture, strengthening the institutional and administrative capacity of the state office of industrial property, improving the efficiency and efficacy of the system for protection of the intellectual property rights on the borders by strengthening the institutional and administrative capacity of the customs administration on central and local level etc. So to conclude, it is important to get a more transparent picture about strengths and weaknesses of the current IP position in Macedonia and develop a good strategy for IPR. In my opinion strategy execution requires a clear commitment from the top management, responsibilities, proper monitoring, research development, marketing and patent attorneys and often even changes in corporate structures and processes.

The digitalization of the information and the development of computer networks, such as the Internet are posing a new and far reaching challenge to intellectual property rights. The main technological challenge behind this "new revolution" is improvements in data storage, manipulation, communication and transmission. With digitalization all kinds of data may be recorded and compressed in the same binary format, and their reproduction can easily be made without any degradation. On the other hand data transmission is not limited to one-to-one basis, which makes a large computer network such as the Internet, a broadcasting system. This rapid development requires amendments to the current intellectual property legal framework, especially the fundamental principle of territoriality, due to the fact that the protection of intellectual property rights online is not contained in the national boundaries or borders. To date, copyright is the most high-profile "intellectual property and on line/social media" issue and it will likely remain that way. The number of cases that have arisen around the world show that so-called "user-generated content" is not the same thing as "user-created content." Content exchanged between individuals online is not always "content generated by a user" but, rather, "content created by a copyright holder who has not authorized its generation by the user." For copyright owners, the ability to exclude others from unauthorized access to their digitally constituted works on Internet is crucial to the commercial profitability. The copyright infringement online is usually divided into two main types: primary, commonly referred to as direct and secondary, contributory infringement. A primary infringement arises when someone is committing the infringement directly or authorizes someone else to do so. A person primary infringes copyright by reproducing, adapting, issues copies to the public or distributes without prior authorization. A person is liable for secondary infringement if the person, with knowledge of the infringing acts, induces or

materially contributes to the infringing activity of another. The scope of the secondary infringement covers the acts of: dealing in infringing copies, providing articles for making infringing copies, facilitation the infringement by transmission, circumvention of protection measures etc. The most prevalent and hotly contested examples of such alleged breaching is the case of file sharing (the uploading and downloading of music, movies, videos, photographs, books, text, or any other data that is shared between users of the internet, commonly referred to as "peers"). Current peer-to-peer ('P2P') file-sharing websites include Mini Nova, Frost Wire, uTorrent, and The Pirate Bay, but the number of such websites and networks are vast and they are constantly growing. In order to take legal action for copyright infringement on the Internet, the copyright owners must address tree fundamental issues: (1) who is liable for the infringement; (2) which jurisdiction does he take his action and which national law is applicable in the case; (3) what acts of infringement have been committed under the applicable law. However in light of the strong territorial premise of copyright laws, the localization of the act of the copyright infringement in particular jurisdiction in a spatial dimension like the cyberspace is complex and problematic task. Furthermore, the laws differ on the question whether they address copyright issues only or take the "horizontal approach" which governing the rule of liability of service providers regardless of the grounds for illegality of the transmitted material. There are laws in force in Germany, Sweden and Japan which state that the provider is liable only if it is technically possible to prevent the transmission of the infringing material; and the provider knows of the existence of the material and; (i) knows that it is infringing or (ii) reasonably ought to know that it infringes. In the USA, the Digital Millennium Copyright Act (DMCA) set down guidelines to copyright infringement online, but does not define when a service provider is liable for copyright infringement. However, the DMCA defines the exemption of liability when the provider is acting as a passive conduit for the information, is not producer of the information and has responded expeditiously to remove or disable access to infringing material upon notice of copyright holder. In the European Union, the service provider liability is regulated in the Directive on electronic commerce, Section 4, art. 12. The social media web sites (Facebook, Tweeter, Linkedin, Youtube) are mainly founded and operate under the US law. Therefore, they require in the terms and services for use, that by posting the content online each user explicitly accepts that it owns all the content and information he posts on the page. On the other hand, the user grants the provider non exclusive and royalty free license to use the posted content. In other words the social media web sites have as many rights as possible without assuming risk of ownership in the content, which could eliminate certain safe harbors under the DMCA.

As discussed above the trademarks are an important tool in the commerce and as such are of essential importance in the e-commerce as well. Therefore, a general consensus has developed that the trademark protection law should extend to the Internet and that its scope should be the same as the protection granted in the physical world. However, the existing national or regional trademark law systems and the relevant international law treaties apply on territorial basis and are not tailored for the borderless world of the Internet. The trademark owners are faced with new challenges with respect to use of their marks in digital environment. The general presence on the Internet requires trademark owners to defend their rights against new forms of

trademark abuse, across millions of discrete sites in multiple languages and domains, which impliedly constitute another obligation for trademark owners, to engage cyber surveillance companies.

Some internet practices that may raise trademark issues are:

1. Meta tagging- a meta tag is a means for Internet search engine to identify and categorize the contents of the web site. The meta tag is not visible to normal users, but the more often the keyword appears in the hidden code, a search engine will rank the site in its search results.

2. Sale of trademarks as keyword – some of the search engines, due to the phenomenon of higher ranking of certain keywords try to sell them to advertisers who want to target their marketing in a way that whenever the keyword is entered into a search engine, an advertisement appears along with the search results

3. Pop - up advertisements – the pop - up ad is a window not initiated by the user which appears on the top of the page when a site is loaded. A user who will click on the pop-up graphic will be redirected to the advertisers' web site in order to capture the user's attention.

4. Mousetrapping – it is an aggressive marketing technique that forces the user to remain on a specific web site sometimes while disabling the browser functions or flooding them with pop – ups. To exit the loop the user is forced to exit the task or reboot the computer

5. Linking and framing – these technologies enable the Internet users to access the content stored in the millions of computers and at the same time enable users to use links to retrieve information from files on the same or other web sites. This can cause a situation where the user believes that a certain web page is approved, affiliated or endorsed by the trademark owner.

The use of the sign on the Internet can infringe a trademark only if such use is deemed to take place in the country where the trademark enjoys protection. However when the use of the sign online is visible use on the web site, there should be a little problem applying offline infringement principles in the online environment. More difficult question arise when the infringement is invisible. The social media web sites provide in their Policies that the clear intent to mislead others will be prevented, even if there is not an explicit trademark violation. Furthermore, the social media web sites prohibit the use of their trademarks (ex. Facebook, Twitter, LinkedIn, Youtube) without having prior affiliation, relationship or endorsement with the social media web site. They also include trademark violation reporting mechanisms referred to as: "non copyright intellectual property issues". One of the most famous cases is the case with the Coca Cola Fun Page on Facebook, which was founded in 2008 by two individuals and the page was not authorized by or associated with the brand and was facing removal by Facebook. However, The Coca Cola Company asked Facebook to let the individuals keep the page as long as they share its content with The Company. The Fun Page now has more than 5 million members. The trade secrets are also subject to online infringement. Namely, the trade secret misappropriation online can be done the same way as it is done in the physical world by: disclosure, deliberate usage to cause harm to the owner of the trade secret, usage of the trade secret when the defendant knew or ought to have known that the trade secret was acquired by unlawful means etc. On the other hand the most common infringement of the trade secrets on the social media platforms is done by shared or posted picture, blog discussion or shared video. These actions

can cause dissemination of information which will erode the secrecy. However the mere fact that the secret is posted on the Internet does not mean that it is no longer a secret. The standard that should be applied when assessing whether there has been a trade secret infringement online is "whether there has been a detriment for the intellectual property rights (trade secret) by the virtue of Internet sharing of the content".

A number of aspects in the patent arena have problematic implications for the new media. The high costs and time intensive nature of patent process work against the largely entrepreneurial nature of the development of the new media. At the same time bundle of applications involving newly emerging digital processes encouraged hasty and sometimes unwise patent approvals. For example some patents issued in the early stages of the Internet now appear to be overly broad and inappropriate.

The patent infringement claims can be classified in the following categories: infringement of software related patents, certain web features which allow online shopping, infringement of technology related to Internet browsers and lately infringement of method and system for cell phones. Some of the most famous case in the field of patents are: Eolas Techs. V Microsoft Corp. (which involved Microsoft Internet explorer), Amazon.com v. Barnsandnoble.com (involving infringement of the patent used for ordering), eBay Inc. v. MercExchange (regarding infringement of the Buy It Now feature) and the Blackberry case (infringement of wireless e-mail technology).What is important to mention is that none of these cases involve an infringement on the social media platforms. According to us the reason for this is the fact that the social media web sites are mainly used as personal profile pages, rather than as corporate profiles. However, the individuals which maintain these web profiles do not have access to resources or assets which will infringe patents, nor they have the incentive to post it on their social media profiles because by posting that they have made a patent infringement they are admitting liability.

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